ACC Association of Corporate Counsel

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Mrs Let's put in Exec Sec, prep a response from me in coordination with OAG Tampa

February 13, 2006

By Hand

The Honorable Alberto Gonzales
Attorney General
U.S. Department of Justice
Robert F. Kennedy Building
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Re: Concerns of the Association of Corporate Counsel (ACC) on the erosion of attorney-client privilege and work product protections in the corporate legal context

Dear Attorney General Gonzales:

On behalf of the Association of Corporate Counsel ("ACC"), thank you for the opportunity to provide input from the business community's lawyers regarding the U.S. Department of Justice's policy regarding waiver of the attorney-client and work product protections in the corporate context. As you know, ACC is the in-house bar association, serving over 19,300 individual members who work as in-house counsel in over 8,000 public, private, and not-for-profit organizations. Our officers (who send their regrets that they could not join us today), board of directors, and general members from across the country (and increasingly from around the world) appreciate the invitation to air our concerns with you today.

Concerns of the Business Community Regarding Attorney-Client and Work Product Protections

As you know, attorney-client privilege and the work product doctrine are fundamental protections in the U.S. legal system that foster corporate compliance by encouraging employees and corporate leaders alike to communicate candidly with the company's counsel. Unfortunately, our members tell us of increasing concerns that their clients' rights to privileged meetings with counsel are under attack in a number of ways:

1. when prosecutors (at the federal and state level) begin investigations into allegations of wrongdoing and suggest (demand or infer) that privilege waiver is necessary to any company that wishes to engage in dialogue or influence settlement discussions, charging decisions, or the prosecutors' designation of the company as cooperative.

2. when regulators from the SEC, but also other federal and state level agencies, engage in similar kinds of co-opting behaviors in order to secure access to communications protected by the attorney-client privilege or lawyer work product.

3. when auditors, hearing the sharper scrutiny mandates present in the post-Andersen world, are no longer satisfied when any stone is left unturned, and refuse to certify a company's books or audit unless privilege has been waived and all attorney-client confidences divulged.

4. when third-party plaintiffs demand access to once-privileged records, which – because of these forced waivers – are now open to public scrutiny.

Summary of Key Revisions to the Thompson Memorandum

While ACC and a number of its partner associations in the business and legal community are assessing how to respond to these erosion concerns in all four contexts, we would like to offer you our input on how we would propose that the Department of Justice could help us reverse the trend of privilege erosion within their spheres of influence.

ACC would like to see revisions to key sections of the Thompson Memorandum. We feel that the time has come for us all to sit at the table as parties interested in ensuring that our justice system works well for all participants: we know that we both have constructive thoughts on concrete ways that the Justice Department could work with the business community to address these concerns in a mutually beneficial way. And we believe that your offices' outreach to the regional field offices is a part of that process and an important key to any solution we might craft.

Because we wish to encourage you to focus on the larger areas of common ground that we must find first, rather than starting with a re-draft of the specifics that we'd like to see changed (and that will likely engender a more argumentative response), we're only offering a summary of our general direction, below, to see if we can come to some general agreements in theory before we start looking at the technicalities and the words.

Indeed, ACC and the ABA's Task Force on Attorney-Client Privilege, along with all of the groups represented in that working group, have each developed specific language suggestions that we will all be pleased to present to you and your legal / policy team at the time and with the persons you designate as you deem appropriate. After you've had time to consider our general concerns, we would like to follow up with the appropriate leaders to arrange a meeting to further discuss our ideas in specific: perhaps in a few weeks (once Mr. McNulty is confirmed and seated?).

Here is a summary of the revisions we propose for the Thompson Memorandum:

1. Delete the waiver requirement for corporate leniency. We believe that prosecutors should be barred from requesting any waiver of attorney-client or work product protections and from "consider[ing] whether a corporation has waived its attorney-

client and work product protections in assessing that corporation's cooperation for any purpose, including in the course of conducting an investigation, determining whether to bring charges, or negotiating plea agreements." Consistent with this approach, we are suggesting that references to production of information subject to attorney-client or work product protections should be eliminated or limited to the production of information not subject to these protections. These proposed revisions directly address the policy issue of greatest concern to the business community.

2. Differentiate isolated cases from a broad pattern of misconduct. These proposed revisions acknowledge the reality that even law-abiding corporate citizens occasionally have rogue employees that engage in misconduct. Conclusions about the culture, compliance programs, or even supervision of employees should be based upon a corporation's general patterns and practices, and should not be extrapolated from an isolated incident.

3. Identify practical limitations on corporate cooperation regarding individual employees. Although the Department's expectation of assistance from a corporation in targeting culpable employees and agents is appropriate in general, there are practical limitations that corporations want the DOJ to acknowledge. These include provisions addressing the recognition that companies may be bound by state indemnification laws to pay the legal fees of certain employees until they have been proven guilty, and that employees have a variety of individual rights that company's must respect, as well.

We appreciate your consideration of our concerns regarding the Department's policy on waiver of attorney-client privilege and work product protections in the corporate context.

Please do not hesitate to contact me on this or any other matter. ACC thanks you for your time and your gracious invitation to join you in your offices to open the lines of communication between our constituencies.

Sincerely,

Susan Hackett
Senior Vice President and General Counsel

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Here is a summary of the revisions ACC proposes for the Thompson Memorandum; they are consistent with the ABA proposals and are supported by the US Chamber. We believe that other business groups will sign on to support these requests as well:

1. Delete the waiver requirement for corporate leniency. We believe that prosecutors should be barred from requesting any waiver of attorney-client or work product

protections and from "consider[ing] whether a corporation has waived its attorney-client and work product protections in assessing that corporation's cooperation for any purpose, including in the course of conducting an investigation, determining whether to bring charges, or negotiating plea agreements." Consistent with this approach, we are suggesting that references to production of information subject to attorney-client or work product protections should be eliminated or limited to the production of information not subject to these protections. These proposed revisions directly address the policy issue of greatest concern to the business community.

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Senior Vice President and General Counsel

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REVIEW & OUTLOOK

Corporate Injustice

Two big things happened last week in the federal prosecution of 16 former KPMG partners and two other alleged co-conspirators. The first, which got lots of media play, is that one of the defendants copped a plea. But the second received almost no attention, even though it may have much larger significance for future white-collar indictments.

How government is stripping business of the attorney-client privilege.

At a pre-trial hearing in the KPMG case in New York last week, federal Judge Lewis A. Kaplan suggested that a three-year-old Justice Department policy on corporate prosecutions might be unconstitutional. He was referring to the now famous Thompson memo, which in 2003 rewrote Justice guidelines on when to indict entire firms in criminal investigations.

"Too often," the memo states, "business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation." With that as a premise, then-Deputy Attorney General Larry Thompson laid out what firms should do to avoid a corporate indictment, a la Arthur Andersen.

Those steps were extraordinary in their attempt to pressure corporate executives: They include waiving attorney-client privilege to give investigators access to internal documents and cutting off accused employees from legal and other forms of support. In short, the Thompson memo said that companies under investigation are expected to surrender any right against self-incrimination and cut their accused employees adrift.

In one sense, the memo's guidelines are just that—internal guidelines for prosecutors. But as a practical matter, only a rare CEO will risk the death sentence that a corporate indictment represents. So "cooperation" as defined by Justice is hardly optional. It was on this point that Judge Kaplan took Assistant U.S. Attorney Justin Weddle to task last week. When Judge Kaplan questioned the fairness of pressuring companies to throw their employees overboard, Mr. Weddle replied that companies are "free to say, 'We're not going to cooperate.'"

"That's lame," the judge retorted. He then asked Mr. Weddle "what legitimate purpose" was served by insisting that companies cut their former employees off from legal support. Companies under investigation, Judge Kaplan noted, ought to be free to decide whether to support their employees or former employees without Justice's "thumb on the scale."

Mr. Weddle replied that paying the legal fees of former employees charged with crimes amounted to protecting "wrongdoers." This prompted the judge to remind the young prosecutor that the accused are still innocent until proven guilty. He also reminded Mr. Weddle that the Constitution's Sixth Amendment guarantees the right to counsel. And for good measure, if the government is confident in its case, it shouldn't be afraid to allow "wrongdoers" access to an adequate defense.

On Tuesday of this week, Judge Kaplan dismissed a defense motion to throw out the entire case based on a charge of "prosecutorial misconduct," but he left the Sixth Amendment question open for possible further proceedings. That partial victory notwithstanding, Mr. Weddle's replies betrayed Justice's willingness to trample the due-process rights of companies and defendants in white-collar cases in the wake of the Enron uproar.

It's certainly possible for law breakers to shield incriminating material using attorney-client privilege, but taking down that wall also has serious unintended consequences. For one thing, executives are now on notice that even asking a legal question of an attorney could later be used against them in court—say, as proof that they were aware that what they were doing might not be proper. The likely result is a greater reluctance to seek legal advice in the first place.

The Thompson memo also notes that firms are "legal persons" that shouldn't be treated more or less leniently by law enforcement because of their "artificial status." But a company and a person are in reality very different. A firm cannot be put in jail or take the stand in its own defense. And bankruptcy nearly always follows a corporate indictment, whether the firm is later convicted or not. That fact alone gives the lie to Mr. Weddle's insouciant reply that companies are free to refuse to cooperate.

The Thompson memo was written at a time when corporate blood was in the political water, and Justice attorneys were angry in particular about Andersen's lack of cooperation. Well, they certainly nailed Andersen, only to have that conviction overturned later by the Supreme Court. The trouble is that in expanding the threat of corporate capital punishment, Justice has also damaged the attorney-client privilege for white-collar defendants and thus the right to a fair trial. And all of this was done with little or no public debate, much less a vote in Congress.

Justice could alter or eliminate the Thompson memo by the stroke of a pen, but it is unlikely to do so until its legitimacy is challenged in court. If Judge Kaplan's reaction in the KPMG case is indicative, that day may not be far off. And a good thing too.

U.S. Pressures Firms Not to Pay Staff Legal Fees

Wall Street Journal

By NATHAN KOPPEL
March 28, 2006; Page B1

Defense lawyers are closely watching an accounting-fraud case in New Hampshire that they see as the latest government effort to stop companies from paying the legal fees of indicted employees.

In the past three years, federal prosecutors in New York, Alabama and, now, Concord, N.H., have pursued a strategy that puts companies at risk of being branded as uncooperative if they don't cut off such payments. Lawyers say that could be tantamount to convicting defendants before they have even had a trial, since they can't properly defend themselves.

"If companies don't cooperate with the government, they can face a death penalty by being indicted," says Ellen Podgor, a professor at Stetson University College of Law. She adds that companies fear becoming the next Arthur Andersen LLP, which imploded shortly after its indictment in 2002 for allegedly obstructing the government's investigation of fraud at Enron Corp. (The accounting firm was later convicted of obstruction, but the Supreme Court overturned the verdict last year.) "Prosecutors can now force

individuals to pay their own attorneys' fees," Prof. Podgor says, "and corporations have to go along."

Justice Department spokesman Brian Roehrkasse counters that "the government does not force corporations to do anything." If a company declines to advance fees, he adds, "that is a business decision made after weighing all of the costs and benefits of cooperation."

The cost of a trial is out of the financial reach of many white-collar defendants. "It is hard to defend a white-collar case for less than $100,000, and most cost much, much more than that," says John Hasnas, a professor at Georgetown University's McDonough School of Business.

In the New Hampshire case, five former executives of technology company **Enterasys Networks** Inc. charged with accounting fraud were set to stand trial in Concord this month but got a three-month reprieve after federal prosecutors were accused of misconduct. Government lawyers pressured the company to cut off legal fees to the defendants to weaken the employees' ability to fight the charges, defense lawyers allege in court filings.

New Hampshire U.S. Attorney William Morse, the lead prosecutor in the case and one of three accused of misconduct, denies wrongdoing. In pretrial testimony, when asked why he inquired

about the company's payment of legal fees, he said, he simply wanted to inform Enterasys that the "payment of attorneys' fees for defendants was something that the Department of Justice had instructed its line prosecutors to consider" when assessing a company's cooperation with prosecutors. In an interview, he says, "Enterasys's decision to stop paying legal fees had nothing to do with government pressure." He says that he last spoke to Enterasys about the reimbursement of fees in the summer of 2004, and that the company didn't cut off funding until a year later.

Mr. Morse says he notified the Justice Department in 2004 that he had asked Enterasys about its payment of legal fees. He says he made the inquiry to determine whether the company was living up to its cooperation agreement. The Justice Department approved his actions, he says. A Justice Department spokeswoman declines to comment.

At a March 7 hearing, U.S. District Judge Paul Barbadoro, who is presiding over the trial, voiced concern that prosecutors had wrongly pressured Enterasys to cut off funding to the defendants. Nevertheless, he didn't sanction the prosecutors, and Enterasys reluctantly agreed to pay past-due legal bills and cover future costs.

The fee-payment issue has gained prominence in

recent years, following a 2003 U.S. Justice Department memo that advised prosecutors to credit companies that cooperate with the government in an effort to avoid indictment. The memo, written by former Deputy Attorney General Larry Thompson, advises that a company's willingness to advance legal fees to "culpable employees" may signal a lack of cooperation. A spokesman for PepsiCo Inc., where Mr. Thompson is now the general counsel, says he wouldn't discuss the memo.

Until now, the nonpayment of legal fees has been most heavily debated in the government's ongoing tax-shelter case against former executives of KPMG LLP, which is scheduled for trial in New York in September. Yielding to government pressure, the accounting firm hasn't reimbursed these executives since 2004 in what Stanley Arkin, an attorney for one of the defendants, calls "a way of unfairly breaking down the defendants' ability to resist the government." KPMG declines to comment.

In their investigation of accounting fraud at HealthSouth Corp., federal prosecutors informed the company that the payment of fees to indicted executives would be viewed as a sign of noncooperation, according to lawyers in the case. The company later withheld fees to former chief executive Richard Scrushy, the only indicted executive who pleaded not guilty to federal

charges. A jury in Birmingham, Ala., acquitted him of fraud in 2005.

Federal prosecutors also encouraged **Symbol Technologies** Inc. to withhold fees from executives charged in an alleged accounting fraud at the New York maker of bar-code scanners, according to company counsel Andrew Levander. Last month, in Central Islip, N.Y., U.S. District Judge Leonard Wexler ended the trial of three former Symbol executives after jurors said they were deadlocked.

Symbol was able to pay the executives' fees after it convinced prosecutors that company bylaws required it to do so, Mr. Levander says. "The government is not sensitive to the fact that a failure to indemnify can harm a company's ability to attract talented officers and directors in the future," the lawyer says.

Enterasys, based in Andover, Mass., makes wireless products and computer hardware. It was spun off by Cabletron Systems in 2000 and co-founded by New Hampshire Gov. Craig Benson before he went into politics. Gov. Benson hasn't been charged with wrongdoing. The executives, whose trial is set for June, are accused of artificially inflating revenue in 2001. Four other top executives, including the company's chief executive, have pleaded guilty to charges relating

to accounting fraud.

Enterasys has agreed to cooperate with the government's fraud investigation, according to company lawyer Harvey Wolkoff. In 2004, prosecutors encouraged Enterasys not to pay the defendants' legal bills, in order to comply with its cooperation agreement, according to Mr. Wolkoff.

The law in Delaware, where the company is incorporated, authorizes Enterasys to advance legal fees to the defendants. Still, prosecutors asked Enterasys to contest the law. It was an appropriate request, says Mr. Wolkoff: "If [the defendants] did something criminal, why should" their legal fees be reimbursed?

The Enterasys defendants asserted in court filings that they have been hampered from proving their innocence by a lack of funding. In a February filing, the defendants claimed Enterasys stopped paying their legal fees in the summer of 2005, hurting their ability to investigate the backgrounds of witnesses and to review "voluminous" documents. Prosecutors have pressured Enterasys to cut off fees in order to "gain a substantial advantage at trial," defendants asserted in the filing.

Whatever the outcome of the Enterasys trial, Robert Bonner, a defense lawyer with Gibson,

Dunn & Crutcher LLP in Los Angeles who isn't involved in the New Hampshire case, worries that in the future more companies will "throw [indicted] executives to the wolves." His rationale: "The consequences of an indictment are so cataclysmic that companies will do anything to avoid it."

Write to Nathan Koppel at nathan.koppel@wsj.com1

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Business needs justice too
Turning corporate lawyers into snitches helps nobody PATTI WALDMEIR Page 9

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Refco reminds us that market trading is a risky business JOHN GAPPER Page 13

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FINANCIAL TIMES

USA | THURSDAY OCTOBER 20 2005

USA $1.50 Canada C$2.50

Why lawyers need to keep corporate America's secrets

PATTI WALDMEIR
LEGAL COUNSEL

Everybody knows it is a bad idea to lie to the government. But, in America, it can also be a crime to lie to your corporate lawyer.

Prompted by the evils of Enron, the energy trader, and spurred on by the general public perception that corporate America and its lawyers are a bunch of crooks, federal prosecutors have spent years trying to conscript the legal profession to help them catch white-collar criminals. The federal government has privatised such a big chunk of corporate law enforcement that talking to your lawyer is seen, these days, as no different from talking to a government agent.

In one recent case, prosecutors managed to persuade former executives of Computer Associates, the software company, to plead guilty to obstructing justice not because they lied to government investigators, but because they lied to a law firm the company hired to investigate itself. The theory was that they ought to have known their untruths would end up in the government's hands and thus lying to a lawyer was the same as lying to a G-man.

So American executives are caught in a bind: if the government asks, they can keep quiet and invoke the constitutional right to avoid self-incrimination; but if the lawyers ask, they must answer or get fired. The prosecutors have found a way to do an end run around the constitution.

But now a range of interest groups across the political spectrum, from the US Chamber of Commerce to the American Civil Liberties Union, is fighting back. They say it is time for prosecutors to go back to catching criminals and for lawyers to revert to their time-honoured role of trying to keep the innocent (not to mention the guilty) out of jail.

Talk to any American corporate lawyer these days and he is likely to complain about this issue. The chamber, the Association of Corporate Counsel and the American Bar Association: all say it has become almost routine for federal prosecutors to compel companies to waive the ancient privilege that protects attorney-client communications, in exchange for promises of leniency. According to a recent survey by the National Association of Criminal Defence Lawyers, nearly half of all outside counsel surveyed reported that since Enron there had been an erosion of lawyer-client privilege, or in the lesser protections afforded to lawyer "work product" (materials prepared by a lawyer to prepare for litigation).

Companies have little choice but to trade secrecy for leniency: for most companies, a trial is tantamount to a death sentence even if, as in the case of Arthur Andersen, the conviction is eventually overturned by the US Supreme Court. And long before they can start defending themselves in a real court, companies lose in the court of shareholder opinion: any company that tries to assert privilege invites immediate public condemnation for secrecy, and a commensurate drop in their share price.

> Turning lawyers into snitches will not clean up corporate America – it will just stop businesses from seeking legal advice

Tom Donohue, president of the US Chamber of Commerce, says all this amounts to "stacking the deck against business", and that turning lawyers into snitches will not, in the end, clean up corporate America – it will just stop businesses seeking the legal advice that could keep them clean in the first place.

It is a hard argument to make to a big-business hating public; that lawyers need to be able to keep corporate America's secrets, in the interests of justice and American prosperity. Bill Mateja, a former senior justice department official who oversaw the prosecution of Computer Associates but has since turned his hand to defending corporate America, says all the fuss over privilege is overdone.

He says the problem is not that prosecutors are pressuring companies to waive privilege but that lawyers think they have to cave in to get a deal, so they do so without being asked. This seems a distinction without a difference: the Feds have made their point so well, they do not even need to threaten any more. But Mr Mateja counters that there are ways round this problem: lawyers can give the government the facts it needs about corporate wrongdoing, without breaching privilege. If they do that, prosecutors will leave them and their sacred protections untouched.

But prosecutors should ease up on the pressure: they have enough power as it is. They should stop short of the tyranny of interfering with a lawyer's duty to defend his client. The privilege between lawyers and their clients has been around since the Magna Carta: justice will not be served by dispensing with it now.

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Legal Times
LAW AND LOBBYING IN THE NATION'S CAPITAL
OCTOBER 17, 2005

■ **Justice League.** They make unlikely bedfellows, but last Friday, legal groups on the left and right came together with a unified message: Attorney-client privilege is under attack. The setting was the headquarters of the **U.S. Chamber of Commerce,** which along with the **Association of Corporate Counsel,** the **American Civil Liberties Union,** and the **National Association of Criminal Defense Lawyers,** is gearing up for a lobbying effort against the recently revised changes to the federal sentencing guidelines. They are concerned that investigators with the Justice Department and the Securities and Exchange Commission increasingly reward companies that agree to waive privileged communications with their lawyers. In so doing, the government is undermining a long-standing tenet of the U.S. justice system, the right to counsel. The practice, which became more common during the wave of corporate scandals that followed Enron's collapse, effectively forces companies to disclose confidential information they share with their attorneys, the groups maintain. That makes it more difficult for lawyers to learn facts and give sound advice. "A lack of candid communication between executives and their lawyers may lead to more corporate failure," says **Fred Kerbs** of the ACC. That outcome, says **Caroline Fredrickson,** legislative director of the ACLU, leaves a lingering "worry that precedents in the corporate arena could turn into problems when individuals are concerned." —EMMA SCHWARTZ

The Business Magazine
For The Chief Legal Officer

CORPORATE counsel

corpcounsel.com • June 2005

IN THE NEWS

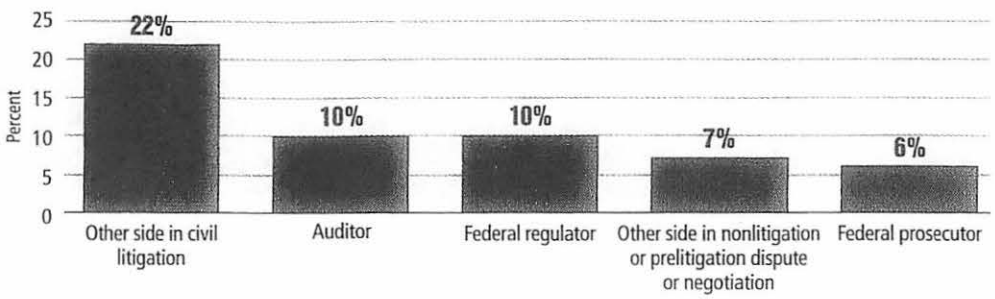
Taking It from All Sides

NEED PROOF THAT ATTORNEY-client privilege is under seige? Consider the preliminary results of a survey by the Association of Corporate Counsel. Roughly 30 percent of the 363 in-house attorneys who responded to the online poll say that they've personally experienced a privilege challenge since the wave of corporate fraud scandals started in 2001.

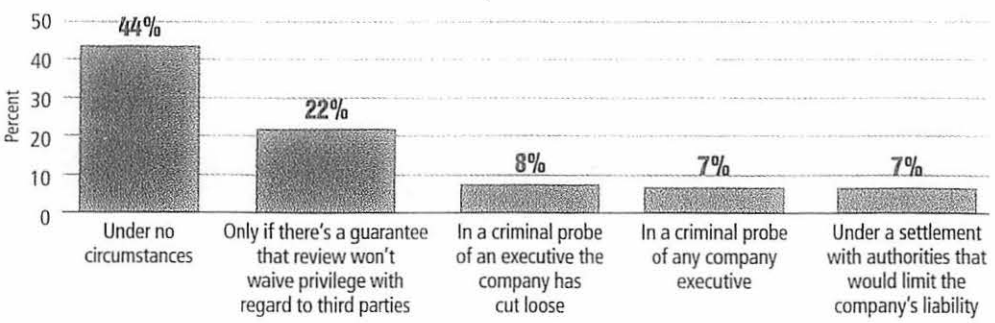
According to ACC, it's the first time that this issue has been quantified. ACC announced the initial results of its survey in April. It's keeping the poll open until August, when it will present its findings to an American Bar Association task force that's looking at the issue.

—SUE REISINGER

Who has challenged your company's right to assert privilege?



Under what circumstances should privileged infomation be disclosed to the government?



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■ WHITE-COLLAR CRIME

Lawyers fear a DOJ 'culture of waiver'

Corporate investigations rely too often on waiving privilege, attorneys say.

By Marcia Coyle
STAFF REPORTER

WASHINGTON—A survey of in-house and outside counsel by a coalition of business and legal organizations reports that a "culture of waiver" of the attorney-client privilege now exists in corporate investigations by the U.S. Department of Justice (DOJ) and other federal agencies.

The survey, conducted in response to a request for data on the issue by the U.S. Sentencing Commission and others, drew responses from 1,400 in-house and outside counsel and was designed to capture more information about government and auditor requests and implicit expectations for privilege and work-product waivers, according to Stephanie Martz of the National Association of Criminal Defense Lawyers (NACDL), a member of the Coalition to Preserve the Attorney-Client Privilege.

"We asked the questions every possible way we could think to capture as much data as we could," said Martz, director of NACDL's white-collar crime project. "We asked whether a privilege waiver was requested directly and unambiguously or indirectly, or whether it was inferred from [government officials'] statements; whether counsel thought requests had increased; whether it was made a condition of cooperation, and which [government] offices were doing it."

The survey results, which were submitted on March 7 to the House Judiciary Committee's subcommittee on crime, terrorism and homeland security, included the following:

- Nearly 75% of both inside and outside counsel agree that a "culture of waiver" has evolved in which government agencies expect a company under investigation to waive legal privileges (1% of in-house counsel and 2.5% of outside counsel disagreed with the statement).
- Of the respondents who confirmed that they or their clients had been subject to investigation in the past five years, approximately 30% of in-house counsel and 51% of outside counsel said that the government expected waiver in order to engage in bargaining or be eligible for more lenient treatment.
- Of those who had been investigated, 55% of outside counsel said the privilege waiver was requested either directly or indirectly; 27% of in-house counsel confirmed that experience.

Eight percent of outside counsel and 3% of in-house counsel said they "inferred it was expected."

At the subcommittee hearing, Associate Attorney General Robert McCallum denied claims by business and legal groups that waiver of the privilege is the norm in Justice Department investigations. "We do not believe [waivers] are routinely requested," he said, adding that there are "many instances" where the department has gotten information without privilege waivers. "Waiver is but one factor in determining cooperation," he said.

Presenting the opposite view were former Attorney General Richard Thornburgh of the Pittsburgh office of Kirkpatrick & Lockhart Nicholson Graham; Thomas J. Donohue, president of the U.S. Chamber of Commerce; and William M. Sullivan Jr. of Chicago-based Winston & Strawn.

Thornburgh said his firm's partners report that waiver requests are standard practice.

"The trend is to demand waiver as a precondition for favorable treatment for cooperation," said Thornburgh. "This is not an issue that Washington lobbyists have orchestrated."

The survey results are inconsistent with a survey conducted in 2002 by then-U.S. Attorney Mary Beth Buchanan from the Pittsburgh U.S. attorney's office. She reported in a law review article:

"The survey results indicate that requests for waivers simply are not the norm," she wrote. "In contrast, those who argue that waivers are required frequently do so on the basis of anecdotes without any supporting data."

Waivers not the norm?

The Justice Department maintains today that waivers are not the norm.

But the Buchanan survey was conducted several years ago and its questions were asked in a very narrow way, said Susan Hackett, senior vice president and general counsel of the Association of Corporate Counsel, also a member of the Coalition to Preserve the Attorney-Client Privilege.

Hackett said that the coalition's more recent and detailed survey supports its contentions that the privilege and the work-product doctrine as applied in the corporate context are under attack.

The NACDL's Martz agreed, saying, "I think the only way DOJ can get its arms around the problem is to accept our survey as accurate or do their own that is every bit as detailed as ours of U.S. attorneys. DOJ should ask: How often have you received information pursuant to a waiver—and work back from there.

"There's really no thing such as a voluntary waiver at this point," Martz insisted. NLJ

THE 'CULTURE OF WAIVER' IN NUMBERS

The types of protected materials most requested by the government in work-product waiver requests:

IN-HOUSE COUNSEL:

- Results of written internal investigation reports, 29%
- Interview memos with witnesses, 22%
- Results of reports prepared by nonlawyers or contractors hired to investigate a corporate matter, 14%

OUTSIDE COUNSEL:

- Interview memos with witnesses, 30%
- Results of written internal investigation reports, 25%
- Results of reports prepared by nonlawyers or contractors hired to investigate a corporate matter, 16%

Source: Coalition to Preserve the Attorney-Client Privilege.

Forbes
JULY 4, 2005 | WWW.FORBES.COM

INVESTIGATIONS

Ratted Out

That reassuring corporate attorney who asked you a few questions may turn out to be the long arm of the law | By Daniel Fisher and Peter Lattman

THE U.S. SUPREME COURT'S DECISION in May overturning the conviction of Arthur Andersen came too late to save the accounting firm, of course, but the legacy of Andersen and its collapse lives on among fearful corporate executives and tough-talking prosecutors. Accused of illegally shredding documents in the Enron accounting scandal, Andersen maintained its innocence—and got hit with a criminal indictment that drove away its image-conscious customers.

The lesson for corporations: If you play tough with us, we indict you—and then you're dead. So now companies are cooperating with government investigators at the mere threat of indictment, handing over internal documents, waiving the privilege that normally shields attorney-client communications and ratting out individual employees as targets for prosecution.

Shed no tears over corporate miscreants, of whom lately there have been many. "The notion that a company should sit and protect corporate employees who engaged in wrongdoing is patently absurd," says Robert Giuffra, a white-collar-criminal lawyer.

But is it possible that companies are ceding too much power to prosecutors in order to avoid indictments—and shortchanging employees' rights? "There was a time when companies would try to step up to the plate, even try to take a guilty plea to protect their individual employees," says N. Richard Janis, a former assistant U.S. Attorney in

ILLUSTRATION BY ZOHAR LAZAR

Washington, D.C. "Now it's just the opposite."

Time Warner, Merrill Lynch, Computer Associates and Monsanto are among the big companies that have cut so-called deferred prosecution agreements with prosecutors. Under these deals the corporation agrees to turn over to the government whatever it wants, often including communications between lawyers and the executives who hired them. In exchange the government agrees to delay, and ultimately drop, charges.

The talk-or-else rules were laid out in a January 2003 memo by Deputy U.S. Attorney General Larry D. Thompson: Prosecutors could go easy on companies—protecting the jobs of innocent employees—in exchange for cooperation. That cooperation includes "willingness to identify the culprits" and waiving the attorney-client privilege. Companies can do that because the attorney-client privilege is between the employer and the attorney.

convicted in September 2004 and sentenced to 18 months in jail.

Last year an internal investigator for Symbol Technologies was forced to turn against executives in an accounting fraud case. Andrew Levander, a former prosecutor hired by the board, says SEC officials insisted he waive attorney-client privilege covering the executives. "Either you do this investigation right or we'll be tearing this company apart for years," he says the SEC told him. He waited seven months before agreeing and says he now doesn't regret the decision. He uncovered information that led to guilty pleas by six executives; another six face trial in July.

There's a little problem here, says Hackett. By deputizing in-house lawyers as government snitches, prosecutors may be squelching the very type of internal communications companies need to make sure they're complying with the law.

Frank Quattrone found out at trial what was hiding in his employer's files; Hank Greenberg took the Fifth because he didn't know.

Thompson's policy set up a Hobson's choice for employees caught up in an internal investigation: Talk to in-house lawyers and risk that they will tell all to prosecutors (who will come after you later), or get fired for failing to cooperate." If you know the in-house lawyer is a mini-G-man, are you inviting him to important strategic meetings?" says Susan Hackett, senior vice president of the 17,500-member Association of Corporate Counsel.

At his 2003 trial for obstruction of justice, former Credit Suisse First Boston investment banker Frank Quattrone faced a tough adversary: David Brodsky, the general counsel for his former employer. Brodsky testified after CSFB agreed with prosecutors to waive the attorney-client privilege, including a key phone call Brodsky made to Quattrone. After a mistrial Quattrone was

Stephen Saltzburg, a former Department of Justice official who now teaches white-collar criminal procedure at George Washington University Law School, says in-house lawyers will typically ask, "What's the worst-case scenario here? What are we facing?" Notes of such a conversation, Saltzburg says, could become a virtual admission of guilt if they indicate the employee recognized the potential illegality of his actions.

Gerald Lefcourt, a New York white-collar defense attorney, says he has a client who can't figure out how to negotiate with the government because his employer has waived attorney-client privilege and he has no idea what might be incriminating. Lefcourt also contends that companies that cooperate too readily with the government also might be able to steer an investigation away from higher-level executives. Corporations "fire people, stop paying their legal fees, do all sorts of things to curry favor with the government," he says.

One of the most devastating tactics is to cut off access to documents an employee needs to prepare a defense. White-collar criminal cases usually come down to whether the defendant knew he was breaking the law. Prosecutors can show this by trundling out e-mails and memos that contradict the defendant's previous statements, as they did in Quattrone's case. Even Maurice (Hank) Greenberg, the powerful former chairman of AIG, felt compelled to assert his Fifth Amendment right to remain silent after the company cut off access to documents he needed to prepare for an interview with SEC investigators.

The atmosphere of mutual suspicion is enough to make an executive think twice about staying in the business. Robert Merritt, the former chief financial officer of Outback Steakhouse, announced his resignation to surprised analysts in April, citing the "recent lunacy" over lease accounting that forced the company to restate earnings. Under the Sarbanes-Oxley Act, Merritt notes, even a minor accounting miscue can become a criminal case if e-mails or testimony from an in-house lawyer look suspicious.

"I've made enough money to live on, and putting that at risk wasn't worth it," says Merritt, 53, who retired May 27 after 23 years of working in public companies. "It's extraordinarily easy to step across that line." F

STEPHEN CHERNIN/GETTY; DIANE BONDAREFF/ BLOOMBERG NEWS (TOP)

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SOURCE: DJC Law (Los Angeles, CA)
SUPPLIER: eClip
DATE: 04-11-2006
HEADLINE: Panel Tosses Language in Guidelines

Source Website

Pressure to Waive *Attorney*-Client Privilege Is Out

By Lawrence Hurley and Anna Oberthur

Daily Journal Staff Writers

WASHINGTON – The U.S. Sentencing Commission has taken the unusual step of removing language from corporate sentencing guidelines that encouraged prosecutors to force corporations to waive *attorney*-client privilege.

Previously, judges could reduce sentences for corporations if the privilege was waived, as it was deemed a sign of cooperation with prosecutors.

But after coming under fire from the U.S. Chamber of Commerce, the American Bar Association and other legal groups, the commission quietly removed the provision last Wednesday.

"That's excellent," Berkeley-based white-collar crime defender Cristina Arguedas said Monday. "It looks like the tide is turning."

It is commonplace in corporate fraud investigations for federal prosecutors to ask company *lawyers* to turn over privileged information such as the reports stemming from internal audits.

Arguedas, a partner at Arguedas, Cassman &Headley, said the Department of Justice often uses its right to lean on corporations to waive *attorney*-client privilege "like a bludgeon" instead of exercising its discretion.

The coalition of groups that pushed for the change is now setting its sights on an internal Department of Justice policy that encourages prosecutors to seek privilege waivers when investigating corporations.

"It's going to be an uphill battle," admitted Susan Hackett, senior vice president and general *counsel* of the *Association of Corporate Counsel.*

Her group has a meeting at the agency later this week where the matter will be discussed, she revealed.

Hackett said the commission's decision "gives us the ammunition we need to convince the department" to change its policy.

The agency's procedures are listed in what is known as the "Thompson memo," named after its author, former Deputy *Attorney* General Larry Thompson.

The memo states that prosecutors should take into account how cooperative a corporation has been before even deciding whether to file charges.

Factors to take into account include "the corporation's timely and voluntary disclosure of wrongdoing and its

willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate *attorney*–client and work product protection," the memo says.

The guidelines allow local departments flexibility in determining when to seek *attorney*–client privilege waivers.

In San Francisco, at least, "there was a productive exchange between the government and the defense so that waivers weren't necessary as a general rule," said white–collar defense *attorney* Nanci Clarence, of Clarence &Dyer in San Francisco.

On other hand, it can be harrowing for *attorneys* handling cases in other parts of the country where federal prosecutors are taking what Clarence called "an overly strict interpretation."

The Department of Justice did not respond by press time to a request for comment on the sentencing commission's decision.

Peter J. Henning, a law professor at Wayne State University Law School in Detroit, said the sentencing commission's decision will matter only if Justice follows its lead. This is because the sentencing commission's guidelines only come into play after a corporation has entered a guilty plea.

That leaves the Department of Justice plenty of opportunities to bargain with corporate players.

"I don't think it will change the way the department does things or the way corporations and their *lawyers* approach negotiating with the department," Henning said.

Peter Lawson, director of congressional and public affairs at the U.S. Chamber of Commerce, also conceded that the commission's decision "won't technically affect ... the vast majority of cases."

But he said it would put pressure on the Department of Justice to change its policy, particularly because both Congress and the federal judges have begun to question it in recent months.

Members of the House Judiciary Committee's subcommittee on crime, terrorism and homeland security held a hearing on the issue in March at which both Democrats and Republicans expressed concern about the policy.

"The reason there's a problem with the Thompson memo is that companies don't have a choice but to settle if they want to stay in business," Lawson said.

He predicts that if the Department of Justice doesn't change its policy, Congress or the judiciary will take action, instead.

For Keith Paul Bishop, a corporate and securities *attorney* at Buchalter Nemer in Irvine, it reflects a growing concern among *lawyers* about the erosion of *attorney*–client privilege.

"It is a real important step in eliminating this overwhelming pressure of companies to waive *attorney*–client privilege," Bishop said. "It's a big deal."

Although, technically, waivers of *attorney*–client privilege are not required, in practice it has become almost inevitable that either the U.S. *attorney*'s office or the Securities and Exchange Commission will ask for such a waiver directly or implicitly as an element of cooperation, Bishop said.

"The change itself is small, but the impact will be very large," Bishop said. "It will start to reshape the basic assumption about what cooperation really means, moving away from the assumption that cooperation means a waiver of *attorney*–client privilege.

American Bar Association President Michael S. Greco would appear to agree with that assessment.

He pointed to the coalition of groups that campaigned for the change, including the American Civil Liberties Union and the National *Association of* Manufacturers, as a sign of how much importance should be attached to *attorney*–client privilege.

"The range of viewpoints represented demonstrates how fundamental the *attorney*–client privilege is to our society, and the shared concern about the government's recent policies to diminish it," Greco added.

Highlights: Attorney, attorney, lawyers, counsel, Association of, Corporate Counsel, attorneys

THE NATIONAL LAW JOURNAL
WWW.NLJ.COM
THE WEEKLY NEWSPAPER FOR THE LEGAL PROFESSION ALM

■ WHITE-COLLAR CRIME

Eroding privilege hurts corporate compliance

Pressure to waive privilege dissuades open airing of problems.

By Leonard Post
STAFF REPORTER

FEAR THAT FEDERAL prosecutors will continue to pressure corporations under investigation to waive attorney-client privilege and work-product protections hampers corporate compliance efforts, say two surveys of corporate lawyers released this month.

Putting the squeeze on corporations to waive these rights in exchange for leniency has had unintended effects on corporations trying to comply with the Sarbanes-Oxley Act and other regulations, said Susan Hackett, senior vice president and general counsel of the Association of Corporate Counsel (ACC).

"Prosecutors' efforts are having the perverse opposite effect on our efforts to promote accountability and transparency," Hackett said. "The message they're sending is to shut up and go for deep cover. They're not going to seek out their lawyer anymore when their lawyer could well become Exhibit A for the prosecution."

The U.S. Department of Justice did not return calls seeking comment.

ACC found that 30% of the clients of the 363 in-house lawyers who responded to its survey had "personally experienced" an erosion in protections afforded by attorney-client privilege and the work-product doctrine, since Enron collapsed about four years ago.

That percentage leapt to 47.6% of the clients of the 356 outside counsel who responded to the White Collar Crime Project of the National Association of Criminal Defense Lawyers (NACDL).

Fear of lawyers becoming 'Exhibit A.'

Project director Stephanie Martz asserted that the risk of losing the privilege makes for less candor, and a fear to put things in writing.

"Our efforts are made particularly difficult when lawyers have to begin interviews with employees with Miranda warnings," said Martz. "That's no way to seriously probe for problems and try to solve them."

Waive goodbye

Commentary to Federal Sentencing Guidelines that took effect last November say that failure to waive attorney-client privilege and work-product protections won't be held against an entity or official in scoring points for sentence reductions based on cooperation "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."

That's a giant "unless," said Andrew Good of Boston's Good & Cormier, who often represents corporate officers in criminal matters.

"The practical reality is that the [Department of Justice] policy is to penalize corporate defendants who do not waive attorney-client privilege," asserted Good. "You get a more lenient deal if you do and a less favorable deal if you don't. The exception swallows the rule."

Corporations can avoid being charged at all or can lessen their potential culpability by waiving their attorney-client privilege and work-product protections, according to a January 2003 memo written by then-Deputy Attorney General Larry D. Thompson to department heads.

Thompson, who is now senior vice president, government affairs; general counsel; and secretary of Purchase, N.Y.-based PepsiCo, was not available for comment.

WORRIES OVER EROSION OF PRIVILEGE

Percentage of clients who have experienced an erosion in privilege and work-product protection in the last four years:
48% outside counsel
30% in-house counsel

Party most likely to dissuade attorneys from asserting privilege:
In-house: opposing parties (**22%**)
Outside counsel: federal prosecutors (**25%**)

Circumstances in which regulators should be allowed to request disclosure: (in-house counsel)
44% under no circumstances
22% privilege still protected as to third parties
8% criminal investigation of a leader the company has terminated
7% criminal investigation of company leader
7% in settlement that would limit company liability

Percentage of senior-level employees who are aware of/rely on privilege when consulting attorneys:
93% in-house
88% outside

Sources: Associate of Corporate Counsel and the National Association of Criminal Defense Lawyers.

An issue of trust

The surveys, designed by ACC, reflect that in-house and outside counsel see pretty much the same landscape. About 96% of those surveyed agreed that the privilege improves a lawyer's ability to monitor, enforce and/or improve a company's compliance initiatives. The crux of any attorney-client relationship is trust, said Laura Stein, general counsel of Oakland, Calif.-based cleaning products maker The Clorox Co., and chairwoman of ACC's advocacy committee. And that's not diminished by the fact that a client is a corporation.

"It is crucial to encourage employees of the client to feel comfortable discussing even the most sensitive matters," said Stein. "Which will lead to greater compliance."

Ninety-three percent of in-house counsel believe that their senior-level corporate clients rely on the privilege. Barry Nagler, general counsel of Pawtucket, R.I.-based toy maker Hasbro Inc. and ACC's treasurer, explained why.

"In-house counsel are uniquely engaged in the front end of decision-making and can prevent bad things from happening," said Nagler. "But you can't stop what you don't know."

NACDL and ACC filed separate amicus briefs in the appeal by the Arthur Andersen accounting firm from its criminal conviction for obstruction of justice. That conviction—which was effectively a death sentence for the company—was based on advice the firm got from an in-house counsel. *Andersen v. U.S.*, No. 04-368 (5th Cir.). Oral arguments are set for April 27. [See Page 7.]

BNA's
Corporate Counsel Weekly

Focus
Corporate Counsel

Granting Corporate Attorney-Client Privilege Waiver Standard Operating Procedure, Survey of Lawyers Says

Three out of four lawyers in corporate practice believe that federal prosecutors and agencies routinely demand wholesale waivers of attorney-client and work-product privileges during corporate investigations as proof that the entity is cooperating in good faith, according to a new survey jointly released March 6 by the Association of Corporate Counsel and the National Association of Criminal Defense Lawyers.

Labeling the government approach a "culture of waiver," lawyers responding to the survey complained that the erosion of legal privileges undermines the confidence that corporate clients have in seeking advice from counsel and opens the company up to liability to third parties.

"This survey refutes the arguments made by the Justice Department that requests for these waivers are not common, that they are appropriately requested, that they are rare, and that they are vital to the department's work," Susan Hackett, counsel for the Association of Corporate Counsel in Washington, D.C., said in a March 7 news conference.

Coalition Report

The survey report, titled "The Decline of the Attorney-Client Privilege in the Corporate Context," focuses on answers provided by 676 in-house lawyers and 538 outside counsel who responded to an online questionnaire. The survey featured 23 questions, most of them of the yes/no variety or multiple choice. Four of the queries were open-ended and solicited written details.

The survey was sponsored by the Coalition to Preserve the Attorney-Client Privilege, an alliance of business and legal groups that includes the ACC, NACDL, the American Chemistry Council, the American Civil Liberties Union, the National Association of Manufacturers, and the U.S. Chamber of Commerce.

The results were submitted to the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, which held a hearing March 7 on whether government demands are undermining the organizations' attorney-client privilege.

"This survey refutes the arguments made by the Justice Department that requests for these waivers are not common."

SUSAN HACKETT,
COUNSEL FOR THE ASSOCIATION OF CORPORATE COUNSEL,
WASHINGTON, D.C.

Round Two

In April 2005, the ACC and NACDL published separate surveys indicating corporate attorneys' belief that the attorney-client privilege is eroding due to increased government and law enforcement demands that organizations prove cooperation by waiving the privilege (20 CCW 123, 4/20/05).

The sponsors of last year's surveys presented their results to the U.S. Sentencing Commission, which was in the process of re-examining commentary language in its guidelines for organizational sentencing. Some corporate counsel have said that this language forces corporations to waive the attorney-client and work product privileges in order to receive mitigation for cooperating with the government.

Application Note 12 to Section 8C2.5 of the sentencing guidelines provides that, to qualify for a reduction in sentence, the corporation's cooperation must be timely and thorough, and that "thorough" cooperation should include "the disclosure of all pertinent information known by the organization."

According to this year's ACC/NACDL report, the Sentencing Commission responded by requesting additional information on the frequency with which the government has been asking companies to waive attorney-client and work-product protections. The commission has set March 28 as the deadline for receiving additional comment.

'Culture of Waiver'

The report identified several recurring themes in the responses it received:

- *No Secrets.* Nearly 75 percent of the responding lawyers agreed that the government has developed a "culture of waiver" in which it is routinely expected that a company under investigation will broadly waive legal privileges to demonstrate that the entity is cooperating with investigators. According to one survey respondent, "Whether to waive the privilege has not been subject to discussion; the only question is how far the waiver will go."
- *Quid Pro Quo.* More than half the respondents reported that the government has increasingly required waiver of legal privileges as a condition of favorable treatment. Approximately 30 percent of in-house counsel and 51 percent of outside counsel confirmed that in the past five years the government expected waiver in order for a company to engage in bargaining or become eligible for more lenient treatment. "Federal prosecutors in particular have begun to treat waiver as almost synonymous with cooperation," one lawyer wrote.
- *Do Ask, Do Tell.* Nearly three-quarters of outside counsel and about two-thirds of in-house respondents

(continued on page 87)

CCW ISSN 0886-0475

(continued from back page)

said that waiver expectations were communicated through direct or indirect statements by prosecutors or enforcement officials. One lawyer complained that an assistant U.S. attorney "stated that asserting the attorney-client privilege was inconsistent with cooperation."

■ *Collateral Damage.* Attorneys reported that 15 percent of the companies that underwent a government investigation within the past five years indicated that the investigation triggered third-party civil lawsuits.

Widespread Problem

According to the report, less than 1 percent of in-house counsel who responded to the survey worked for *Fortune* 1000 clients or employers, and only 12 percent of the outside counsel worked for publicly traded companies with more than $1 billion in annual revenue.

This demographic, the report says, "be[lies] the conclusion that waiver requests, demands, and expectations are a problem only for large, publicly-traded companies who are at the center of 'headline' scandals."

BY LANCE J. ROGERS

The survey is available on the ACC's Web site at http://www.acca.com/Surveys/attyclient2.pdf and on NACDL's Web site at http://www.nacdl.org/public.nsf/whitecollar/WhiteCollar_index.

CORPORATE CRIME REPORTER

Corporate Lawyers Launch Attack on "Culture of Waiver"
20 *Corporate Crime Reporter* 11(1), March 6, 2006

Corporate lawyers will launch an attack tomorrow on what they are calling the "culture of waiver" they believe is weakening the corporate attorney-client privilege.

The attack is being spearheaded by a number of major big business groups – including the American Chemistry Council, the Business Roundtable, the Financial Services Roundtable, the National Defense Industrial Association and the U.S. Chamber of Commerce.

And it's being coordinated by the National Association of Criminal Defense Lawyers (NACDL) and the Association of Corporate Counsel (ACC).

Tomorrow, the House Judiciary Committee Subcommittee on Crime, Terrorism and Homeland Security will hold a hearing on the matter.

Three of the four witness – Dick Thornburgh of Kirkpatrick & Lockhart, William Sullivan of Winston & Strawn, and Thomas Donahue, the CEO of the U.S. Chamber of Commerce -- will present the corporate side of the issue.

Associate Attorney General Robert McCallum will present the government's side – which is, in a nutshell – we don't demand waivers of corporate attorney/client privilege.

The centerpiece of the corporate attack is a survey of NACDL's 13,000 members and ACC's 4,700 members.

The survey was put together by Stephanie Martz of the NACDL and Susan Hackett of ACCA.

Martz said that the Crime Subcommittee hearing grew out of a conference held in November 2005 by the NACDL and the U.S. Chamber of Commerce.

At the conference, Judiciary Committee Chairman F. James Sensenbrenner (R-Wisconsin) expressed interest in a hearing on the subject of waiver of corporate attorney-client privilege.

When asked whether legislation was in the offing, Martz said – "not so far."

"But oversight by House and Senate Judiciary Committees will certainly have some effect," Martz said. "I don't know whether they would ask for more reporting, or request better guidelines. Our preliminary conversations with members of the Crime Subcommittee indicate that more hearings are probably in the offing."

The survey found that almost 75 percent of both inside and outside counsel agreed that

a "'culture of waiver' has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections.

The survey also found that:

* Fifty-two percent of in-house respondents and 59 percent of outside respondents said they believe that there has been a marked increase in waiver requests as a condition of cooperation.

* Of the respondents who confirmed that they or their clients had been subject to investigation in the last five years, approximately 30 percent of in-house respondents and 51 percent of outside respondents said that the government expected waiver in order to engage in bargaining or to be eligible to receive more favorable treatment.

* Of those who have been investigated, 55% of outside counsel responded that waiver of the attorney-client privilege was requested by enforcement officials either directly or indirectly. Twenty-seven percent of in-house counsel confirmed this to be true.

The survey results directly contradict a 2002 survey conducted by Mary Beth Buchanan, the U.S. Attorney in Pittsburgh, of all 94 U.S. Attorney's offices.

That survey found that waivers were requested in only a handful of cases.

"The survey results indicate that requests for waivers simply are not the norm," Buchanan wrote in 2004. "In contrast, those who argue that waivers are required frequently do so on the basis of anecdotes without any supporting data."

How can the results of both surveys be true?

"It could be that the truth is somewhere in between," Martz said. "Inside and outside lawyers feel such pressure to waive that they waive whenever there is a problem and before waiver is requested."

"But I would still lay the blame at the door of the government," Martz said. "In its survey, the government asked the U.S. Attorneys – do you formally request privilege waivers on a routine basis?"

"Well, they could all say no and still be asking on a periodic basis," Martz said. "Or they could say to themselves – I didn't ask, but I did emphasis the Thompson factors. Or, I didn't ask, but I did explain that they might get more favorable treatment if they waived."

Home

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1209 National Press Bldg.
Washington, D.C. 20045

March 27, 2006

VIA ELECTRONIC FILING

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attention: Public Affairs—Priorities Comment

Re: Follow up pursuant to the testimony of the Coalition to Preserve the Attorney Client Privilege: Request for changes to the commentary language of Section 8C2.5 regarding waiver of the attorney-client privilege.

Dear Commissioners and Staff:

On behalf of the Coalition to Preserve the Attorney-Client Privilege,[1] please accept our thanks for allowing us time to present our views to you on March 15, 2006, during Panel Three of your hearings schedule.

You have our testimony – both oral and written, as well as the document providing the results of our privilege survey of in-house and outside lawyers. On March 28, we are filing under separate cover a formal comment letter on behalf of this Coalition, as well. And of course, you have our previous testimonies and submissions.

I only wish to offer one follow-up from our testimony based on the back-and-forth discussion with the Commissioners. Ex-Officio Commissioner Michael Elston of the Department of Justice challenged our testimony regarding the statement of Associate Attorney General Robert McCallum before Members of Congress at the March 7, 2006, House Judiciary Committee Subcommittee hearings on the erosion of the attorney client privilege. The Coalition noted it its testimony to you that Mr. McCallum suggested at the Congressional hearing that the Department of Justice would not challenge the removal of the privilege waiver language; Mr. Elston suggested that our report of that hearing was incorrect, and that our statement that Mr. McCallum was retracting what he told Congress when he testified before the Sentencing Commission earlier in the morning on March 15 was inappropriate.

While we did not wish to argue the issue further at the hearing and while we certainly do not dispute what Mr. McCallum told the Commission on March 15 during its first panel of speakers (namely, that the Department would object to any changes in the language), we think it important for the Commission to know what it is that Mr. McCallum actually did say to the Congress on March 7, since the Members who were pressing him on waiver issues eased off their questioning on

[1] The complete listing of Coalition members appears at the end of this letter. Please note that the American Bar Association is not a member of this coalition, but regularly cooperates in the Coalition's work and has participated side by side with the Coalition in regard to this effort.

the Sentencing Guidelines language after he made the following statement. (And Representative Lundgren was not the only Member who mentioned concern about the Sentencing Guidelines' privilege waiver language – see our March 28 submission for more quotes from other Members of the House.) Members of Congress who were present at this hearing and who oversee the work of this Commission may have reason to believe that the privilege waiver language will not be a continuing issue of contention as a result of Mr. McCallum's statements.

We have produced the relevant text of the preliminary transcript for your reference below. (The final transcript of this session is not available to us to submit with this letter.)

Beginning at line 1295 and ending at line 1325 of the preliminary transcript of the Office of the Clerk of the U.S. House [White Collar Enforcement (Part I): Attorney-Client Privilege and Corporate Waivers, Tuesday, March, 7, 2006, House of Representatives, Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, Washington, DC]:

> Mr. Lundgren: ... And here you have a situation where you want a corporation to follow the law, I presume. And you would want the corporation to listen to good counsel, I would think. And here we have got a rule that seems to me to work in the opposite direction.
>
> And I think that that weighs heavy on me and other members here on this panel. And so I would ask, don't you see the creeping intrusion here? I mean, first you have the first memorandum. Now we have the second memorandum, which is a little tighter and a little tougher. And then, following that, you have the Sentencing Commission saying, well, that is a bad idea. As a matter of fact, we are going to have that as evidence of cooperation, and the lack of it as evidence of lack of cooperation.
>
> What is a corporate counsel to do under those circumstances?
>
> Mr. McCallum: Well, there are a series of questions there, Mr. Lundgren. Number one, with respect to the Sentencing Commission, the Department's position has been we would be comfortable with the Sentencing Commission going back to where it was before that amendment.
>
> Mr. Lungren: Well, is that your position? Is that the administration's position?
>
> Mr. McCallum: I believe that that is the Department of Justice's review –
>
> Mr. Lungren: That is what I mean.
>
> Mr. McCallum: -- underway at this particular time. I do not know whether that has been absolutely finalized. But my review of that is that there would not necessarily be an objection to going back to the way it was before, where it was not addressed.

I do not believe that there were any other issues that you requested we address during or after the hearing, and so I thank you once again for your time and your courtesy in

allowing us to present our survey findings for your consideration. Please feel free to contact me or any of the other members of our Coalition if we can be of assistance to you in your deliberations.

Respectfully Submitted For the Coalition to Preserve the Attorney-Client Privilege by:

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NATIONAL ASSOCIATION OF MANUFACTURERS
NATIONAL DEFENSE INDUSTRIAL ASSOCIATION
RETAIL INDUSTRY LEADERS ASSOCIATION
THE U.S. CHAMBER OF COMMERCE
WASHINGTON LEGAL FOUNDATION

Submission to the U.S. House of Representatives
Judiciary Subcommittee on Crime, Terrorism and Homeland Security

The Honorable Howard Coble, Chairman

Regarding the Subcommittee's Hearings on "White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers"

Tuesday, March 7, 2006

Submitted by the Coalition to Preserve the Attorney-Client Privilege:

American Chemistry Council
American Civil Liberties Union
Association of Corporate Counsel
Business Civil Liberties, Inc.
Business Roundtable
National Association of Criminal Defense Lawyers
National Association of Manufacturers
U.S. Chamber of Commerce

Chairman Coble, members of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, we appreciate the opportunity to submit the following statement for the record of today's hearing to examine the erosion of the attorney-client privilege in the corporate context.

It is our firm belief that the attorney-client privilege in the corporate context has been significantly weakened in recent years due largely to current Justice Department investigative policies and practices and recent amendments to the U.S. Sentencing Guidelines that put companies in the position of having to waive their attorney-client privilege during federal investigations in order to receive credit, during charging and sentencing decisions, for having fully cooperated with the authorities. This statement explains our concerns, and provides the Subcommittee with historical context for the importance of the attorney-client privilege.

Background and Importance of the Attorney-Client Privilege

Attorney-client confidentiality is the foundation of the relationship between a lawyer and client. The attorney-client privilege is essentially an evidentiary or procedural right recognized by the courts when one party to litigation or other adversarial matter wishes to exclude documents or communications from the other party's requested production of the first party's files, when those files include attorney-client confidences. But increasingly, demands to waive the attorney-client privilege are being made outside the authority and oversight of the courts; increasingly, privilege waiver demands are unilaterally made by prosecutors, enforcement officials, and third-party plaintiffs. Those demanding such waivers of the privilege believe they are entitled to everything and anything that may assist them in investigating potential misconduct at the company, even if the information is privileged. Even corporate auditors are demanding to see privileged information as the price of a "clean" audit letter.

While lawyers are generally bound by rules of professional ethics [1] to preserve their clients' confidences, it is the attorney-client privilege that allows a client to assert the right to the confidentiality of its conversations with counsel. While the workings of the privilege are more familiar in the context of an individual who, confronted with a threat of prosecution or suit, consults a lawyer and expects that the content of their conversations will be confidential, the U.S. Supreme Court confirmed that corporations are similarly entitled to the protections of the privilege in the landmark case of *Upjohn Co. v. United States.*[2]

The main general exceptions to the clients' rights to maintain the privileged status of conversations with their attorneys are:

• the crime-fraud exception (the privilege cannot apply to conversations in which the lawyer's advice or services will be used in furtherance of a crime or fraud); and

• the exception for discovery of communications that the client previously waived through disclosure to any non-privileged party; such a disclosure can invalidate the client's right to invoke the privilege's protections against other third parties who demand production of the communications in the future.[3]

Privilege In The Post Sarbanes-Oxley Environment

While nothing has technically changed in the laws governing the application of the privilege in the corporate context in recent years, past corporate accounting scandals have raised concerns about the need for corporations to operate in a more transparent and accountable fashion. However, we believe that weakening the attorney-client privilege is counterproductive to the ultimate twin goals of promoting corporate compliance and rewarding corporate self-reporting.

Since lawyers employed or retained by a corporation represent the entity (rather than individual employees, officers or directors), they are particularly aware of the need to protect the privilege. Corporate counsel find that privilege is essential to successfully counseling those officers and employees on compliance and ethics in the daily conduct of business. In order to perform their functions optimally, corporate lawyers must be *included in* executive corporate decision-making. Success requires that they encourage clients to take a moment, and seek legal advice in an increasingly fast paced, competitive, complex and regulated business environment.

The privilege allows corporate counsel to advise against poor choices and help clients understand the adverse legal implications of suggested activities without fear that their sensitive conversations will be made public in the future. Furthermore, it provides an important incentive to those with relevant information or concerns about possible wrongdoing to share what they know with their counsel, who can then advise them and the company to pursue remedial actions and proactively prevent similar problems in the future.

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[1] See, for example, Model Rule of Professional Conduct 1.6, and its counterpart rule in every state's code of professional responsibility.

[2] *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981).

[3] We have provided a more detailed explanation of the privilege and its application as Attachment A.

If employees believe that the attorney-client privilege will not protect the confidentiality of those conversations, conversations that are in the company's best interests and continued legal health will likely not occur. As the Supreme Court declared in the *Upjohn* case – "An uncertain privilege . . . is little better than no privilege at all.[4]

Privilege Waiver Requests Are on the Rise

Demands for waiver of privilege fall into four main categories:

1. the prosecutorial context (involving the Department of Justice, U.S. attorneys or state attorneys general);
2. the regulatory context (most commonly with the SEC);
3. the adversarial civil litigation context (in which the other side is demanding access to privileged or work-product material as a matter of right); and
4. the corporate audits context (as the company's external auditors seek to comply with the Public Company Accounting Oversight Board's excessive interpretation of Sarbanes-Oxley internal controls requirements).

Unfortunately, waiver of privilege to any one of these groups opens these same files to the potential future discovery demands of any third party seeking the same or even related information stemming from the same matter for most any other purpose. Attempts to craft a limited waiver agreement (through the execution of a confidentiality agreement) with government investigators or prosecutors would not be enforceable in most jurisdictions when subsequent document production demands were made.

The Government is Contributing to Privilege Erosion

In recent years[5], particularly on the federal level, criminal law enforcement and regulatory authorities have adopted policies and employed practices and procedures that suggest that if corporations disclose documents and information that are protected by the corporate attorney-client privilege and work-product doctrine, they will receive credit for "cooperation." While this sounds like an option that a company can choose to exercise or not, the reality is that corporations have no practical choice but to comply with this waiver demand. In federal criminal cases against companies, prosecutors' ability to assert a need for waiver is reinforced by both the Justice Department's internal policies on charging decisions (the Thompson Memorandum[6]), as well as a provision of the Federal Sentencing Guidelines

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[4] Upjohn, supra note 2,449 U.S. at 393.

[5] Former leaders of the Department of Justice have testified in alignment with our coalition that the aggressive waiver policies in play today were not the norm during their tenures, and are not only unnecessary to accomplishing the Department's goals, but deplorable and inappropriate. *See, e.g.*, the testimony of former Attorney General Dick Thornburgh before the US Sentencing Commission at http://www.ussc.gov/corp/11_15_05/Thornburgh.pdf; and the submitted statement of nine former senior DOJ officials, including former Attorneys General, Deputy Attorneys General and Solicitors General, attached to this filing because the Commission did not post it to its website.

[6] Deputy Attorney General Larry Thompson issued a 2003 memorandum that addressed the principles of federal prosecution of business organizations. (Memorandum from Deputy Attorney General Larry Thompson to Heads of Department Components and U.S. Attorneys, "Principles of Federal Prosecution of Business Organizations" (Jan. 20, 2003) (available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm). The

which suggests that prosecutors can demand waiver of privilege if they feel that it is important to making their case.[7] In the case of the SEC, the precedent of the "Seaboard Report" and the SEC's Enforcement Division's focus on lawyers as needed "gatekeepers" are emphasized.[8] Furthermore, the SEC's strategies are being imitated by other agencies, such as the IRS, the DOL, the EPA, the FEC and others.

Even prosecutors who traditionally recognized that criminal charges ought to be rarely applied against corporate entities now often employ the threat of criminal prosecution of the entity to secure the company's assistance in their criminal investigations and prosecutions of individuals who are actually responsible for malfeasance and the target of the government's probe. Because recent cases of corporate failures are complex, the size and sophistication of the government's investigations into complex frauds has increased correspondingly. This build-up has placed tremendous public pressure on prosecutors to obtain convictions of bad actors, which has lead many prosecutors to look for ways to coerce the "assistance" of companies under investigation.

Formerly, a company could show cooperation by providing access to both relevant documents and information and to the company's workplace and employees. The definition of a company's "cooperation" did not entail production of legally privileged communications and attorneys' litigation work product. Under current practices, in order to convince the prosecutor or regulator that the company is cooperating with the investigation, and indeed

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Thompson Memorandum (which updates the "Holder Memorandum," originated by one of his predecessors, Eric Holder) lists nine factors that federal prosecutors should consider when charging companies. One of the nine factors is the corporation's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protections." This provision in practice is interpreted to require that companies routinely identify and hand over damaging documents, disclose the results of internal investigations, furnish the text and results of interviews with company officers and employees, and agree to waive attorney-client and work product protections in the course of their cooperation.

[7] Amendments made to the US Sentencing Guidelines, which became effective in November of 2004, state that in order to qualify for a reduction in sentence for providing assistance to a government investigation, a corporation is required to waive confidentiality protections if "such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." (U.S. Sentencing Guidelines Manual § 8C2.5 (2004) (emphasis added) (available at http://www.ussc.gov/2004guid/8c2_5.htm.)

[8] Federal regulators, and particularly the SEC, have begun to adopt policies and practices mirroring those of the Department of Justice, which while discussing "cooperation credit," mention disclosures of protected confidential information. See, e.g., the Seaboard Report, ["Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions," Exch. Act Rel. No. 44969 (Oct. 23, 2001)]; in the Seaboard Report, the SEC outlined some of the criteria that it considers when assessing the extent to which a company's self-policing and cooperation efforts will influence its decision to bring an enforcement action against a company for federal securities law violations. The concern that waiver of the attorney-client privilege and work-product protections are now viewed as necessary elements evidencing a company's cooperation is bolstered by public remarks made by former SEC enforcement chief Stephen Cutler, in his remarks made during a program discussing the changing role of lawyers in remedying corporate wrongdoing during a presentation at UCLA's Law School in the Fall of 2004 ("The Themes of Sarbanes-Oxley as reflected in the Commission's Enforcement Program," (September 20, 2004) (transcript available at http://www.sec.gov/news/speech/spch092004smc.htm.)

to avoid being accused of engaging in obstructionist behavior, companies are told directly or indirectly to waive their privileges.

While the DOJ repeatedly states that cooperation and waiver of the privilege is only one of the nine criteria they examine under the Thompson Memorandum, and is rarely determinative, our surveys suggest otherwise. Furthermore, we do not believe the DOJ has done enough to promote reliable and enforceable internal guidelines interpreting the purpose of this policy, when it is to be applied, and what safeguards should be in place to prevent abuse. Coalition constituents tell us that privilege waiver is inevitably the pivotal consideration that determines whether a company will be able survive prosecution in a manner that will allow it to return to its business at the conclusion of the investigation, even if the government finds that no further prosecution is warranted.

Waiver of the Privilege has had a Negative Impact

The Department of Justice has maintained that the privilege is not in danger, primarily because DOJ very rarely seeks waivers.[9] Confident that this contention is incorrect, the Coalition to Preserve the Attorney-Client Privilege, which includes organizations that have signed this statement, decided to collect empirical data on the prevalence of waiver requests, as well as other indicators of the current health of the attorney-client privilege.

To accomplish our goal, we conducted several surveys to collect information about privilege erosion in 2005. In the first survey, over 700 corporate lawyers gave their perspectives on the privilege and its application in the corporate context. Over 350 responses came from corporate counsel, many of them general counsel and the remainder came from outside counsel who specialize primarily in white collar criminal defense. We were struck by the strong response rate, and the unanimity of the message sent by respondents from different disciplines. The following are the results from our survey:[10]

- **Reliance on privilege:** In-house lawyers confirmed that their clients are aware of and rely on privilege when consulting them (93% affirmed this statement for senior-level employees; 68% for mid and lower-tier employees).

- **Absent privilege, clients will be less candid:** If the privilege does not offer protection, in-house lawyers believe there will be a "chill" in the flow or candor of information from clients (95%); indeed, in-house respondents stated that clients are far more sensitive as to whether the privilege and its protections apply when the issue is highly sensitive (236 of 363), and when the issue might impact the employee personally (189 of 363).

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[9] *See, e.g.*, Mary Beth Buchanan, "Effective Cooperation by Business Organizations and the Impact of Privilege Waivers," 39 Wake Forest L. Rev. 587, 598 (2004).

[10] An executive summary of this survey and its results is online at http://www.acca.com/Surveys/attyclient.pdf.

- **Privilege facilitates delivery of legal services:** 96% of in-house counsel respondents said that the privilege and work-product doctrines serve an important purpose in facilitating their work as company counsel.

- **Privilege enhances the likelihood that clients will proactively seek advice:** 94% of in-house counsel respondents believe that the existence of the attorney-client privilege enhances the likelihood that company employees will come forward to discuss sensitive/difficult issues regarding the company's compliance with law.

- **Privilege improves the lawyer's ability to guarantee effective compliance initiatives:** 97% of corporate counsel surveyed believe that the mere existence of the privilege improves the lawyer's ability to monitor, enforce, and/or improve company compliance initiatives.

Struck by the responses to our survey, the United States Sentencing Commission, which is reviewing its 2004 decision to include new privilege waiver language in its organizational sentencing guidelines, asked us to conduct further research in several areas of particular interest. We offer you today the results of this new survey, which are being unveiled for these hearings; they are attached and at the end of this document.

In brief, this second survey[11], found:

- **A Government Culture of Waiver Exists:** Almost 75% of both inside and outside counsel who responded to this question expressed agreement (almost 40% agreeing strongly) with a statement that a "'culture of waiver' has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections." **(Only 1% of inside counsel and 2.5 % of outside counsel disagreed with the statement.)**
- **'Government Expectation'[12] of Waiver of Attorney-Client Privilege Confirmed:** Of the respondents who confirmed that they or their clients had been subject to investigation in the last five years, approximately 30% of in-house respondents and 51% of outside respondents said that the government expected waiver in order to engage in bargaining or to be eligible to receive more favorable treatment.
- **Prosecutors Typically Request Privilege Waiver – It Is Rarely "Inferred" by Counsel:** Of those who have been investigated, 55% of outside counsel responded that waiver of the attorney-client privilege was requested by enforcement officials either directly or indirectly. Twenty-seven percent of in-house counsel confirmed this to be true (60% of in-house counsel responded that they were not directly involved with waiver requests). Only 8% percent of outside counsel and 3% of in-house counsel said that they "inferred it was expected."

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[11] The second survey's results are online at http://www.acca.com/Surveys/attyclient2.pdf.

[12] The survey defined 'government expectation' of waiver as a demand, suggestion, inquiry or other showing of expectation by the government that the company should waive the attorney-client privilege.

- **DOJ Policies Rank First, Sentencing Guidelines Second Among Reasons Given For Waiver Demands:** Outside counsel indicated that the Thompson/Holder/McCallum Memoranda are cited most frequently when a reason for waiver is provided by an enforcement official, and the Sentencing Guidelines are cited second. In-house counsel placed the Guidelines third, behind "a quick and efficient resolution of the matter" (1) and DOJ policies (2).
- **Third Party Civil Suits Among Top Consequences of Government Investigations:** Fifteen percent of companies that experienced a governmental investigation within the past 5 years indicated that the investigation generated related third-party civil suits (such as private antitrust suits or derivative securities law suits). Of the eight response options that asked respondents to list the ultimate consequences of their clients' investigations, related third-party civil suits rated third for in-house lawyers. The first and second most common outcomes for in-house counsel were that the government decided not to pursue the matter further (24%), or that the company engaged in a civil settlement with the government to avoid further prosecution (18%). For outside counsel, the most cited outcome was criminal charges against individual leaders/employees of the company (18%), and a decision by the government not to prosecute (14%). "Related third party civil litigation" finished fifth (for outside counsel respondents) with 12%.

Faced with this evidence of privilege erosion and increasingly successful (coerced) unilateral government waiver demands, we conclude that the government believes it has a right to determine when clients can and cannot exert their Constitutional privilege rights.

Privilege erosions are almost inevitable in situations where prosecutors have immense leverage and companies very little; a company's failure to "cooperate" could have severe impact on its reputation, its financial well-being and even its very existence. While companies have a good reason to complain about forced or coerced waiver of their privileges, lawyers who advise their clients to take a stand and fight against privilege erosions are potentially subjecting the company to a long, costly, and hostile prosecution, at the end of which the client will have paid dearly even if it is ultimately acquitted.

Faced with such situations, many corporations will conclude that the protection of their privileged communications and files is not worth risking the negative publicity that could follow the company's stark refusal to divulge its "secret" conversations with its lawyers in asserting privilege.[13] Though a difficult decision, companies must consider the affect of asserting privilege in these situations on the company's shareholders or investors, customers and suppliers, and its standing in the marketplace.

The Role of Congress in Protecting the Attorney-Client Privilege

In the Subcommittee's continued oversight, we ask you to join us in sending a message to the Department of Justice that the Thompson Memorandum is inconsistent with the

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[13] Unfortunately, a decision to waive for the short-term gain of "getting along" with a current prosecution could also be later questioned if the results of waiver are even more devastating further down the road in an unrelated third party action. Boards and executives know that civil suits ensuing after the "successful" completion of a settlement with the government can have more damaging effects on the company's long-term viability than the instant matter.

foundational role of the attorney-client privilege in our system of justice, and that the prosecutorial powers regarding privilege exercised thereunder are inappropriate. The attorney-client privilege is a client's right under our legal system, and its application serves the purposes of corporate compliance, self-reporting, and corporate responsibility. Privilege waiver should not be coerced or even considered when assessing whether a corporation is cooperating in an investigation or can qualify for leniency. We believe that Congress should send a clear message to the federal prosecutors at the Department of Justice and other regulatory agencies that companies and their employees should not be punished for preserving their rights to exercise their attorney-client privileges. Further, we believe Congress should hold further hearings to request that the Department of Justice provide more meaningful information on privilege waiver requests by prosecutors and its progress in policing the practices of US attorneys in the field.

Similarly, we urge Congress to request similar changes to similar procedural enforcement powers exercised at the SEC. We agree that aggressive enforcement of wrongdoing and harsh penalties for wrongdoers is appropriate, but stripping clients of their privilege rights – especially when it is clear that even when provided under a confidentiality agreement, privilege waiver may be irreversible in many jurisdictions – is not a necessary or appropriate tactic for an agency to employ in the course of an investigation, even before any finding of entity complicity or culpability for a failure is made.

Finally, we urge the Subcommittee to communicate these concerns to the United States Sentencing Commission as it engages in its current process of reconsidering the 2004 amendment to the Guidelines' commentary language, which the Justice Department views as codifying its policy of requesting privilege waiver routinely as an emblem of cooperation. The waiver of the right to effective and meaningful legal counsel is not an appropriate demand to make of a defendant, and should not be the standard by which the courts determine whether an entity has properly facilitated the government's investigation of charges against individuals or the entity.

ATTACHMENT A

The Attorney-Client Privilege and its Operation in the Corporate Legal Setting

Following is a working definition of the attorney-client privilege and how it applies in the corporate context. Before the privilege can attach to a client's communication with its attorney, the following requirements must be satisfied:

- The entity that wishes to hold the privilege must be the lawyer's client.
- The person to whom the client's communication is made must be a member of the bar of a court or a subordinate of such a person.
- The lawyer to whom the communication is made must be acting as a lawyer (and not, for instance, as a business person).
- The communication must be made without non-client and non-essential third parties present (it could be made, for instance, at a crowded restaurant, but not at a table with other non-client folks around to overhear; it could be conducted as an email exchange, but not if non-client, "unnecessary" parties are cc'ed or are forwarded the email later).
- The communication must be made for the purpose of securing legal services or assistance, and not for the purpose of committing a crime or fraud.
- The client must claim and not waive the privilege.[14]

While the privilege will attach to almost all communications that satisfy these requirements, what it protects is actually very narrow in scope. The privilege does not protect the client from the discovery through other means and sources of any relevant facts. It just protects the "consult." Indeed, one of the best arguments in favor of privilege protection is precisely that it *doesn't* prevent anyone from discovering all the facts necessary to make their case, whatever that may be: it simply requires the government or a civil litigant to do their own work to prove their case, so as not to deprive the client's ability to communicate openly with its attorney.

If the application of the privilege to a conversation, documents or a written communication between lawyer and client is challenged, the party claiming the benefit of the privilege has the burden of proving its applicability.[15]

The related "work product doctrine" offers qualified protection for materials prepared by or for an attorney when litigation is anticipated (even if the litigation never arises or ends up taking on a different form). Attorney work product material can enjoy the same level of protection as attorney-client privileged materials, but if the work product does not disclose

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[14] These criteria were laid down by the court in United States v. United States Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950), and have set the standard for privilege qualification ever since.

[15] Federal Trade Commission v. Lukens Steel Co., 444 F.Supp. 803 (D.D.C. 1977).

the mental impressions of the attorney, a court may order its production if good cause for the documents' production is established (such as it would be unreasonable or impossible for the other side to replicate the work on their own).

One of the most contentious and difficult issues for companies concerned about privilege issues is the production of the internal investigation notes of the company's lawyers (and their agents). Many companies self-investigate and self-report problems and the number of self-reports are increasing as a result of Sarbanes-Oxley and related legislation and regulation at the federal, state and agency levels. But self-reporting a problem, by its very nature, confirms to an adversary or prosecutor that the ideal place to begin their evaluation of the company's problems would be a thorough review of the company's internal investigation and any communications made between lawyers and the company regarding the failure. Producing these investigation summaries and reports entails the disgorgement of the attorney's work product and attorney-client confidences, and the U.S. Supreme Court set forth the standard for protecting such work from discovery in Hickman v. Taylor.[16]

The attorney work product doctrine suggests that it is unfair for the other side to have access to another party's attorney's thought process, her impressions and thoughts, and even her strategies in unlocking and mapping her potential case by the selection of which employees to interview (and which to skip); which files she reviews, and so on.

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[16] *Hickman v. Taylor*, 329 U.S. 495 (1947).

House Judiciary Committee
Subcommittee on Crime, Terrorism, and Homeland Security
Oral testimony on Attorney-Client privilege
By Thomas J. Donohue
President & CEO, U.S. Chamber of Commerce

Rayburn House Office Building
March 7, 2006

- Good afternoon, Mr. Chairman and members of the committee. My name is Tom Donohue. I am president and CEO of the U.S. Chamber of Commerce, the world's largest business federation, representing some 3 million businesses.

- I am also here today on behalf of the Coalition to Preserve the Attorney Client Privilege, which includes most of the major legal and business associations in the country, including:

  - The American Chemistry Council
  - The American Civil Liberties Union
  - The Association of Corporate Counsel
  - Business Civil Liberties, Inc.

- The Business Roundtable
- The Financial Services Roundtable
- Frontiers of Freedom
- The National Association of Criminal Defense Lawyers
- The National Association of Manufacturers
- The National Defense Industrial Association
- Retail Industry Leaders Association
- The U.S. Chamber of Commerce; and
- The Washington Legal Foundation

- I should add that the coalition is working closely with the American Bar Association, which has separately submitted written testimony here today detailing its concerns about the erosion of attorney-client privilege. ABA policy prevents the organization from being listed as a member of broader coalitions.

- The privilege to consult with an attorney freely, candidly, and confidentially is a fundamental Constitutional right that is under attack.

- Recent policy changes at the Department of Justice and the SEC have permitted and encouraged the government to demand or expect companies to waive their attorney-client privilege or work-product protections during an investigation.

- A company is required to waive its privilege in order to be seen as cooperating with federal investigators.

- A company that refuses to waive its privilege risks being labeled as uncooperative, which all but guarantees that it will not get a settlement or receive leniency in their sentencing or fine.

- But it goes far beyond that. The "uncooperative" label can severely damage a company's brand, shareholder value, their relationships with suppliers and customers, and their very ability to survive.

- The enforcement agencies argue that waiver of attorney-client privilege is necessary for improving compliance and conducting effective and thorough investigations.

- The opposite is true. An uncertain or unprotected attorney-client privilege actually diminishes compliance with the law.

- If company employees responsible for compliance with complicated statutes and regulations know that their conversations with attorneys are not protected, they will simply choose not to seek legal guidance.

- The result is that the company may fall out of compliance – not intentionally – but because of a lack of communication and trust between the company's employees and its attorneys.

- Similarly, during an investigation, if employees suspect that anything they say to their attorneys can be used against them, they won't say anything at all.

- That means that both the company and the government will be unable to find out what went wrong, punish the wrongdoers, and correct the company's compliance system.

- And there's one other major consequence – once the privilege is waived, third party private plaintiffs' lawyers can gain access to attorney-client conversations and use them to sue the company or obtain massive settlements.

- How pervasive has the waiving of attorney-client privilege become?

- Last November, we presented findings to the U.S. Sentencing Commission showing that approximately one-third of inside counsel respondents – and as much as 48% of outside counsel respondents – said they had personally experienced erosion of attorney-client privilege or work-product protections.

- This was according to a survey by the Association of Corporate Counsel and the National Association of Criminal Defense Lawyers.

- After that presentation, the Sentencing Commission asked us for even more information about the frequency of waivers and their impact.

- So our coalition commissioned a second, more detailed survey and got an even greater response rate from the members of our coalition partners.

- We publicly released the results of this second survey just yesterday. They have been provided to the Committee, along with a more detailed coalition written statement. Here are a few highlights:

    - Almost 75% of both inside and outside counsel agree with the statement that a "culture of waiver" has evolved to the point that governmental agencies believe it is reasonable and appropriate to expect a company under investigation to broadly waive attorney-client privilege or waiver protections.

    - Of the respondents who confirmed that they or their clients had been subject to investigation in the last five years, approximately 30% of in-house respondents and 51% of outside respondents said that the government expected wavier in order to engage in bargaining or to be eligible to receive more favorable treatment.

- Of those who have been investigated, 55% of outside counsel responded that waiver of the attorney-client privilege was requested by enforcement officials either directly or indirectly. Twenty-seven percent of in-house counsel confirmed this to be true – 60% responded that they were not directly involved with waiver requests. Only 8% percent of outside counsel and 3% of in-house counsel said that they "inferred waiver was expected."

- Our coalition is aggressively seeking to reverse this erosion of confidential attorney-client conversations.

- We are pleased that the U.S. Sentencing Commission has decided to revisit recently amended commentary to the guidelines that allows waiver to be a cooperation factor in sentencing formulas, and we have submitted detailed comments on the ramifications of this policy.

- We would encourage the Committee to weigh in with its support of the attorney-client privilege to the United States Sentencing Commission as it reconsiders the 2004 amendments to the Guidelines' commentary language.

- It is important to note that the Department of Justice and other regulatory agencies have created this erosion of the privilege without seeking input, oversight, or approval from Congress or the judiciary.

- We seek your input and strongly urge you to exercise your oversight of DOJ and the SEC to ensure protection of the attorney-client privilege.

- Let me be very clear: our efforts are not about trying to protect corrupt companies or businesspeople. Nobody wants corporate wrongdoers caught and punished more than legitimate and honest businesspeople.

- Rather, this is about protecting a well established and vital Constitutional right. Thank you very much. I look forward to your questions.

Testimony of Dick Thornburgh
Former Attorney General of the United States
before the Subcommittee on Crime, Terrorism & Homeland Security
of the House Committee on the Judiciary
regarding
"White Collar Enforcement (Part I): Attorney-Client Privilege and Corporate Waivers."
Tuesday, March 7, 2006

Good morning, Chairman Coble and members of the Subcommittee, and thank you for the invitation to speak to you today about the grave dangers posed to the attorney-client privilege and work product doctrine by current governmental policies and practices. At the outset, let me commend you for being the first Congressional body to convene a hearing on this very worrisome situation. The attorney-client privilege is a fundamental element of the American system of justice, and I fear that we have all been too slow in recognizing how seriously the privilege has been undermined in the past several years by government actions. Your focus on this issue today is vitally needed and much appreciated.

The attorney-client privilege is the oldest of the "evidentiary privileges," originating in the common law of England in the 1500s.[1] Although the privilege shields from disclosure evidence that might otherwise be admissible, courts have found that this potential loss of evidence is outweighed by the benefits to the immediate client, who receives better advice, and society as a whole, which obtains the benefits of voluntary legal compliance. These ideas have been embraced time and time again by the courts -- in the words of the Supreme Court, the privilege encourages "full and frank communication between attorneys and their clients and thereby promote[s] broader public interest in the observance of law and administration of

[1] *See Berd v. Lovelace*, 21 Eng. Rep. 33 (Ch. 1577); *Dennis v. Codrington*, 21 Eng. Rep. 53 (Ch. 1580) (finding "A counselor not to be examined of any matter, wherein he hath been of counsel").

justice."[2] The attorney-client privilege is thus a core element in a law-abiding society and a well-ordered commercial world.

And yet the previously solid protection that attorney-client communications have enjoyed has been profoundly shaken by a trend in law enforcement for the government to demand a waiver of a corporation's privilege as a precondition for granting the benefits of "cooperation" that might prevent indictment, or diminish punishment. These pressures emanate chiefly from the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"). Beginning with the 1999 "Holder Memorandum," and as more forcefully stated in the 2003 "Thompson Memorandum," DOJ has made clear its policy that waiver of the attorney-client (and work product) protections is an important element in determining whether a corporation may get favorable treatment for cooperation.[3] The SEC, in a public "report" issued at the conclusion of an investigation, outlined a similar policy.[4] Finally, the U.S. Sentencing Commission in 2004 amended the commentary to its Sentencing Guidelines so that waiver of privilege became a significant factor in determining whether an organization has engaged in the timely and thorough "cooperation" necessary for obtaining leniency.[5] Following the federal lead, state law

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[2] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

[3] *See* Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components and United States Attorneys, *Re: Principles of Federal Prosecution of Business Organizations* (January 20, 2003); available at www.usdoj.gov/dag/cftf/business_organizations.pdf. The DOJ recently re-affirmed that the Thompson Memorandum remains the Department's official policy. *See* Memorandum from Acting Deputy Attorney Robert D. McCallum, Jr. to Heads of Department Components and United States Attorneys, *Re: Waiver of Corporate Attorney-Client and Work Product Protection* (October 21, 2005) (the "McCallum Memorandum"); available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm.

[4] *See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, SEC Release Nos. 34-44969 and AAER-1470 (Oct. 23, 2001) (the "Seaboard Report"); available at http://www.sec.gov/litigation/investreport/34-44969.htm.

[5] United States Sentencing Commission, Guidelines Manual, § 8C2.5(g), comment 12 (Nov. 2004).

enforcement officials are beginning to demand broad privilege waivers, as are self-regulatory organizations and the auditing profession.[6]

While the tone of these documents may be moderate, and officials representing these entities stress their intent to implement them in reasonable ways, it has by now become abundantly clear that, in actual practice, these policies pose overwhelming temptations to prosecutors seeking to save time and resources and to target organizations desperate to save their very existence. And each waiver has a "ripple effect" that creates more demands for greater disclosures, both in individual cases, and as a matter of practice. Once a corporation discloses a certain amount of information, then the bar is raised for the next situation, and each subsequent corporation will need to provide more information to be deemed cooperative.

The result is documented in a survey released just this week to which over 1,400 in-house and outside counsel responded, in which almost 75% of both groups agreed – almost 40% agreeing strongly -- that a "'culture of waiver' has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections." I practice law at a major firm with a significant white collar criminal defense practice. My partners generally report that they now encounter waiver requests in virtually every organizational criminal investigation in which they are involved. In their experience, waiver has become a standard expectation of

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[6] For example, in late 2005 the New York Stock Exchange issued a memorandum detailing the degree of "required" or "extraordinary" cooperation Members and Member Firms could and should engage in with the Exchange. *See* NYSE Information Memorandum No. 05-65, Cooperation, dated September 14, 2005. Exchange Members engaging in "extraordinary" cooperation, including waiver of the attorney-client privilege, are able to reduce prospective fines and penalties levied by the Exchange. *See, e.g.*, NYSE News Release, *NYSE Regulation Announces Settlements with 20 Firms for Systemic Operational Failures and Supervisory Violations* (January 31, 2006) (noting that Goldman, Sachs & Co. had been credited with "extraordinary" cooperation by self-reporting violations, and indicating it received the lowest of three possible fine amounts), available at http://www.nyse.com/Frameset.html?displayPage=/press/1138361407523.html.

federal prosecutors. Others with whom I've spoken in the white collar defense bar tell me the same thing.

I am prepared to concede that the significance of these developments took some time to penetrate beyond the Beltway and the relatively small community of white collar defense lawyers. It is clear, however, that as the legal profession has become aware of the problem, it has resulted in a strong and impassioned defense of the attorney-client privilege and work product protection. This issue was the hottest topic of last summer's Annual Meeting of the American Bar Association ("ABA"), and at its conclusion, the ABA House of Delegates unanimously passed a resolution that "strongly supports the preservation of the attorney-client privilege" and "opposes policies, practices and procedures of government bodies that have the effect of eroding the attorney-client privilege. . . ."[7]

I was one of nine former Attorneys General, Deputy Attorneys General and Solicitors General, from both Republican and Democratic administrations, who signed a letter to the Sentencing Commission last summer urging it to reconsider its recent amendment regarding waiver. It is never a simple matter to enlist such endorsements, particularly in the summer and on short notice. And yet it was not difficult at all to secure those nine signatures, because we all feel so strongly about the fundamental role the attorney-client privilege and work product protections play in our system of justice.

We feel just as strongly that the other governmental policies and practices outlined above seriously undermine those protections. As you know, I served as a federal prosecutor for many

[7] This resolution was initially drafted by an ABA Task Force on the Attorney-Client Privilege, which held public hearings on the issues raised by recent government practices. A report detailing the Task Force's work is available at http://www.abanet.org/buslaw/attorneyclient/materials/hod/report.pdf. ABA members also heard extensive discussion of the issues at these well attended presentations. *See* Conference Report, ABA Annual Meeting, Vol. 21, No. 16 (August 10, 2005).

years, and I supervised other federal prosecutors in my capacities as U.S. Attorney, Assistant Attorney General in charge of the Criminal Division and Attorney General. Throughout those years, requests to organizations we were investigating to hand over privileged information never came to my attention. Clearly, in order to be deemed cooperative, an organization under investigation must provide the government with all relevant factual information and documents in its possession, and it should assist the government by explaining the relevant facts and identifying individuals with knowledge of them. But in doing so, it should not have to reveal privileged communications or attorney work product. That limitation is necessary to maintain the primacy of these protections in our system of justice. It is a fair limitation on prosecutors, who have extraordinary powers to gather information for themselves. This balance is one I found workable in my years of federal service, and it should be restored.

I was pleased to see the Sentencing Commission earlier this year request comment on whether it should delete or amend the commentary sentence regarding waiver. In testimony last fall I urged it to provide affirmatively that waiver should not a factor in assessing cooperation. I understand that the ABA will shortly approach DOJ with a request that the Thompson memorandum be revised in similar fashion. These are promising developments.

Mr. Chairman, I thank you again for beginning the much-needed process of Congressional oversight of the privilege waiver crisis. This is not an issue that Washington lobby groups have orchestrated, but it is one that likely will take Congressional attention to resolve.

Thank you, and I look forward to your questions.

TESTIMONY OF WILLIAM M. SULLIVAN, JR. ESQ.

PARTNER, WINSTON & STRAWN, LLP

BEFORE THE COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

MARCH 7, 2006

Introduction

Good Morning Chairman Coble and members of the Subcomittee. Thank you for your kind invitation to address you today concerning the Department of Justices' policies and practices with regard to seeking attorney-client privilege and work product protection waivers from corporations, and whether the waiver of such privilege and protection should be relevant to assessing the corporation's "cooperation" within the meaning of the Organizational Guidelines.

I am currently a partner at the law firm of Winston & Strawn, LLP where I specialize in white-collar criminal defense and corporate internal investigations. From 1991-2001, I served as an Assistant United States Attorney for the District of Columbia. In these capacities, I have been involved in virtually all facets of white-collar investigations and corporate defense: I have overseen both criminal investigations and internal corporate investigations, and I have represented both corporations and individuals in internal investigations, and before federal law enforcement authorities and regulators, as well as in class action, derivative, and ERISA litigation. My perspective on corporate cooperation and the waiver of attorney-client and attorney work product privileges has therefore been forged not only by my experiences on both sides of the criminal justice system, but by my participation in the civil arena as well.

The Real Issue Is Not The Waiver, But What Is Being Waived, And How It Was Assembled

For business organizations today, the traditional protections afforded by the attorney-client privilege and the attorney work-product doctrine are under siege. Prosecutors and regulators now routinely demand that, in return for the mere prospect of leniency, corporations engage in intensive internal investigations of alleged wrongdoing and submit detailed written reports documenting both the depth and breadth of their inquiry, as well as the basis for their conclusions.

When pressed on this practice, many prosecutors and regulators will publicly insist that they are only seeking a "road map"—the identity of the individuals involved, the crucial acts, and the supporting documentation. However, this has not been my experience. Just last week, I was asked by a government regulator in our very first meeting to broadly waive attorney-client privilege and work product protection and to provide copies of interview notes, even before I had completed my client's internal investigation, and accordingly even before I determined as corporate counsel that cooperation would be in my client's best interest.

Most importantly, however, such "road map" requests fail to relieve the valid concerns of corporations related to privilege and work product waivers. A less than carefully drawn road map risks a broad subject-matter waiver of attorney-client privilege and attorney work-product protection. Under current authority applicable in most jurisdictions, the waiver of attorney-client communications arising in connection with a factual road map subsequently disclosed to law enforcement would extend beyond the disclosure itself and encompass all communications on that subject matter. The consequences of this result can be extreme in that even a rudimentary road map is the product of information obtained through thousands of hours legal work spent conducting interviews, parsing statements from hundreds of pages of interview notes, and

analyzing thousands (perhaps millions) of pages of both privileged and non-privileged corporate documents. Furthermore, the waiver would be applicable not only to the law enforcement officials receiving the information, but would include all future third-parties, including other government agencies and opportunistic plaintiffs' attorneys seeking fodder for class action and derivative strike suits.

In addressing the practice of conditioning leniency for disclosure of otherwise privileged reports, I believe that a balance must be struck between the legitimate interests of law enforcement in pursuing and punishing illegal conduct, the benefits to be obtained by corporations which determine to assist in this process and to take remedial action, and the rights of individual employees. It is imperative that we do not sacrifice accuracy, fundamental fairness and due process for expediency and convenience. An equilibrium must be achieved between the aforementioned competing concerns, and I am prepared today to share my views regarding how that might be accomplished.

An Old Debate
Revitalized By A Harsh New Reality

The discussion regarding the attorney-client privilege in the corporate context is not a novel phenomenon. Commentators have long discussed and disputed the scope of the privilege and its application to corporations and other legal entities. The dialogue has largely revolved around efforts to adapt the attorney-client privilege to the practical realities of business entities: corporations act only through employees (with whom they share limited legal privity) and the conduct of those employees—at all levels of the company—have legal consequences for the entity.[1] Consequently, corporate privilege serves an important purpose in protecting

[1] Indeed, the harsh consequences of cooperation with law enforcement and the waiver of attorney-client privilege, have also been recognized for several decades. The decision in Diversified Industries v. Meredith, the only circuit court decision recognizing selective waiver of attorney-client privilege, was rendered in 1978.

communications between attorneys and their corporate clients so as to facilitate the candid exchange of ideas and information to enable the enterprise to comply with applicable law and regulation. But while the organization itself is recognized as the client, it is incapable of communicating with counsel. This anomaly has been crystallized in the "*Upjohn* Warning," which is premised upon on a 1981 Supreme Court decision and is routinely given to corporate employees by company counsel. This warning seeks to explain that discussions with corporate counsel are privileged, but that the privilege belongs solely to the company and may be waived at any time by the company. Ironically, this explanation inevitably undercuts the privilege's effectiveness by chilling communications. Employees are left with the accurate understanding that anything they say may be disclosed to third parties, including law enforcement, government regulators, and plaintiffs' counsel.

Today, what is driving the renewed concern regarding the waiver of attorney-client privilege is the premium being placed by law enforcement on internal investigative reports and related work product. In the wake of the Holder and Thompson Memoranda, and the Seaboard Report, the corporate defense bar has witnessed an unprecedented surge in government demands for access to privileged communications and work product. It is often said that perception is reality, and on this issue the two easily merge. Whether or not admitted by prosecutors and regulators, cooperation has become synonymous with waiver.

Regardless of this perceived equivalence, corporate counsel must always understand at the outset that choices exist, and that counsel's obligation to the client is to make the best choice based upon an informed understanding of the law and facts. The presumption of innocence should never be forgotten or ignored, and counsel's first responsibility should be to inquire as to whether misconduct in fact took place, and if so, whether there might exist a credible defense.

Common but misunderstood industry practices, newly revised and complex regulatory frameworks, and well-intentioned but ineffectual internal controls are all examples of factors which might negate criminal intent, and all should be fully explored and developed. Nevertheless, in other instances, counsel might be confronted with strong evidence of impropriety, and the best interests of the corporation are only served through cooperation with the government. Having made such a determination in today's environment, however, corporations can sometimes pursue compliance with the waiver demands of law enforcement, only to find themselves rewarded with an indictment. Moreover, because such waivers cannot be recalled or even truly limited under current legal doctrine, the compliant corporation has thereby also imperiled itself to parallel and intractable civil litigation, consuming vast amounts of corporate financial resources and posing a constant distraction to management. In such situations, the only real winners are the lawyers.

Further, there is widespread concern that government demands for waiver in this context blur traditional criminal procedure constraints. Employees interviewed are often compelled to provide statements and to potentially waive their Fifth Amendment right against self-incrimination under threat of losing their employment. Ironically, the Supreme Court in Garrity v. New Jersey[2] held almost thirty years ago that evidence obtained through such coercive pressure was inadmissible against government employees, yet the government currently demands that corporations routinely deploy such duress against their own. Moreover, through corporate counsel, the government can gain direct access to witness statements without negotiating a proffer, immunity or cooperation agreement with counsel for individuals, and without having to specify whether the person interviewed is a witness, subject, or target of its investigation. Of

[2] Garrity v. New Jersey, 385 U.S. 493 (1967).

course, all such information gathered by corporate counsel is obtained free from constitutional protections, especially that of the Fifth Amendment, and can immediately serve as the basis for charging decisions against either the corporation itself or individual employees.

By necessity, therefore, corporate counsel is often placed in a precarious position, one which the Fourth Circuit has described as a "minefield." In re Grand Jury Subpoena Under Seal, 415 F.3d. 333 (4th Cir. 2005). Accordingly, the careful and thoughtful corporate counsel understands and fulfills the obligations imposed by the Rules of Professional Conduct applicable to internal investigations, specifically the responsibility to explain client identity, disclose conflicts of interest, deal fairly with unrepresented persons, and to never employ methods of obtaining evidence that would violate a client's interest or operate in disregard of the rights of third persons.

Nevertheless, we have seen some internal inquiries proceed in a pre-determined way, commissioned by those who have an interest in absolution. In such instances, employees (especially mid-level and lower-level employees) were neither afforded counsel, nor apprised of their right to have counsel present during the interviews at their own expense. In addition, employees were not provided any opportunity to review documents or refresh their memories before or during interviews, even when the events at issue occurred years earlier and were largely indistinguishable from the employee's routine activities. Moreover, even in a well intentioned investigation there are often no assurances that the team of investigators employed to ferret out the truth is thoroughly knowledgeable about the corporation's business and the subject matter under investigation. This is especially true in cases involving complex financial transactions and accounting issues, which are often beyond the expertise of most investigating attorneys. In such circumstances, there is a heightened risk that inaccuracies and misperceptions

will be held by investigators, which in turn can lead to incorrect findings, misplaced blame, and, in some cases, the frustration of the search for truth.

Such observations should never be understood to be a denunciation of the internal investigation process, but rather a call for its continued refinement as an indispensable corporate compliance and governance tool. Today, there are many fine lawyers who are diligently conducting thorough, accurate investigations and, as is their professional responsibility, maintaining fidelity to individual rights, and in particular the rights of unrepresented persons. Nor do I wish to suggest that there should be a single, inflexible approach to conducting an internal investigation. Every scenario is different, and the endless variety of business enterprise precludes drawing conclusions as to a single "correct" way to perform an internal investigation. Yet, as we review the policies related to the waiver of attorney-client privilege and the disclosure of the products of internal investigations, we must be cognizant of the weaknesses of the process and the risks of inaccuracy and injustice, particularly in instances where the fundamental fairness obligations of counsel have gone unrecognized. Once an investigation has been concluded and the attorney-client privilege and work product protection waived, investigative conclusions and findings invariably shape the contours of all the actions that follow—law enforcement and regulatory actions, civil litigation, and public reports and perceptions. The findings become, in essence, the law of the case, and while individual aspects of the report or findings may be questioned or discredited, it is almost impossible to undo the damage of a wholly inaccurate, incomplete or biased report.

Striking The Proper Balance

The attorney-client and work product privileges reflect the public priorities of facilitating the observance of law through the uninhibited communication with counsel and the resultant

effective assistance of counsel. The recent efforts of law enforcement to condition cooperation on the disclosure of detailed written reports and underlying attorney work product implicate society's interest in identifying and punishing crime, the corporation's interest in identifying misconduct and adopting remedial measures, as well as protecting itself from exasperating civil litigation, and the rights of individuals. There is obviously friction in seeking to satisfy all these objectives, but there are a number of possible measures which, if developed, would maximize the benefit to society, while protecting the rights of employees as well.

(i) Consensus on the Type of Information the Government Expects

There is a lack of consensus regarding what the government is actually seeking from corporations. At least some prosecutors have publicly stated that they are merely desirous a "road map" of internal investigations -- the identities of the individuals, the key events, and the supporting documents. In practice, however, many law enforcement authorities require far more, including detailed written reports, interview notes, attorney opinion work product, and other sensitive materials. Discussions of waiver need to be informed by a consensus of what the government will and should accept from corporate cooperators, in exchange for leniency. As developed above, conditioning credit for cooperation on the waiver of privilege and the disclosure of detailed reports and work product chills candor within the corporation and implicates individual rights otherwise left intact by other forms of cooperation. In my view, offering to provide the factual findings of an internal investigation conducted in a manner consistent with the precepts of fundamental fairness should satisfy government representatives while simultaneously preserving privileged communications and work product. Indeed, once in receipt of a factual proffer, the government should be encouraged, and should itself insist, that it perform its own legal analysis.

(ii) Selective Waiver

To the extent law enforcement authorities and regulators continue to insist on the disclosure of internal investigative reports and attorney work product, I believe we must consider implementing a limited version of selective waiver, restricted to specifically negotiated materials, which would permit corporations to make disclosures to the government without sacrificing the privilege with respect to all other third-parties and without effectuating a broad subject-matter waiver. To date, most of the Circuit Courts of Appeals have refused to recognize the idea of selective waiver on the basis that such a practice is fundamentally inconsistent with the traditional application of the waiver and could encourage the use of the waiver as both a "sword and a shield." As a result, a corporation faces a veritable Hobson's choice. The corporation can waive its privilege and thereby receive consideration and credit from the government for its cooperation, but then must face the prospect of enormously expensive civil litigation brought by plaintiffs' counsel seeking to exploit the corporation's own repentant efforts. Alternatively, the corporation may refuse to waive the privilege, but then runs the risk of being perceived by the government as uncooperative, and therefore undeserving of consideration or leniency. Selective waiver cuts through this Gordian Knot by recognizing the benefit to society of the corporation's full and complete cooperation, while at the same time preserving corporate defenses and the interests of innocent shareholders and employees from vexatious litigation.

Far from denigrating the attorney-client privilege as a mere tactical tool as some critics have alleged, the doctrine of selective waiver restores the delicate balance of protecting confidential legal communications from outside parties while still allowing those adverse parties access to the underlying factual material. Perhaps most importantly, however, selective waiver allows the government access to relevant information, without the broadcasting of untested

conclusions about the corporation or its employees to the public in a manner in which no meaningful response is possible, and without unnecessarily encouraging burdensome litigation.

(iii) Standards to Guide Internal Investigations

Under the *status quo*, the most vulnerable group is that of individual employees. Through internal investigations, employees are routinely compelled to participate in interviews under the threat of losing their jobs. These interviews are not necessarily subject to basic notions of fairness and due process. Nevertheless, they can have profound implications for the individual employee, including loss of livelihood, diminution of reputation, compelled waiver of the Fifth Amendment right against self-incrimination, and, ultimately, civil sanctions and/or criminal prosecution. The significance placed on these interviews, and the potential for adverse consequences for the individual, increases dramatically if otherwise privileged records of the interviews are demanded by law enforcement as the price of corporate cooperation.

Should this trend continue, corporate counsel and the legal profession as a whole need to establish compelling guidelines for interacting with individual employees during internal investigations. While the Rules of Professional Responsibility governing the legal profession apply to how internal investigations should be conducted, greater clarity is needed. For, example American Bar Association Model Rule 4.4 provides that "[i]n representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [third persons]." Such general pronouncements, however, do little to articulate when individuals should be apprised of their right to have individual counsel, what access (if any) the employee should have to corporate records and documents, and whether the employee should be given an opportunity to review and correct interview notes. Not only do such fundamental questions remain

unanswered, but there currently exists no effective mechanism for redressing even clear violations of professional responsibility on the part of corporate investigators.

The call for uniform standards for internal investigations is not merely a prescription for the corporate bar. I believe that law enforcement authorities have an affirmative obligation to be sophisticated consumers of internal investigative reports and to ensure that the search for truth is conducted in a fair and impartial manner consistent with the rules of professional conduct and traditional understandings of fundamental fairness. This proposed procedural review would assist in insuring that conflicting interests within a corporation do not result in an unreliable report and would further refocus internal investigations on what they have always purported to be about -- helping the corporation as an entity to resolve internal problems, and not what they have too frequently become -- an exercise in protecting one constituency of the corporation at the expense of another.

Conclusion

The issues being addressed today in this committee meeting are not simply a part of an academic debate. Across the country there are dozens of corporations scrutinized in internal investigations at any one time, with real consequences for real people. These investigations directly impact the lives of thousands of workers, and millions of shareholders. In conditioning leniency upon the disclosure of otherwise privileged information, we need to accommodate the competing interests of effective law enforcement, the benefits to redound to deserving corporations, and the fundamental rights of individual employees. Reaching a consensus on the information sought by the government, the adoption of a selective waiver for cooperating

corporations, and lucid, comprehensive standards to guide internal investigations, are each important first steps.

Thank you. I look forward to your questions.

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WHITE COLLAR ENFORCEMENT (PART 1): ATTORNEY-CLIENT PRIVILEGE AND CORPORATE WAIVERS

Tuesday, March 7, 2006

House of Representatives,

Subcommittee on Crime, Terrorism, and Homeland Security,

Committee on the Judiciary,

Washington, D.C.

Committee Hearings

of the

U.S. HOUSE OF REPRESENTATIVES

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WHITE COLLAR ENFORCEMENT (PART 1):
ATTORNEY-CLIENT PRIVILEGE AND CORPORATE
WAIVERS
Tuesday, March 7, 2006
House of Representatives,
Subcommittee on Crime, Terrorism, and Homeland Security,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to notice, at 12:00 p.m., in Room 2141, Rayburn House Office Building, Hon. Howard Coble [chairman of the subcommittee] presiding.

Mr. COBLE. Good afternoon, ladies and gentlemen. We welcome you to this important oversight hearing on white collar crime and the issue of the attorney-client privilege and waivers by corporations in criminal investigations.

At first blush, some may say that this topic is an arcane legal issue with little relevance to the general public. In fact, the attorney-client privilege is deeply rooted in our values and the legal profession. It encourages openness and honesty between clients and their attorneys so that clients hopefully can receive effective advice and counsel.

But this privilege is not inviolate. When it comes to corporate crime, there is and probably always will be an institutional tension between preserving corporate attorney-client and work product privileges and a prosecutor's quest to unearth the truth about criminal acts.

I know that one of the most important engines in our criminal justice system is cooperation. By encouraging and rewarding cooperation, prosecutors are able to unearth sophisticated fraud schemes which cause devastating harm to investors and employees and undermine our faith in the markets.

But the possible benefits of cooperation cannot be used to support a prosecutor's laundry list of demands for a cooperating corporation. Prosecutors must be zealous and

vigorous in their efforts to bring corporate actors to justice. However, zeal does not in my opinion equate with coercion in fair enforcement of these laws.

To me, the important question is whether prosecutors seeking to investigate corporate crimes can gain access to the information without requiring a waiver of the attorney-client privilege. There is no excuse for prosecutors to require privilege waivers as a routine matter, it seems to me.

The subcommittee will examine the important issue with a keen eye to determine whether Federal prosecutors are routinely requiring cooperating corporations to waive such privilege. Then-Acting Deputy Attorney General McCallum issued a memorandum on October 21, 2005 which mandated a change in Justice Department policy to try to establish a more uniform review procedure for any such requirement imposed by a prosecutor.

This is a welcome development, and the subcommittee is interested in determining how that policy has been implemented. I am also aware of the fact that the Sentencing Commission is examining its current policy of encouraging such waivers when determining the nature and extent of cooperation.

While the guidelines do not explicitly mandate a waiver of privileges for the full benefit of cooperation, in

practical terms we have to make sure that they do not operate to impose such a requirement. Our subcommittee needs to examine this issue, work closely with the Sentencing Commission, the defense bar, and the Justice Department to make sure that a fair balance is struck.

I look forward to hearing from our distinguished panel of witnesses today, and I am now pleased to recognize the distinguished gentleman from Virginia, the Ranking Member of the subcommittee, Mr. Bobby Scott.

[The statement of Mr. Coble follows:]

********** SUBCOMMITTEE INSERT **********

Mr. SCOTT. Thank you, Mr. Chairman. And I want to thank you for holding this hearing on attorney-client privilege and corporate waivers of that privilege.

Attorney-client privilege is more usually associated with the context of protecting an individual from having to disclose communications with his or her lawyer for the purpose of criminal or civil prosecution, corporations or persons, for the sake of legal processes that are also entitled to attorney-client privilege.

As noted by the United States Supreme Court in Upjohn vs. U.S., the attorney-client privilege is the oldest of privileges for confidential communications known to common law. Its purpose is to encourage full and frank communications between attorneys and their clients so that sound legal advice and advocacy can be given by counsel. Such advice or activity depends upon the lawyer being fully informed by the client.

As noted in other cases, the lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. This purpose can only be effectively carried out when the client is free from consequences or apprehensions regarding the possibility of disclosure of the information.

Exceptions to protections of the attorney--excuse me.

Exceptions to the protections of the privilege do exist, but they have generally been limited to the crime-fraud exception, which holds that the privilege does not apply to an attorney-client communication in furtherance of a crime, or other cases where the client has already waived the privilege through disclosure to a non-privileged third party.

Now it appears that the Department of Justice has determined that there may be another exception, that is, when it wishes the corporation to waive the privilege in the context of a criminal investigation. For some time now I have been concerned about reports that the Department of Justice is coercing corporations to waive their attorney-client privilege during criminal investigations of the corporation and its employees by making waiver a prerequisite for consideration by the Department and its recommendation for not challenging leniency should criminal conduct be established.

Now, this is particularly significant because under mandatory minimums and sentencing guidelines, prosecutorial motions for leniency may be the only way to get a sentence under the mandatory minimum. So in this case, a prosecutor often has more control over sentencing than the judge.

While the attorney-client privilege doctrine does apply to corporations, complications arise when the client is a corporation since the corporate privilege has to be asserted

by persons who may themselves be the target of a criminal investigation or subject to criminal charges based on the disclosed attorney-client information. Disclosed information can be used either in criminal prosecutions or civil prosecutions. Whatever fiduciary duty an official may have to the corporation and its shareholders, it is probably superseded by the official's own self-interest in the criminal investigation.

And there is no protection for employees of the corporation against waivers of the attorney-client privilege by officials who may have their own self-interest at heart. This includes information provided by employees to corporate counsel to assist internal investigations by the corporation, even if the information was under threat of an employee being fired and even if the information constituted self-incrimination by the employee.

It is one thing for officials of a corporation to break the attorney-client privilege in their own self-interest by their own volition. It is another thing for the Department to require or coerce it by making leniency considerations contingent upon it, even when it is merely on a fishing expedition on the part of the Department. Complaints have indicated that the practice of requiring a waiver of the corporate attorney-client privilege has become routine. And, of course, why wouldn't it be the case? What is the

advantage to the Department of not requiring a waiver in the corporate investigation?

Now, because of the exclusionary rule, when a confession is coerced or a search is conducted illegally, anything that is found of that becomes fruit of a poisonous tree and can't be used in a criminal prosecution. So police and prosecutors who jeopardize the case by such tainted evidence are generally disparaged by their colleagues, and thus there is a disincentive for them to pursue and collect such evidence in the first place. There is no incentive to collect evidence if it is going to ruin the case.

Although coerced confessions and illegal searches are always improper, before the exclusionary rule there was an incentive for police to coerce confessions and illegally obtain information because they could make a case based on it, and there was no penalty.

Here we have the same incentives with respect to the waiver of corporate privilege. So, not surprisingly, reports are the demand for waivers are rising, not only by the Department but by other entities as well, such as auditors as a prerequisite of issuing a clean audit.

Now, coercing corporate attorney-client privileges has not been--has not long been the practice in the Department. It has really been the last two administrations that have practiced this, and it has been growing by leaps and bounds.

Corporate attorney-client privilege has not always been the prerequisite for leniency. Providing non-privileged documents and information and providing broad access to corporate premises and employees have been traditional ways to receive benefits of corporate cooperation.

Some nine U.S. Attorneys General, Deputy Attorneys General, and Solicitors General have expressed their concerns about the current Departmental waiver policy. We will hear from witnesses today who have prosecuted corporate cases without requiring such waiver. And so, Mr. Chairman, we look forward to the testimony by witnesses and to working with you to address the concerns regarding the Department's corporate attorney-client waiver policy.

[The statement of Mr. Scott follows:]

********** SUBCOMMITTEE INSERT **********

Mr. COBLE. Thank you, Mr. Scott. And gentlemen, we have been joined by the distinguished gentleman from California, Mr. Lungren, the distinguished gentleman from Florida, Mr. Feeney, and distinguished gentleman from Massachusetts, Mr. Delahunt.

Gentlemen, what I am about to do I am very awkward in doing it. It is customary for the subcommittee to administer the oath to the panelists. I know you all. I know you don't need to be sworn in to tell the truth. But if you don't mind, would each of you please stand and raise your hands.

[Witnesses sworn.]

Mr. COBLE. Let the record show each witness answered in the affirmative. And I have had the fear if I depart with you all, then the next panel is going to wonder why I don't depart from them. But you all, I am not worried about what you all say violating the truth in any way.

As I said before, we have four distinguished witnesses with us today. Our first witness is Mr. Robert McCallum, Jr., Associate Attorney General of the Department of Justice. In this capacity, Mr. McCallum advises and assists the Attorney General and the Deputy Attorney General in formulating policies pertaining to a broad range of civil justice, Federal and local law enforcement, and public safety matters. Prior to this appointment, he served as Assistant Attorney General for the Civil Division. Mr. McCallum

received his undergraduate and law degrees from Yale University, and was a Rhodes Scholar at Oxford University.

Our second witness is returning to the Hill after some extended absence, the Honorable Dick Thornburgh of Kirkpatrick & Lockhart Nicholson Graham. Mr. Thornburgh's distinguished public career extends over a quarter of a century. He previously served as Governor of Pennsylvania, Attorney General under Presidents Reagan and Bush, and Undersecretary General of the United Nations.

Mr. Thornburgh has been awarded honorary degrees by 31 colleges and universities, and previously served as Director of the Institute of Politics at Harvard's John F. Kennedy School of Government. Mr. Thornburgh earned his undergraduate degree at Yale and his law degree at the University of Pittsburgh School of Law.

Our third witness is Mr. Thomas Donohue, President and CEO of the United States Chamber of Commerce. In his current capacity, Mr. Donohue has expanded the influence of the Chamber across the globe. He engaged the Chamber Institute for Legal Reform and revitalized the National Chamber Foundation. Previously, Mr. Donohue served for 13 years as President and CEO of the American Trucking Association, and was awarded his bachelors degree from St. Johns University and a masters degree from Adelphi University.

Our fourth and final witness today is Mr. William

Sullivan, Jr., litigation partner at Winston & Strawn. In this capacity, Mr. Sullivan concentrates on corporate internal investigations, trial practice, white collar criminal defense, and complex securities litigation.

Previously, he served for over 10 years as an Assistant United States Attorney for the District of Columbia, and has worked in private practice as a litigator. Additionally, Mr. Sullivan has addressed the World Trade Organization on Sarbanes-Oxley issues. He received his bachelors and masters degrees from Tufts University and his law degree from Cornell University.

Gentlemen, it is good to have you all with us. And as we have previously told you, without hamstringing you too severely, we try to apply the 5-minute rule here. And when you all see that amber light on your panel appear, that tells you that the ice on which you are skating is becoming thin. You have about a minute to go. And we're not going to keelhaul anybody for violating it, but if you can wrap up in as close to 5 minutes as you can.

Mr. McCallum, why don't you kick us off.

TESTIMONY OF ROBERT D. McCALLUM, JR., ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE; HON. DICK THORNBURGH, KIRKPATRICK & LOCKHART NICHOLSON GRAHAM LLP; THOMAS J. DONOHUE, PRESIDENT AND CEO, U.S. CHAMBER OF COMMERCE; AND WILLIAM M. SULLIVAN, JR., LITIGATION PARTNER, WINSTON & STRAWN

TESTIMONY OF ROBERT D. McCALLUM, JR.

Mr. MCCALLUM. Thank you, Mr. Chairman, Ranking Member Scott, and members of the committee. We appreciate at the Department of Justice this opportunity to appear before you today.

Now, President Bush, this Congress, and the American people have all embraced a zero tolerance policy when it comes to corporate fraud. In passing the landmark Sarbanes-Oxley legislation in 2002, Congress gave the Department of Justice clear marching orders: prosecute fully those who would use their positions of power and influence in corporate America to enrich themselves unlawfully, and thereby restore confidence in our financial markets.

And we have done exactly that, Mr. Chairman. From July 2002 through December 2005, the Department has secured more than 900 corporate fraud convictions, including 85 presidents, 82 chief executive officers, 40 chief financial

officers, 14 chief operating officers, 17 corporate counsel or attorneys, and 98 vice presidents, as well as millions of dollars in damages for victims of fraud.

Much of our success depends on our ability to secure cooperation. As Chairman Sensenbrenner noted recently, and I quote, ''By encouraging and rewarding corporate cooperation, our laws serve the public interest in promoting corporate compliance, minimizing use of our enforcement resources, and leading to the prosecution and punishment of the most culpable actors.''

The Department's approach to corporate fraud is set forth in the so-called Thompson Memorandum, issued by Larry D. Thompson as Deputy Attorney General. Pursuant to that memorandum, the degree to which a corporation cooperates with a criminal investigation may be a factor to be considered by prosecutors when determining whether or not to charge the corporation with criminal misconduct.

Cooperation in turn depends on--and here I quote the Thompson Memorandum--''the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protections.''

Some critics have suggested that the Department is contemptuous of legal privileges. Nothing could be further

from the truth. We recognize the ability to communicate freely with counsel can serve legitimate and important functions and encourage responsible corporate stewardship and corporate governance.

But at the same time, we all must recognize that corporate fraud is often highly difficult to detect. Indeed, in recent years we have witnessed a series of highly complex corporate scandals which would have been difficult to prosecute in a timely and efficient manner without corporate cooperation, including in some instances the waiver of privileges.

The Thompson Memorandum carefully balances the legitimate interests furthered by the privilege, and the societal benefits of rigorous enforcement of the laws supporting ethical standards of conduct.

There is also a so-called McCallum Memorandum, issued during my tenure as Acting Deputy Attorney General last year, which adds to this balancing of the competing interests. The McCallum memorandum first ensures that no Federal prosecutor may request a waiver without supervisory review. And second, it requires each United States Office to institute a written waiver review policy governing such requests.

Mr. Chairman, I recognize that despite these limitations and restrictions, there are some critics of the Department's approach. While I look forward to addressing specific

concerns of the members of this subcommittee that may occur during the questioning, let me make a few preliminary observations.

First, voluntary disclosure is but one factor in assessing cooperation, and cooperation in turn is but one factor among many considered in any charging decisions. Disclosures thus is not required to obtain credit for cooperation in all cases; cooperation may be had by corporations most readily without waiving anything, simply by identifying the employees best situated to provide the Government with relevant information.

Nor can the Government compel corporations to give waivers. Corporations are generally represented by sophisticated and accomplished counsel who are fully capable of calculating the benefits or harms of disclosures. Sometimes they agree; sometimes they do not agree. Whether to disclose information voluntarily always remains within the corporation's choice. And in fact, voluntary disclosures are frequently initiated by the corporate counsel and not by the Government.

Second, under our process, waivers of privileges should not be routinely sought, and we believe are not routinely sought. Indeed, they should be sought based upon a need for three things: timely, complete, and accurate information. And they should be requested pursuant to the established

guidelines, and only with supervisory approval.

Third, our approach does not diminish a corporation's willingness to undertake investigations, in our view. Wholly apart from the Government's criminal investigations, corporate management owes to its shareholders, not to itself or to its employees, but to its shareholders, a fiduciary duty to investigate potential wrongdoing and to take corrective action. To the extent that shareholders are best served by timely internal investigations, responsible management will always do so.

And finally, in some jurisdictions, voluntary disclosure to the Government waives privileges in civil litigation seeking monetary damages, thus, it is said, compounding the corporation's litigation risk. Addressing this concern, the committee should be aware that the Evidence Committee of the Advisory Rules of the Judicial Conference is currently considering a rule that would limit use by others of privileged material voluntarily provided by a corporation in its cooperation with a Government investigation. We at the Department of Justice will be involved in the Federal Rules Advisory Committee on Evidence considering that, and we will watch that debate with interest.

In sum, Mr. Chairman, we believe that the Department has struck an appropriate balance between traditional privileges and the American people's legitimate law enforcement needs

and the necessity of establishing standards.

Thank you for the opportunity to testify.

[The statement of Mr. McCallum follows:]

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Mr. COBLE. Thank you, Mr. McCallum.

Mr. Thornburgh.

TESTIMONY OF HON. DICK THORNBURGH

Mr. THORNBURGH. Chairman Coble, Ranking Member Scott, members of the subcommittee, I want to thank you for the invitation to speak to you today about the grave dangers posed to the attorney-client privilege and work product doctrine by current governmental policies and practices.

At the outset, let me commend you for being the first Congressional body to convene a hearing on this very worrisome situation. The attorney-client privilege, as we all know, is a fundamental element of the American system of justice, and I fear that we have all been too slow in recognizing how seriously the privilege has been undermined in the past several years by Government action. Your focus on this issue today is vitally needed and much appreciated.

The attorney-client privilege is the oldest of the evidentiary privileges originating in the common law of England in the 1500s. Although the privilege shields from disclosure evidence that might otherwise be admissible, courts have found that this potential loss of evidence is outweighed by the benefits to the immediate client, who receives better advice, and to society as a whole, which obtains the benefits of voluntary legal compliance.

These ideas have been embraced time and time again by our courts. In the words of the Supreme Court, the privilege

encourages ''full and frank communication between attorneys and their clients, and thereby promotes broader public interest in the observance of law and the administration of justice.'' The attorney-client privilege is thus a core element in a law-abiding society and a well-ordered commercial world.

And yet the previously solid protection that attorney-client communications have enjoyed has been profoundly shaken by a trend in law enforcement for the Government to, in effect, demand a waiver of a corporation's privilege as a precondition for granting the benefits of cooperation that might prevent indictment or diminish punishment. These pressures emanate chiefly from the Department of Justice and the Securities and Exchange Commission.

Beginning with the 1999 Holder Memorandum, and as more forcefully stated in the 2003 Thompson Memorandum, the Department of Justice has made clear its policy that waiver of the attorney-client and work product protections is an important element in determining whether a corporation may get favorable treatment for cooperation. The SEC, in a public report issued at the conclusion of an investigation, outlined a similar policy.

Finally, the U.S. Sentencing Commission in 2004 amended the commentary to its sentencing guidelines so that waiver of

privilege becomes a significant factor in determining whether an organization has engaged in timely and thorough cooperation necessary for obtaining leniency. Following the Federal lead, State law enforcement officials are beginning to demand broad privilege waivers, as are self-regulatory organizations and the auditing profession.

While the tone of these documents may be moderate, and officials representing these entities stress their intent to implement them in reasonable ways, it has now become abundantly clear that in actual practice, these policies pose overwhelming temptations to prosecutors seeking to save time and resources and to target organizations desperate to save their very existence. And each waiver has a ripple effect that creates more demands for greater disclosures, both in individual cases and as a matter of practice. Once a corporation discloses a certain amount of information, then the bar is raised for the next situation, and each subsequent corporation will need to provide more information to be deemed cooperative.

The result is documented in a survey released just this week to which over 1400 in-house and outside counsel responded, in which almost 75 percent of both groups agreed--almost 40 percent agreeing strongly--that a culture of waiver has evolved in which Government agencies believe it is reasonable and appropriate for them to expect a company

under investigation to broadly waive attorney-client privilege or work product protections.

I practice law at a major firm with a significant white collar criminal defense practice. My partners generally report that they now encounter waiver requests in virtually every organizational criminal investigation in which they are involved. In their experience, waiver has become a standard expectation of Federal prosecutors. Others with whom I have spoken in the white collar defense bar tell me the same thing.

I am prepared to concede that the significance of these developments took some time to penetrate beyond the Beltway and the relatively small community of white collar defense lawyers. It is clear, however, that as the legal profession has become aware of the problem, it has resulted in a strong and impassioned defense of the attorney-client privilege and the work product protection.

This issue was the hottest topic at last summer's annual meeting of the American Bar Association, and at its conclusion, the ABA House of Delegates unanimously passed a resolution that strongly supports the preservation of the attorney-client privilege and opposes policies, practices, and procedures of Government bodies that have the effect of eroding the attorney-client privilege.

I was one of those nine former Department of Justice

officials from both Republican and Democratic administrations who, as the Chairman noted, signed a letter to the Sentencing Commission last summer urging it to reconsider its recent amendment regarding waiver.

It is never a simple matter to enlist such endorsements, particularly in the summertime and on short notice. And yet it was not difficult at all to secure those nine signatures because all feel so strongly about the fundamental role the attorney-client privilege and work product protections play in our system of justice.

We feel just as strongly that the other governmental policies and practices outlined above seriously undermine those protections. As you know, I served as a Federal prosecutor for many years, and I supervised other Federal prosecutors in my capacities as U.S. Attorney, Assistant Attorney General in charge of the Criminal Division, and Attorney General of the United States. Throughout those years, requests to organizations we were investigating to hand over privileged information never came to my attention. One wonders what has changed in the past decade to warrant such a dramatic encroachment on the attorney-client privilege.

Clearly, in order to be deemed cooperative, an organization under investigation must provide to the Government all relevant factual information and documents in

its possession, and it should assist the Government by explaining the relevant facts and identifying individuals with knowledge of them. But in doing so, it should not have to reveal privileged communications or attorney work product.

That limitation is necessary to maintain the primacy of those protections in our system of justice. It is a fair limitation on prosecutors, who have extraordinary powers to gather information for themselves. This balance is one I found workable in my years of Federal service, and it should be restored.

I was pleased to see the Sentencing Commission earlier this year request comment on whether it should delete or amend the commentary sentence regarding waiver. In testimony last fall, I urged it to provide affirmatively that waiver should not be a factor in assessing cooperation. I understand that the American Bar Association will shortly approach the Department of Justice with a request that the Thompson Memorandum be revised in similar fashion. These are promising developments.

Mr. Chairman, I thank you again for beginning a much-needed process of Congressional oversight of the privilege waiver crisis. This is not an issue that Washington lobby groups have orchestrated, but it is one that likely will take Congressional attention to resolve.

Thank you. I look forward to your questions.

[The statement of Mr. Thornburgh follows:]

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Mr. COBLE. Thank you, Mr. Thornburgh.

And Mr. Donohue, in a sense of equity and fairness, since I permitted Mr. McCallum and Mr. Thornburgh to exceed the red light, I will not crack the hammer on you once that red light illuminates.

You are now recognized.

TESTIMONY OF THOMAS J. DONOHUE

Mr. DONOHUE. Thank you, Mr. Chairman, Mr. Scott, members of the committee.

I am here today representing the Chamber and on behalf of a coalition to preserve the attorney-client privilege, which includes many of the major legal and business associations in our country, including the American Chemistry Council, the American Civil Liberties Union, the Association of Corporate Counsel, the Business Civil Liberties, Inc., the Business Roundtable, the Financial Services Roundtable, Frontiers of Freedom, the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, the National Defense Industrial Association, the Retail Industry Leaders Association, and the Washington Legal Foundation.

I should add that the coalition is working closely with the American Bar Association, which has separately submitted written testimony here today detailing its concerns about the erosion of the attorney-client privilege. ABA policy prevents the organization from being listed as a member of broader coalitions.

The privilege to consult with an attorney freely, candidly, and confidentially is a fundamental constitutional right that in our opinion is under attack. Recent policy

changes at the Department of Justice and, very importantly, at the SEC have permitted and encouraged the Government to demand or expect companies to waive their attorney-client privilege or work product protections during an investigation.

A company is required to waive its privilege in order to be seen as cooperating with Federal investigators. A company that refuses to waive its privilege risks being labeled as uncooperative, which all but guarantees that it will not get a chance to come to a settlement or receive, if it needs to, leniency in sentencing or fines.

But it goes far beyond that, Mr. Chairman. The uncooperative label can severely damage a company's brand, its shareholder value, their relationship with suppliers and customers, and their very ability to survive.

The enforcement agencies argue that waiver of attorney-client privilege is necessary for improving compliance and conducting effective and thorough investigation. The opposite, in my opinion, is true. An uncertain and unprotected attorney-client privilege actually diminishes compliance with the law.

If company employees responsible for compliance with complicated statutes and regulations know that their conversations with attorneys are not protected, they will simply choose not to seek appropriate legal guidance. The

result is that companies may fall out of compliance, often not intentionally, but because of a lack of communication and trust between a company's employees and its attorneys.

Similarly, during an investigation, if employees suspect that anything they say to their attorneys can be used against them, they won't say anything at all. That means that both the company and the Government will be unable to find out what went wrong, to punish wrongdoers, and to correct the company's compliance system.

And there is one other major consequence. Once the privilege is waived, third party private plaintiffs' lawyers can gain access to attorney-client conversations and use them to sue the company or other massive settlements. By the way, right now there are some arguments in the court about partial protection in waiving, and the question has been raised that perhaps the Government cannot even guarantee that.

How pervasive has this waiving of the attorney-client privilege become? Well, last November we presented findings to the U.S. Sentencing Commission showing that approximately a third of inside counsel respondents, and as many as 48 percent of outside counsel respondents, say they had personally experienced erosion of attorney-client privilege or work product protections.

After that presentation, the Sentencing Commission asked us for even more information about the frequency of waivers

and their impact. So our coalition commissioned a second, more detailed survey and got an even greater response rate from the members of our coalition partners. We publicly released the results of this second survey just this morning. They have been provided to the committee, along with more detailed coalition written statements on the subject.

Here are a couple of highlights, and I am going to skip them because General Thornburgh mentioned them, but 75 percent of both inside and outside counsel agreed with the statement that a culture of waiver has evolved to the point the Government agencies believe it is responsible and appropriate to expect a company under investigation to broadly waive attorney-client privilege or waiver protections. Of those who have been investigated, 55 percent of outside counsel say that that is the experience that they had.

Now, our coalition is aggressively seeking to reverse this erosion of confidence in the attorney-client provision and the conversations covered there. We are pleased that the U.S. Sentencing Committee has decided to revisit recently amended commentary to the guidelines that allow the waiver to be a cooperation factor in sentencing, and we have submitted more detailed materials to them.

We would encourage this committee to weigh in with its support of the attorney-client privilege to the Sentencing

Commission as it reconsiders its guidelines. It is important to note that the Department of Justice and other regulatory agencies have created this erosion of the privilege without seeking input, oversight, or approval from the Congress or the judiciary. And the plan, Mr. Chairman, that is on the table now, would allow all 92 jurisdictions of the Department of Justice across the country to have their own plan, their own determination, of what is covered and what is protected. That is going to be a circus.

We seek your input and strongly urge you to exercise your oversight of the Department of Justice and the SEC to ensure the protection of attorney-client privilege. Now, let me be very clear as I close: Our efforts are not about trying to protect corrupt companies or businesspeople. Nobody wants corporate wrongdoers caught and punished more than I do and the legitimate and honest businesspeople that I represent. Rather, this is about protecting a well-established and vital constitutional right.

Mr. Chairman, I thank you and the members of the committee, and I look forward to your questions.

[The statement of Mr. Donohue follows:]

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Mr. COBLE. Thank you, Mr. Donohue.

Mr. Sullivan.

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TESTIMONY OF WILLIAM M. SULLIVAN, JR.

Mr. SULLIVAN. Thank you. Good afternoon, Chairman Coble, Ranking Member Scott, and members of the subcommittee. Thank you for your kind invitation to address you today concerning the Department of Justice policies and practices with regard to seeking attorney-client privilege and work product protection waivers from corporations, and whether the waiver of such privilege and protection should be relevant to assessing the corporations' cooperation efforts within the meaning of the organizational guidelines.

I am currently a partner at the law firm of Winston & Strawn, where I specialize in white collar criminal defense and corporate internal investigations. For 10 years, from 1991 to 2001, I served as an assistant U.S. Attorney for the District of Columbia. In these capacities, I have been involved in virtually all aspects of white collar investigations and corporate defense.

I have overseen both criminal investigations as a prosecutor and internal corporate investigations as a defense attorney. And I have represented both corporations and individuals in internal investigations and before Federal law enforcement authorities and regulators as well as in class action, derivative, and ERISA litigation.

My perspective on corporate cooperation and the waiver of attorney-client and attorney work product privileges has therefore been forged not only by my experiences on both sides of the criminal justice system, but by my participation in the civil arena as well. This afternoon, I am eager to give you a view from the arena.

The real issue is not the waiver but what is being waived and how it was assembled. For business organizations today, the traditional protections afforded by the attorney-client privilege and the work product doctrine are under siege. The privilege reflects the public priority of facilitating the observance of law through candor with counsel.

Prosecutors and regulators now routinely demand that in return for the mere prospect of leniency, corporations engage in intensive internal investigations of alleged wrongdoing and submit detailed written reports documenting both the depth and breadth of their inquiry as well as the basis for their conclusions. Attorney impressions, opinions, and evaluations are necessarily included.

When pressed on this practice, many prosecutors and regulators will publicly insist that they are only seeking a roadmap--the identity of the individuals involved, the crucial acts, and the supporting documentation. However, this has not been my personal experience.

Just last week I was asked by a Government regulator in our very first meeting to broadly waive attorney-client private and work product protection and to provide copies of interview notes, even before I had completed my client's internal investigation myself, and accordingly, even before I had determined as corporate counsel that cooperation would be in my client's best interest.

Incredibly, I was further asked whether or not I was appearing as an advocate for my client the corporation or whether I was an independent third party. Presumably, the regulators had hoped that I would undertake their investigation for them, despite the fact that I would be paid by my client to do so.

Most importantly, however, such roadmap requests fail to relieve the valid concerns of corporations related to privilege and work product waivers. A less than carefully drawn roadmap risks a broad subject matter waiver of attorney-client privilege and attorney work product protection under a current authority applicable in just about every jurisdiction.

The waiver of attorney-client communications arriving in connection with a factual roadmap subsequently disclosed to law enforcement extends beyond the disclosure itself and encompasses all communications on that subject matter. The consequences of this result can be extreme, in that even a

rudimentary roadmap is the product of information obtained through thousands of hours of legal work spent conducting interviews, parsing statements from hundreds of pages of interview notes, and analyzing thousands and perhaps millions of pages of both privileged and nonprivileged corporate documents.

Furthermore, the waiver would be applicable not only to the law enforcement officials receiving the information, but would also embrace future third parties, including other Government agencies and opportunistic plaintiffs' counsel seeking fodder for class action and derivative strike suits.

In addressing the practice of conditioning leniency for disclosure of otherwise privileged reports, I believe that a balance must be struck between the legitimate interests of law enforcement in pursuing and punishing the legal conduct, the benefits to be retained by corporations which assist this process and determine to take remedial action, and the rights of individual employees.

It is imperative that we do not sacrifice accuracy and fundamental fairness for expedience and convenience now routinely requested by the Government. An equilibrium much achieved between the aforementioned competing concerns.

The issues being addressed today in this committee meeting are not simply part of an academic debate. Across the country, there are dozens of corporations scrutinized in

internal investigations at any one time, with real consequences for real people. These investigations directly impact the lives of thousands of workers and millions of shareholders.

In conditioning leniency upon the disclosure of otherwise privileged information, we need to accommodate the competing interests of effective law enforcement, the benefits down to deserving corporations, the corporation's own interests and its ability to observe law through consultation with counsel, and the fundamental rights of individual employees.

Reaching a consensus on the information sought by the Government, limiting that information to non-opinion factual work product or perhaps the adoption of a selective waiver for cooperating corporations, and lucid, comprehensive standards to guide internal investigations, are each important first steps.

Thank you, and I look forward to your questions.

[The statement of Mr. Sullivan follows:]

********** SUBCOMMITTEE INSERT **********

Mr. COBLE. Thank you, Mr. Sullivan.

Mr. McCallum, I think--by the way, we apply the 5-minute rule to ourselves as well, so we will try to move along here.

Mr. McCallum, I think Mr. Donohue may have touched on this. And where I am coming from is: Does the policy require uniform review? That is to say, a United States Attorney in the Middle District of North Carolina, would it be likely or unlikely that he or she would be operating under a policy that would be identical to the Eastern District of Virginia?

Your mike is not on, Mr. McCallum.

Mr. MCCALLUM. Mr. Chairman, in response to that question, the memorandum that I issued does allow for the different United States Attorneys to institute a review policy in accordance with the peculiar circumstance of their particular district.

For instance, the Southern District of New York may be very different than the District of Montana in terms of the number of sophisticated corporate cases that involve allegations of corporate fraud, and therefore the number of people that are in the Southern District of New York, the number of Assistant United States Attorneys that are available for the review process, may be very different than the number of attorneys that are in a different district.

So it is not identical, but it affords the type of

prosecutorial discretion in the United States Attorney to determine what it will be, and that is coordinated through the Executive Office of United States Attorneys in the Department of Justice as well.

Mr. COBLE. I thank you, sir. Now, you indicated, Mr. McCallum, that in some instances, the corporate defendant may well be the one to initiate the waiver. Do you have any figures as to, comparatively speaking, Government initiated or defendant initiated?

Mr. MCCALLUM. Mr. Chairman, we do not have statistical figures like that. And most of the surveys, including, we believe, the survey that we have not yet seen that the Chamber of Commerce just issued this morning, are based more on perception and anecdotal evidence than they are on very, very specific identification of particular cases.

We have been involved in a dialogue with various business representatives, including the task force of the American Bar Association that is dealing with this issue, with its chairman. And we invited him and Jamie Conrad, who is here today, to come out and talk with the United States Attorneys last year at their annual conference to make sure that the United States Attorneys were aware of exactly the concerns and the issues that the business community was seeing in this.

And we were told at that time that a very detailed study

of particular cases would be prepared and would be provided to us. And just last week, Mr. Ide, the ABA chairman, indicated to me that that was forthcoming. That will allow us to dig down into the specifics because each case is really unique, Mr. Chairman. And it is that sort of detailed analysis that will be necessary to determine or refute the ''routineness'' with which these waivers are requested. We do not believe that they are ''routinely'' requested.

Mr. COBLE. I thank you, Mr. McCallum.

Mr. Thornburgh, during your many years of public service, were you ever aware of any criminal case in which the Justice Department sought or required an attorney-client privilege waiver from a cooperating corporation, A; and if so, what was and is your position on that issue?

Mr. THORNBURGH. I am not aware of any such request, Mr. Chairman, although I can't absolutely verify that such a request was not made at any time during the 25 years that I have been affiliated one way or another with the Department of Justice. It is a development of the last decade or so.

I would just like to add a footnote to Mr. McCallum's response. It seems to me that the Department is giving up too much by permitting each United States Attorney to frame his own set of policies on this kind of question. Uniformity and internal Department of Justice review has been adopted in any number of areas that are sensitive, such as issuing a

subpoena to an attorney or to a reporter, or using undercover sting operations. Those are not within the discretion of the U.S. Attorney. And when we are dealing with such a sensitive and venerable privilege as the attorney-client privilege, it seems to me that ought to be the kind of rule that is applied.

Secondly, I think that there is a controversy, at least, with regard to statistics about whether or not frequent use is made of this waiver request. And the easiest way to do that is to promulgate a review process within the Department so that you have readily available at your fingertips the absolute number of times it has been carried out.

If, as the Department claims, these are limited and infrequent, it would not impose any undue burden. If, on the other hand, they are as the perceptions indicate from this report, it would provide a solid base for evaluating whether or not this process is going forward in the right manner.

Mr. COBLE. I thank you, Mr. Thornburgh. I see my time has expired. Gentlemen, we probably will have a second round of questioning because I have questions for Mr. Sullivan and Mr. Donohue. This is significant enough, I think, to do that.

The gentleman from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, we have a public policy on the

attorney-client privilege which we are trying to protect. There are other kind of public policies that can't be--where you can't use certain things as evidence when you are trying to investigate and fix a problem. You can't--the fact that you fixed a product subsequently can't be used to show negligence of the former product because that would obviously discourage fixing. Evidence that you tried to settle a case can't be used as an admission because that would discourage settlements.

Is there a public policy that we want to protect in trying to protect, to the extent possible, the attorney-client privilege, Mr. McCallum?

Mr. MCCALLUM. Ranking Member Scott, there is unquestionably recognized within the Department of Justice the societal benefits that attend to the attorney-client privilege and work product privilege and various other privileges. And it is certainly something that the United States Attorneys are--and the other Federal prosecutors are mindful of.

And I think that one of the things that you are alluding to is something that all three of my distinguished panelists have touched on, and that is the providing of information to the Government, whether to a regulator or to a prosecutor, and the consequences of that disclosure in the civil litigation area.

Now, that, I mentioned previously, is an area that the Federal Rules Advisory Committee on Evidence is looking at. It is also an area that there have been bills introduced and the Congress to address that issue. So I think that there is certainly recognition.

Mr. SCOTT. Well, I think Mr. Donohue kind of alluded to civil litigation because if somebody blurts something out in a criminal investigation totally unrelated to what may be said affecting civil litigation, you could open yourself up to all kinds of problems including massive punitive damages if all that information got out. Is that right?

Mr. MCCALLUM. There is a consequence of a waiver of attorney-client privilege, and one context being a waiver in other contexts. That is correct, Mr. Scott.

Mr. SCOTT. Okay. Well, have you ever asked for waivers in individual cases?

Mr. MCCALLUM. I am sure that, like former Attorney General Thornburgh, I can't tell you that that has never happened. I am--it has never happened in any case that I am involved in. And I think there is one issue that needs to be focused on here, is that there is an issue of attorney-client waivers, privilege waivers, by the corporation. That is, the lawyers who represent the corporation. In my opening statement, I made the point that they do not represent the management. They do not represent employees.

And I am sure that Mr. Sullivan, every time he does an internal investigation and interviews a witness, he explains to them exactly who he represents, i.e., that it is the corporation, and that that individual who is being interviewed is not his client and there is no attorney-client privilege between him and that individual.

Mr. SCOTT. Well, I mean, in an individual criminal case where an individual is the defendant, have you ever asked for a waiver of attorney-client privilege?

Mr. MCCALLUM. I never have, Mr. Scott. But my experience over my 35-year career has been predominately in the civil litigation area. So I would not be someone who would be able to respond to that effectively.

Mr. SCOTT. Have you ever had cases that the defendant, the corporate defendant, got leniency for cooperation when they had not waived attorney-client privilege?

Mr. MCCALLUM. I cannot personally testify to that. I can tell you that within the Department, I am informed by those that have extensive experience in the criminal area that that is indeed the case, that cooperation is but one factor in the Thompson Memorandum in determining whether to indict someone. And it is a factor, of course, in the Sentencing Commission current matters.

Mr. SCOTT. Can you get the cooperation benefit without waiving attorney-client privilege?

Mr. MCCALLUM. There are--there are any number of instances, I am informed, in which that is indeed the case, yes, and that the circumstances of a corporation providing information may not require the waiver of attorney-client privileged information of work product information.

Mr. SCOTT. Let me ask one further question. Mr. Sullivan, you represent corporations, many of whom have multi-jurisdictional activities. Would there be a problem in having 92 different processes in terms of what the attorney-client privilege may be?

Mr. SULLIVAN. Ranking Member Scott, yes. I think that would be a very difficult road to navigate. It is difficult enough working with prosecutors and regulators who are insistent that you do their work for them. And in fact, if I am in a situation where I am evaluating a cooperative mode for purposes of obtaining favorable treatment by the Government in exchange for a new compliance program, ferreting out wrongdoing--which would be my obligation in any event--to the extent that I would have to, in a multi-district context, deal with a variety of competing considerations along the same lines would make my job much more difficult and would also cause intractable problems on the part of the corporation in terms of negotiating a resolution.

Let me also add that I know the context here is

cooperation, but I don't think the presumption of innocence should be forgotten. And when I addressed the committee a few minutes ago and mentioned that at the very first meeting I was asked to waive the privilege, I also mentioned that I had not even conducted an internal investigation and therefore had not made up my mind as to whether I have defensible conduct or not. So I think that also illuminates the mindset that corporate counsel are dealing with today.

Mr. COBLE. I thank the gentleman.

We have been joined by the distinguished gentleman from Ohio, Mr. Chabot.

And in order of appearance, the Chair recognizes the distinguished gentleman from Florida, Mr. Feeney.

Mr. FEENEY. Thank you, Mr. Chairman. And I am grateful for the testimony from all our distinguished panel.

You know, I had an observation I thought perhaps you could talk a little bit about because I think you have gone into some details about the importance historically of the attorney-client privilege.

By the way, I would point out that most of us who, you know, practiced law at one point think of this more in the context of criminal--of violent crime as opposed to corporate crime, exactly for the reasons that former Attorney General Thornburgh laid out. This really hasn't been used until the last 8 or 10 years, this waiver requirement.

But the average violent criminal doesn't have deep pockets. And other than the fact that if he fails to comply and waive privilege, for example, there is very little incentive. He is not subject to fines because he has got the empty pocket defense. He is not worried about civil litigants. But for a lot of the reasons that Mr. Donohue laid out, the pressure on corporate clients and business clients is immense to find favor as they cooperate, and there is an enormous pressure on them.

I do understand the necessity at times to try in a corporate context, especially with respect to fraud, to find out what everybody knew, and that would include corporate counsel. What I am worried about, and I guess I want to put it in this respect--Mr. Sullivan might be the best person to answer this--we live in a very new climate on Wall Street. I mean, investors appropriately expect a lot more transparency. We had things like Enron and WorldCom.

But in some ways, we may have overreacted. Post-Sarbanes-Oxley, directors have some real problems. Number one, we don't have a standard set of accounting principles, so that a major international corporate firm may be responsible, and the directors individually liable, to know where every box of pencils or paper clips are. And we don't have standards to protect people based on de minimis standards.

When directors or executives with corporations go and they hire an independent auditor nowadays, they are not allowed to seek the guidance of their auditor. They can't get help from one of the top four accounting firms that they have to pay. That firm is not allowed to tell them how to comply with Sarbanes-Oxley.

Now we are in a position where if we are going to have what amounts to blanket waivers or, in some jurisdictions, anyway, what amounts to blanket waivers, where corporate executives and corporate directors, who are going to be held personally responsible even if they didn't necessarily know about mis-actions that somebody else in the corporation took over, can't be candid with their lawyer and cannot count on candid advice back.

That type of chilling effect makes it almost impossible for anybody with any sense to agree to be a member of the board of directors today, and I thought maybe Mr. Sullivan and Mr. Donohue could talk about this in the totality of the circumstances today in corporate law. I mean, this is just one more burden that makes it almost impossible to try to do your job in an honest way as a member of a board or an executive at a major corporation.

Mr. Sullivan, go ahead.

Mr. SULLIVAN. Thank you, Mr. Feeney. Well, in fact, you are absolutely correct. Corporations have noticed a

dearth of willing applicants in terms of individuals who are willing to serve on boards. What is attempted these days is to maintain a level of independence, both with outside counsel as well as special audit committees, special litigation committees, and as you mentioned, even accountants.

But it also goes right back to what Mr. McCallum said, and he is absolutely correct. I am well aware of the Upjohn warnings, and when I am pursuing an internal investigation, I am obligated and I do advise the individuals whom I am interviewing that I do not represent them.

But in fact, if we move forward and they are led to believe that not only do I not represent them but I am also going to turn over everything they say to the Government at a moment's notice, upon caprice or whim because I am interested in maintaining the best possible position of the corporation, we are in a situation where, as Mr. Donohue mentioned, I won't get any information at all.

The corporate entity is an artificial entity, true. It has legal responsibilities, true. But it also is run and managed by people. The acts of the employees are imputed to the corporation. So you must deal with the people because they are the ones who bind the corporation.

And for my--from my perspective as well as the perspective of independent directors or board members or

auditors or management, we need to be able to access facts. We need to be able to do it freely, without any concerns about where those facts may ultimately go. And we need to be able to manage the information we have so that we can evaluate properly how to respond to Government inquiries.

As I mentioned before, all too often the first mode that a corporation will pursue is cooperation. They will find or seek to find responsible employees and throw them under the bus. That is not necessarily the best policy. In a free-flowing exchange of information environment where the lawyer can carefully evaluate the information he has, he can make the best decision for that corporation in how to deal with regulators and ultimately save everybody a lot of money, shareholders and individual investors.

Mr. SCOTT. Mr. Donohue?

Mr. DONOHUE. I serve on three public company boards of directors. And I will say in response to your inquiry that, first of all, it is getting harder and harder to attract competent directors, not only because of the fear of liability, which is getting greater, but because of the extraordinary amount of time and process that has to be followed following the Sarbanes-Oxley rules and their implementation.

What directors most worry about, other than running the company, leading the company and having good management that

operates in an honorable way, are two things, and that is dealing with regulators of every type and shape and dealing with the Justice Department. And by the way, when you get people like Mr. McCallum here, if he were to come out and deal with the issues that individual companies have to deal with, we would do fine.

But they have the greatest collection of young, soon-to-make-it, want-to-be-famous kinds of lawyers all around the country who, by the way, don't have the same amount of judgment and experience, and many have little or no idea what corporations do and how they are supposed to work.

So when 92 different groups--by the way, and when there is an approval, it will be approval by the U.S. Attorney for one of his underlings--they are going to have 92 different approaches to do this, it is going to get a little more complicated for most of the companies on whose boards I serve.

And I am not--we are not talking about huge criminal issues; there are always questions with the SEC and others. And it gets very, very complicated when everybody has got a different rule. Everybody has got a different way of approaching it. And standing behind them like vultures on a fence are the class action and the mass action lawyers that are sucking the vitality out of American industry. And they are doing it, maybe unintended, but they are doing it with

the help of our Government, who is putting us in that kind of a position that it shouldn't happen.

Mr. COBLE. The gentleman's time has expired.

The distinguished gentleman from Massachusetts, Mr. Delahunt, recognized for 5 minutes.

Mr. DELAHUNT. I would think, Mr. Sullivan, that you must find yourself in a position where not only do you have to inform the employee that you are not his lawyer, but there is going to be a likelihood that what he tells you will become--you will at some point in time be compelled to reveal to the Government exactly what he says.

Have you run into that situation?

Mr. SULLIVAN. Yes, Mr. Delahunt. As part of the Upjohn warnings, I am required to advise the employee that I represent the company, that the privilege resides with the company, and that the privilege can be waived by the company at any time--

Mr. DELAHUNT. And that--

Mr. SULLIVAN. --and in any manner.

Mr. DELAHUNT. --in a significant number of cases, the privilege is waived.

You know what I can't understand, Mr. McCallum, is what happened in the past 10 years? You know, for 20 years of my own professional life, I was a--I was a prosecutor. Did a number of sophisticated white collar crime investigations.

And, I mean, there are grand juries. There is the use of informants. You know, we knew how to squeeze people without sacrificing or eroding the attorney-client privilege.

You know, I just have this very uneasy feeling that it is the easy way to do it, you know. There is a certain level of, you know, why should I--why should I have to really exercise myself to secure the truth?

You know, from what I understand, there has been no review in terms of the frequency of the waiver. There is no data. There is nothing empirical. But, you know, Mr. Thornburgh and Mr. Sullivan, you know, I am sure they have had extensive practices. At least anecdotally, you know, they are here. They are concerned.

Is there something that I am missing that the traditional law enforcement investigatory techniques were insufficient?

Mr. MCCALLUM. Mr. Delahunt--

Mr. DELAHUNT. I got to tell you something. I am a little annoyed with the Sentencing Commission, too, making this a factor. You know, where did that come from? Go ahead.

Mr. MCCALLUM. I believe it came from the defense bar, who wanted to pin down for certain that if there was a waiver--to answer the second question first--

Mr. DELAHUNT. Sure. Thanks.

Mr. MCCALLUM. --if there was a waiver, that it would necessarily be deemed cooperation for purposes of a downward departure. But let me--

Mr. DELAHUNT. Well, I would just dwell on that for a minute because we will get a second round.

Mr. MCCALLUM. Okay.

Mr. DELAHUNT. I would want to--I would want to hear that coming from, you know, some criminal defense lawyer, saying that that is the import of it. Because that tells me that if they are looking for that kind of certainty, that this is being used frequently. This is--this is becoming the rule rather than the exception. But go ahead and take a shot at my--

Mr. MCCALLUM. Let me respond to the first question, Mr. Delahunt, and that is what has happened recently over the years? I think we only have to look back to the 1997 through 2006 era to see a spate of very complicated, very complex, very arcane, very difficult to determine corporate frauds of immense proportions in terms of the dollar amounts involved which also--

Mr. DELAHUNT. With all due respect, Mr. McCallum, I got to tell you something. That just doesn't--that doesn't hold water. You know, I am sure immense complex fraud has been being perpetrated, you know, since the days of the robber barons. If we don't have the resources in the Department of

Justice to conduct the necessary investigations to deal with it, then let's assess it on a resource basis. Let's not do it the easy way that erodes, I believe, a fundamental principal of American jurisprudence.

I mean, if that is what you are telling me, I won't accept it because of my own experience. You know, fraud is nothing new. Uncovering it maybe is, but, I mean, there is--you have--you know, you can use immunity. There are informants. There are grand juries. There are all kinds of ways to do it.

And I am sure Mr. Thornburgh, being a former Attorney General and a former, I think, Attorney General in a State, I am sure he supervised or conducted a series of heavy investigations that are as complex as anything that, you know, occurred from 1997 to date, and did it in a way that didn't erode significant legal principles that are embedded in our jurisprudence.

I will be back, and you can think about the question.

Mr. MCCALLUM. Thank you.

Mr. COBLE. The gentleman's time has expired.

The distinguished gentleman from California.

Mr. LUNGREN. Mr. Chairman, it is always fun being with my friend from Massachusetts. I was trying to figure out what he said when he said ''partay,'' and then I thought he was talking about getting a drink and going out someplace.

[Laughter.]

Mr. DELAHUNT. I can't understand what you are talking about.

Mr. LUNGREN. But I understand. You weren't talking about a party, you were talking about a part A. I got that. Okay.

And Mr. Sullivan, I have been informed by counsel here that the two of you used to work together, so that you used to be one of those fellows that resembled the remarks of Mr. Donohue.

[Laughter.]

Mr. LUNGREN. But now you have made it.

Mr. SULLIVAN. Mr. Volkoff was a fine mentor.

Mr. LUNGREN. And I wondered if you had to deal with 92 different jurisdictions. It would certainly improve your billables.

[Laughter.]

Mr. SULLIVAN. I try to get involved in--

Mr. LUNGREN. But those Italian suits could be kept up, as it was.

Just to put it on the record, I have submitted a letter last August to the Sentencing Commission regarding my concerns about the Sentencing Commission's commentary with respect to the rule. It looks to me like that amendment authorizes and encourages the Government to require entities

to waive the attorney-client privilege and work product protections as a condition of showing cooperation. And that is the huge concern I have here.

Let me ask you this, Mr. McCallum: Should we in the Congress believe that any time the administration refuses to waive executive privilege, that the administration is not cooperating with the Congress?

Mr. MCCALLUM. Absolutely not, Mr. Lungren. I would--I would hesitate to make that argument. There are benefits, and I think that in my opening statement I described that there are definitely benefits, societal benefits, from attorney-client privilege.

Mr. LUNGREN. But, see, that--I understand. See, that is my problem. If we in the Congress were to every time the President says that there is a reason to protect executive privilege, not only for his administration but for future administrations, that every time he did that he was violating the sense of cooperation that should prevail between two equal branches of government, I think we would be wrong.

And I see the Justice Department taking a position that if a corporate defendant or potential defendant refuses to waive that privilege, that is a priori evidence of the fact that they are not cooperating. And that is the problem I really have here.

See, the President makes the arguments--and I think that

you should--and the Department makes the arguments that there is a reason for those privileges that at the executive branch has. And the reason is part institutional, but part to have that ability to speak within yourselves, that is, that institution of the administration, which is more than the President but is personified by the President. He can talk to his advisors without believing that we are going to hear everything he says.

And here you have a situation where you want a corporation to follow the law, I presume. And you would want the corporation to listen to good counsel, I would think. And here we have got a rule that seems to me to work in the opposite direction.

And I think that that weighs heavy on me and other members here on this panel. And so I would ask, don't you see the creeping intrusion here? I mean, first you have the first memorandum. Now we have the second memorandum, which is a little tighter and a little tougher. And then, following that, you have the Sentencing Commission saying, well, that is a bad idea. As a matter of fact, we are going to have that as evidence of cooperation, and the lack of it as evidence of lack of cooperation.

What is a corporate counsel to do under those circumstances?

Mr. MCCALLUM. Well, there are a series of questions

there, Mr. Lungren. Number one, with respect to the Sentencing Commission, the Department's position has been we would be comfortable with the Sentencing Commission going back to where it was before that amendment.

Mr. LUNGREN. Well, is that your position? Is that the administration's position?

Mr. MCCALLUM. I believe that that is the Department of Justice's review--

Mr. LUNGREN. That is what I mean.

Mr. MCCALLUM. --underway at this particular time. I do not know whether that has been absolutely finalized. But my review of that is that there would not necessarily be an objection to going back to the way it was before, where it was not addressed.

Number two, let me talk about the issue of cooperation. Attorney-client privilege waivers are only one factor with respect to cooperation. There are many other ways for a corporation under the Thompson Memorandum to indicate and to provide a degree of cooperation that will impact both the decisions on the charging of the corporation and on the determination of recommendations to be made to any sentencing commission about--or to any sentencing body about a downward deviation. So I don't--I don't think that it is accurate to assert that privilege waivers are the sine qua non or the absolute requirement in order to achieve a status of

cooperation with prosecutors.

With respect to the diversity of jurisdictions, the 92 different districts, as I indicated previously, this is not a situation in which one size fits all. And what the McCallum Memorandum really did was to recognize a best practices that was, in my view, attendant to United States Attorneys across the United States in which privilege waiver requests, formal ones from the Government, as opposed to privilege waiver offers voluntarily from corporations, would go through some sort of supervisory review that would preserve for the peculiar circumstances of that particular district and the United States Attorney there a degree of flexibility.

But all of that would be done in coordination through the Executive Office of United States Attorneys. So I don't think it is an accurate picture to paint, 92 different definitions of what is attorney-client privileged and what is not attorney-client privileged. It is a second set of eyes to reassure that there is a deliberate and considered process before attorney-client privilege waivers are requested by the Department of Justice.

Mr. LUNGREN. Thank you.

Mr. COBLE. The gentleman's time is expired.

The distinguished gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman.

Mr. Donohue, if I could begin with you. Can you give

the subcommittee any examples from your members of instances where a request for a Department of Justice--for an attorney-client waiver resulted in unnecessary consequences for the corporation, perhaps a third party suit, for example, and arguably the information could have been gathered without a waiver?

Mr. DONOHUE. Well, sir, you have just put your finger on why this is a very difficult matter to challenge, either here in the Congress or in the courts, because most companies that have been painted into this box are not going to come forward and give you an example. I know many examples. I would suggest it is probably in our mutual best interests not to lay out the names of a bunch of companies.

I could tell you a couple of interesting points. In one matter that I am aware of, the prosecutor in a jurisdiction gave a public speech and said, in our jurisdiction, anybody failing to waive the privilege will be considered guilty. I passed that material on to the Justice Department; I don't know how it was used.

But if you were to go--and by the way, it is very, very important to understand that the SEC and the Justice Department have hundreds and thousands of investigations going on. And the great amount of these have nothing to do with fraud. They have arguments about proper accounting and all kinds of other issues.

Where there is fraud, there should be a vigorous investigation. But, you know, I was trying to think of a good example that I might use. You know, the Inquisition supposedly had the blessing of the Church, but their means weren't very appropriate. And when Mr. McCallum began today, he laid out a rationale of why they should be able to do these things because of the assignment they were given to respond to Sarbanes-Oxley.

My understanding is that the privilege is a constitutional protection, and that the end does not justify the means, and that the serious nature of this--and I think the point made about resources did not--should not put the companies in the position of conducting investigations, which I am aware of many, to supplement the work and actually do to the work of the prosecutors.

And I ended my statement by saying if people maliciously, directly, and intentionally go out and violate the law and they are in the American business community, lock them up. But you try and go out, as Mr. Sullivan indicated, and deal with these prosecutors--and you have got two sets of them; you got the SEC and you got the Justice Department, and they are playing off each other, and they are sitting in the same rooms, you know, when you have a civil issue and you have a criminal issue. And I would just say, you know, if you and I want to walk down a hall one day, I will give you

four or five examples. But with the Chairman's permission and protection, I am not going to do that here.

[Laughter.]

Mr. CHABOT. Thank you very much.

Mr. Sullivan, if I could ask you the next question. What alternative techniques are available to prosecutors to obtain the needed information from a corporation without requiring a waiver of the attorney-client privilege?

Mr. SULLIVAN. Mr. Delahunt alluded to many, drawing upon his hears as a prosecutor. There are all types of investigative techniques. There is cooperation undertaken by individuals within the corporation. There is the grand jury process, with subpoenas. There are wires.

What also is available, and which I suggested, for purposes of a corporation who is--which is interested in cooperating is the factual recitation, which is actually quite common: a factual review of what the outside counsel's investigation has yielded, with a view toward working in concert with the Government, ferreting out the criminal activity as it is perhaps determined to be a rogue element or an independent group working without knowledge of management. We see that in export control cases, for example, where shipments are made abroad by individuals who have an incentive for sales commissions without the knowledge of management or at least without management understanding that

ineffective internal controls were in place.

All of this suggests that the corporate entity itself and outside counsel, certainly responsible management, as Mr. Donohue has mentioned, has an interest in abiding by the law. And to the extent that it becomes aware of problems with the law, either through its own inquiry or through an external source, a subpoena or whatnot, outside counsel working with in-house counsel wants to ferret that out and find it out.

And we will assist the Government to the extent that it is in our best interests to provide them with the roadmap, with the factual outline, who you should talk to, what this document means. But we shouldn't have to and we don't want to provide them with our mental impressions, our specific interview notes, our opinion work product, and our sensitive discussions with employees because we want to preserve the ability to talk to them again about another problem so that we can continue to observe the law.

And the factual recitation is not something that is ultimately going to be a problem. Factual recitations are found in indictments every day in every public context. If you want to learn what happened in a particular case, what went wrong, read the Government's indictment. And we will help you with that factual outline to preserve our ability to interact with you and to get credit for cooperation. But you should be encouraged, Mr. Prosecutor, and you should insist

on doing your own legal analysis.

Mr. CHABOT. Thank you.

Mr. COBLE. The gentleman's time is expired. I thank the gentleman.

Gentlemen, as I said earlier, I think this issue warrants a second round, so we will commence that now.

Mr. Donohue, I may be repetitive, but I want to be sure this is in the record. In your testimony, you mentioned that erosion of the attorney-client privilege will frustrate corporate efforts to comply with regulations and statutes. Elaborate a little bit more in detail about that.

Mr. DONOHUE. Mr. Chairman, what happens in a company is when issues of significance--it happens with me every day--come up that we are dealing with some Federal regulation, some political regulation, whatever it is, the first thing we do is call the general counsel. When we are sued, as people are on a regular basis, the first thing we do is call the general counsel. And these are all civil matters.

But I want to have a feeling that when I sit down and talk to Steve Bokat, who is the general counsel of the United States Chamber of Commerce, that what I am talking about is going to stay there. And if I had a feeling that in matters where there may be differences with the Government, there may be differences with regulars, if I talk to him, if anybody

wanted to bring an action against us, he is going to be up sitting--talking about what we discussed, I am not too sure I am going to talk to him. Nor am I going to go and get my regulatory counsel, nor am I going to go down and get my outside counsel.

At least--you know, the term ''counsel'' is used up here a great deal. And if you look to your right, you have your counsel, and you sure want to make sure that what you are talking to him about is not blabbed all over this place.

Mr. COBLE. Yes. Well, that is what I thought you--

Mr. DONOHUE. And I think we have a constitutional right to do that.

Mr. COBLE. Thank you, Mr. Donohue.

Mr. Sullivan, in your testimony, you noted that you represented a client before a regulator who requested a waiver prior to your client's declining to cooperate or deciding to cooperate.

What impact would such a waiver have on your ability to represent a client corporation, given--under those facts?

Mr. SULLIVAN. Thank you, Mr. Chairman. Of course, I declined that request immediately. And in fact, as Mr. Donohue so perceptively referenced only upon hearing my anecdote, there were more than one law enforcement agency representative in there. There was the tag team, as he referenced a few moments ago.

As I said before, this was a very early meeting, a meet and greet, if you will, where I was attempting to outline to them what my preliminary view of the evidence I had gathered after only a couple weeks would suggest as a function of how to address their concerns.

I had not made up my mind as to what I would do in terms of seeking cooperation or defending. As I said before, we should never forget about the presumption of innocence as a corporate representative, as a corporate lawyer, and we should always ferret out the facts and then have a good understanding of the law on those facts to understand whether or not there was a crime committed and whether or not there was a credible defense.

But to go directly to answer your question, if I had undertaken to waive the privilege, how would I walk into that company's office the following day? We had not determined that a crime had been committed or that there were regulatory problems. I needed to find out what went on, and in the best way possible, so that I could represent that client in an informed way.

Who would speak to me, Mr. Chairman? What type of evidence would I be able to gain? I would be nothing more than an arm of the Government. I would in fact have been deputized. My role would be completely eliminated. It makes no sense, particularly when, if I found there was wrongdoing

and I needed to work with the Government, I would be most pleased to do so by rendering factual, non-opinion work product.

Mr. COBLE. I thank the gentleman.

The gentleman from Virginia. The distinguished gentleman from Virginia.

[Laughter.]

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Sullivan, why would a corporation do an in-depth investigation of suspected employee misconduct if the report of that investigation has to be turned over to the prosecutors?

Mr. SULLIVAN. Well, frequently reports are turned over to prosecutors. In fact, we see public reports very frequently. We just saw a very public Fannie Mae report. Shell has got a report. Baker Botts has got Freddie Mac's report on its website.

The difference is, again, reports outlining factual undertakings and understandings as opposed to attorney work product and attorney-client communications. And--

Mr. SCOTT. Well, let me ask it another way. If you are writing such a report, would you be writing it to be read by the president of the corporation or by the prosecutor? I mean, you know, you would say things differently depending on who the audience is.

Mr. SULLIVAN. Sure. And it depends who I represent and what my charge might be. The individuals who, for example, are writing the Fannie Mae report may have been reporting to an independent board, an independent accounting board or an independent board of directors, coming in after the fact to outline what facts happened. I think they would be very cautious in outlining any opinion work product in that report.

And to be fair to the Justice Department, I have not seen requests for waiver of attorney-client communications. It is all work product. And I am not saying that in any way to suggest that it is any less nefarious. It is the opinion attorney work product, which is perhaps the most dangerous.

But to the extent that I would undertake to write a report, a report for the general counsel or for the board of directors, I would insist that it be a privileged document, that it would include my mental impressions and opinions, thereby covering it as work product, perhaps made in anticipation of litigation as well. It would certainly be an attorney-client communication because I would be proffering it to the general counsel. But I would never want that to go elsewhere. A parsed, very narrowly drawn factual recitation I might be persuaded to part company with.

One thing I would like to also mention, Ranking Member Scott. You earlier in the hearing talked about public

policies regarding inadmissible information and material. I think that was a very important point. I would like to bring out that I have represented Federal prosecutors in internal DOJ investigations, OPR investigations, Office of Professional Responsibility.

There is no compelled waiver of the Fifth Amendment. There is no compelled self-incrimination under pain of losing your job in the Justice Department. There is a Supreme Court case on that, Garrity. Nevertheless, I am literally asked by Justice Department officials to bring my employees in and to tell them they either tell me everything or they walk.

And I have no problem doing that because there is no specific type of due process in a corporation. But the next step is, and by the way, once you get something from that employee and if it is an incriminatory Fifth Amendment waiver, I did it, I want it, Mr. Sullivan. And that is where I draw the line.

They don't extract from their own employees. Why should they ask that kind of duress of mine, or of my clients?

Mr. SCOTT. Thank you. Exactly who can waive the privilege?

Mr. SULLIVAN. The corporation, to the extent that the corporation has the privilege when we are dealing with corporations and employees.

Mr. SCOTT. Who? Who? The CEO?

Mr. SULLIVAN. We would have to get that consent of representative management, whoever is running the program, the board, in consultation with counsel.

Mr. SCOTT. Can the CEO waive the privilege?

Mr. SULLIVAN. Not as an individual. He has got to only do it on behalf of the corporation as a function of his role as a corporate representative.

Mr. SCOTT. Is that right, Mr. Donohue?

Mr. DONOHUE. I believe procedurally the CEO could move, with probably advice of his lawyer, to waive the privilege. But in these kinds of instances, this would be so sensitive that it would already be up to the board, and the board would be informed of that change in circumstance.

Mr. SULLIVAN. and that is what I meant by--

Mr. DONOHUE. That probably wouldn't have been done four or five years ago, but it would sure be done today.

Mr. SCOTT. Are you aware of--the Department indicated that they don't--you can get full cooperation without a waiver. Are you aware of cases where full cooperation credit on sentencing was given without a waiver of attorney-client privilege?

Mr. DONOHUE. Mr. Scott, I am sure it has. I cannot give you a definitive case. The more difficult the case, the more visible the Justice Department and the SEC has been in announcing the case and how they are going to be successful

and all these terrible things that have happened before they have had their full investigation, the more aggressive the SEC and Justice Department lawyers are going to be to try and make sure that they are successful.

And when they are having problems in finding what they thought they were going to find, then they want the company to investigate it for them, and they want people to break the privilege. We are not trying to protect criminals. We are trying to protect a constitutional protection that is given to individuals and corporate individuals, and we believe it is being eroded.

Mr. SCOTT. Mr. Chairman, could I ask one other question?

In terms of corporate organization, which attorney--do all attorneys in the corporation have the privilege, or is it just corporate counsel we are talking about? And let me follow up on that by saying, I mean, there is some--if you are trying to discuss certain activities, trying to come up with a process that may be kind of borderline legal, would you help yourself by having the person in that position you are talking to be an attorney where you wouldn't get that privilege if it was not an attorney? And do you find people hiring lawyers in kind of non-lawyer positions to try to get a privilege?

Mr. DONOHUE. Mr. Scott, I am going to respond and then

ask Mr. Sullivan if he would make sure I am correct. But I am not sending him a fee.

[Laughter.]

Mr. DONOHUE. You know, generally, when one is dealing with broad corporate matters, the general counsel of the corporation, who is an officer of the court by his own professional standing, would be the person that would have this role with the CEO or other executives.

There are, however, issues, for example, on SEC questions or environmental questions or other matters where there are senior lawyers within the institution, probably but not necessarily working for the general counsel, who on those matters would be seen as the more senior person with whom discussions and therefore protected discussions could have been held.

Mr. Sullivan, you have had a minute to think about that.

Mr. SULLIVAN. You are absolutely right. My experience has been working with the general counsel and other lawyers in the company who hold particular expertise in various areas as questions may arise. But no privilege determinations are made without the assent and consent of the board or a special committee who is operating in a joint way--a special committee on accounting, a special litigation committee--so that there is usually a board approval at the highest levels for such--

Mr. SCOTT. Board approval to determine who has a privilege and who doesn't?

Mr. SULLIVAN. Well, board approval relating to waiver of the privilege.

Mr. SCOTT. Well, I mean, if you have in a certain department--for example, sometimes a person may be hired as a lawyer; sometimes they may have expertise and are not a lawyer. Would the lawyer have--would there be a privilege when the person happens to be a lawyer and a privilege when the person does not happen to be a lawyer, and would there be an advantage in hiring somebody for that position who is a lawyer?

Mr. SULLIVAN. The privilege is held by the corporation. And to the extent that, for example, outside counsel is acting at the behest of the corporation for purposes of pursing an internal investigation, individual employees who are interviewed by that counsel does not hold a privilege relationship with that investigating counsel. The privilege is held by the corporate entity, and it can be waived only through the exercise of a determination by management in consultation with the board.

Mr. DONOHUE. But Mr. Scott--

Mr. SCOTT. That is if you have a lawyer. If you have a non-lawyer in that position, he wouldn't have a privilege. Is that right?

Mr. DONOHUE. Yes. But even the lawyer--for example, as you can imagine in this town, the Chamber is full of lawyers. So if we looked at it as if it were a public company and I walked in the door and talked to any of the lot of lawyers, there is no implied privilege there.

The privilege is when you seek legal guidance from those people who are in a corporate position to give it and protect it. And so walking down to the cafeteria with any number of the lawyers that work for us in some other--and I think Mr. Sullivan--again, I am not paying him a fee--I think he would suggest that there would be no implied privilege there.

Mr. SULLIVAN. I would agree.

Mr. COBLE. The gentleman's time is expired.

The distinguished gentleman from Florida.

Mr. FEENEY. Thank you.

General Thornburgh, you said you don't recall using this required waiver in prosecutions during your tenure as AG. You can think of, you know, briefly a hypothetical where it would be appropriate in order for a corporation to have considered to have cooperated where the attorney-client privilege would be waived, can you not?

Mr. THORNBURGH. I think there are certainly going to be situations where the corporation itself may take the initiative to waive the privilege in order to make available to the Government--

Mr. FEENEY. But off the top of your head, you can't think of where it would be appropriate for the Justice Department to waive--to require a waiver in order for the corporation to have considered cooperating?

Mr. THORNBURGH. I can't, but I wouldn't want to rule it out. I mean, there might be--

Mr. FEENEY. Okay. I think that is very telling.

And with that, you know, Mr. McCallum, I have to tell you, I am, you know, typically a huge supporter of giving the Justice Department the tools that it needs because these are very dangerous times, and we want to clean up Wall Street, Enron, and WorldCom. We're a disaster for investors.

But I would ask you: Have there been any successful prosecutions that you know of of major Wall Street fraud that would not have been successful in the absence of a required waiver?

Mr. MCCALLUM. I can't speak to that because I was not personally involved to a degree to be able to assess the strength or weaknesses of any of those cases.

I would, in response to the previous question, indicate to you, Mr. Feeney, that with respect to circumstances in which it would be clear that a waiver of attorney-client privilege might be necessary would be when the investigation implicates or creates suspicion regarding the general counsel's activity and whether that person is complicit

within the fraud. That would be one, you know, prime example that is obvious.

But I can't talk to you with regard to the second question. I can't address the issue of would the prosecution of X have succeeded without a--

Mr. FEENEY. If you would be willing to give us a list, I think I would like to know that, Mr. Chairman, with unanimous consent of the committee, if you would be willing to go back and get us that information.

General Thornburgh?

Mr. THORNBURGH. Yeah. I want to amplify a bit my response. Under the crime-fraud exception, there is no privilege. So it's not a waiver of a privilege; it is that the privilege doesn't arise in the first place.

I want to say one thing, if I might. Having been one of those young, zealous prosecutors that Tom Donohue so eloquently described earlier on, I want to come to their defense. We want our prosecutors to use every single tool that is legally available to them. On the other hand, I don't want to castigate those prosecutors for the faults that we are speaking about today.

This, unfortunately, is a matter of Department policy. And they are empowered to pursue these waivers by the policy of the Department of Justice. And it is that level upon which this requires some redress.

Mr. FEENEY. I thank you, General Thornburgh. And on that one, I wanted to go back to Mr. McCallum.

Mr. McCallum, as I said, I tend to be a huge supporter of the tools the Justice Department needs. But I am not persuaded by the position of the Justice Department in this case--in this case yet. I mean, you start out your remarks by talking about the number of prosecutions.

My goal would be investor confidence and investor security. Prosecuting successfully lots of directors, CFOs, CEOs, and COOs is not necessarily the type of successful, clean Wall Street that I want to see.

And towards that end, you know, Mr. Donohue suggested that a lot of directors nowadays and top level management are spending a good portion, if not the majority of their time, not only building a better, cheaper, quality mousetrap, but on compliance with regulatory burdens and legal burdens. It doesn't seem like that helps investors, and it doesn't seem like that helps a solid corporate governance strategy.

You know, one of the concerns that I have is that if I am a director--let's assume hypothetically I am a director trying to do the right thing, which is to make profits for the shareholders and succeed in business. And let's assume for purposes of my hypothetical that even though I am a Congressman, I am an ethical guy. And let's assume, since it is my hypothetical, that I am trying to do the right thing.

If I have an accounting question, I want to go to my independent auditor. I am not allowed to do that under Sarbanes-Oxley. If there is a close call on a legal or ethical issue, I want to go to the corporation's general counsel. I am terrified to do that for the same reason that if I were a Catholic and there was no protection for things I said to my priest, I would be afraid to confess some of my sins and I would not be able to get the absolution that I were seeking.

So can you see that some of the things that we want to accomplish with solid corporate governance, with people focused on doing the right thing but making a profit for their shareholders, providing a better widget for the marketplace, can you see how some of these concerns--I am not worried about the Enron fraud case. I am worried about the guy trying to do the right thing and how he is afraid to talk to, in the one case, his accountants, and in this case, his lawyers.

Mr. MCCALLUM. Mr. Feeney, we certainly hear the arguments that are made by the business community on that side relating to the chilling effect. I would submit to you that our view of the compliance environment is indeed that corporations are spending more time on compliance. There is more regulatory supervision and oversight that has been imposed as a result of the corporate frauds. And I think

that corporate governance is better off for it.

Rather than being deterred from seeking counsel from the general counsel, we believe that management is--in fact has been encouraged to seek advice and counsel, and there are any number of institutional investors who assess the legal risks and who try to determine whether there are compliance programs in place that are vigorously followed and that are effective. That has become part of the investment decision that institutional investors make these days because of the frauds that--corporate frauds that have been experienced in the financial community over the--over the past 6, 7, 8 years.

Mr. FEENEY. Well, just one brief follow-up. If that is part of the investor decision-making process, does that account for the enormous flight into international investments and the fact that since Sarbanes-Oxley, for example, at that time 90 percent of foreign firms that went public raised 90 percent of their capital in the U.S. Today it's the reverse. Foreign corporations, not just because of Sarbanes-Oxley but because of the legal burden, are fleeing, and capital markets are moving overseas where there is no requirement for some of these things and these burdens.

Mr. MCCALLUM. Well, I think that doesn't speak to the issue of the improvements in corporate governance, corporate standards, and corporate citizenship within the United

States. And there has been, I would submit, a restoration of confidence in the American corporate culture and in the American financial markets as a result of many of the regulatory oversight matters that have been instituted by the Congress and enforced by the Department of Justice.

Mr. COBLE. The gentleman's time is expired.

The distinguished gentleman from Massachusetts.

Mr. DELAHUNT. Mr. McCallum, let me give you a chance to respond to part A. You know, what happened in the past decade since I left, you know, my previous career as a prosecutor? You know, what information do you receive now from waiver of the attorney-client privilege that absolutely cannot be developed from other mechanisms, other tools that have existed, you know, for the past 30, 40 years?

Mr. MCCALLUM. Well, Mr. Delahunt, there are three standards that are articulated in the Thompson Memorandum.

Mr. DELAHUNT. I am not interested in the standards. What I am interested in, you know, is in the course of an investigation, there are--there is a litany of investigative methods, mechanisms, and tools--we could repeat them--that are insufficient that have increased the reliance on the waiver.

Mr. MCCALLUM. All right. There are issues regarding the timeliness of the information and whether or not a particular criminal activity and the consequences of it can

be addressed regardless of the investment of significant resources in an adequately--in a timely manner to respond to both the public need, the financial market needs.

Number two, the completeness of the information. I would submit to you that even in the investigations that you diligently pursued, you were not always confident that despite all of the efforts that you had used and all of the tools that you had used, that the information that you found was, in fact, complete. the whole story, all the facts, with all of the documents. And then--

Mr. DELAHUNT. I--go ahead. I am.

Mr. MCCALLUM. Excuse me. And then thirdly is the accuracy of that information. That is, there are subjective judgments that are necessarily made regarding the credibility of witnesses, the credibility of documentation, and all of that is--

Mr. DELAHUNT. Right. But documentation and witness credibility, they can all be tested via grand jury testimony. I mean, everything that you say I can envision occurring without the need to secure the waiver.

What I am concerned about, even--I think that, you know, there has been a restoration of confidence. I think that that in fact has happened as a result of legislative policy. I think it has happened probably because of aggressive enforcement. And I think that is good for our financial

markets, and over time, I think it would attract capital as opposed to encourage its flight.

But I am concerned about the attorney-client privilege because I can see slippage in that privilege. You know, today it's, you know, the corporation. You know, tomorrow it's that priest, you know, that I might have gone to confession to. All right? I mean, it makes me very, very uncomfortable, and I really do think that this is a shortcut method to secure evidence that can be developed by alternative means.

You know, I thought Mr. Thornburgh made a good suggestion in terms of the review that alluded to. I would like to see you, the Department on its own, conduct a review. Get us some information. You know, get us some data. I mean, who is doing this and who is initiating it? Because it is a concern.

And, you know, I think that you can probably sense by the questions that have been posed, as well as observations by individual members, that there is a real concern here. And you don't want someone like Lungren from California, you know a far right conservative Republican, and Delahunt, this Northeast liberal, filing legislation on this because I think that is the order of magnitude that is being expressed here.

So respectfully, that is a message that I think you can bring back to Justice, is that there is concern about the

Thompson/McCallum Memorandum. Okay?

Mr. MCCALLUM. I will certainly take that message back, Mr. Delahunt.

Mr. COBLE. And for the record, let me say that far left-winger and that far right-winger are both pretty good guys.

Gentlemen, before I forget it, I want to introduce into the record, without objection, coalition letters to preserve the attorney-client privilege.

[The coalition letters follow:]

********** INSERT **********

Mr. COBLE. Gentleman, we thank you all very much for being here. In order to ensure a full record and adequate consideration of this issue, the record will be left open for additional submissions for 7 days. Any written questions that a member of the subcommittee wants to submit should also be submitted within the same 7-day period.

This concludes the oversight hearing on white collar enforcement, part 1, attorney-client privilege and corporate waivers. Thank you again, gentlemen. And the subcommittee stands adjourned.

[Whereupon, at 1:50 p.m., the subcommittee was adjourned.]

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LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

April 4, 2006

MEMORANDUM TO THE APPELLATE RULES COMMITTEE

SUBJECT: *Agenda Book*

Attached is the agenda book for the meeting on Friday, April 28, 2006, in San Francisco, CA.

As a reminder, the meeting will be held in the Exchange Room at the Park Hyatt hotel. **The meeting will start at 8:30 a.m., and end no later than 12 noon.** Orange juice, breakfast breads, coffee and tea will be available at 7:30 a.m. The committee dinner will be held on Thursday, April 27, at 6:30 p.m., at the L'Olivier Restaurant, which is located at 465 Davis Court only a short 5 block walk from the hotel. Walk north (left) on Battery for 3 blocks; turn right on Jackson for 2 blocks; turn right on Davis Court and you will see the restaurant on your right.

John K. Rabiej

Attachment

cc: Honorable David F. Levi
Honorable J. Garvan Murtha
Professor Daniel R. Coquillette
Peter G. McCabe, Secretary

ADVISORY COMMITTEE
ON
APPELLATE RULES

San Francisco, CA
April 28, 2006

Agenda for Spring 2006 Meeting of
Advisory Committee on Appellate Rules
April 28, 2006
San Francisco, California

I. Introductions

II. Approval of Minutes of April 2005 Meeting

III. Report on June 2005 and January 2006 Meetings of Standing Committee

IV. Action Items

A. Item No. 03-10 (new FRAP 25.1 — electronic filing/privacy protections)

V. Discussion Items

A. Item No. 05-01 (FRAP 21 & 27(c) — conform to Justice for All Act)

B. Items Awaiting Initial Discussion

1. Item No. 05-04 (FRAP 41 — *Bell v. Thompson*)

2. Item No. 05-05 (FRAP 29(e) — timing of amicus briefs)

3. Item No. 05-06 (FRAP 4(a)(B)(ii) — amended NOA after favorable or insignificant change to judgment)

4. Item No. 06-01 (FRAP 26(a) — time-computation template)

5. Item No. 06-02 (adjust deadlines to reflect time-computation changes)

6. Item No. 06-03 (new FRAP 28(g) — pro se filings by represented parties)

VI. Additional Old Business and New Business (If Any)

VII. Schedule Date and Location of Fall 2006 Meeting

VIII. Adjournment

FORDHAM
University School of Law

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter and Ken Broun, Consultant
Re: Consideration of Rule Concerning Waiver of Attorney-Client Privilege and Work Product
Date: March 22, 2006

At its last meeting, the Committee reviewed two versions of a rule that would govern waiver of privileges and work product. The Committee agreed to continue its consideration of a possible rule on this subject. The Committee resolved that the questions of waiver of privilege and work product were of the utmost importance, and that disuniformity in these waiver rules imposed unnecessary cost and inefficiency in litigation.

In the interim, the Chair of the House Committee on the Judiciary, Congressman Sensenbrenner, issued a letter requesting that the Judicial Conference "initiate a rule-making on forfeiture of privileges." Of course, a rule of privilege cannot become law under the ordinary rulemaking process. Privilege rules must be enacted directly by Congress. Congressman Sensenbrenner's letter recognizes this fact. He requests the rulemaking process to proceed in the ordinary fashion, however, with the idea that whatever comes out of that process will be reviewed by Congress and directly enacted if acceptable.

In light of these developments, the Reporter and Consultant drafted a Rule 502, and a Committee Note. That Rule and Note are included in the hearing materials behind Tab 1 of the agenda book, and they are also attached as an appendix to this memorandum.

Rule 502 and the accompanying note are intended to capture the discussion at the previous Committee meeting, at which there appeared to be substantial agreement on the following fundamental principles:

1. Uniform rules on waiver are required, so that parties are able to predict in advance the consequences of litigation conduct.

2. The waiver rules must be uniform at both the federal and the state level. If, for example, conduct does not constitute a waiver in federal practice but does so in a state court, parties would have no assurance that information protected by privilege or work product will remain protected.

3. Subject matter waiver should be limited to situations where fairness requires such an extreme result.

4. Parties should be able to, and encouraged to, cooperate with government investigations by turning over protected material without risking a finding that the cooperation constitutes a waiver in private litigation.

5. When disclosure is by mistake, a waiver should be found only if the disclosing party was negligent in production and in failing to seek return of the protected material.

6. In addition to the protection provided by a default rule, litigants should be able further to reduce the costs of pre-privilege review by additional terms contained in court-entered confidentiality orders; for such orders to be protective, they must preclude a finding of waiver in any court.

This memorandum is in five parts. Part One is Ken Broun's memo on the case law concerning waiver (with a few Reporter's comments interspersed). Part Two is Ken's memo concerning the authority necessary for implementing a waiver rule that will bind state courts. Part Three is Ken Broun's memo on the justification for a fairness–based subject matter waiver test for work product. Part Four provides a discussion of comments received on the Rule so far. Part Five discusses and explains two important drafting choices made in preparing the draft rule for the Committee's consideration.

I. Ken Broun's Memo on Case Law on Waiver of Privilege

Waiver of privilege problems frequently arise in large document litigation. The issues usually involve the attorney-client privilege, but may involve other privileges as well. There are at least three distinct, but sometimes overlapping, problems:

1. The effect on a privilege of an inadvertent production of a privileged document ["inadvertent waiver"].

2. The scope of the waiver of a document produced either intentionally or inadvertently ["scope of waiver"].

3. The effect on future privilege claims of the production of documents in the course of a government investigation, either with or without a confidentiality agreement entered into with the government agency ["selective" or "limited" waiver referred to in this memorandum as "selective waiver"].

Concern that privilege may be waived even by an unintended disclosure of a document will cause counsel and his or her staff to spend countless hours reviewing documents in large volume cases to insure against inadvertent disclosure. The rule applied by many courts that waiver of privilege by disclosure of a single document is a waiver of privilege with regard to all communications dealing with the same subject matter will cause counsel to guard against disclosure of privileged documents even though counsel may not really care if a particular document is disclosed to opposing counsel. These rulings raise the cost of pre-production privilege review to astronomic proportions — in the thousands of dollars for a basic action, in the millions for a major action with electronic discovery.

The likelihood that disclosure of documents to a government agency may result in waiver of privilege as against other parties may limit a party's willingness to cooperate fully with a government investigation.

With regard to the inadvertent waiver and scope of waiver issues, the cases differ widely on such matters as the effect of an inadvertent disclosure and the scope of the subject matter if a waiver or forfeiture is found. Stipulations or case-management orders saving the privilege, at least against inadvertent disclosure, have become common. Nevertheless, as will be discussed, such orders are of somewhat limited usefulness.

With regard to selective waivers, most federal circuits hold, at least without a confidentiality agreement, that a party may not selectively waive a privilege. In other words, disclosure to a government agency literally destroys the privilege. One circuit, the Eighth, holds to the contrary. The other circuits are split on whether the existence of a confidentiality agreement with the government agency preserves the privilege against the rest of the world.

This memorandum seeks to flesh out the dimensions of these interrelated problems, to discuss the case law dealing with the issues, and to propose some statutory models intended to ease the burden on the courts and counsel.

Inadvertent waiver and scope of waiver: the problem

The best formal statement of these two related problems is contained in Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605, 1606-07 (1986).

Marcus sets forth the concerns as follows:

> . . . [E]normous energy can be expended to guarantee that privileged materials are not inadvertently revealed in discovery, and lawyers may adopt elaborate witness preparation strategies in order to prevent witnesses from seeing privileged materials. Judges also feel the burden; where waiver is at stake, parties will litigate privilege issues that otherwise would not require judicial attention. Finally, for those not lucky or wealthy enough to adopt strategies that avoid waiver, broad waiver rules erode the reliability of the privilege. In recognition of these costs, courts are increasingly willing to enter orders preserving privilege despite disclosure in order to facilitate the pretrial preparation process. Although commendable, these orders appear totally unenforceable under classical waiver doctrine.

See also, Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 Wis. L. Rev. 31, 73; *Paul R. Rice, Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 Duke L. J. 853 (1998).

Although the Marcus piece is now almost twenty years old, its description of the problem is still largely current. Perhaps the only things that have changed are the even more frequent use of protective orders to deal with inadvertent disclosures in discovery and the added complexities caused by the increasing existence of electronically stored information.

The Report of the Civil Rules Advisory Committee (May 17, 2004, Revised, August 3, 2004) dealing with proposed amendments concerning electronic discovery specifically notes the problem as well as the attempts of parties to deal with the issue by protocols minimizing the risk of waiver.[1] The Committee notes (p. 8):

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[1]The Civil Rules Advisory Committee elected to use the term "waiver" in connection with even inadvertent or unintended disclosures of privileged material. Technically, such disclosures may result in a "forfeiture" rather than a "waiver," which by definition would be intentional. Nevertheless, the courts have consistently used the term "waiver" in connection with unintentional disclosures, and this memorandum and the draft Rule 502 continue that use of terminology.

Such protocols may include so-called quick peek or claw back arrangements, which allow production without a complete prior privilege review and an agreement that production of privileged documents will not waive the privilege.

The Civil Rules Committee Report cites the Manual for Complex Litigation (4th) § 11.446, setting forth the same issue:

> A responding party's screening of vast quantities of unorganized computer data for privilege prior to production can be particularly onerous in those jurisdictions in which inadvertent production of privileged data may constitute a waiver of privilege as to a particular item of information, items related to the relevant issue, or the entire data collection. Fear of the consequences of inadvertent waiver may add cost and delay to the discovery process for all parties. Thus, judges often encourage counsel to stipulate at the outset of discovery to a "nonwaiver" agreement, which they can adopt as a case-management order. Such agreements protect responding parties from the most dire consequences of inadvertent waiver by allowing them to "take back" inadvertently produced privileged materials if discovered within a reasonable period, perhaps thirty days from production.[2]

The Civil Rules Committee's concern for the problem is reflected in its proposed amendments to Rules 16(b)(6) and 26(f)(4) and Form 35 providing that if the parties can agree to an arrangement that allows production without a complete privilege review and protects against waiver, the court may enter a case-management order adopting that agreement.

However, although a protective or case-management order may be quite useful as among the parties to a particular litigation, it is likely to have no effect with regard to persons or entities outside the litigation. As Marcus indicates in the statement quoted above, protective orders "appear totally unenforceable under classical waiver doctrine."

Moreover, even if the courts were to hold that a stipulation or protective order is effective to guard against waiver with regard to parties outside the litigation, problems still exist. For example, such orders may deal only with inadvertent disclosures. Questions may and do arise under

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[2]An example of a case-management order dealing with disclosure of privileged documents is contained in *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 1995 WL 411805 at * 4 (Del. Super.Ct. Mar. 17, 1995), where the court quotes the order as stating:

> The production of a privileged document shall not constitute, or be deemed to constitute, a waiver of any privilege with respect to any document not produced. The production of a document subject to a claim of privilege or other objection and the failure to make a claim of privilege or other objection with respect thereto shall not constitute a waiver of a privilege or objection. . . .

such orders as to what is an inadvertent disclosure. See *Baxters Travenol Labs., Inc. v. Abbott Labs.*, 117 F.R.D. 119 (N.D. Ill. 1987) (disclosure not inadvertent under the circumstances).

Thus, an order requiring the return of an inadvertently disclosed document may help in the instant litigation, but it still requires careful counsel to claim privilege even where she doesn't care about disclosure, and it still requires counsel to conduct an extensive pre-production review for privilege.

Because both concepts are important to a discussion of possible legislative remedies for the above described problem, the next two sections of this memorandum attempt briefly to describe the case law on 1) the effect of inadvertent waiver and 2) the scope of waiver based upon disclosure of documents during the litigation process.

Inadvertent waiver

The courts have taken three different approaches to inadvertent disclosure: 1) inadvertent disclosure does not waive the privilege even with regard to the disclosed document; 2) inadvertent disclosure waives the privilege regardless of the care taken to prevent disclosure; 3) inadvertent disclosure may waive the privilege depending upon the circumstances, especially the degree of care taken to prevent disclosure of privileged matter and the existence of prompt efforts to retrieve the document.

Perhaps the fewest number of cases take the first approach finding no waiver from inadvertent disclosure. The leading case is *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 955 (1982). The court stated:

> Mendenhall's lawyer (not trial counsel) might well have been negligent in failing to cull the files of the letters before turning over the files. But if we are serious about the attorney-client privilege and its relation to the client's welfare, we should require more than such negligence by counsel before the client can be deemed to have given up the privilege. [citing Dunn Chemical Co. v. Sybron Corp., 1975-2 Trade Cas. ¶ 60,561 at 67,463 (S.D.N.Y. 1975)] No waiver will be found here.

See also *Conn. Mut. Life Ins. Co. v. Shields*, 18 F.R.D. 448 (S.D.N.Y. 1955) (no evidence of intent to waive privilege).

The opposite approach has been taken by a significant number of courts. Among the more frequently cited cases holding that an inadvertent disclosure waives the privilege regardless of the circumstances is *International Digital Systems Corp. v. Digital Equipment Corp.*, 120 F.R.D. 445, 449-50 (D. Mass. 1988). The court in *International Digital Systems* analyzed the three different approaches to inadvertent disclosure. The court is particularly critical of the approach that analyzes

the precautions taken, noting that if precautions were adequate "the disclosure would not have occurred." It added:

> When confidentiality is lost through "inadvertent" disclosure, the Court should not look at the intention of the disclosing party. . . . It follows that the Court should not examine the adequacy of the precautions taken to avoid "inadvertent" disclosure either.

The court adds that a strict rule "would probably do more than anything else to instill in attorneys the need for effective precautions against such disclosure." 120 F.R.D. at 450.

The court in *International Digital Systems* relied upon *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546, 549 (D.D.C. 1970). In that case, the court stated:

> The Court will not look behind this objective fact [of disclosure] to determine whether the plaintiff really intended to have the letter examined. Nor will the Court hold that the inadvertence of counsel is not chargeable to his client. Once the document was produced for inspection, it entered the public domain. Its confidentiality was breached thereby destroying the basis for the continued existence of the privilege.

In accord are *Harmony Gold U.S.A., Inc. v. FASA Corp.*, 169 F.R.D. 113, 117 (N.D.Ill. 1996) ("With the loss of confidentiality to the disclosed documents, there is little this court could offer the disclosing party to salvage its compromised position."); *Ares-Serono v. Organon Int'l. B.V.*, 160 F.R.D. 1 (D. Mass. 1994) (trade secrets privilege); *Wichita Land & Cattle Co. v. Am. Fed. Bank, F.S.B.* 148 F.R.D. 456 (D.D.C. 1992) (attorney-client and work product privileges).

The third or balanced approach is also taken by a significant number of courts. Many decisions cite the factors for determining whether waiver exists as a result of inadvertent disclosure set forth in *Hartford Fire Insurance Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985). In *Hartford Fire*, the Court relied upon the analysis in an earlier case, *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D.N.Y. 1985), which had found the following elements significant in deciding the existence of a waiver, calling it the "majority rule":

> (1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time taken to rectify the error, (3) the scope of discovery; (4) the extent of the disclosure; and (5) the "overriding issue of fairness."

The court in *Hartford Fire* found there had been waiver under the circumstances.

Other cases among the many taking a similar balancing approach to inadvertent disclosure include *Alldread v. City of Grenada*, 988 F.2d 1425 (5th Cir. 1993) (governmental privilege); *Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576-77 (D. Kan. 1997) (work product privilege); *Hydraflow, Inc. v. Enidine, Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege); *Edwards v. Whitaker*, 868 F.Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege).

For more detailed descriptions of the various approaches see John T. Hundley, Annotation, *Waiver of Evidentiary Privilege by Inadvertent Disclosure – Federal Law*, 159 A.L.R. Fed. 153 (2005); Note, Jennifer A. Hardgrove, *Scope of Waiver of Attorney-Client Privilege: Articulating a Standard That Will Afford Guidance to Courts*, 1998 U.Ill. L. Rev. 643, 659.

The scope of waiver based upon disclosure of documents during the litigation process

A decision that an inadvertent disclosure results in waiver with respect to the disclosed document does not necessarily mean that the privilege is waived with regard to all communications dealing with the same subject matter. As in the case of the effect of an inadvertent disclosure with regard to a disclosed document, there are various approaches to the issue of subject matter waiver.

Some courts hold that even where an inadvertent disclosure results in a waiver with regard to the disclosed documents themselves, there is no waiver with regard to other communications – even those dealing with precisely the same subject matter.

For example, in *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., Inc.* 132 F.R.D. 204 (N.D. Ind. 1990), the court found that there had been a waiver of the attorney client privilege based upon an inadvertent disclosure. Waiver was found under either the strict or balancing approach. However, the court limited the waiver to the actual document produced, stating (132 F.R.D. at 208):

> Laying aside for the moment the question of whether the attorney-client privilege has been waived as to the letter, the court could find no cases where unintentional or inadvertent disclosure of a privileged document resulted in the wholesale waiver of the attorney-client privilege as to undisclosed documents concerning the same subject matter. [citing Marcus, supra, at 1636].

International Digital Systems Corp. v. Digital Equipment Corp., 120 F.R.D. 445, 449-50 (D. Mass. 1988), discussed above, is a leading case for the strict approach to inadvertent disclosure. Yet, the court in that case refused to find subject matter waiver.

In *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46, 52 (M.D.N.C. 1987), the court used the balancing test to find waiver with regard to an inadvertent disclosure. However, the court noted:

> The general rule that a disclosure waives not only the specific communications but also the subject matter of it in other communications is not appropriate in the case of inadvertent disclosure, unless it is obvious a party is attempting to gain an advantage or make offensive or unfair use of the disclosure. In a proper case of inadvertent disclosure, the waiver should cover only the specific document in issue.

Despite the strong language in cases such as *Golden Valley*, other courts have in fact found subject matter waiver even where the disclosure was inadvertent. *E.g., In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989); *In re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir. 1984); *Nye v. Sage Prods., Inc.*, 98 F.R.D. 452 (N.D. Ill. 1982) (court notes that plaintiffs had secured no agreement from defendants that inadvertent disclosure would not waive privilege with respect to other documents); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1974) (statement of intent not to waive privilege ineffective); *Malco Mfg. Co. v. Elco Corp.*, 307 F. Supp. 1177 (E.D. Pa. 1969) (attempt to reserve privilege ineffective).

Other courts have applied a subject matter waiver but have limited that waiver in some way based upon the circumstances – often indicating a concern for fairness to both of the parties. For example in *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 156 (D. Del. 1977), the court applied subject matter waiver but noted:

> The privilege or immunity has been found to be waived only if facts relevant to a particular, narrow subject matter have been disclosed in circumstances in which it would be unfair to deny to the other party an opportunity to discover other relevant facts with respect to that subject matter.

See also *In re Grand Jury Proceedings Oct. 12, 1995*, 78 F.3d 251 (6th Cir. 1996) (intentional, non-litigation disclosure; waiver of subject matter, but subject matter limited under the circumstances); *Weil v. Inv./Indicators, Research and Mgmt., Inc.*, 647 F.2d 18 (9th Cir. 1981) (subject matter waiver; however, because disclosure made early in proceedings and to opposing counsel rather than the court, the subject matter of the waiver is limited to the matter actually disclosed and not related matters); *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989) (determination of subject matter of waiver depends on the factual context); *Goldman, Sachs & Co. v. Blondis*, 412 F. Supp. 286 (D.C. Ill. 1976) (disclosure at deposition; waiver limited to specific matter disclosed at deposition rather than broader subject matter); *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455 (D.C. Cal. 1978) (same).

The Marcus article surveys the cases up to that point in time in great depth. The author uses the case of *Transamerica Computer Co. v. IBM*, 573 F.2d 646 (9th Cir. 1978) as an example of a court that appropriately considered the circumstances of the case in determining the existence of waiver. In *Transamerica Computer*, the court considered whether the inadvertent disclosure of documents in an earlier case waived the privilege in this case. The court determined that it did not, based upon the extreme logistical difficulties of protecting documents in the earlier case.

Marcus argues that waiver should be analyzed in terms of fairness, stating, "the focus should be on the unfairness that results from the privilege-holder's affirmative act misusing the privilege in some way." (84 Mich. L. Rev. at 1627). Elsewhere in the article, the author states (84 Mich. L. Rev. at 1607-08):

> This article therefore concludes that the focus should be on unfairness flowing from the act on which the waiver is premised. Thus focused, the principal concern is selective use of privileged material to garble the truth, which mandates giving the opponent access to related privileged material to set the record straight. . . .
>
> Contrary to accepted dogma that all disclosures work a waiver, the article suggests that there is no reason for treating disclosure to opponents or others as a waiver unless there is legitimate concern about truth garbling or the material has become so notorious that decision without that material risks making a mockery of justice.

Marcus expands on his "truth garbling" point later in the article where he raises the possibility that the use of disclosed information, while still protecting other information through the exercise of the privilege, might result in a distortion of the facts. He refers to cases involving the Fifth Amendment privilege against self-incrimination, including *Rogers v. United States*, 340 U.S. 367, 371 (1951). Marcus notes (84 Mich. L. Rev. at 1627-28):

> Similarly with the attorney-client privilege, the courts have condemned "selective disclosure," in which the privilege-holder picks and chooses parts of privileged items, disclosing the favorable but withholding the unfavorable. It is the truth-garbling risk that results from such affirmative but selective use of privileged material, rather than the mere fact of disclosure, that justifies treating such revelations as waivers.

Even where there is no use of the disclosed communications by the privilege holder, it is also possible that the matter disclosed has become so much a part of the common knowledge that protection of the other communications dealing with the same subject matter makes no sense. Marcus states (84 Mich. L. Rev. at 1641- 42):

> At some point widespread circulation of privileged information threatens to make a mockery of justice if, due to his inability to obtain the information or offer it in evidence, the opponent is subjected to a judicial result that many others (who do have the information) know to be wrong. Very strong fairness arguments then counsel disclosure, and the interest in preserving the privilege diminishes to the vanishing point. This, indeed, seems to be a central concern of courts that condemn "selective disclosure" to some but not others.

Selective Waiver

Only the Eighth Circuit has held that a selective waiver of the attorney-client privilege applies whenever a client discloses confidential information to a federal agency. Other courts

have suggested that a selective waiver may apply if the client has clearly communicated his or her intent to retain the privilege, such as by entering into a confidentiality agreement with the federal agency. The First, Third, Fourth, Sixth, and D.C. Circuits have expressly held that when a client discloses confidential information to a federal agency, the attorney client privilege is lost. Cases from the Third and Sixth Circuits have held that disclosure destroys the privilege, even in the presence of a confidentiality agreement.

Cases permitting selective waiver

The court in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) adopted a selective waiver approach. Diversified Industries had conducted an internal investigation over a possible "slush fund" that may have been used to bribe purchasing agents of other corporations to buy its product. The Securities and Exchange Commission instituted an official investigation of Diversified and subpoenaed all documents relating to Diversified's internal investigation. Without entering into a confidentiality agreement, Diversified voluntarily complied with the SEC's request. Subsequently, Diversified was sued by one of the corporations affected by the alleged bribery scandal. The plaintiff in that suit sought discovery of the materials disclosed to the SEC, arguing that the attorney-client privilege was waived when privileged material was voluntarily disclosed to the SEC. The Eighth Circuit rejected this argument, holding that because the documents were disclosed in a "separate and nonpublic SEC investigation . . . only a limited waiver of the privilege occurred." 572 F.2d at 611. The court explained, "To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them. . . ." Id.

Some district courts outside the Eighth Circuit have adopted the *Diversified* approach to waiver, holding that the attorney-client privilege may be selectively waived to federal agencies even in the absence of an agreement by the agency to keep the information confidential. For example, in *In re Grand Jury Subpoena Dated July 13, 1979*, 478 F. Supp. 368, 373 (D. Wis 1979), the court held that cooperation with federal agencies should be encouraged, and therefore refused to treat disclosure of privileged information to the SEC as a waiver of the corporation's attorney-client privilege. See also *In re LTV Sec. Litig.*, 89 F.R.D. 595, 605 (N.D. Tex. 1981), where the court held that disclosure of privileged information to a federal agency does not always constitute an implied waiver of the attorney-client privilege. The court explained that, because the client did not intend to waive the privilege and assertion of the privilege was not unfair, the client's "disclosure of . . . materials to the SEC does not justify [a third party's] discovery of the identity of those documents. . . ."

General rejection of selective waiver

In *United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997), the court held that the attorney-client privilege was lost when MIT disclosed privileged materials to the Department of Defense. The documents had been disclosed voluntarily to the DOD pursuant to a regular audit. The same documents were sought as part of an IRS investigation. In rejecting the *Diversified* approach, the court explained that selective waiver was unnecessary because "agencies usually have means to secure the information they need and, if not, can seek legislation from Congress." 129 F.3d at 685. The court added that applying the general principle of waiver of privilege to any third party disclosure "makes the law more predictable and certainly eases its administration. Following the Eighth Circuit's approach would require, at the very least, a new set of difficult line-drawing exercises that would consume time and increase uncertainty." Id.

Reporter's Comment: The *MIT* rationale ignores the fact that while regulators might have the "means to secure the information they need," those "means" may 1) require substantial effort and cost, and 2) may never lead to the recovery of privileged information. Judge Boggs has critiqued the *MIT* rationale as follows:

> The court, as well as other courts addressing this question, argues that the government has "other means" to secure the information that they need, while conceding that those other means may consume more government time and money. *Massachusetts Inst. of Tech.*, 129 F.3d at 685. Presumably, the court is referring to search warrants or civil discovery. It should be emphasized, however, that the government has no other means to secure otherwise privileged information. That the documents or other evidence sought is privileged permits the target of an investigation to refuse production through civil discovery, to quash any subpoena duces tecum, or to prevent the admission of the privileged information even by the government. The only way that the government can obtain privileged information is for the holder of the privilege voluntarily to disclose it. The court's argument about the adequacy of other means, suggesting that the only difference between them and voluntary disclosure is cost, requires the premise that all privileged information has a non-privileged analogue that is discoverable with enough effort. That premise, however, does not hold.

In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 311 (6th Cir. 2002) (Boggs, J., dissenting). Thus, a waiver rule that promotes voluntary disclosure — without resort to these other means, which are unlikely to be successful anyway — promotes efficiency and saves expense on the part of the government.

In *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981), Permian sought attorney-client protection for documents sought by the Department of Energy. The documents had previously been disclosed to the SEC. The court rejected the approach of the *Diversified* case and held that the

privilege had been waived by the SEC disclosure. The court stated that "[v]oluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship." 665 F.2d at 1221. The court added that the "client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit. . . . The attorney-client privilege is not designed for such tactical employment." Id.

Rejection of selective waiver even with a confidentiality agreement

Two prominent cases, from the Third and Sixth circuits, have rejected selective waiver, even when privileged material is disclosed to a federal agency pursuant to a confidentiality agreement.

In *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991), Westinghouse had voluntarily turned over privileged material to the SEC and to the Department of Justice in connection with investigations concerning the bribing of foreign officials. Westinghouse said that its disclosures to the SEC were made in reliance upon SEC regulations providing that "information or documents obtained in the course of an investigation would be deemed and kept confidential by SEC employees and officers unless disclosure was specifically authorized." 951 F.2d at 1418, n. 4 citing 17 C.F.R. § 240.0-4 (1978). The disclosures to the DOJ were subject to an agreement expressly providing that review of corporate documents would not constitute a waiver of Westinghouse's work product and attorney-client privileges. The Republic of the Philippines brought suit against Westinghouse alleging the bribing of former President Marcos to obtain a power plant contract. The Republic sought discovery of the documents Westinghouse had previously disclosed to the federal agencies. The court held that Westinghouse had waived the attorney-client privilege by its voluntary disclosure of privileged material to the SEC and DOJ. The court noted (951 F.2d at 1425):

> [S]elective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose. . . . Moreover, selective waiver does nothing to promote the attorney-client relationship; indeed, the unique role of the attorney, which led to the creation of the privilege, has little relevance to the selective waiver permitted in Diversified. . . .
>
> The traditional waiver doctrine provides that disclosure to third parties waives the attorney-client privilege unless the disclosure serves the purpose of enabling clients to obtain informed legal advice. Because the selective waiver rule in *Diversified* protects disclosures made for entirely different purposes, it cannot be reconciled with traditional attorney-client privilege doctrine. Therefore, we are not persuaded to engraft the *Diversified* exception onto

the attorney-client privilege. Westinghouse argues that the selective waiver rule encourage corporations to conduct internal investigations and to cooperate with federal investigativ agencies. We agree with the D.C. Circuit that these objectives, however laudable, are beyon the intended purposes of the attorney-client privilege, see *Permian*, 665 F.2d at 1221, an therefore we find Westinghouse's policy arguments irrelevant to our task of applying th attorney-client privilege to this case. In our view, to go beyond the policies underlying th attorney-client privilege on the rationale offered by Westinghouse would be to create a entirely new privilege.

The court also noted that in 1984, Congress had rejected an amendment to the Securities an Exchange Act of 1934, proposed by the SEC, that would have established a selective waiver rul regarding documents disclosed to the agency. 951 F.2d at 1425, citing SEC Statement in Suppo of Proposed § 24(d) of the Securities and Exchange Act of 1934, in 16 Sec.Reg. & L.Rep. at 46 (March 2, 1984). A regulation to the same effect was proposed, but not adopted, in connection wit the Sarbanes-Oxley Act. See proposed 17 C.F.R. § 205.3 (e)(3), http://www.sec.gov/rules/final/33 8185.htm (Viewed Oct. 5, 2005). The Commission indicated that the regulation, although include in the final draft of the regulations implementing Sarbanes-Oxley, was not adopted because of th Commission's concern about its authority to enact such a provision. In its final report, th Commission reiterated its position that there were strong policy reasons behind such a provision an that, because of those policy reasons, it still intended to enter into confidentiality agreements. Id.

Relevant to the question of scope of waiver, the court in *Westinghouse* also held that th privilege is waived only as to those communications actually disclosed, "unless a partial waive would be unfair to the party's adversary." Id. at 1426 n.12. If partial waiver disadvantages th adversary by allowing the disclosing party to present a one-sided story to the court, the privileg would be waived as to all communications on the same subject.

The court in *Westinghouse* distinguished between the attorney-client and work produc privileges and stated that a disclosure to another party might not necessarily operate as a waiver o the work product privilege. Disclosures in aid of an attorney's preparation for litigation would stil be protected. However, the court found that disclosure to the federal agencies in this instance did operate as a waiver, because the disclosures were not made to further the goal underlying the work product doctrine – the protection of the adversary process. Id. at 1429.

The court in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002) also rejected a selective waiver doctrine for both the attorney-client and work product privileges, even in the face of an express confidentiality agreement. In that case, the Department of Justice had conducted an investigation of possible Medicare and Medicaid fraud. Columbia/HCA had disclosed documents to the DOJ under an agreement with "stringent" confidentiality provisions. Id. Numerous lawsuits were then instigated against Columbia/HCA by insurance companies and private individuals. These plaintiffs sought discovery of the materials disclosed to the DOJ. Columbia/HCA raised attorney-client and work product privilege objections. The court expressly rejected the application of selective waiver for either privilege under these

circumstances. In rejecting the argument that the confidentiality agreement precluded waiver, the court noted that the attorney-client privilege was "not a creature of contract, arranged between parties to suit the whim of the moment." Id. at 303. The court further reasoned that allowing federal agencies to enter into confidentiality agreements would be to allow those agencies to "assist in the obfuscating the truth-finding process." Id.

Reporter's Comment: The court in *Westinghouse* recognizes that enforcement of selective waiver is good policy because it encourages cooperation with government investigations. But it dismisses this policy argument as "beyond the intended purposes of the attorney-client privilege." Yet at the point of disclosure to a government regulator, the relevant question is not the purpose of the attorney-client privilege, but rather whether the purposes behind the law of *waiver* of the privilege are effectuated. Judge Boggs, dissenting in *Columbia,* critiques the *Westinghouse* argument as follows:

> It is not clear why an exception to the third-party waiver rule need be moored to the justifications of the attorney-client privilege. More precisely, we ought to seek guidance from the justifications for the waiver rule to which the exception is made. Those justifications are not exactly coincident with the justifications for the privilege itself. * * * The preference against selective use of privileged material is nothing more than a policy preference, and really also has very little to do with fostering frank communication between attorney and client. The question for this court is one of policy: Whether the benefits obtained by the absolute prohibition on strategic disclosure outweigh the benefits of the information of which the government has been deprived by the rule? As the harms of selective disclosure are not altogether clear, the benefits of the increased information to the government should prevail.

Recognition of selective waiver where a confidentiality agreement exists

A few courts have at least indicated that they would recognize selective waiver where there was an express reservation of confidentiality before disclosure.

The leading decision taking this position is *Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.*, 521 F. Supp. 638 (S.D.N.Y. 1981). The court held in that case that a waiver of the attorney-client privilege occurs upon disclosure of privileged information to a federal agency "only if the documents were produced without reservation; no waiver [occurs] if the documents were produced to the SEC under a protective order, stipulation or other express reservation of the producing party's claim of privilege as to the material disclosed." Id. at 646. The

court noted:

> [A] contemporaneous reservation or stipulation would make it clear that . . . the disclosing party has made some effort to preserve the privacy of the privileged communication, rather than having engaged in abuse of the privilege by first making a knowing decision to waive the rule's protection and then seeking to retract that decision in connection with subsequent litigation.

In *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993), the court rejected the *Diversified* selective waiver approach with regard to prior disclosures of documents to the SEC that would otherwise have been protected as work product. However, after so holding, the court stated (Id. at 236):

> In denying the petition, we decline to adopt a per se rule that all voluntary disclosures to the government waive work product protection. Crafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis. . . . Establishing a rigid rule would fail to anticipate situations . . . in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials.

See also *Dellwood Farms, Inc. v Cargill,Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997) (claim of law enforcement privilege could have been maintained after government had disclosed information to a third party if the disclosure had been made under a confidentiality agreement); *Fox v. Cal./Sierra Fin. Serv.*, 120 F.R.D. 520, 527 (N.D. Cal. 1988) (privilege lost "without steps to protect the privileged nature of such information;" follows Teachers Insurance); *In re M & L Bus. Mach. Co.*, 161 B.R. 689, 697 (D. Colo. 1993) (prior disclosure to United States Attorney under a confidentiality agreement did not waive privilege against a private party).

II. Ken Broun's Memo on the Impact of the Draft Rule 502 on Waiver of Privilege in a State Action

If a statute or rule governing inadvertent waiver, scope of waiver and selective waiver of an evidentiary privilege is to be effective in eliminating the need for unnecessarily burdensome document review and rulings on privilege in mass document cases, the provision would have to be binding in all courts, state and federal. The proposed rule, as submitted to the Committee, is drafted with the intent to accomplish that end as broadly as possible, at least with regard to the attorney-client privilege and work product protection.

My conclusion is that, in order to be binding in both federal and state courts, the Rule would have to be enacted by Congress using both its powers to legislate in aid of the federal courts under Article III of the Constitution and its commerce clause powers under Article I. Although a Rule might be enacted, binding on the states, setting forth waiver rules for all evidentiary privileges where a disclosure is made in the course of federal litigation, a Rule governing disclosure in other circumstances would have to be limited to areas that affect interstate commerce – probably limiting the permissible scope to attorney-client privilege and work product protection. A separate rule might be considered that dealt with disclosures of matters covered by other privileges (e.g., marital communications or psychotherapist-patient communications) in the course of litigation. However, virtually all of the waiver problems that the Committee is trying to address concern the attorney-client privilege or work-product protection.

1. Possible limitations on federal court rulings dealing with waiver of privilege

A. Power to bind the states in the absence of a Rule

In the absence of a Congressionally-adopted rule, there may well be limitations on the power of a federal court to bind the state courts with regard to waiver or non-waiver of an evidentiary privilege.

There is no question that a federal court has the power to limit the use of information obtained in discovery. Protective orders, especially those involving trade secrets, abound and have universally been upheld. See *E.I. DuPont De Nemours Powder Co. v. Masland,* 244 U.S. 100, 103 (1917); *Chem. & Indus. Corp. v. Druffel,* 301 F.2d 126, 130 (6th Cir. 1962); 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2043.

However, limiting the use of documents or even information obtained in discovery is different from ruling that disclosures or other actions taken in federal court do or do not constitute a waiver of state evidentiary privileges. The most significant case dealing with this issue is *Bittaker v. Woodford,* 331 F.3d 715 (9th Cir. 2003). *Bittaker* was an *en banc* decision of the Ninth Circuit involving the scope of a habeas petitioner's waiver of the attorney-client privilege. The district court

had held that the petitioner had waived the attorney-client privilege by filing a claim based on ineffective assistance of counsel. The court, however, entered a protective order precluding use of the privileged materials for any purpose other than litigating the federal habeas petition – including barring the state from use of the information in a re-prosecution. The state appealed claiming that the court had no authority to prevent a state court from dealing with the issue of waiver of privilege under state privilege rules. A majority of the *en banc* court, in an opinion written by Judge Kozinski, held that the district court's order effectively determined that there would be no waiver of the privilege in a subsequent state trial. The court held that the district court had the power to determine the limits of the waiver and to make that determination binding on the state courts. The opinion noted that a waiver limiting the use of privileged communications to adjudicating the ineffective assistance of counsel claim fully serves federal interest as well as preserving "the state's vital interests in safeguarding the attorney-client privilege in criminal cases." 331 F.3d at 722. The court further noted that the courts of California "remain free, of course to determine whether Bittaker waived his attorney-client privilege on some basis *other than* his disclosure of privileged information during the course of the federal litigation." 331 F.3d at 726. [emphasis by the court]

On one level, Judge Kozinski's opinion is compelling from a policy standpoint. Limiting the use of information covered by the attorney-client privilege to dealing with the ineffective assistance appropriately limits the waiver to what is necessary to resolve the petitioner's claim. Arguably, the petitioner would pay too high a price for his attack on the prosecution if the information were to be permitted to be used by the state in a re-prosecution. Yet, the two concurring judges also make a valid point, one relevant to the power of the federal courts in dealing with waiver of privilege in a statute or rule such as we have under consideration. Judges O'Scannlain and Rawlinson concurred in *Bittaker* on the basis that the judge's order should not be interpreted as dealing with the scope of the privilege under state law. Rather, the order should be interpreted as preventing the use of information obtained in the federal litigation but would not prevent the state from the use of the same information obtained from another source if the California law would so permit. The privilege law of California would govern in any re-prosecution of the defendant. The courts of that state should be free to determine whether or not the privilege had been waived. The federal courts have a right to limit the use of information obtained in connection with its litigation – as in trade secrets cases – but no power to determine the application of a state privilege in the state courts.

At least one lower court has refused to issue an order having the effect that the majority in *Bittaker* prescribed. In *Fears v. Bagley,* 2003 WL 23770605 (S.D. Ohio 2003), the court rejected the reasoning of the majority in *Bittaker* and ordered only that the state would be bound to keep the information obtained confidential but that the court would not decide the issue of waiver of privilege in a subsequent state court proceeding.

Even though not a controlling precedent, the *Bittaker* case is useful in framing the issues. Although, as the court notes, the case involves a waiver by implication rather than an intentional or inadvertent disclosure of a privilege document (see 331 F.3d at 719-20), the case squarely presents the issue of the power of a federal court, at least in the absence of a Congressionally-enacted rule

to affect the future application of a state court privilege. As the divided opinion in *Bittaker* graphically illustrates, the result is far from clear.

B. The effectiveness of a Federal Rule of Evidence or Civil Procedure, adopted under Congress's Article III powers, to bind the states

That the question of whether an individual court has the power to issue an order affecting subsequent state court proceedings is in doubt does not necessarily mean that such a power might not be conferred by rule or statute. Arguably, an issue such as that raised in *Bittaker* could be based on the absence of a common law rule conferring authority on the court to make such orders binding on the state courts – an absence that might be corrected by the adoption of a rule or statute governing the issue.

28 U.S.C. § 2074(b), providing that any "rule creating, abolishing, or modifying an evidentiary privilege" must be approved by an act of Congress, was adopted by Congress and obviously could be modified or eliminated by Congress. Furthermore, Congress could itself adopt a Rule without going through the Rules Enabling Act, 28 U.S. C. § 2072(b). *See, e.g.,* Fed. R. Evid. 413-415.

A rule that governed the effect on evidentiary privilege of disclosure of a document in the course of federal court litigation would almost certainly survive an attack on its constitutionality. Congress has broad powers to legislate in aid of the federal courts, whether through the Rules Enabling Act process or independently. Congress's power stems from Article III, §1 and Article I, § 8 cl. 9, giving it power to establish lower tribunals, as well as the necessary and proper clause of Article I, § 8, cl. 18. The broad power of Congress to describe and regulate modes of proceeding was established early in our Constitutional history. *See Wayman v. Southard,* 23 U.S. 1 (1825); *Livingston v. Story,* 34 U.S. 632, 656 (1835). *See also* the often quoted dissent by Justice Reed in *Erie RR v. Tompkins,* 304 U.S. 64, 92 (1938) ("no one doubts federal power over procedure").

Some have argued that the power of Congress to enact legislation dealing with procedural matters is broader than that delegated to the courts under the Rules Enabling Act. *See, e.g.,* Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 Notre Dame L. Rev. 47, 94, 103 (1998).[3] However, whatever the merit of the debate over the extent of

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[3]Authors like Kelleher question whether Congress intended to delegate to the courts all of its power to establish procedure under Article III and the necessary and proper clause of Article I. Section 2072(b) prohibits rules that abridge, enlarge or modify any substantive right. The limitation was intended to reach not only federalism concerns but also to deal with the allocation of authority between Congress and the Courts. See Stephen B. Burbank, *The Rules Enabling Act of 1934,* 130 U.Pa.L.Rev. 1015, 1187 (1982). Certainly, Congress has established statutes dealing with clearly procedural matters, such as venue (28 U.S. C. § 1391) outside of the rules process. The argument is that there are certain policy matters, even though involving procedure, that

Congressional delegation, the issue is moot if the Rule is in fact enacted by Congress rather than promulgated through the Rules Enabling Act process.

It is unlikely that a rule limited to disclosures made in the course of federal litigation would be held invalid. *Hanna v. Plumer,* 380 U.S. 460, 472 (1965) established that the Congress's power delegated under the Rules Enabling Act extends to matters that fall in the "uncertain area between substance and procedure, [but] are rationally capable of classification as either." The Court has never found a Rule invalid for impermissibly affecting a substantive right, see, *e.g.,* Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court is Doing a Halfway Decent Job in its Erie-Hanna Jurisprudence,* 73 Notre Dame L. Rev. 963 (1998); Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23,* 39 Ariz. L. Rev. 461 (1997).

One could argue about whether rules governing evidentiary privileges are essentially procedural or essentially substantive. However, even writers who objected to the enactment of the proposed Federal Rules of Evidence governing privilege assumed the power of Congress to enact such rules, arguing against their adoption on policy grounds. *See, e.g.,* Louise Weinberg, *Choice of Law and the Proposed Federal Rules of Evidence: New Perspectives,* 122 U. Penn. L. Rev. 594 (1974). *See also* Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law,* 82 Geo. L. J. 1781 (1994) (arguing for an amendment of Fed.R.Evid.501 to provide for deference to state privileges in most cases).

The ability of the Rules to bind state court actions has been clearly established. For example, a federal court determination of the preclusive effect of a judgment controls state action with regard to that judgment. *Semtek Intl. Inc. v. Lockheed Martin Corp.,* 531 U.S. 497 (2001). *See also Stewart Organization v. Ricoh,* 487 U.S. 22 (1988) (federal law, not state law with regard to enforceability of forum selection clauses governed transfer under 23 U.S.C. § 1404); *Burlington Northern RR v. Woods,* 480 U.S. 1 (1987) (Fed.R.App.P 38, not state law, governed issue of damages after unsuccessful appeal).

The principle of the supremacy of federal law has been applied to state procedural rules where federal substantive law is preemptive. *See, e.g., Felder v. Casey,* 487 U.S. 131 (1988) (federal civil rights law prevented state from applying its notice of claim rule in a federal civil rights action filed in state court); *Dice v. Akron, C. & Y.R. Co.,* 342 U.S. 359 (1952) (validity of a release under

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should be left to Congress at least in part because state interests are in fact represented in Congress. *See* Paul J. Mishkin, *Some Further Last Words on Erie – The Thread,* 87 Harv. L. Rev. 1682, 1685 (1974). For example, under § 2074(b), Congress left for itself issues involving evidentiary privileges. It determined that it should decide such issues; it did not determine that legislation about such issues was beyond its powers. See Kelleher, 74 Notre Dame L. Rev. at 111.

Federal Employers Liability Act determined by federal law); *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949) (federal pleading test should have been applied in FELA action filed in state court).

On the other hand, it would be difficult to argue that a Rule governing the effect of a disclosure outside of the litigation process – e.g., disclosure to an administrative agency or in private settlement negotiations before any litigation had begun – would be within the power of Congress under Article III.

Despite the wide berth to enact procedural rules established both in the cases and the legal literature, the language in *Hanna* would have to be considered on its face – the rule would have to be rationally capable of classification as either substance or procedure. Fairly recent cases, although not invalidating rules of procedure, have interpreted the rules somewhat narrowly so as to avoid application in a way that might conflict with state substantive policy. *See, e.g., Kamen v. Kemper Financial Services Inc.*, 500 U.S. 90 (1991) (limitations on application of Fed.R.Civ. P. 23.1 dealing with the demand requirement in a shareholders derivative action); *Gasperini v. Center for Humanities, Inc.*, 518 U. S. 415 (1996) (application of Fed.R. Civ.P. 59 and the test for granting a new trial); *Amchem Products, Inc. v. Windsor*,521 U.S. 591 (1997) (settlement class certification under Fed.R.Civ.P. 23 interpreted in light of constitutional limitations on the powers of Congress).

Any Rule seeking to have an effect beyond disclosure in the course of litigation would likely face a challenge that it was not rationally capable of classification as procedural. Arguments could be made in support of such legislation – *e.g.*, that the most significant likely impact of the waiver rules would be in the federal courts – but the risk of a finding that the rule would not be binding on the states would be significant.

In order to prevent more constitutional comfort for a rule dealing with disclosures outside the litigation process, Congress's commerce powers would have to come into play.

C. The constitutionality of a Rule, binding on the states, governing waiver of evidentiary privilege if enacted by Congress under its Commerce Clause powers.

A strong argument could and has been made for a federalized attorney client privilege enacted by Congress under its Commerce Clause powers. (Art. I, §8, cl. 3). The Rule under consideration would federalize issues of inadvertent and selective waiver and scope of waiver with regard to the attorney-client privilege and attorney work-product protection. If the power exists for a federalized attorney-client privilege, presumably a rule that affected only an aspect of that privilege, and its close relative – work-product protection – would also pass constitutional scrutiny.

Timothy P. Glynn, in his article, *Federalizing Privilege*, 52 Amer. U. L. Rev. 59, 156-171 (2002), argues that Congress would have the power under the Commerce Clause to enact a federal law of attorney-client privilege that would apply to the states. He recognizes that the Supreme Court has served notice that Congress's powers under the commerce clause have outer boundaries. Thus,

in *United States v. Lopez*, 514 U.S. 549 (1995), the Court invalidated an act making the possession of a gun on or near school premises a crime as beyond the commerce clause powers. It took the same action with regard to an act providing a federal civil remedy for the victims of gender-motivated violence. *United States v. Morrison,* 529 U.S. 598 (2000). Glynn points out the obvious differences between legislation such as that involved in *Lopez* and *Morrison* and a regulation that fosters and protects the economic and commercial activity between attorneys and clients. He adds that the "attorney-client privilege protects communications upon which the industry's article of commerce – provision of legal services depends." 52 Amer. U. L. Rev. 159.

Glynn also raises the possibility that Congressional action might be limited by Tenth Amendment considerations. There are recent cases that place limits on Congressional action because of a violation of principles of federalism. For example, in *New York v. United States,* 505 U.S. 144 (1992) the Court struck down a portion of the Low-Level Radioactive Waste Policy Amendments Act because it, in effect, required the states to implement legislation. Likewise, in *Printz v. United States,* 521 U.S. 898 (1997), the Court invalidated a provision in the Brady Handgun Violence Prevention Act that would have required law enforcement officers to administer a federal program. On the other hand, in *Reno v. Condon,* 528 U.S. 141 (2000), the Court upheld a provision of the Driver's Privacy Protect Act that made no such demands on state legislators or local executive officials.

The Rule under consideration makes no demands on the states like the legislation in *New York* and *Printz.* The rule is self-executing. It simply needs to be enforced by the courts of the state. At least one author has questioned the power of Congress under the Tenth Amendment to enact procedural rules unconnected with substantive federal rights. *See* Anthony J. Bellia Jr, *Federal Regulation of State Court Procedures,* 110 Yale L. J. 947 (2001). However, the legislation that was the focus of the Bellia article, the Y2K Act, involved notice to defendants before commencing suit – not a matter as integrally connected to the regulation of legal commerce as is the rule in question. Arguably, the attorney-client related protections involve substantive protections. The "privilege regulates, indeed protects and promotes, primary conduct and commercial activity – attorney-client communications and the provision of legal services– and serves interests wholly extrinsic to the litigation in which it is asserted." *See* Glynn, 52 Amer. U. L. Rev. at 165.

Although one could argue that Glynn takes the concept of a federal attorney-client privilege too far, politically and as a matter of policy, by proposing a federal law totally supplanting state attorney-client privileges, more modest legislation dealing simply with the existence and scope of waiver seems likely to be upheld. It is also arguable that the Article I commerce clause rationale may combine with the powers under Article III applicable in many instances to give a strong basis for the legislation.

Nevertheless, the likely validity of such legislation dealing with attorney-client privilege or work product protection may not extend to a statute that attempted to apply the same rules to evidentiary privileges generally. Perhaps one could argue that in many contexts the psychotherapist-patient privilege has some effect on commerce, although the concept stretches one's imagination.

It is even more difficult to argue for a statute that affected privileges such as those for marital or clergyman communications. Other privileges such as those involving law enforcement and the qualified journalist's privilege may involve additional constitutional analyses including a determination of the impact of the provisions on First or Sixth Amendment considerations.

Reporter's Comment: In drafting Rule 502 in light of Ken's analysis of statutory authority, we were cognizant of situations in which waiver questions might not affect interstate commerce, and in those situations, we decided as an initial matter not to extend the rule. The most important example is the rule on mistaken disclosures. That rule is limited to mistaken disclosures made during the course of discovery. Of course, mistaken disclosures may be made in other circumstances (e.g, a privileged document is mistakenly included in a package of other materials sent to a friend). But disclosures outside the litigation context might not affect interstate commerce, and so we decided not to cover those situations.

There may also be situations in which state proceedings are so localized that they do not affect interstate commerce, and in those cases a "federalized" waiver rule may be problematic. We chose, however, not to carve out those proceedings in the rule, for at least two reasons: 1) They may not exist; you don't have to go far to affect interstate commerce in a litigation; and 2) If they do exist, they are hard to describe. We thought it best to leave the matter to the implementing legislation.

III. Ken Broun's Memo on the Scope of Waiver of Work Product

Proposed Rule 502(a) extends the waiver of both attorney-client privilege and work product protection "to undisclosed information concerning the same subject matter if that undisclosed information ought in fairness to be considered with the disclosed information." Some members of the committee and others have raised the question of whether the draft proposed rule extends the waiver of work product privilege beyond the existing law.

Wright and Miller state that the disclosure of some documents does not destroy work-product protection for other documents. 8 C. Wright and A. Miller, Federal Practice and Procedure § 2024 at 209 (1970). However, an analysis of the cases dealing with the issue indicates that the statement is too broad. Rather, the scope of the waiver depends upon considerations of fairness that include the nature of the disclosure giving rise to the waiver and the subsequent use of the protected materials such as the presentation of testimony based on them. The case law is entirely consistent with the language of proposed draft Rule 502.

The most important case on waiver of work product privilege is *United States v. Nobles*, 422 U.S. 225 (1975). In *Nobles,* the Court held that the defendant would waive his work product privilege by calling his investigator to testify about interviews with two prosecution witnesses. The Court held that the investigator, if he testified, would have to disclose his report. The defendant refused to turn over the report and the investigator was precluded from testifying. The Court held that the preclusion was appropriate – if the investigator testified, the report would have to be disclosed. The testimony would waive the privilege "with respect to matters covered in his testimony." 422 U.S. at 239. In a footnote, the Court distinguished counsel's ordinary reference to notes during the course of the trial from testimonial use of such materials. The effect of the Court's ruling was that, not only was the work product protection waived with regard to matters directly reflected in the report but to all related matters – a subject matter waiver. *See also Chubb Integrated Systems, Ltd. v. National Bank of Washington,* 103 F.R.D. 52, 64 n. 3 (D.D.C. 1984) (*Nobles* cited for the proposition that "the testimonial use of work-product constituted waiver of all work-product of same subject matter").

More recent cases from the Courts of Appeal and District Courts reflect a view that subject matter waiver may be more limited than suggested in *Nobles* and that the limitation will depend upon consideration of fairness under the circumstances. Reflective of that view is *U.S. v. Doe*, 219 F.3d 175 (2d Cir. 2000). In *Doe*, a corporation had asserted its attorney-client and work-product privileges in its dealing with an ATF investigation concerning sales of firearms. A corporate officer testified and made references to advice of counsel. The primary question was whether his references to advice of counsel and disclosure of communications waived the corporation's attorney-client and work product privileges. The court noted that "the implied waiver analysis should be guided primarily by fairness principles." 219 F.3d at 185. The court indicated that the district court, in determining the existence and scope of waiver as a result of the corporate officer's disclosures, should consider such things as such as the witness's lack of legal training and the fact that the disclosures were made before the grand jury where the corporation could gain nothing affirmative.

Specifically with regard to waiver of work product privilege, the court stated (219 F.3d at 191), "[w]e believe that the district court on remand should consider further whether there was any waiver of Doe Corp.'s work-product privilege, and, if there was, the proper scope of the waiver. The fairness concerns that guide the waiver analysis above are equally compelling in this context." The court distinguished *Nobles* and *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988), discussed below, stating (*Id.*)

> In this case, however, there was no actual disclosure of any privileged documents. Further the context – a grand jury proceeding – is, as already indicated, quite different from settlement negotiations or voluntary disclosure programs where the company, initially at least, stand to benefit directly from disclosing privileged materials.

In *Duplan Corp. v. Deering Milliken, Inc.,* 540 F.2d 1215 (4th Cir. 1976), the court held that there would be no subject matter waiver of work product protection under the circumstances. In *Duplan,* the party seeking protection had made partial and inadvertent waiver of some of the claimed protected documents, which consisted of mental impressions, opinions and legal theories of their attorneys and representatives. In refusing to find subject matter waiver, the court distinguished *Nobles* on two grounds. First, in *Nobles,* the work product was a witness's report, not the mental impressions of a lawyer. Second, the court noted that in this case the party had "neither made nor sought to make any affirmative testimonial use of the documents for which the throwsters [the party seeking protection] claim the work product privilege." 540 F.2d at 1223. The court noted that the principles of *Nobles* may be applicable if the documents were in fact used at trial.

The Fourth Circuit expanded on its reasoning in *Duplan* in *In re Martin Marietta Corp.*, cited above. In *Martin Marietta,* the defendant in a criminal case sought documents from Martin Marietta, his former employer, relating to matters on which he had been indicted. Martin Marietta claimed attorney-client and work product privilege. Defendant argued that the privilege had been waived because documents or some portions of them had been disclosed by the corporation to the United States. Attorney and the Department of Defense. The Court found a subject matter waiver of the attorney client privilege based upon the disclosure to the government. With regard to the work product privilege, the court held that the delivery to the government constituted a testimonial use of the documents, as in *Nobles,* and held that there would be a subject matter waiver of non-opinion work product. However, it held that there was no subject matter waiver of opinion work product. The court emphasized the added protection given to such work product and added (856 F.2d at 626):

> [T]he underlying rationale for the doctrine of subject matter waiver has little application in the context of a pure expression of legal theory or legal opinion. As we noted in *Duplan*, the Supreme Court applied the concept in Nobles: "where a party sought to make affirmative testimonial use of the very work product which was then sought to be shielded from disclosure." . . . There is relatively little danger that a litigant will attempt to use a pure mental impression or legal theory as a sword and as shield in the trial of a case so as to distort the factfinding process. Thus, the protection of lawyers from the broad repercussions

of subject matter waiver in this context strengthens the adversary process, and, unlike the selective disclosure of evidence, may ultimately and ideally further the search for the truth.

Both *Duplan* and *Martin Marietta* hold that there is not necessarily a subject matter waiver applied to disclosures of some matters protected as work product. Yet, the holding of both Fourth Circuit cases is consistent with the Proposed Rule: if it is fair to require apply the waiver to subject matter under the circumstances, the waiver should apply. *Martin Marietta* finds that the protected mental impressions had not been used in such a way as to require disclosure in that case and notes that there is little danger that they would be so used. The case does not predict the result where the party in fact used mental impression work product both as a shield and as a sword.

Relatively recent District Court cases confirm an approach that would apply considerations of fairness to the issue of subject matter waiver. One example is *Bank of America v. Terra Nova Insurance Co.*, 212 F.R.D. 166 (S.D.N.Y. 2002). The court found a split of authority on the issue of subject matter waiver of work product protection citing *Martin Marietta* and other cases.

The cases it cited are, with my brief parenthetical description of the holdings, as follows: Cases cited as holding that there is a broad subject matter waiver were *In re Sealed Case,* 676 F.2d 793, 822-23 (D.C. Cir. 1982) (revealing documents to the SEC waived work product privilege as to all other communications relating to the same subject matter); *Bowne v. AmBase Corp.*, 150 F.R.D. 465, 485-86 (S.D.N.Y. 1993) (work product protection waived based on deposition testimony); *Bristol-Myers Squibb Co. v. Rohne-Poulenc Rorer,* 1997 WL 801454 (S.D.N.Y) (subject matter waiver based on production of document; considerations of "fairness" govern). Cases limiting waiver to the specific materials disclosed were *Pittman v. Frazer,* 129 F.3d 983, 988 (8th Cir. 1997) (waiver limited to photographs actually used at trial); *St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp.,* 197 F.R.D. 620, 639 (N.D. Iowa 2000) (no subject matter waiver under the circumstances; "the scope of the waiver depends upon the scope of the disclosure"); *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994)(waiver limited to specific subject matter under the circumstances; where the party did not deliberately disclose documents in an attempt to gain a tactical advantage, "the law does not mandate a subject-matter waiver and such a waiver is more likely to undermine the adversary system than to promote it"). The holding of none of these cases distracts from the proposition that fairness is a consideration in determining the existence of subject matter waiver.

In the *Bank of America v. Terra Nova* case itself, the court's treatment of the scope of waiver is based on the same kind of fairness considerations noted in the cases discussed in the preceding paragraphs (212 F.R.D. at 174):

> Here, the Court's decision on the scope of the waiver is guided by the nature of Terra Nova's conduct and the policies underlying the work product doctrine. Because all of the information available to Holland [the party's representative] regarding his investigation was made available in an oral presentation to the governmental authorities, it is only fair to permit Bank of America to examine the facts that were in Holland's possession at that time. That

Holland freely revealed the contents of his investigation in Terra Nova's presence reflects that Terra Nova had no great interest in ensuring the confidentiality of the investigation – be it the actual facts revealed to the government or the underlying documents upon which the presentation was based. Thus, Terra Nova must permit Holland to be re-deposed and to answer questions regarding what factual information was available to him at the time he met with the government agencies.

The court held that any documents relating to the investigation in Holland's possession at the time of his presentation to the government authorities would have to be produced. However, the protection would not be waived with regard to documents in his possession after that date.

Cincinnati Ins. Co. v. Zurich Ins. Co., 198 F.R.D. 81 (W.D.N.C. 2000) is an example of circumstances calling for the extension of a subject matter waiver even with regard to opinion work product. The case involved an alleged negligent failure to settle by an insurance company. The attorney involved in the settlement negotiations was to be called as a witness at trial. The court held that there would be no work product protection, even for his opinions. In this case, the attorney's opinion would be used as a "sword."

In short, the proposed rule 502(a) language does not change the prevailing federal law with regard to the scope of work product waiver.

IV. Discussion of Comments Received

This section of the memo addresses some comments that have already been received on draft Rule 502. Where appropriate, language is suggested to address a comment if the Committee determines that the comment requires an adjustment in the draft rule or Committee Note.

1. Scope of Work Product Waiver

Greg Joseph expresses concern about the rule's provision that there is a subject matter waiver of work product when the undisclosed work product "ought in fairness to be considered with the disclosed information." He believes it changes existing law. As discussed in Ken Broun's memo on the subject, we believe that we accurately capture the existing case law on the subject. And it seems to us that there would have to be a subject matter waiver when the nondisclosed information "ought in fairness" to be considered. Certainly the work product doctrine should not be applied in such a way to allow the invoking party to engineer an unfair result.

Greg suggests that the first paragraph of the Committee Note should be amended to add some discussion about subject matter waiver of work product. He suggests first that the note clarify that the "ought in fairness" language is taken from Rule 106 (the rule of completeness); this reference will provide some guidance on how the subject matter waiver test should be applied. He also suggests that the note cite to a case involving subject matter waiver of work product.

Greg's suggestions seem eminently sensible. **What follows is a proposed change to the first paragraph of the Committee Note that would implement these suggestions:**

> **Subdivision (a).** This subdivision states the general rule that a voluntary disclosure of information protected by the attorney-client privilege or work product doctrine constitutes a waiver of those protections. *See, e.g., United States v. Newell,* 315 F.3d 510 (5th Cir. 2002) (client waived the privilege by disclosing communications to other individuals who were not pursuing a common interest). The rule provides, however, that a voluntary disclosure generally results in a waiver only of the information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to protect against a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re von Bulow,* 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged information in a book did not result in unfairness to the adversary in a litigation, therefore a subject matter waiver was not warranted); *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994)(waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle is the same. A party that

makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation. *See, e.g., United States v. Branch*, 91 F.3d 699 (5th Cir. 1996) (under Rule 106, completing evidence was not admissible where the party's presentation, while selective, was not misleading or unfair). The rule ~~thus~~ rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

* * *

Greg poses a hypothetical in light of these additions: Suppose a lawyer interviews three witnesses (all work product). Two are favorable and one unfavorable. If the lawyer proffers the two favorable statements, does that constitute a subject matter waiver as to the undisclosed unfavorable statement? If the answer to that is yes, then the rule obviously creates a substantial change in practice and it should be changed.

But at least in the Reporter's view, the hypothetical facts *do not* result in a subject matter waiver. The presentation of the two favorable witnesses is *selective*, but it is not *misleading*. The proper analogy is to the Rule 106 cases like *Branch*, cited above, where the government admitted a portion of the defendant's confession — the portion which essentially said, "I committed the crime." Other portions of the defendant's statement provided his motivation and a purported excuse for committing the crime. But the court held that Rule 106 did not require admission of these excised portions. According to the court, the government's presentation was "selective" but it was not misleading. The fact was that the defendant admitted the crime.

Accordingly, the Reporter's view of Greg's hypothetical is that it would not come close to a subject matter waiver. On the other hand, if counsel represented that his two favorable witnesses were the *only* witnesses to the event, then this would be not only a selective but also a misleading presentation, and it would result in a subject matter waiver under the rule.

The Consultant is less confident that Greg's hypothetical would not be problematic. He states that the question of "fairness" will be "difficult and often fact-bound", but concludes that these are the very kind of questions that courts are currently deciding in cases involving possible subject matter waiver of work product.

If the Committee is concerned that a subject matter waiver could be found under the facts Greg sets forth, or similar facts, then a sentence could be added to the Committee Note to allay concerns. That sentence could read something like this:

Under the rule, a subject matter waiver is not found merely because privileged information or work product is presented selectively. A subject matter waiver is found only where the

disclosure or use of privileged information or work product is selective and misleading, and a further disclosure is required to protect the adversary from a misleading presentation of the evidence.

2. Who "holds" the privilege or work product immunity?

Greg Joseph and Rick Marcus both raise the question of whether the rule should say something about who holds the privilege or work product protection, and accordingly who has the power to waive it. Greg suggests, for example, that subdivision (a) should be changed to read something like the following:

> **(a) Waiver by disclosure in general.** — A ~~person waives an~~ holder of an attorney-client privilege or work product protection ~~if that person~~ waives the privilege or protection if that holder — or a predecessor while its holder — voluntarily discloses or consents to disclosure of any significant part of the privileged or protected information. The waiver extends to undisclosed information concerning the same subject matter if that undisclosed information ought in fairness to be considered with the disclosed information.

We decided to avoid the term "holder" as much as possible (though the term does appear elsewhere in the rule) because it is not always clear who is the holder of the privilege, and it is even less clear who is the holder of the work product protection. *See* Fred Zacharias, *Who Owns Work Product?*, 2006 Univ. Ill. L.Rev. 127, for an extensive discussion of this very murky area. We are not sure that the addition of the word "holder" in place of "person" is any kind of improvement in the rule. But if it is, we would caution against going any further and trying to define who is a holder and who is not. **In fact, if the Committee does wish to implement a change from "person" to "holder" in the text, we strongly suggest that a sentence be added to the Committee Note that would disavow any intent to determine who is the holder of a privilege or work product — leaving that question to common law.**

The addition to the Committee Note could read something like this (including the changes to the entry on subject matter waiver, discussed above):

> **Subdivision (a).** This subdivision states the general rule that a voluntary disclosure of information protected by the attorney-client privilege or work product doctrine constitutes a waiver of those protections. *See, e.g., United States v. Newell,* 315 F.3d 510 (5th Cir. 2002) (client waived the privilege by disclosing communications to other individuals who were not pursuing a common interest). The rule provides, however, that a voluntary disclosure

generally results in a waiver only of the information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to protect against a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re von Bulow,* 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged information in a book did not result in unfairness to the adversary in a litigation, therefore a subject matter waiver was not warranted); *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994)(waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle is the same. A party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation. *See, e.g., United States v. Branch,* 91 F.3d 699 (5th Cir. 1996) (under Rule 106, completing evidence was not admissible where the party's presentation, while selective, was not misleading or unfair). Under the rule, a subject matter waiver is not found merely because privileged information or work product is presented selectively. A subject matter waiver is found only where the disclosure or use of privileged information or work product is selective and misleading, and a further disclosure is required to protect the adversary from a misleading presentation of the evidence. The rule ~~thus~~ rejects the result in *In re Sealed Case,* 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The rule governs only waiver by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.,* 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson,* 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

The rule governs waiver by disclosure of the "holder" of the attorney-client privilege or work product protection. The rule does not attempt to determine or define who is a holder of either the privilege or the work product protection. The "holder" question is often difficult and fact-bound. *See generally* Fred Zacharias, *Who Owns Work Product?*, 2006 Univ. Ill. L.Rev. 127.

3. Inadvertent disclosure coverage limited to discovery:

Professor Bob Pitler of Brooklyn Law School asks why the provision on inadvertent disclosure should be limited to the context of discovery. The draft rule provides that a disclosure is not a waiver if:

> the disclosure is inadvertent *and is made during discovery in federal or state litigation or administrative proceedings* — and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B);

We made the choice to limit the rule's coverage to mistaken disclosures during discovery for three reasons: 1) Almost all of the reported cases on mistaken disclosure involve disclosure during discovery; 2) The rule sweeps broadly and dramatically in its attempt to control waiver principles under both federal and state law, and so we tried not to extend it to situations that rarely arise — as Ken puts it, it "seems piggy" to extend the rule any further than it already goes; and 3) At the state level, we were confident that the risk of mistaken disclosures in discovery would affect interstate commerce and therefore could be regulated by Congress — but we were less confident that commerce would be affected when a mistaken disclosure of privilege or work product is made outside of a litigation context.

If the Committee believes, however, that the rule should extend to *all* mistaken disclosures, this can be done easily.

1. The italicized, qualifying language in the above paragraph (*and is made during discovery in federal or state litigation or administrative proceedings*) can simply be deleted.

2. The Committee Note would need to be altered to delete references to discovery, but again this could be effectuated easily. The relevant language of the Committee Note would be changed as follows:

> *Inadvertent disclosure during discovery:* Courts are in conflict on whether an inadvertent disclosure of privileged information or work product~~, made during discovery,~~ constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in preserving the privilege and failed to request a return of the information in a timely manner. And a few courts hold that any mistaken disclosure of protected information constitutes waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of privileged or protected information ~~during discovery~~ constitutes a waiver only if the party did not take reasonable precautions to prevent disclosure and did not make reasonable and prompt efforts to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver. *See, e.g., Alldread* v. *City of Grenada,* 988 F.2d 1425 (5th Cir. 1993) (governmental attorney-client privilege); *Zapata v. IBP*, Inc., 175 F.R.D. 574, 576-77 (D. Kan. 1997) (work product); *Hydraflow, Inc. v. Enidine, Inc.,* 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege); *Edwards v. Whitaker,* 868 F.Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege). The rule establishes a compromise between two competing premises. On the one hand, information protected by the attorney-client privilege or work product immunity should not be treated lightly. On the other hand, a rule imposing strict liability for an inadvertent disclosure ~~during discovery~~ threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.

4. Subdivision (c) court orders: state and federal?

Rick Marcus points out that subdivision (c) , on the controlling effect of court orders, does not specify whether state confidentiality orders are covered by the rule. The rule simply refers to "a court order." Rick states that ordinarily "court order" in a federal rule would mean the order of a federal district court.

Rick's point is well-taken. The rule is intended to cover both state and federal courts. (*See* Part Five of this memo for an explanation of this drafting choice.) It is intended to protect the expectations of all litigants, permitting them to rely on a confidentiality order, whether entered by a federal or a state court.

Therefore, we suggest that the language of the subdivision be changed slightly, as follows:

(c) Controlling effect of court orders. — Notwithstanding subdivision (a), a federal or state court order concerning the preservation or waiver of the attorney-client privilege or work product protection governs its continuing effect on all persons or entities, whether or not they were parties to the matter before the court.

5. Subdivision (e)— Work Product

Rick Marcus suggests that the reference to "work product" in the definitional section, subdivision (e), should instead be "work product *protection*" because that is the phrasing used throughout the rule. We agree with this suggestion and so propose adoption of that slight change, as follows:

> (e) Included privilege and protection. — As used in this rule:
>
> 1) "attorney-client privilege" means the protections provided for confidential attorney-client communications under either federal or state law; and
>
> 2) "work product protection" means the immunity for materials prepared in preparation of litigation as defined in Fed.R.Civ.P. 26 (b) (3) and Fed.R.Crim.P. 16 (a) (2) and (b)(2), as well as the federal common- law and state-enacted provisions or common-law rules providing protection for attorney work product.

6. Committee Note Reference to Commerce Clause as the Source of Legislative Authority:

The Committee Note makes reference to the Commerce Clause as the source of legislative authority for promulgating this rule — a rule that applies a single set of waiver rules to both state and federal litigation. That section of the Note states as follows:

> The Committee is well aware that a privilege rule proposed through the rulemaking process cannot bind state courts, and indeed that a rule of privilege cannot take effect through the ordinary rulemaking process. See 28 U.S.C § 2074(b). It is therefore anticipated that Congress must enact this rule directly, through its authority under the Commerce Clause. Cf. Class Action Fairness Act of 2005, 119 Stat. 4, PL 109-2 (relying on Commerce Clause power to regulate state class actions).

Rick Marcus argues that there might be enough authority for the rule in Congress's power to regulate federal courts, and finally concludes that "the Note need not say what the authority of Congress might be. That's not something it can get from the rules process." Reviewing Rick's comment, Ken Broun concludes that the Note should "leave out the question of the power to enact this legislation entirely" because the Note is "a guide for practitioners and the courts" and not an explication of the authority for promulgating the rule.

The Reporter placed the reference to authority for the rule in the Committee Note because this is obviously an unusual rule. It can be argued that an explanation of authority for is helpful — especially at this early point in the process — because otherwise those who review the rule during a public comment period may wonder how the Rules Committee could possibly believe it had the authority to promulgate not only a rule of privilege but also a rule that binds state as well as federal

courts. It is possible, of course, that this could all be explained in some kind of cover letter accompanying the rule through the public comment period. But those letters do not get the same focus as the Committee Note. And there is an argument that a notice function will be necessary for such a unique rule even once it becomes enacted.

Thus, the above paragraph in the Committee Note is intended to serve a (perhaps temporary) notice function that arguably is necessary given the unique provenance of the rule. But if the Committee decides that the source of authority for the rule is a topic not suite to, or better left untreated by, the Note, then the paragraph can be deleted.

7. Committee Note on Subdivision (d), Citation to Hopson

The section of the Committee Note covering subdivision (d) — on confidentiality agreements not entered as court orders — declares as follows:

> Subdivision (d) codifies the well-established proposition that parties to litigation can enter an agreement to limit the effect of waiver by disclosure between or among them. *See, e.g., Dowd v. Calabrese,* 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the parties stipulated in advance that certain testimony at a deposition "would not be deemed to constitute a waiver of the attorney-client or work product privileges"); *Zubulake v. UBS Warburg LLC,* 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection from a finding of waiver by disclosure in a separate litigation, the agreement must be made part of a court order. *See Hopson v. City of Baltimore,* 232 F.R.D. 228, 238 (D.Md. 2005) (noting that "it is essential to the success of this approach in avoiding waiver that the production of inadvertently produced privileged electronic data must be at the compulsion of the court, rather than solely by the voluntary act of the producing party").

Rick Marcus argues that the citation of the *Hopson* case is problematic. He explains that the theme of *Hopson* "is that the Ninth Circuit's decision in *Transamerica Computers v. IBM* establishes that protection can only come if the court orders production. Thus, that is involuntary and can be sanitized from waiver, while a voluntary act of production can't be protected." Rick concludes that the citation is inapt if intended to establish the proposition that voluntarily entered court orders guard against waiver.

While the point can be argued one way or the other, we agree that the citation is not necessary, and if it could confuse the point made in the note, then it should be deleted. We

recommend simply deleting the citation to *Hopson* (and of course the parenthetical) from the above paragraph of the Committee Note.

V. Two Important Drafting Choices

The Reporter and the Consultant made (at least) two important drafting decisions in writing up the draft of the rule. The first is that the text of the rule specifically covers state court actions and state administrative proceedings. The second is that selective waiver is enforced even if there is no confidentiality agreement between the client and the government regulator. We want to explain why we made these choices, and set forth alternatives in case the Committee disagrees with these choices.

A. Covering State Court Actions and State Administrative Proceedings in the Text of the Rule

The Committee determined at its last meeting that any rule on waiver must apply uniformly in state and federal proceedings. Otherwise the rule could not be relied upon, and clients and lawyers would be back where they started—expending substantial resources to guard against waiver and unnecessarily increasing the cost of litigation; and being subject to a disincentive for cooperating with government regulators.

The question, then, is not whether a waiver rule should apply uniformly to both state and federal proceedings. The question is whether this should be made explicit in a Federal Rule of Evidence. Obviously, the Federal Rules apply to federal proceedings and so it is unusual to include within it a rule that covers state proceedings. The coverage can be justified by the fact that Rule 502 would be directly enacted by Congress. Still, there is some tension between draft Rule 502 and Rule 1101(a), which states that the rules apply to "the United States district courts." It could be argued that Rule 1101 (c) resolves any anomaly by providing that rules of privilege apply to "all stages of all actions, cases and proceedings." But it could also be argued that the term "all" is implicitly limited by subdivision (a), which refers to federal proceedings only.

Given the fact that it is critical to cover both state and federal proceedings with the same waiver standards, is there any drafting alternative to that taken in the draft Rule 502? One alternative would simply be to cover only federal proceedings in the rule, and leave state proceedings to parallel legislation adopted by Congress. This possibility is referred to in the Sensenbrenner letter, attached to this memo. This alternative would mean that all references to state proceedings would be eliminated from the draft, and a separate letter to Congress would stress the need for conforming legislation that covers state proceedings.

We decided to include state proceedings within the text of the rule, at least at this point, to make the public aware that there is an explicit intent to cover state proceedings in any legislative attempt to promulgate a waiver rule. That intent would not be as clear if the references to state proceedings were taken out of the text of the draft and left to an explanation in some kind of covering letter. After all, this rule has to be enacted by Congress. The Judicial Conference will not provide the final language. We thought it better to provide notice about the reach of the rule in the text of the rule, and to leave it to Congress to implement the rule in the way it sees fit.

If the Committee disagrees with our drafting choice, the alternative can be implemented without difficulty. Reference to "state" proceedings can be deleted from the text of the rule and the committee note, and we can draft a letter accompanying the rule indicating the need for parallel legislation to govern state proceedings.

Another drafting alternative would be to limit rule 502 to disclosures made during litigation in the federal courts, but to define its effect as including a determination of waiver under either federal or state law. In other words, the Committee could remove the references to state action except in the definitional part (e). The triggering of the rule would then have to occur in the federal judicial process (much like res judicata). Waiver of state privileges would be affected by the rule, but not disclosures that occurred outside of federal litigation and administrative proceedings. A letter accompanying the rule would indicate the need for separate legislation to deal with disclosure in state court and state administrative or agency situations. Such a rule would probably more comfortably fit in the Federal Rule scheme. But again, we decided to put all the provisions in a single rule at this point, in order to obtain the fullest public comment. Ultimately the most efficient method for binding state courts has to be sorted out by Congress.

B. Enforcing Selective Waiver Even Without a Confidentiality Agreement

As indicated in Part One of this memo, a number of courts enforce selective waiver only if the client has entered into a confidentiality agreement with the government regulator. A few courts enforce selective waiver even without such an agreement. We decided to draft the rule so as not to require confidentiality agreements as a condition for enforcement of selective waiver. We made this decision in part because of a comment received by Judge Levi from Helane Morrison, District Administrator of the San Francisco office of the SEC. Ms. Morrison concludes that a requirement of a confidentiality agreement may not fully implement the policy of encouraging cooperation with government investigations that is the animating principle of the draft rule.

Ms. Morrison first points out that the term "confidentiality agreement" is not self-defining, and that many agreements entered into by the SEC contain only "conditional confidentiality language." The conditions include the possibility that the privileged material will be disclosed to other law enforcement officials, and that confidentiality is maintained "except to the extent that the Staff determines that disclosure is otherwise required by federal law or in furtherance of the Commission's discharge of its duties and responsibilities." Ms. Morrison states that the Commission "has to maintain the leeway" established by this conditional confidentiality language. If that is so, it seems that the confidentiality agreement does not establish very much that is relevant in determining whether to enforce a selective waiver. If the reason for a confidentiality requirement is to limit selective waiver to situations in which there will, by agreement, be a limit on widespread use of the protected material, the conditional confidentiality language cuts against that rationale.

Ms. Morrison also points out that legislation introduced in Congress in 2003 and supported by the Commission (H.R. 1729) "did not require a confidentiality agreement to prevent waiver of the privilege when privileged documents were shared with the Commission." To the extent we are doing Congress's work for them in drafting this rule, we felt that this proposed legislation had some relevance.

Finally, Ms. Morrison points out that a confidentiality agreement requirement "would not protect the privilege in the Commission's examination program, which inspects the books and records of brokerage firms, investment advisers and mutual funds, because examinations are not performed pursuant to confidentiality agreements (as currently handled)." To the extent cooperation with government regulators is to be encouraged by the rule, we determined that the encouragement should apply to all aspects of government regulation.

Fundamentally, we concluded that a confidentiality agreement requirement imposed a formalism that would impede efficient cooperation with the government; and it appears to be a formalism that has very little to do with whether it is fair or appropriate to limit the breadth of a waiver of privilege or work product. Essentially the requirement would create lawyers' work without an apparent corresponding benefit. We explain our reasoning in a paragraph of the draft Committee Note:

> The Committee considered whether the protection of selective waiver should be conditioned on obtaining a confidentiality agreement from the government agency. It rejected that condition for a number of reasons. If a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the attorney-client privilege and work product immunity. Moreover, a government agency might need to use the information for some purpose and then would find it difficult to be bound by an air-tight confidentiality agreement, however drafted. If such an agreement were nonetheless required to trigger the protection of selective waiver, the policy of furthering cooperation with and efficiency in government investigations would be undermined. Ultimately, the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule. The Committee found it sufficient to condition selective waiver on a finding that the disclosure is limited to persons involved in the investigation.

* * *

Of course we are aware that selective waiver would be a tough sell if a party gave privileged information to a government regulator with the express agreement that the regulator could and would disseminate it widely — on the news, to friends and family, etc. But this does not mean that a confidentiality requirement is necessary to justify a finding of selective waiver. We chose to address any concerns about widespread disclosure by putting as a condition that disclosure must be "limited to persons involved in the investigation."

If the Committee disagrees with our assessment, however, there is a drafting alternative that would impose a requirement of obtaining a confidentiality agreement before a selective waiver will be found. That drafting alternative was reviewed by the Committee at its last meeting. The change from the draft would be as follows:

(b) Exceptions in general. — A voluntary disclosure does not operate as a waiver if:

(1) the disclosure is itself privileged or protected;

(2) the disclosure is inadvertent and is made during discovery in federal or state litigation or administrative proceedings — and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B); or

(3) the disclosure is made to a federal, state, or local governmental agency during an investigation by that agency, ~~and is limited to persons involved in the investigation~~ under an agreement that preserves the confidentiality of the communications disclosed.

The Committee Note would have to be changed as well:

Selective waiver: Courts are in conflict on whether disclosure of privileged or protected information to a government agency conducting an investigation of the client constitutes a general waiver of the information disclosed. Most courts have rejected the concept of "selective waiver", holding that waiver of privileged or protected information to a government agency constitutes a waiver for all purposes and to all parties. *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines,* 951 F.2d 1414 (3d Cir. 1991). Other courts have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government agency. *See, e.g., Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.,* 521 F. Supp. 638 (S.D.N.Y.

1981). And a few courts have held that disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties. *See, e.g., Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

The rule rectifies this conflict by providing that disclosure of protected information to an investigating government agency does not constitute a general waiver of attorney-client privilege or work product protection if the holder of the privilege obtains a confidentiality agreement from the agency. A rule protecting selective waiver to investigating government agencies furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litigation,* 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting) (noting that the "public interest in easing government investigations" justifies a rule that disclosure to government agencies of information protected by the attorney-client privilege or work product immunity does not constitute a waiver to private parties). The requirement of obtaining a confidentiality agreement will tend to assure that the client is treating the privilege seriously and is not engaging in widespread disclosure of information that would be inconsistent with the justification for finding a selective waiver.

~~The Committee considered whether the protection of selective waiver should be conditioned on obtaining a confidentiality agreement from the government agency. It rejected that condition for a number of reasons. If a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the attorney-client privilege and work product immunity. Moreover, a government agency might need to use the information for some purpose and then would find it difficult to be bound by an air-tight confidentiality agreement, however drafted. If such an agreement were nonetheless required to trigger the protection of selective waiver, the policy of furthering cooperation with and efficiency in government investigations would be undermined. Ultimately, the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule. The Committee found it sufficient to condition selective waiver on a finding that the disclosure is limited to persons involved in the investigation.~~

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 502. Attorney-Client Privilege and Work Product; Waiver By Disclosure

(a) Waiver by disclosure in general. — A person waives an attorney-client privilege or work product protection if that person — or a predecessor while its holder — voluntarily discloses or consents to disclosure of any significant part of the privileged or protected information. The waiver extends to undisclosed information concerning the same subject matter if that undisclosed information ought in fairness to be considered with the disclosed information.

(b) Exceptions in general. — A voluntary disclosure does not operate as a waiver if:

(1) the disclosure is itself privileged or protected;

(2) the disclosure is inadvertent and is made during discovery in federal or state litigation or administrative

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*New material is underlined; matter to be omitted is lined through.

proceedings — and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B); or

(3) the disclosure is made to a federal, state, or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigation.

(c) Controlling effect of court orders. — Notwithstanding subdivision (a), a court order concerning the preservation or waiver of the attorney-client privilege or work product protection governs its continuing effect on all persons or entities, whether or not they were parties to the matter before the court.

(d) Controlling effect of party agreements. — Notwithstanding subdivision (a), an agreement on the effect

of disclosure is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order.

(e) Included privilege and protection. — As used in this rule:

1) "attorney-client privilege" means the protections provided for confidential attorney-client communications under either federal or state law; and

2) "work product" means the immunity for materials prepared in preparation of litigation as defined in Fed.R.Civ.P. 26 (b) (3) and Fed.R.Crim.P. 16 (a) (2) and (b)(2), as well as the federal common- law and state-enacted provisions or common-law rules providing protection for attorney work product.

Committee Note

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of material protected by the attorney-client privilege or the work product doctrine— specifically those disputes involving inadvertent disclosure and selective waiver.

2) It responds to the widespread complaint that litigation costs for review and protection of material that is privileged or work product have become prohibitive due to the concern that any disclosure of protected information in the course of discovery (however innocent or minimal) will operate as a subject matter waiver of all protected information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Rowe Entertainment, Inc. v. William Morris Agency,* 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (finding that in a case involving the production of e-mail, the cost of pre-production review for privileged and work product material would cost one defendant $120,000 and another defendant $247,000, and that such review would take months). *See also Report to the Judicial Conference Standing Committee on Rules of Practice and Procedure by the Advisory Committee on the Federal Rules of Civil Procedure,* September 2005 at 27 ("The volume of information and the forms in which it is stored make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming yet less likely to detect all privileged information."); *Hopson v. City of Baltimore,* 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of information protected by the attorney-client privilege or work product doctrine. As part of that predictability, the rule is intended to regulate the consequences of disclosure of information protected by the attorney-client privilege or work product doctrine at both the state and federal level. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable in both state and federal courts. If a federal court's confidentiality order is not enforceable in a state court (or vice versa) then the burdensome costs of privilege review and retention are unlikely to be reduced.

The Committee is well aware that a privilege rule proposed through the rulemaking process cannot bind state courts, and indeed that a rule of privilege cannot take effect through the ordinary rulemaking process. See 28 U.S.C § 2074(b). It is therefore anticipated that Congress must enact this rule directly, through its authority under the Commerce Clause. Cf. Class Action Fairness Act of 2005, 119 Stat. 4, PL 109-2 (relying on Commerce Clause power to regulate state class actions).

Subdivision (a). This subdivision states the general rule that a voluntary disclosure of information protected by the attorney-client privilege or work product doctrine constitutes a waiver of those protections. *See, e.g., United States v. Newell,* 315 F.3d 510 (5th Cir. 2002) (client waived the privilege by disclosing communications to other individuals who were not pursuing a common interest). The rule provides, however, that a voluntary disclosure generally results in a waiver only of the information disclosed; a subject matter waiver is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information. *See, e.g., In re von Bulow,* 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged

information in a book did not result in unfairness to the adversary in a litigation, therefore a subject matter waiver was not warranted). The rule thus rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The rule governs only waiver by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.*, 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson*, 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (b). This subdivision collects the basic common-law exceptions to waiver by disclosure of attorney-client privilege and work product.

Protected disclosure: Disclosure does not constitute a waiver if the disclosure itself is protected by the attorney-client privilege or work product immunity. For example, if a party privately discloses a privileged communication to another party pursuing a common legal interest, that disclosure is itself protected and the privilege covering the underlying information is not waived. *See, e.g., Waller v. Financial Corp. of America*, 828 F.2d 579 (9th Cir. 1987) (communications by a client to his lawyer remained privileged where the lawyer shared the communications with codefendants pursuing a common defense); *Hodges, Grant & Kaufman v. United States Gov't Dept. of Treasury*, 768 F.2d 719, 721 (5th Cir. 1985) (noting that the

privilege is not waived "if a privileged communication is shared with a third person who has a common legal interest with respect to the subject matter of the communication"). Similarly, the protection of the attorney-client privilege or work product immunity is not waived if protected information is disclosed by one lawyer to another in a law firm.

Inadvertent disclosure during discovery: Courts are in conflict on whether an inadvertent disclosure of privileged information or work product, made during discovery, constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in preserving the privilege and failed to request a return of the information in a timely manner. And a few courts hold that any mistaken disclosure of protected information constitutes waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of privileged or protected information during discovery constitutes a waiver only if the party did not take reasonable precautions to prevent disclosure and did not make reasonable and prompt efforts to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver. *See, e.g., Alldread* v. *City of Grenada,* 988 F.2d 1425 (5th Cir. 1993) (governmental attorney-client privilege); *Zapata v. IBP,* Inc., 175 F.R.D. 574, 576-77 (D. Kan. 1997) (work product); *Hydraflow, Inc. v. Enidine, Inc.,* 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege); *Edwards v. Whitaker,* 868 F.Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege). The rule establishes a compromise between two competing premises. On the one hand, information protected by the attorney-client privilege or work product immunity

should not be treated lightly. On the other hand, a rule imposing strict liability for an inadvertent disclosure during discovery threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.

Selective waiver: Courts are in conflict on whether disclosure of privileged or protected information to a government agency conducting an investigation of the client constitutes a general waiver of the information disclosed. Most courts have rejected the concept of "selective waiver", holding that waiver of privileged or protected information to a government agency constitutes a waiver for all purposes and to all parties. *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991). Other courts have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government agency. *See, e.g., Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.*, 521 F. Supp. 638 (S.D.N.Y. 1981). And a few courts have held that disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties. *See, e.g., Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

The rule rectifies this conflict by providing that disclosure of protected information to an investigating government agency does not constitute a general waiver of attorney-client privilege or work product protection. A rule protecting selective waiver to investigating government agencies furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting) (noting that the "public interest in easing government investigations" justifies a rule that disclosure to

government agencies of information protected by the attorney-client privilege or work product immunity does not constitute a waiver to private parties).

The Committee considered whether the protection of selective waiver should be conditioned on obtaining a confidentiality agreement from the government agency. It rejected that condition for a number of reasons. If a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the attorney-client privilege and work product immunity. Moreover, a government agency might need to use the information for some purpose and then would find it difficult to be bound by an air-tight confidentiality agreement, however drafted. If such an agreement were nonetheless required to trigger the protection of selective waiver, the policy of furthering cooperation with and efficiency in government investigations would be undermined. Ultimately, the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule. The Committee found it sufficient to condition selective waiver on a finding that the disclosure is limited to persons involved in the investigation.

Subdivision (c). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. *See Manual for Complex Litigation Fourth* § 11.446 (Federal Judicial Center2004) (noting that fear of the consequences of waiver "may add cost and delay to the discovery process for all sides" and that courts have responded by encouraging counsel "to stipulate at the outset of discovery to a 'nonwaiver' agreement, which they can adopt as a

case-management order."). But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the information can be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case can bind non-parties from asserting waiver by disclosure in a separate litigation. *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law. The rule provides that such orders are enforceable against non-parties. As such the rule provides a party with a predictable protection that is necessary to allow that party to limit the prohibitive costs of privilege and work product review and retention.

Subdivision (c) contemplates that the court may order production and guarantee confidentiality under criteria different from those providing exceptions to waiver under subdivision (b). For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product..

Subdivision (d). Subdivision (d) codifies the well-established proposition that parties to litigation can enter an agreement to limit the effect of waiver by disclosure between or among them. *See, e.g., Dowd v. Calabrese*, 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the parties stipulated in advance that certain testimony at a deposition "would not be deemed to constitute a waiver of the attorney-client or work product privileges"); *Zubulake*

v. UBS Warburg LLC, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection from a finding of waiver by disclosure in a separate litigation, the agreement must be made part of a court order. *See Hopson v. City of Baltimore,* 232 F.R.D. 228, 238 (D.Md. 2005) (noting that "it is essential to the success of this approach in avoiding waiver that the production of inadvertently produced privileged electronic data must be at the compulsion of the court, rather than solely by the voluntary act of the producing party").

Subdivision (d) contemplates that the parties may agree to production and guarantee confidentiality under criteria different from those providing exceptions to waiver in subdivision (b). For example, the parties may provide for return of documents without waiver irrespective of the care taken by the disclosing party, and may agree to "claw-back" or "quick peek" arrangements to reduce the cost of pre-production review for privilege and work product.

Subdivision (e). This subdivision makes clear that the rule governs waiver by disclosure for the attorney-client privilege and work product immunity under both state and federal law.

The rule's coverage is limited to attorney-client privilege and work product. The limitation in coverage is consistent with the goals of the rule, which are 1) to provide a reasonable limit on the costs of privilege and work product review and retention that are incurred by parties to litigation; and 2) to encourage cooperation with government investigations and reduce the costs of those investigations. These two interests arise mainly, if not exclusively, in the context of disclosure

of attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.

ONE HUNDRED NINTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951
http://www.house.gov/judiciary

January 23, 2006

Mr. Leonidas Ralph Mecham
Director
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

Dear Ralph:

I write to request that the U.S. Judicial Conference initiate a rule-making on forfeiture of privileges.

I am informed that an absence of clarity on this subject, particularly as it pertains to the attorney-client privilege, is causing significant disruption and cost to the litigation process. I therefore urge the Judicial Conference to proceed with a rule-making that would –

- protect against the forfeiture of privilege where a disclosure in discovery is the result of an innocent mistake;
- permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to a litigation; and
- allow persons and entities to cooperate with government agencies by turning over privileged information without waiving all privileges as to other parties in subsequent litigation.

The expense in reviewing an enormous volume of papers, electronic files, and other materials in intensive discovery cases can represent a major component of litigation costs, which continue to rise. Lawyers are often compelled to expend countless hours screening vast quantities of documents to guarantee that any document produced in response to a discovery request does not include a privileged document for fear that the disclosure will waive the privilege for all other documents dealing with the same subject matter.

Parties occasionally try to facilitate the discovery process by agreeing to make discovery without forfeiting privileges so that any claim of privilege can be selectively asserted at a later date. Sometimes these agreements are approved by court order. Yet these agreements, even with a court

CNG-71

order, do not provide adequate assurances that the privilege will not be deemed waived in other proceedings or in other fora. The same difficulties can arise when disclosure is made voluntarily to a regulatory or governmental agency.

I understand that implementation of such a rule would require approval by an act of Congress in accordance with the Rules Enabling Act. Separate legislation would also be needed to extend the rule's protection to subsequent litigation in state court.

A federal rule protecting parties against forfeiture of privileges in these circumstances could significantly reduce litigation costs and delay and markedly improve the administration of justice for all participants. My Committee looks forward to working with the Judicial Conference on this important matter.

Sincerely,

F. JAMES SENSENBRENNER, JR.
Chairman

FJS/bsm

cc: Chief Judge David F. Levi

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

February 13, 2006

Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your letter of January 23, 2006, requesting the Judicial Conference to initiate the rulemaking process to address litigation costs and burdens arising from the review of attorney-client and work-product information. I have sent your request to the Advisory Committee on Evidence Rules for its consideration.

I understand that the Evidence Rules Committee is planning to hold a mini-conference with attorneys, academics, and judges expert in privilege law at the Fordham University School of Law in New York City on April 24-25, 2006. The Committee will consider a draft proposal that protects parties from waiving attorney-client privilege or work-product protection when information is inadvertently disclosed in discovery, when information is disclosed in accordance with the parties' agreement or a court order, or when information is disclosed by a party cooperating with a government agency in an investigation preceding the litigation. The Committee would welcome you or your staff at the New York City conference. In any event, we will keep you posted of progress on this important issue.

We appreciate your continuing support of the rulemaking process. If you need further assistance in this matter, please contact Cordia A. Strom, Assistant Director, Office of Legislative Affairs at (202) 502-1700.

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Honorable David F. Levi, Chair,
Committee on Rules of Practice and Procedure
Honorable Jerry E. Smith, Chair,
Advisory Committee on Evidence Rules

THE ATTORNEY GENERAL'S *NEWS BRIEFING*

PREPARED FOR THE OFFICE OF PUBLIC AFFAIRS, U.S. DEPARTMENT OF JUSTICE

TO: THE ATTORNEY GENERAL AND SENIOR STAFF

DATE: TUESDAY, JANUARY 3, 2006 7:45 AM EST

TODAY'S EDITION

Civil Rights:

Antitrust:

Environment/Indian Affairs:

FBI/DEA/ATF/USMS:

Immigration:

Congress-Administration:

Other News:

TERRORISM NEWS:

White House Plans Focus On Iraq, Economy For 2006. In a story that runs over 2100 words highlighting political and policy opportunities for the Administration -- as well as potential pitfalls, USA Today (1/3, Jackson, Page, 2.31M) says that while past president have faced their greatest difficulties during the sixth year of their tenure, the White House is making preparations for a "better year" ahead. USA adds that for President Bush, 2005 "was a year of growing public impatience with the Iraq war, angst over record gas prices, devastation from Hurricane Katrina, the collapse of his Social Security plan and, finally, a firestorm over his decision to authorize targeted domestic spying without court warrants. Now he faces a challenge that has upended the best-laid plans of his predecessors: his sixth year in office." However, the White House "and its allies see opportunities, though, sixth year or not." Top aides "say Bush aims to travel more often and speak out more forcefully, touting the economy as underappreciated good news." To "avoid the sort of stalemate that undermined his Social Security proposal, Bush will downsize his domestic agenda, proposing changes in immigration law but shelving, at least for now, plans for a tax overhaul." White House spokesman Scott McClellan "says the basic game plan is simple: 'The economy and progress in Iraq.'" USA adds Bush's "most powerful aide, Karl Rove, has invited think-tank analysts, authors and others to the White House for ideas to help reinvigorate the president's domestic agenda." But there is "trouble on the horizon, too, and events that are outside White House control," such as in Iraq, the CIA leak investigation, and the Abramoff probe. USA then outlines the White House's planned strategy across a number of policy fronts.

The Washington Times (1/3, Sammon, 90K) reports President Bush "is planning to spend 2006 getting back to the basics of his agenda by making the case for his policies on Iraq and the economy instead of pursuing lofty new domestic initiatives." White House spokesman Trent Duffy said, "The president will begin the new year very much in the way he left 2005, which is to discuss the country's two top priorities, keeping our economy strong and growing stronger and creating jobs, and also winning the war on terrorism." The Times adds that is "not to say Mr. Bush will not reveal new initiatives in his State of the Union address, tentatively scheduled for Jan. 31. But those initiatives are expected to be more modest than his ambitious quest to reform Social Security, partly because it will be harder to enact his agenda in a congressional re-election year." Aides "hinted that Mr. Bush will try to make his tax cuts permanent, pass an immigration reform law and push for additional energy legislation, including a measure to open oil exploration in the Arctic National Wildlife Refuge in Alaska. Although he has not officially abandoned Social Security reform, he will spend less time promoting the long-shot initiative."

Democrats To Attack Bush, GOP On Privacy Issues. The Washington Times (1/3, Hurt, 90K) reports congressional Democrats "are drafting a strategy to attack the Bush administration and Republicans as having little regard for the privacy of Americans." Before Christmas, Senate Minority Whip Richard Durbin said, "We will initiate at the beginning of this year one of the most serious debates and discussions on Capitol Hill in our history about individual rights and liberties." The Times adds the "topic will be a major focus of the Supreme Court confirmation hearings of federal Judge Samuel A. Alito Jr. as privacy rights -- the political code phrase for abortion rights -- already has become a major issue, Mr. Durbin said." Democratic leaders "then plan to keep the issue alive as they continue their opposition to key parts of the USA Patriot Act, which is set to expire in early February unless extended." But the "real payoff, Democrats say, will be the hearings into President Bush's authorization of warrantless spying on terror suspects."

Comey Opposed Parts Of NSA Domestic Spying Program. CNN's Lou Dobbs Tonight (1/2, Romans) reported, "The White House is vowing to aggressively defend its program to secretly wiretap Americans in the days and weeks ahead. But this upcoming offensive comes amid new reports of serious internal debate in the Bush administration over the legality of this program." CNN (Quijano) added, "Government officials say during at least part of James Comey's tenure as deputy attorney general, he vigorously opposed parts of the National Security Agency's secret domestic surveillance program and refused to sign off on its renewal." On Sunday, President Bush "would not comment directly when asked whether he was

aware of any high-level resistance to the NSA program. Instead, he again forcefully defended its use, calling it legal and necessary." CNN added that "sources have told CNN that the surveillance program was stopped in 2004 for a short time because of legal questions. Some changes were then made to the program, but it's not clear what those changes were."

Williams Says Domestic Spying Program Is Hard To Defend. Pete Williams said on MSNBC's Hardball (1/2) that the domestic surveillance program is "a hard program to defend, because we don't know the extent of it or precisely how it worked. … Now, the legal justification they make is twofold. First, they say, the president has a constitutional authority as commander-in-chief to do this. And secondly, they say, when Congress authorized the use of military force, which was right after 9/11, it gave the president whatever authority he needed to do in wartime. Intelligence gathering, the administration argued, is incident to making war and the president has authority under that law as well. That's been their legal argument.

Mitchell Says Administration Needs To Be "More Out Front" About Eavesdropping. Andrea Mitchell of NBC News said on MSNBC's Hardball (1/2), "I think [Senate Judiciary Committee Chairman Arlen] Specter is a bellwether. … Right now the administration is pressing Specter to give this up and let the intelligence community do this in secret. And he's been arguing that this needs to be the Judiciary Committee. That there are major legal issues involved. One of the things that the White House probably is still resisting, but really needs to do, is be a little bit more out front, because it's not just a handful of cases. It's at least 500 people at a time being eavesdropped upon. And in fact, there were millions and millions of calls and e-mails that were swept up in this electronic vacuum cleaner.'

Thomas Says Presidents Always Give Themselves Power In Times Of War. Evan Thomas of Newsweek said on MSNBC's Hardball (1/2) that this is "an historic moment. A couple hundred years of presidents in times of crisis reaching out, giving a lot of power to themselves. Inevitably, there's a reaction, first it starts with a bureaucracy, it's a little slow and then seeps into the public. You can trace this after Watergate, Vietnam, World War II, World War I, every time we have a war, presidents do this. Eventually there's a reaction. I think that reaction is beginning now. What's not clear is how severe it is, whether the president is going to get whapped back, but you can feel some emanations off of Capitol Hill, as often where it starts, that people are starting to say, hey, maybe the balance is a little bit out of whack here."

Bush Defends Domestic Wiretap Program. President Bush on Sunday visited San Antonio to meet with wounded Iraq veterans and staff at the Brooke Army Medical Center. That visit, however, was largely upstaged by what NBC called his "strongly worded defense" of the Administration's use of the National Security Agency to wiretap people in the US. Other reports also tended to state say Bush defended the program "strongly" or "fiercely." The President made the remarks as media reports indicated there was some dissension within the Justice Department over the legality of the program -- and as four senators backed holding hearings. The story was the lead on NBC, while CBS covered it in a full segment and ABC mentioned it briefly. Today's major newspapers also cover the story in depth.

NBC Nightly News (1/1, lead story, 2:30, Costello) reported the President said, "yet again, in a very strongly worded defense," that "if al Qaeda is trying to call someone, the government should now who and why." Bush "felt compelled again to defend the secret White House program to monitor email traffic and listen into the phone calls of as many as 500 Americans each day without court approval. Mr. Bush said only international calls to and from the US and involving known al Qaeda sympathizers were tapped." President Bush: "It seems logical to me if we know a phone number associated with al Qaeda and or an al Qaeda affiliate, and they are making phone calls, it makes sense to find out why." Costello: "The President again emphasized Congress was kept informed of the program, which was regularly reviewed by the Justice Department and found to be legal. But the New York Times reported that then-Deputy Attorney General James Comey resisted approving parts of the spying program out of concern that it wasn't legal. And Newsweek reports in a cover story that then-Attorney General John Ashcroft refused to overrule Comey, while Time magazine reports that the President even bypassed top Justice Department attorneys who normally reviewed top-secret intelligence programs."

The CBS Evening News (1/1, story 4, 2:00, Roberts) reported, "Bush again fiercely defended his domestic spying program, one that authorizes the government to monitor conversations to and from the US without a court warrant." In an "attempt to dissuade congressional hearings its legality, he says even the program's disclosure has damaged national security and in answer to criticisms about possible civil liberty violations he argues that spying is limited in scope." President Bush: "If somebody from al Qaeda is calling you, we'd like to know why. In the meantime, this program is conscious of people's civil liberties, as am I." Roberts: "Today four US Senators, including Richard Lugar, the Republican Chairman of the Foreign Relations Committee said that hearings on the President's authorization of domestic spying without warrants are appropriate."

The New York Times (1/2, Lichtblau) reports Senator Arlen Specter, "a Pennsylvania Republican and chairman of the Judiciary Committee, has already pledged to make hearings into the program one of his highest priorities." In a

letter to Specter on Sunday, "Senator Charles E. Schumer, a New York Democrat who is also on the committee, said the panel should also explore 'significant concern about the legality of the program even at the very highest levels of the Department of Justice.'"

Lugar, appearing on CNN's Late Edition (1/1, Blitzer), said, "I can understand in the context of 9/11 that there may have been, in a common sense way, a reason why calls coming from the Middle East or Afghanistan to America might be intercepted, but I think the Congress quite rightly is trying to take a look at now that we're past 9/11, we're going to have to live with the war on terror for a long, long while." Asked if he advocated holding hearings on the matter, Lugar responded, "I do. I think this is an appropriate time. … I think we want to see what in the course of time really works best and the FISA Act has worked pretty well from the time of President Carter's day to the current time."

Sen. Mitch McConnell, on Fox News Sunday (1/1, Wallace), said, "Thank goodness the Justice Department is investigating to find out who has been endangering our national security by leaking this information so that our enemies now have a greater sense of what our techniques are in going after terrorists. The overwhelming majority of the American people understand that we need new techniques in the wake of 9/11 in order to protect us. … This needs to be investigated, because whoever leaked this information has done the U.S. and its national security a great disservice."

ABC World News Tonight (1/1, story 6, :20, Harris) reported, "There are reports that high-level officials at the Justice Department objected to the Administration's controversial domestic spying program." Reuters (1/2, Zakaria) notes the New York Times "reported on Sunday that James Comey, a deputy to then-Attorney General John Ashcroft, was concerned about the legality of the NSA program and refused to extend it in 2004." White House aides "then turned to Ashcroft while the attorney general was hospitalized for gallbladder surgery, the Times said." The AP (1/2, Riechmann) says Bush "didn't answer a reporter's question about whether he was aware of any resistance to the program at high levels of his administration and how that might have influenced his decision to approve it."

The New York Post (1/2, Mangan, Dicker) reports, "President Bush belittled top Justice Department official James Comey with the nickname 'Cuomo' after the former Manhattan U.S. attorney balked at allowing controversial warrantless eavesdropping to catch terrorists, a new report claims." The Post continues, "Comey acquired the nickname — which referred to New York ex-Gov. Mario Cuomo — after Bush administration officials concluded he was not a 'team player' on that and other issues, Newsweek reports. … Comey, who now is general counsel for the Lockheed Martin corporation, could not be reached for comment. … But Cuomo laughingly told The Post, 'I'll say this — Comey and Cuomo have this in common: They both agree that the president was wrong.' … The White House denied that Bush, who has a penchant for doling out nicknames, tagged Comey with the scornful sobriquet."

New York Daily News (1/2, Siemaszko) reports, "Schumer also said he will ask Specter to question top White House officials such as former Acting Attorney General Jim Comey, who reportedly opposed the secret domestic eavesdropping on legal grounds. … 'When Comey, who was one of the premier terrorism prosecutors in this country, said that he thought this program violated the law ... it calls into question the way the president and the vice president went about changing it,' Schumer said on 'Fox News Sunday.'"

Schumer, on Fox News Sunday (1/1, Wallace), commented, "The problem here is that the President thought there was a problem -- that's legitimate -- but instead of coming to people and saying 'okay, I need changes in the law,' he just changed it on his own. And today's revelations…really heighten the concerns about this. When [former Deputy Attorney General James] Comey, who was one of the premiere terrorism prosecutors in this country, said that he thought this program violated the law, when it's reported that people at the NSA -- and none of these people are left-wing liberals -- had real doubts about the program, it calls into question the way the president and vice president went about changing it."

The Los Angeles Times (1/2, Roche, Chen) says Bush "strongly defended the domestic eavesdropping program," and quotes the President saying, "If somebody from Al Qaeda is calling you, we'd like to know why. … We're at war with a bunch of coldblooded killers."

The Washington Post (1/2, A1, Rein) notes it was Bush's "third defense in two weeks of his secret domestic spying program." The Post quotes Bush saying, "This is a limited program designed to prevent attacks on the United States of America, and I repeat limited." The Post later says, "The president's first public comments of the new year after no public appearances last week offered a glimpse into how his administration intends to deflect congressional inquiries into his authorization of wiretaps on terrorism suspects -- with a vigorous defense of the program as a matter of national security."

The Washington Times (1/2, Curl) adds the President also "criticized anew the leaker who revealed the program to the New York Times, which published a front-page article about it on the day the Senate was scheduled to vote on an extension of the Patriot Act. 'There's an enemy out there. They read newspapers, they listen to what you write, they listen to what you put on the air, and they react,' said Mr. Bush, who added that the leak of the program causes great harm to national security."

NSA Surveillance Credited With Stopping Terror Attacks Post-9/11. Syndicated columnist Charles Krauthammer, appearing on Fox News Sunday (1/1, Wallace), said, "There's a great irony here. Everybody has been asking of themselves for the last four years why haven't we had a second attack. … But what we've heard over the last six months with these revelations, these so-called scandals, of the secret prisons where high-level Al Qaida have been held, the coercive interrogation which is under attack in the McCain amendment, and now the NSA eavesdropping -- we have the untold story which the administration could not tell. It knew why we had been protected. … We had a means, technological, in the NSA eavesdropping, and also other means in capturing these terrorists, of getting information. It's worked. It's held us safe."

DOJ Probes Of High-Level Leaks Seldom Meet With Success. Knight Ridder (1/2, Mondics) reports, "When President Bush defended the National Security Agency after the disclosure that it had spied on hundreds of Americans, he angrily denounced media leaks about the program, and the Justice Department has now opened a criminal probe. … But an ongoing Justice investigation of the president's own staff in an unrelated leak case and the handling of hundreds of other leak allegations each year suggest that the probe of the NSA leak - which focuses on the disclosure of classified information to The New York Times - faces huge obstacles." Knight Ridder continues, "Only two government officials have ever been convicted of leaking classified information to a news organization. Samuel L. Morison, a Navy intelligence analyst, was prosecuted for leaking three spy satellite photos to Jane's Defence Weekly in 1984; Jonathan Randel, a former Drug Enforcement Administration analyst, was convicted in 1999 of leaking confidential information about DEA investigations to a London newspaper." Knight Ridder adds, "More recently, special prosecutor Patrick Fitzgerald acknowledged difficulty proving that any laws governing the release of classified information were broken in the White House leak to the media of a CIA operative's identity. Fitzgerald did win an indictment Oct. 28 of I. Lewis "Scooter" Libby, former chief of staff to Vice President Cheney, for allegedly lying to investigators in the case. But after two years, Fitzgerald has charged no one with illegally releasing sensitive national security information - the charge that prompted the investigation. … Mark Corallo, a former Justice spokesman who is now a spokesman for Bush adviser Karl Rove in matters related to the Fitzgerald investigation, said the department typically received hundreds of requests a year from intelligence agencies to investigate leaks, and most cases went nowhere. … One reason is that the Justice Department, despite a handful of high-profile cases, has been reluctant to subpoena reporters who for reasons of confidentiality declined to testify; another is that laws governing such prosecutions require the government to show that the leaker intended to break the law - a difficult hurdle to clear."

Bush Will Begin 2006 "Preoccupied" By Domestic Spying Controversy. Time (1/9, Lacayo) reports that President Bush's 2002 Executive Order allowing the NSA to eavesdrop without a warrant on phone conversations, e-mail and other electronic communications "remained a closely guarded secret" for four years. Time adds, "Because the NSA program was so sensitive, Administration officials tell TIME, the 'lawyers' group,' an organization of fewer than half a dozen government attorneys the National Security Council convenes to review top-secret intelligence programs, was bypassed. Instead, the legal vetting was given to Alberto Gonzales, then White House counsel. In the weeks since Dec. 16, when the program was disclosed by the New York Times, it has set off a ferocious debate in Washington and around the country about how the rule of law should constrain the war on terrorism. That development ensures that the President will start the new year preoccupied for a while with a fight over whether his responsibility to prevent another attack gave him the power to push aside an act of Congress -- or, to use the terms of his harshest critics, to break the law."

In a separate story, Time (1/9, Tumulty, Allen) reports that "the revelation that his Administration has been spying in this country without warrants -- illegally, critics say -- may have put a crimp in Bush's plan to climb back on top of the agenda as the new legislative session begins. 'When Congress comes back,' warns a top G.O.P. congressional aide, 'domestic surveillance and privacy issues will be all over the front pages.' To which the President and his strategists seem to be saying, Bring it on." From the Time the story broke, the Administration "decided its strategy would be to 'overwhelm the skeptics, not back off, not change anything about the program and really home in very strongly on the fact that this is a legitimate part of presidential warmaking power,' says an adviser." GOP strategists "argue that Democrats have little leeway to attack on the issue because it could make them look weak on national security and because some of their leaders were briefed about the National Security Agency (NSA) no-warrant surveillance before it became public knowledge. Some key Democrats even defend it."

"Ferocious" Administration Infighting Delayed Domestic Spying Program For A Time. Newsweek (1/9, Thomas, Klaidman) reports, "NEWSWEEK has learned, ferocious behind-the-scenes infighting stalled for a time the administration's ambitious program of electronic spying on U.S. citizens at home and abroad." Newsweek adds, "It does not appear that President Bush -- determined to stand tall in the war on terror -- or Vice President Cheney, a staunch believer in executive power, hesitated to circumvent FISA.

Asserting the broad warmaking powers conferred on the president by Article 2 of the Constitution and by a post-9/11 congressional resolution authorizing the use of force to combat global terror, Bush repeatedly approved of what the NSA calls a 'special collection program' that eavesdropped -- without warrants -- on about 500 Americans a day."

"Reassertion Of Presidential Power" Said To Be At Heart Of Spying Debate. U.S. News and World Report (1/9, Kaplan) reports, "At the heart of the debate over domestic spying is a reassertion of presidential power. Legal advisers to the president have made a case for sweeping executive authority during wartime. The White House's authority to render terrorism suspects jailed without trial and run warrantless eavesdropping, they argue, is authorized by a congressional war resolution passed after 9/11 and by the Constitution's grant of war-making power to the commander in chief. Among the prime supporters of this position is Vice President Dick Cheney, who as White House chief of staff under Gerald Ford saw Congress take back considerable amounts of executive power after the abuses of the Nixon era. But Congress and the courts may now be pushing back. Legal challenges to the administration's detention policy and the FBI's national security letters are winding their way through the courts." Likewise, Time (1/9, Lacayo) says the White House "has been developing a very robust interpretation of presidential power" to "support its aggressive conduct." Vice President Dick Cheney "in particular believes that presidential power has been unreasonably confined since the 1970s." Time adds, "Because they required the President to plainly bypass an act of Congress, the no-warrant wiretaps may be the sharpest expression yet of the Administration's willingness to expand the scope of Executive power."

Domestic Spying Efforts May Be More Widespread Than Previously Thought. U.S. News and World Report (1/9, Kaplan) reports, "A string of revelations in recent weeks suggests that domestic spying programs may be far broader than previously thought." Government officials "have offered spirited defenses" of these programs. They say these allegations of spying "have been misinterpreted and exaggerated," and they "insist that the public expects law enforcement and intelligence agencies to be aggressive in the age of terrorism. President Bush was unapologetic about the NSA's warrantless intercepts. … The FBI, too, has mounted a strong defense. No investigations are opened, officials say, unless there is 'specific information about a potential criminal or terrorist threat.' Mere mention of groups or individuals in an FBI file, agents say, does not mean they are under investigation."

Allegations Have Sparked Lawmakers Into Action. U.S. News and World Report (1/9, Kaplan) reports that "the mounting allegations of domestic spying have sparked widespread concern and prompted members of Congress to action, among them Arlen Specter, the Pennsylvania Republican who chairs the Senate Judiciary Committee and who will convene hearings later this month. 'I want to know precisely what they did,' Specter said. 'How the NSA utilized their technical equipment, whose conversations they overheard, how many conversations they overheard, what they did with the material, what purported justification there was.' Democrat Rep. Robert Wexler is demanding documents on the Defense Department's secret monitoring program, part of a little-known agency called the Counterintelligence Field Activity."

Time (1/9, Lacayo) adds that "the House and Senate Intelligence Committees are almost certain to make deeper inquiries. Meanwhile, the Justice Department is launching an investigation of its own, into how word of the secret program was leaked." Justice officials "have refused to say whether the overall legality of the NSA program will also be investigated."

Bush Administration "Implored" NYTimes Editors Not To Publish Domestic Spying Story. Time (1/9, Ratnesar) reports on New York Times reporters James Risen and Eric Lichtblau, who broke the story "that the Bush Administration was running a covert domestic-spying program." It "took Risen more than a year to get the story into print -- and not before President Bush personally implored Times editors not to publish Risen and Lichtblau's account of how Bush authorized the National Security Agency to wiretap telephone and e-mail communications inside the US without court-sanctioned warrants." Time adds, "At the center of the article's backstory is Risen, who unsuccessfully pushed to publish the wiretap report last year, then took a leave to write a book, State of War: The Secret History of the CIA and the Bush Administration. It now appears he may pay a price for the disclosure: last Friday the Justice Department opened an investigation into who leaked the existence of the NSA program to the Times, raising the prospect of Risen's being compelled to reveal the identities of the 'nearly dozen' current and former officials who spoke to him about the program or face jail time for contempt of court."

Domestic Spying Debate Follows A "Predictable" Wartime Pattern. Newsweek (1/9, Thomas, Klaidman) reports in its cover story, "The current debate over national security and civil liberties is not new. It follows a predictable pattern of a democracy in wartime. … To understand the current struggle -- and judge how seriously to take the Bush and Cheney bids for power -- it is useful to compare this battle to all the balancing acts that have come before. The facts change, but the pattern varies little: In national crises, presidents reach for power." A president "will almost always choose to violate individual rights over the risk of losing a war." Newsweek adds, "Congress lies low and goes along. … Typically, in times of national peril, Congress gets swept

along on a wave of patriotism. … The bureaucracy pushes back. … Though 'bureaucrat' can be a bad name, government careerists are sometimes the only ones who will uphold standards of fairness or decency. They know, too, that they can be left holding the bag if later congressional hearings look into dubious secret operations. … The public and the politicians react -- and overreact. Historically, wartime encroachments on civil liberties have spawned backlashes. … The American public may be less than sympathetic to the targets of the Bush antiterror crackdown. But if the administration is shown to have violated the civil liberties of mainstream peace groups or (heaven forbid!) members of the press, the outcry could produce an overreaction."

More Commentary. Columnist Ruth Marcus, meanwhile, writes in today's Washington Post (1/2) about Bush's domestic spying, and comments, "Perhaps, in the aftermath of Sept. 11, that's how the country wants its intelligence activities conducted." But "living on the edge inevitably risks falling off a cliff - especially if you choose to live there on your own and in secret." Marcus says "the need for legal checks, the importance of congressional oversight, the missteps that inevitably occur when the executive branch is accountable only to itself -- seem to have been ignored by all the parties involved. As Congress gears up for another needed round of hearings, the challenge is not only to discover what happened but also not to forget, again, what was already, painfully learned."

DOJ IG Finds Terror Specialists At US Attorney's Offices Failing To Coordinate. The Washington Times (1/3, Seper, 90K) reports that a report from the Justice Department's Office of Inspector General has concluded that "Intelligence specialists at the 93 US attorneys' offices assigned to identify terrorist activity and assist in prosecutions are not coordinating their efforts and lack guidance." According to the report, though the offices "have made 'valuable' individual contributions to counterterrorism efforts, their overall effectiveness needs to increase through improved coordination and guidance." The IG report "made eight recommendations to improve the use of the specialists, including identifying and providing the standard tools they should use, defining the types of results they should produce, and establishing the quality standards those results should meet. "

Former CIA Official Says Agency May Need A Decade To Build Up Anti-Terror Service. Reuters (1/2, Morgan) reports, "A former CIA counterterrorism officer who tracked Osama bin Laden through the mountains of Afghanistan says the U.S. spy agency could need a decade to build up its clandestine service for the U.S. war on terrorism." Gary Berntsen, "a decorated espionage officer who led a paramilitary unit code-named 'Jawbreaker' in the war that toppled the Taliban after the September 11 attacks," said CIA Director Porter Goss "faces an uphill battle to fill the agency's senior ranks with aggressive, seasoned operatives." Berntsen said in an interview, "He's probably more aggressive than most of the senior officers in the clandestine service. So I think he's having to pull them along a bit." Goss, he added, "is trying to improve the situation. But it's going to be tough. The rebuilding is going to take years. A decade, at least."

Experts Say Padilla Dispute Could Jeopardize Terror War. The Legal Times (1/2, Henning) reports, "This time, audacity may not pay off for Bush administration lawyers. …. Having aggressively — and in the view of their critics, arrogantly — pursued an expansive view of executive power since the start of the war on terrorism, they could see their plans derailed by an escalating skirmish over 'enemy combatant' Jose Padilla." The Times continues, "Last week was punctuated by another round, in a rancorous and highly unusual exchange between the U.S. Court of Appeals for the 4th Circuit and the Bush administration over the detention of Padilla, a U.S. citizen whose case is regarded as a crucial legal litmus test of anti-terrorism tactics. … In late November the government abruptly asked the appeals court to vacate a Sept. 9 decision granting President George W. Bush the right to detain indefinitely U.S. citizens as enemy combatants without charge or trial. It was a move that alienated one of the administration's most reliable judicial allies, the largely conservative 4th Circuit." The Times adds 'The administration's abandonment of its aggressive position in a case that it has touted as crucial to battling terrorists confounded outsiders and infuriated the judges who had previously given the White House a highly favorable ruling. … 'This is perhaps the most important constitutional litigation since September 11,' says Timothy Lynch, director of the Cato Institute's Project on Criminal Justice. 'They severely underestimated the reaction by the judiciary and other legal observers. Maybe they missed the forest for the trees and lost sight of how big this was, but this is going to hurt the credibility of the Justice Department in other terrorism cases.'"

The Pittsburgh Post-Gazette (1/2, McGough) reports, "It must have seemed like a good idea at the time. Fearful of another test of presidential power in the U.S. Supreme Court, the Bush administration in November decided to cut its losses and end the 3 1/2-year-long confinement of Jose Padilla as an 'enemy combatant.' .. Mr. Padilla, a Brooklyn-born convert to Islam, was arrested at Chicago's O'Hare Airport in May 2002 and was identified by then-Attorney General John Ashcroft as a participant in an al-Qaida plot to explode a radioactive 'dirty bomb' in the United States. A federal appeals court upheld his detention, but Mr. Padilla's lawyers appealed to the Supreme Court. … Then the Bush

administration executed a legal U-turn. It secured an indictment of Mr. Padilla by a federal grand jury in Florida on terrorism charges unrelated to a 'dirty bomb,' announced that he would be transferred from a Navy brig in Charleston, S.C., to a civilian prison in Miami and asked the 4th U.S. Circuit Court of Appeals in Richmond to vacate its decision upholding Mr. Padilla's confinement." The Post-Gazette adds, "The 4th Circuit, one of the administration's favorite tribunals, wouldn't play. It refused to vacate its order or approve of Mr. Padilla's transfer from military to civilian custody. In an opinion by Judge J. Michael Luttig, a conservative icon often mentioned as a possible Bush appointee to the Supreme Court, the 4th Circuit worried about 'an appearance that the government may be attempting to avoid consideration of our decision by the Supreme Court.' … Last week the administration shot back, demanding that the Supreme Court authorize Mr. Padilla's transfer. In a petition filed with the Supreme Court, Solicitor General Paul D. Clement fumed that 'the 4th Circuit's order defies both law and logic' and constituted an 'unwarranted attack' on President Bush's authority. Besides, Mr. Clement said, Mr. Padilla's lawyers hadn't objected to transferring their client. … It is true that in an earlier filing with the 4th Circuit, Mr. Padilla's attorneys had indicated that they wouldn't object to the transfer because they could continue to challenge Mr. Padilla's designation as an enemy combatant. But last week they took a different tack. … The battle of the briefs between the government and Mr. Padilla's lawyers turns on the proper interpretation of a federal court rule that says prisoners seeking a writ of habeas corpus -- as Mr. Padilla is doing -- ordinarily can't be transferred from one jailer to another. But the larger issue in the turf war between the 4th Circuit and the Bush administration is the same one raised in Mr. Padilla's original legal challenge: the scope of presidential power in the 'war on terror.'"

WPost Comments On Changing Government Tactics In The Padilla Case. The Washington Post (1/2) editorializes, "Just when it appeared the case of accused enemy combatant Jose Padilla couldn't get any weirder, the two parties have switched sides. In an emergency brief filed before the Supreme Court last week, the Justice Department asked the justices to step in and allow the government to transfer Mr. Padilla immediately from military to civilian custody so that he can face the criminal charges recently filed against him. This is the same Justice Department that had been arguing for 3 1/2 years that Mr. Padilla could be held without charge on President Bush's order as an al Qaeda fighter - for much of that time without even having access to his lawyers. … The government is now seeking to release Mr. Padilla from his legal limbo, and Mr. Padilla is objecting."

US Said To Be Underutilizing Arab, Muslim Community In War On Terror. Randa Fahmy Hudome, former associate deputy energy secretary in the Bush administration, in an op-ed in the Wall Street Journal (1/3, A24, 2.11M) writes that while the US government "has focused on the vital national security challenges posed in the post-9/11 environment -- challenges in law enforcement, intelligence gathering and public diplomacy," there is "an untapped resource in all 50 states that can provide insight into many of these challenges -- the American Arab and Muslim community." However, "they have been underutilized on the frontlines of the global war on terror. While President Bush has appointed more Arab- and Muslim-Americans to senior positions than any previous administration, the rest of the government has been slow to follow his lead." Fahmy Hudome states, "The Department of State should create an Arab- and Muslim-American Advisory Board -- made up of experts who reflect the religious, ethnic and geographic diversity of the Middle East -- to advise the US government about issues, sensitivities, perceptions and misperceptions both here and abroad."

Administration Action On Hamadi Release Called Inadequate. Ken Stethem, brother of US Navy Diver Robert Stethem, who was murdered during the 1985 TWA hijacking, was asked on MSNBC's Scarborough Country (1/2), why he wrote to the Bush Administration complaining about the release by German authorities of Mohammed Ali Hamadi, who was convicted of the murder. Stethem said, "We're absolutely unsatisfied with the indifference and the action that they took upon Hamadi's release. … We've gotten two phone calls, one from Andrew Card, wishing us well and saying he's sorry. And then we got one from [State Department Counterterrorism Coordinator] Ambassador [Henry] Crumpton…saying basically the same thing." Stethem went on to say he has not "heard anything" from Congress, "and it's unbelievable." When asked what the Administration's response to his requests has been, Stethem said, "Nothing! We've been trying to get meetings with Condoleezza Rice in the State Department, through the Justice Department since May. And we've not been given the opportunity once. … It's incredible, just incredible to see the president soliciting support for the war on terrorism, the same week that Hamadi is released and the Administration knew about his impending release while the president was preparing that speech."

PATRIOT ACT:

White House To Step Up Defense Of Patriot Act, NSA Surveillance. The Financial Times (1/3,

Daniel) reports the White House "will this week step up efforts to defend its policy on the Patriot Act as well as its controversial decision to conduct domestic surveillance on US citizens without a warrant from a judge, in the face of mounting concerns from civil liberties groups." President Bush "began the counter-offensive with a strong defence of his decision in 2001 to authorise the National Security Agency to eavesdrop on those suspected of links to al-Qaeda and of his legal authority to prosecute the war on terror." On Tuesday, Bush "will take part in a meeting on the Patriot Act, the anti-terrorism legislation that Congress failed to renew before the Christmas break. On Wednesday he will make a statement on the 'war on terror' at the Pentagon." As "part of a co-ordinated approach, Dick Cheney, vice-president, will also give a speech about terrorism."

HOMELAND RESPONSE:

Chertoff To Announce Changes To Homeland Security Grant Program. Several media outlets this morning are reporting on the upcoming announcement of changes to the Urban Area Security Initiative. The AP indicates that Secretary Chertoff has sought the changes, while the New York Times notes that he is prepared for some negative response. The New York Times (1/3, Lipton, 1.19M) reports, "Facing cuts in antiterrorism financing, the Department of Homeland Security plans to announce today that it will evaluate new requests for money from an $800 million aid program for cities based less on politics and more on assessments of where terrorists are likely to strike and potentially cause the greatest damage, department officials say. The changes to the program, the Urban Area Security Initiative, are being driven in part by a reduction in the overall pool of money for antiterrorism efforts." Homeland Security Secretary Michael Chertoff, who is to announce the shift, said in a speech last month that "the changes he was considering would require an acknowledgment that the nation could not protect itself against all risks." DHS officials "would not offer predictions of what the likely outcome would be in terms of how many cities would see their grants eliminated or cut significantly." Meanwhile, "Mr. Chertoff has made clear that he expects protests when the final grant awards are announced."

The Wall Street Journal/AP (1/3, A4) reports, "The change…addresses both the destruction and lack of preparedness seen during Hurricane Katrina. It also reflects…Chertoff's efforts to give his department an all-hazards mission -- even though it was created as a direct result of the Sept. 11, 2001, terror attacks." The AP notes, "Homeland Security spokesman Russ Knocke would not comment on which cities will be eligible for grants this year." A longer version of the AP (1/2, Jordan) story noted, "Calls to city officials around the country and to the US Conference of Mayors for comment were not immediately returned."

Under the headline "More Cities Eligible For Urban Grants, USA Today (1/3, 2.31M) reported, "Homeland Security Secretary Michael Chertoff will announce today which cities will receive part of $765 million in annual Urban Area Security Initiative grants. In past years, the grants have gone to the nation's 50 largest cities for terror-related security measures. This year, cities that risk being hit by a natural disaster or health crisis also are eligible."

DHS Issues Manual On Correspondence For Employees. In its "Verbatim" column, the Washington Post (1/3, A15, 744K) runs a portion of "a new manual for correspondence standards and procedures" sent out by Fred Schwien, the Department of Homeland Security's executive secretary. The portion is headlined, "4.3 Statement of Lateness (Note: Not in use until on or about Feb 1, 2006)," and reads, "If a component response does not meet the five-day deadline for returning correspondence to the ES, a statement of lateness is required. … Workload and component priorities are not valid excuses. As stated previously, for the DHS employee tasked with preparing an item for the Secretary or Deputy Secretary signature, there are few, if any, higher priorities."

Deadline Extended For Evacuees To Leave Hotels. Federal officials have extended the deadline for Hurricane Katrina evacuees to check out of their government-funded hotel rooms. The AP (1/3, McGill) reports that the extension comes as the feds "iron out issues arising from a class-action lawsuit. One issue: The Federal Emergency Management Agency, which inherited the program from the American Red Cross, still does not have up-to-date records on the identities of evacuees in the hotel program or where they are staying, according to court papers filed last week by government lawyers. Under a federal judge's ruling last month, FEMA is required to keep the hotel program running until Feb. 7. However, U.S. District Judge Stanwood Duval said FEMA could stop paying for hotel rooms beginning Jan. 7 — Saturday — for evacuees who have been approved or disapproved for other FEMA housing aid, such as a trailer or rental assistance. Now, the Jan. 7 date no longer holds, according to a flier being distributed to hotels in the program. It says: 'The program will continue for all evacuees in all states until further notice pending the resolution of certain issues now in litigation.'"

Residents Await Word On Neighborhood Hit By Katrina Oil Spill. A front page story in the Wall Street Journal (1/3, McKay, 2.11M) reports that when the

levees that protected the Chalmette, Louisiana "gave way to Hurricane Katrina on Aug. 29, about 1,800 homes were inundated with floodwaters carrying nearly 1.1 million gallons of oil from a nearby refinery. Thick black crude seeped into homes and yards. Officials sealed off the area. A private contractor hired by the refinery's owner, Murphy Oil Corp. of El Dorado, Ark., began cleaning up. But the crews left most homes and yards untouched for weeks until Murphy Oil could track down their scattered owners to seek permission to clean them, the oil company says. Four months after Katrina hit, oil remains in hundreds of homes and yards. This heavily damaged community, which remains mostly abandoned, raises acute personal and public-policy questions: How can residents displaced by Katrina determine if it's safe to return to their homes, and when? And who ultimately should decide?" The Journal notes that "neither federal nor state nor local officials have provided residents with any clear answers. Parish leaders and residents say they expected the federal Environmental Protection Agency to manage the cleanup process and determine when the neighborhood was safe. But the EPA says it's not up to it to decide whether the community should be resettled."

I-10 Repairs Cited As An Example For All Gulf Coast Rebuilding Projects. The New York Times (1/3, Schwartz, 1.19M) reports that while the repair of the twin spans of Interstate 10 over Louisiana's Lake Pontchartrain "has gone unusually right, coming in ahead of time and under budget. By cannibalizing one bridge to fix the other, and then using temporary steel spans to fix the first bridge, the State of Louisiana and the contractor were able to open one span in October and plan to have traffic flowing on the other as early as Jan. 6, nearly two weeks ahead of schedule." The Times adds that following Katrina, "one of the highest priorities was getting the Interstate open, and doing so quickly required creative thinking, dedication and no small amount of luck. … The work was financed by the Federal Highway Administration, which advised Louisiana on the project. Norman Y. Mineta, the federal transportation secretary, said through a spokeswoman that the project was 'serving as a model for the kinds of efficiencies we should try to achieve in all gulf rebuilding projects.'"

Local Gulf Coast Contractors Feel Cut Out Of Katrina Cleanup. The CBS Evening News (1/1, story 7, Roberts) reported, "In the months since Hurricane Katrina hit, Federal agencies have poured billions of dollars into the battered gulf region. But in Mississippi, Bill Whitaker heard complaints from local contractors who say few of those dollars have come their way." CBS (Whitaker) added, "Big players like Ashbritt of Pompano Beach, Florida, awarded a Federal contract worth $500 million and others like Bechtel and Halliburton subsidiary Kellog Brown and Root got contracts for tens of millions dollars more." Socrates Garrett: "And the network of good old boys were already in place." Whitaker: "Socrates Garrett's company is the biggest in Mississippi yet trucks and workers he has in place sit idle." Garrett: "If we can't work then you can bet that other smaller minority firms don't even have a chance." Whitaker: "Mississippi Congressman Thompson says his state's businesses are suffering because FEMA and the Army Corps of Engineers and other Federal agencies responsible for cleanup are playing politics." Rep. Bennie Thompson: "Those are the contracts that have gone to companies that were well connected, had the right lobbyists, contributed to the right party in power." Whitaker: "Ashbritt says it wasn't politics but hard work that won the contracts." Randal Perkins, Ashbritt: "At the end of the day if you're not qualified and capable and ready to handle the challenge given to you you're not getting the contract." Whitaker: "He says most of Ashbritt's subcontracts have gone to Mississippi companies, but Congressman Thompson says they're getting the dregs, the little jobs and little of the Federal money. Mississippi's Republican governor agrees." Gov. Haley Barbour: "We don't think there's a high enough percentage of the work going to local contractors. There's some, unquestionably, but we think there needs to be more."

Nagin Says New Orleans Could Take Three To Five Years To Regain Population. The AP (1/2) reports, "New Orleans Mayor C. Ray Nagin yesterday said it could take three to five years to regain the city's population of nearly half a million before Hurricane Katrina. Mr. Nagin said on CBS' Face the Nation that reopening several public and private schools this month would help raise New Orleans' population to about 200,000, double the current level, as families returned with their children. Shortages of suitable housing would limit further growth over the near term, he said."

Emergency Officials Include Animal Rescue In Emergency Plans. The Washington Post (1/2, B1, Wan) reports on the "merging field of disaster planning for pets, filled with doomsday scenarios, four-legged victims and people who love them. For years, despite an estimated 69 million U.S. households with a pet, animal advocates have been relegated to the fringes of emergency planning. After Katrina, however, and the sight of people in New Orleans refusing to evacuate and in some cases dying with their pets, emergency officials are starting to take animal rescue seriously. By saving the pets, advocates said, owners can be saved as well." The Post adds, "The concept is as old as Noah's Ark, but modern pet disaster planning didn't truly begin, U.S. experts said, until after Hurricane Andrew in 1992.

When Andrew tore through South Florida, it killed more than 100 animals in the Miami Metrozoo. Hundreds of others, including baboons, antelope and 500-pound Galapagos tortoises, wandered off through the rubble. Escaped horses drowned in canals. … After Andrew, the federal government created Veterinary Medical Assistance Teams, to be deployed wherever animal-threatening disasters hit. The 1992 hurricane also prompted the Humane Society to establish a department devoted to disaster planning and rescue."

Gulf Coast Seeing Puppy Boom Following Hurricane Katrina. The Washington Post (1/3, A10, Reeves, 744K) reports on a boom in the birth of puppies in the wake of Hurricane Katrina. According to the Post, "Officials say more than 6,000 pets were saved in the region after Katrina came ashore Aug. 29, and many of them were relocated to new homes elsewhere in the country. An unknown number drowned in the floodwaters or died later of injuries. But thousands of animals remain, and humane organizations are beginning to see the result of even small numbers of animals running loose for weeks in neighborhoods where fences were flattened and owners fled.'

Charleston Post & Courier Lauds FBI's Nuclear Monitoring. The Charleston (SC) Post & Courier (1/3) editorializes, "A federal program to monitor radiation levels has quietly sought to defuse one of the greatest terror threats to the nation. Radiation surveillance seeks to diminish the likelihood that terrorists could set off a so-called "dirty bomb" containing radioactive material or, worse, detonate a nuclear explosive." The P&C continues, "The program was recently reported on the Web site of U.S. News & World report, and confirmed by federal officials. It hasn't received the same media attention as electronic eavesdropping and other forms of domestic spying, though it has been criticized by some Muslim groups who feel they are being targeted." The P&C adds, "Radioactivity monitors have been installed at a variety of public locations, including ports and subways since 9/11. There should be no reluctance to use passive monitoring as broadly as is warranted. … Monitoring potential sources of radioactivity by 'sniffing the air' clearly doesn't raise the same issues of privacy as wiretapping. Keeping radioactive material out of the hands of potential terrorists is essential to national security and public safety."

WAR NEWS:

Shiites, Kurds May Drop Allawi From Coalition, Give Sunnis Role. The Los Angeles Times (1/3, Daragahi, 958K) reports, "The victors in last month's parliamentary election indicated Monday that they were prepared to cut a secular politician backed by Washington out of the new government in favor of Iraq's main Sunni Arab slate. The pro-Western politician, former interim Prime Minister Iyad Allawi, did poorly in the Dec. 15 balloting despite spending heavily on a sleek television campaign." The Times adds that "the emerging political alliance lumps together Shiites, Kurds and Islamist Sunni Arabs — and excludes secular Iraqis, hard-core Sunni Arab nationalists and those sympathetic to the Baath Party of ex-dictator Saddam Hussein."

USA Today/AP (1/3) adds "Iraq's main Sunni Arab group made an unprecedented trip north to see Kurd leaders and agreed Monday for the first time on broad outlines for a coalition government." The move "opens a way out of the political turmoil that has gripped the country since disputed parliamentary elections Dec. 15." The agreement "struck by Kurdistan regional President Massoud Barzani and representatives of the main Sunni Arab group, the Iraqi Accordance Front, could lead to a broad-based government." The Accordance Front "will be part of a future government," said Foreign Minister Hoshyar Zebari, "a Kurd who sat in on the meetings."

The New York Times (1/3, Oppel Jr., 1.19M) also reports on the "broad framework for a coalition government," which "drew a rebuke from other Sunni Arab political leaders who accused the Sunni consensus party of violating an agreement to press ahead with claims of Sunni disenfranchisement during the vote on Dec. 15 and to not bargain on their own for a role in the new government."

Despite Poor Election Results, Chalabi Could Play Key Role. Knight Ridder (1/3, Hannah, Youssef) reports, "Even though Ahmad Chalabi apparently lost badly in last month's parliamentary election here, the former Pentagon favorite is still likely to be a big player in the next Iraqi government." The Dec. 15 vote "went largely to ethnic and sectarian coalitions at the expense of secular slates, including his, preliminary returns indicate. That could leave him without a seat in parliament." Yet "the former exile who helped spur the US-led invasion by feeding false intelligence to Washington about Saddam Hussein's alleged weapons of mass destruction, and who returned to Iraq after Saddam's fall to craft himself into a political leader, still has more cards to play. Characteristically, Chalabi, 61, could land on his feet in a high government post even though he failed to win even a minimum of votes from the Iraqi people."

Iraq Facing Fuel Crisis As Oil Minister Quits. NBC Nightly News (1/2, story 8, :30, Holt) reported, "There are growing concerns tonight about an oil crisis in Iraq. Fuel prices for Iraqi citizens are way up, supplies are growing scarce and new numbers out today show Iraq's oil exports hit their lowest levels since the war. Today, Iraq's oil minister

quit." The AP (1/3, Juhi) adds "Iraq's exports of oil hit their lowest level in December since the war, as the country's oil minister resigned Monday in the wake of protests and riots over soaring gas prices and lengthening lines at the pump. Only 34.4 million barrels were exported in December, or about 1.1 million barrels per day," which was "the lowest average since Iraq resumed exports after the U.S.-led invasion in March 2003, according to figures released Monday." The Washington Post (1/3, A12, Hernandez, 744K) also reports the story.

Twelve Iraqis Killed In Insurgent Attacks. NBC Nightly News (1/2, story 8, :30, Holt) reported, "At least 12 people, including two children, were killed in violence today. In the worst incident, a suicide bomber rammed his car into a bus full of Iraqi policemen, killing seven and injuring 13." The CBS Evening News (1/02, story 7, 2:00, Schieffer) reported, "No American deaths were reported in Iraq today but insurgent violence killed at least a dozen Iraqis."

The Los Angeles Times (1/3, Daragahi, 958K) reports the US military also "reported the deaths of four American civilian contractors involved in a motor vehicle accident on the Asad Air Base in western Iraq on Sunday. Nineteen others, including a Marine, were also injured when their bus was struck by a 7-ton truck, the military said."

Iraqi Volunteer Buries Unclaimed Bodies Of Those Slain In Violence. The CBS Evening News (1/02, story 7, 2:00, Schieffer) reported on the "story of a remarkable man who has devoted himself to honoring the dead, no matter who they were." CBS (Alfonsi) added on Sheikh Jamal-al Sudani's effort to bury the unclaimed bodies of about 250 of those killed in insurgent attacks. Al-Sudani "and his group of volunteers aren't paid. They do this grim job, they say, solely for God's rewards." The "group drives the bodies from Baghdad to Najaf through Iraq. The final stop is the Valley Cemetery, a holy place because a number of prophets are buried there and a practical place because the loose soil makes it easy to bury so many bodies. The bodies of Sunnis, Shiites, Muslims and Christians are all carefully washed and wrap." Terrorists "want to kill him because he cares for the victim of their suicide attacks others because he buries the suicide bombers but he is no stranger to threats. He's been doing this work for 15 years."

Poll Finds Support Among Military For Bush Policies Drops To 60%. Agence France-Presse (1/3) reports, "Support for President George W. Bush's Iraq policy has fallen among the US armed forces to just 54 percent from 63 percent a year ago, according to a poll by the magazine group Military Times. In its annual survey of the views of military personnel, the group reported on its website that support for Bush's overall policies dropped over the past year to 60 percent from 71 percent." AFP adds, "While still significantly more supportive of the president than the broad US population, the fall in support by military personnel tracks a similar decline in the president's popularity among the general public."

Murtha Says He Wouldn't Join Military Today. Reuters (1/3) reports, "Rep. John Murtha, a key Democratic voice who favors pulling U.S. troops from Iraq, said in remarks airing on Monday that he would not join the US military today. A decorated Vietnam combat veteran who retired as a colonel after 37 years in the U.S. Marine Corps, Murtha told ABC News' 'Nightline' program that Iraq 'absolutely' was a wrong war for President George W. Bush to have launched." "Would you join (the military) today?," he was asked in an interview taped on Friday. He replied, "No." The interviewer retorted, "And I think you're saying the average guy out there who's considering recruitment is justified in saying 'I don't want to serve.'" Said Murtha, "Exactly right."

On ABC News Nightline (1/2), Murtha said the Administration "got awful lot of bad information" about the situation in Iraq because "they don't talk to Congress. … They don't listen to people with experience." When asked if President Bush "doesn't really know what's going on" in Iraq, Murtha said, "Yes, that's what happens. The President mischaracterizes things because he gets bad information." In the run-up to the Gulf War, former President Bush "would get all kinds of criticism from Democrats and Republicans, and he would patiently listen to it, and then do what he thought was right." The American public "is way ahead of this president. If they think they're fooling the public with their rhetoric, they're wrong. You can't operate that way in today's world. … The American people want to see a clear mission, they want to see an exit strategy."

Father Calls Son's Death In Iraq "A Waste." Paul E. Schroeder, managing director of a trade development firm in Cleveland, writes in the Washington Post (1/3, A17, 744K), "Early on Aug. 3, 2005, we heard that 14 Marines had been killed in Haditha, Iraq. Our son, Lance Cpl. Edward 'Augie' Schroeder II, was stationed there. At 10:45 a.m. two Marines showed up at our door. After collecting himself for what was clearly painful duty, the lieutenant colonel said, 'Your son is a true American hero.' … I am outraged at what I see as the cause of his death. For nearly three years, the Bush administration has pursued a policy that makes our troops sitting ducks. While Secretary of State Condoleezza Rice told the Senate Foreign Relations Committee that our policy is to 'clear, hold and build' Iraqi towns, there aren't enough troops to do that. … Though it hurts, I believe that his death -- and that of the other Americans who have died in Iraq -- was a waste" if "Americans stop hiding behind flag-draped hero

masks and stop whispering their opposition to this war. Until then, the lives of other sons, daughters, husbands, wives, fathers and mothers may be wasted as well. This is very painful to acknowledge, and I have to live with it. So does President Bush."

Abizaid Optimistic About Turning Control Over To Iraqi Government.

USA Today (1/3, Komarow, 2.31M) reports, "The top US general in the Iraq region says he is optimistic the United States will succeed this year in turning a substantial part of the country over to Iraqi government control, moving US forces into a backup role. The ability of Iraq's military to secure the country is a key condition for the eventual withdrawal of US forces." In an interview this weekend, Gen. John Abizaid, who "was on a short visit to Iraq, prodded his subordinates to turn control of their sectors over to Iraqi forces as soon as the Iraqis are ready. U.S. commanders must overcome their reluctance to turn over control to less-experienced Iraqi forces, Abizaid said." Said Abizaid, "Look, there is always a risk in taking a chance on the people that you've come to help. … There's also a risk of condescension (where) you look at them and say, 'They're not ready.'" Abizaid, "head of US Central Command, declined to speculate on what American troop levels will be at the end of 2006."

Administration Boosts Peacekeeping, Post-War Capabilities. The Wall Street Journal (1/3, King Jr., Jaffe, 2.11M) reports, "The difficulties of rebuilding Iraq after toppling Saddam Hussein have taught President Bush a painful lesson: Aftermaths can be tougher than wars. Now the administration is trying to recalibrate the military and foreign service to better handle postwar developments in future conflicts. For the first time, the Pentagon has declared that, along with battling foes, the ability to foster stability and reconstruction is one of its core missions." The Administration also "planted the seed for a corps of trained nation builders in 2004 when it created an Office of the Coordinator for Reconstruction and Stabilization in the State Department. The 55-person shop is staffed largely by officials on loan from the Defense Department, the Central Intelligence Agency and other agencies. It tries to anticipate the next global hot spot -- be it Sudan or North Korea -- and prepares to deploy as the main US postwar coordinator wherever a need might arise." However, "with finances tight, Congress isn't rushing to budget the money. One senior Pentagon official says he has heard objections from both Democrats and Republicans on Capitol Hill. Their worry: elevating the importance of nation-building will, over time, divert funds from the nation's ability to wage all-out war and leave the military less prepared to counter an unexpected major threat from a country such as China. And legislators in both parties are wary of more Iraq-style adventures."

Budget Request To Include No New Iraq Rebuilding Funds.

The Wall Street Journal (1/3, Dreazen, 2.11M) reports, "The US and its key foreign allies are likely to fall short of their funding pledges to help rebuild Iraq, as violence in the war-torn country absorbs contributions and deters nations from making new ones. T he reconstruction shortfall may total one-third of promised funds, adding to the challenges for Iraq's next government." The White House and "some US lawmakers have made clear that this year they want Iraqi security forces to take the lead in combating the insurgency, laying the groundwork for a gradual US military withdrawal." The new year also "marks a turning point in the administration's goal to rebuild Iraq -- an effort that has had mixed success." The Journal adds, "The $18.4 billion US rebuilding program was established with a three-year term that expires in the fall, and lawmakers -- mindful of contractor overcharges, corruption and security issues that have surfaced -- have made clear that they are unwilling to authorize a follow-up program. The budget request for Fiscal Year 2007 that the White House sends Congress next month will include no new Iraq rebuilding money, according to an official familiar with the matter. News that the White House won't seek Iraq reconstruction funds for fiscal 2007 was reported earlier by the Washington Post."

Book Claims CIA Ignored Information That Iraq Had No WMD.

The AP (1/3) reports, "A new book on the government's secret anti-terrorism operations describes how the CIA recruited an Iraqi-American anesthesiologist in 2002 to obtain information from her brother, who was a figure in Saddam Hussein's nuclear program." Dr. Sawsan Alhaddad of Cleveland "made the dangerous trip to Iraq on the CIA's behalf. The book said her brother was stunned by her questions about the nuclear program because -- he said -- it had been dead for a decade." New York Times reporter James Risen "uses the anecdote to illustrate how the CIA ignored information that Iraq no longer had weapons of mass destruction. His book, 'State of War: The Secret History of the CIA and the Bush Administration' describes secret operations of the Bush administration's war on terrorism." The major revelation in the book "has already been the subject of extensive reporting by Risen's newspaper: the National Security Agency's eavesdropping of Americans' conversations without obtaining warrants from a special court." The book said Dr. Alhaddad "flew home in mid-September 2002 and had a series of meetings with CIA analysts. She relayed her brother's information that there was no nuclear program. A CIA operative later told Dr. Alhaddad's husband that the agency believed her brother was lying."

Clinton Administration Said Saddam Was Reconstituting His WMD. In its "History Lessons" column,

the Washington Times (1/3, 90K) excerpts the State Department's Daily Press Briefing of November 10, 1998 in which then-Assistant Secretary of State James Rubin said, "[T]his can't go on indefinitely; that if Saddam [Hussein] continues to block UNSCOM and we do not respond, he will be able to reconstitute his weapons of mass destruction in a matter of months, not a matter of years. This is a dangerous situation; this is why we have considered it a grave situation. If we fail to act, he will feel emboldened to threaten the region further, armed, possibly, with the most dangerous kinds of weapons."

Saddam Says He Prefers To Be Shot If Sentenced To Death. The Washington Times (1/3, Martin, 90K) reports, "Saddam Hussein has told his lawyers that he wants to be shot by firing squad, not hanged, if sentenced to death during his murder trial, which resumes later this month in Baghdad." Saddam "maintains that he is still commander in chief of Iraq's armed forces -- and that a firing squad is 'the right way' to execute a military leader."

US Teen Returns Home From Winter Vacation Trip To Baghdad. NBC Nightly News (1/2, story 11, 1:50, Holt) reported 16-year-old Farris Hassan is "returned home last night from his ill-advised solo journey to Iraq. And it's not just his mom who wants answers." NBC (Sanders) added, "Maybe it's a sign of the times when a 16-year-old tells his family he's more nervous about facing the US media than traveling to a war zone. But he may have good reason after his arrival at Miami International Airport last night. He certainly appeared self-assured late this afternoon." Farris Hassan: "Yes. Right now, I came back and I'm pretty tired and I'm preparing my statement this time." Sanders: "Today, it was Farris' day off. He says he'll talk the details about his trip tomorrow." Hassan "reportedly told selected friends he gone to Iraq to witness democracy in progress. But after talking to the Associated Press there, the US Embassy told him he couldn't make any more statements." USA Today (1/3, Koch, 2.31M) and New York Times/AP (1/3), among others, also report the story.

Magazine Notes Iraq War Game Staging Ground In Louisiana. The Washington Post (1/3, C1, Carlson, 744K) reports Harper's magazine "has found a big, heartwarming silver lining inside that gloomy old Global War on Terrorism. Here it is: Our government has hired a bunch of poor souls who lost their arms and legs in accidents and has rigged them up with bags of fake blood so they can play wounded civilians in war games down at Fort Polk, La." Cubic, "the defense contractor that produces these games, has also hired 250 Arabic-speaking immigrants at $220 a day as 'Cultural Role Players' in the war games. They've also hired hundreds of local Louisianans to play random Arab civilians, plus 'dozens of scriptwriters' to come up with realistic scenarios for the war games." Wells Tower, "author of this jaw-droppingly bizarre article," said, "The military spends an average of $9 million staging each 3 1/2 -week mission rehearsal exercise," which "works out to about $117 million a year." That "doesn't include the $49 million spent constructing the state-of-the-art fake city of Suliyah, which contains 29 buildings."

US Giving NATO, Allies Growing Role In Afghanistan. The Washington Post (1/3, A1, Witte, 744K) reports, "Four years into a mammoth reconstruction effort here that has been largely led, funded and secured by Americans, the United States is showing a growing willingness to cede those jobs to others. The most dramatic example will come by this summer, when the US military officially hands over control of the volatile southern region -- plagued by persistent attacks from Islamic militias -- to an international force led by the NATO alliance." The United States "will cut its troop strength by 2,500, even though it is not clear how aggressively NATO troops will pursue insurgents, who have shown no sign of relenting." The Post ads, "At the same time, the U.S. government is increasingly allowing Western allies, or Afghans themselves, to take on the tasks of rebuilding a country that has suffered more than two decades of fighting and remains beset by poverty, drugs and insurgency."

Bush Awards Purple Hearts To Soldiers Wounded In Iraq. The Houston Chronicle (1/2, Hedges) reports, "President Bush's first official act of the new year was pinning Purple Hearts on US soldiers wounded in Iraq, a signal that for the White House, 2006 would be another year dominated by the war." The President "gave the military award to nine soldiers during a private session today with veterans of Iraq and Afghanistan and some family members at the Brooke Army Medical Center." The soldiers "were among more than 2,300 wounded service members treated there since the beginning of the two wars, and Bush took note of their plight as he restated his reasons for the unpopular Iraq war." Said Bush, "There's horrible consequences to war -- that's what you see in this building. … On the other hand, we also see (soldiers) who say, 'I'd like to go back in, Mr. President, what we're doing is the right thing,' because many of these troops understand that by defeating the enemy there, we don't have to face them here. And they understand that by helping the country and the Middle East become a democracy, we are, in fact, laying the foundation for future peace."

The AP (1/2, Riechmann) says the President "boarded the Marine One presidential helicopter before dawn on his

ranch in Crawford and flew more than an hour to Randolph Air Force Base. His motorcade drove to Brooke Army Medical Center, a 224-bed hospital at nearby Fort Sam Houston, to meet with about 50 injured members of various branches of the armed forces and their families." Said Bush, "This hospital is full of healers and compassionate people that care deeply about our men and women in uniform. … It's also full of courageous young soldiers and marines, airmen. I'm just overwhelmed by the great strength of character of not only those who have been wounded but of their loved ones as well."

Reuters (1/2) adds Bush "returned to Washington later in the day to tackle his agenda for 2006, another year in which the Iraq war is expected to be a dominating factor with critics calling for US troops to withdraw." The Los Angeles Times (1/2, Chen) also mentions Bush's visit.

As 2006 Begins, Bush's Focus Is On Economy, Iraq, War On Terror. According to the AP (1/2, Riechmann), President Bush is starting 2006 trumpeting upturns in the US economy, defending US actions in Iraq and challenging critics of his policies in the war on terror. The AP adds, "White House officials hope this week sets the tone for its top priorities as Bush visits the Pentagon on Wednesday to discuss the war on terror and then flies to Chicago on Friday to try to convince Americans that the economy is on solid footing." On Sunday, Bush visited wounded US troops in San Antonio, and this week, he will use "the backdrop of the White House to meet with a bipartisan group of former secretaries of state and defense to discuss terrorism and Iraq and to surround himself with U.S. attorneys to pressure lawmakers to renew the Patriot Act."

Brownstein Compares Bush, Polk Presidencies. Ron Brownstein writes in the Los Angeles Times (1/2), "The president whom George W. Bush may resemble most is not his biological father, George H.W. Bush, or even Ronald Reagan, who often seems his ideological father, but James K. Polk, a dynamic and willful leader few discuss anymore. … Polk may be the only predecessor who matched Bush's determination to drive massive change on a minute margin of victory. Polk won by fewer than 38,000 votes of 2.7 million cast. Over four tumultuous years, he pursued an ambitious, highly partisan agenda that offered little to those who had voted against him. Sound familiar? … It's worth considering Polk's record not because Americans will take up arms against each other anytime soon — although you might never know that from listening to talk radio — but because it suggests that a president who slights the need to build national consensus can seed long-term problems that aren't immediately apparent amid short-term successes."

Bush Will Not Ask Congress For Additional Iraq Reconstruction Funding. The Washington Post (1/2, A1, Knickmeyer), in a front-page article, reports that the Bush administration "does not intend to seek any new funds for Iraq reconstruction in the budget request going before Congress in February, officials say. The decision signals the winding down of an $18.4 billion US rebuilding effort in which roughly half of the money was eaten away by the insurgency, a buildup of Iraq's criminal justice system and the investigation and trial of Saddam Hussein. … US officials in Baghdad have made clear, other foreign donors and the fledgling Iraqi government will have to take up what authorities say is tens of billions of dollars of work yet to be done merely to bring reliable electricity, water and other services to Iraq's 26 million people."

Army Officer Shows Off Baghdad Reconstruction Projects. The Washington Post (1/2, A10, Knickmeyer) traveled around Baghdad with Maj. John Hudson of the U.S. Army Corps of Engineers on a tour his "Prides and joys," the many reconstruction projects going on in the city. At "an Army Corps of Engineers office in the Green Zone -- the fortified site of much of the Iraqi government -- Hudson, in flak jacket and helmet, spread his hands lovingly on a map of Baghdad. 'Two youth centers. Two fire stations -- those are in some of your poorer neighborhoods. Baghdad highway patrol. A facility for the SWAT team. A new perimeter wall for Doura,' a power plant in Baghdad's insurgency-ridden south. A checkpoint on a southern road into the city. An electrical substation. … The projects are among 90 under his domain and among 3,600 projects in an $18.4 billion reconstruction package for Iraq due to peak, and be completed, this year." The Post adds, "Hudson will return to Colorado Springs around March. Money for the U.S. reconstruction package here is scheduled to run out around the end of the year. International donors largely have not kept their pledges to pick up the tab for reconstruction. Iraqis have balked at the painful economic reforms necessary to win foreign loans to do the work. Insurgents want to destroy it all. Civil war would do the same."

DOJ:

New Maryland US Attorney Restructures Staff, Targets Violent Crime. The Baltimore Sun (1/2, Dolan) reports, "Maryland's top federal prosecutor is both expanding his office and reorganizing his staff to emphasize a commitment to fighting violent crime." The Sun continues, "Maryland U.S. Attorney Rod J. Rosenstein said he would start this month by restructuring his criminal division. It's part of an effort, he said, to coordinate better with local and federal law enforcement agents. … 'I had a meeting with the FBI's public corruption unit, and there was a real question of where that responsibility lay in our office,' Rosenstein said. 'It's a

question of accountability.' The Sun adds, "Starting this year, federal prosecutors handling criminal cases in Baltimore will be required to focus on either terrorism and national security, fraud and public corruption, violent crime, drugs or major crimes - a catch-all section including civil rights violations and child pornography. They'll be expected to stay in their subjects for at least two years, Rosenstein said. … The division's managers have all been asked to reapply for their jobs, he added. … Five months into the job, the moves come as Rosenstein has established a reputation as a genial and intense leader known for his thoroughness and his prolific e-mails to his staff. … James Wyda, the federal public defender for Maryland, praised Rosenstein for his new hires and complimented the quality of his staff. … But Wyda also cautioned that Rosenstein is early in his tenure. He said Rosenstein would be judged, in part, on how he handles the substantial number of capital murder cases that have been transferred into the federal system in Maryland."

CORPORATE SCANDALS:

Attorneys For CA Defendants Claim US Misusing Sarbanes-Oxley. The Legal Times (1/2, Perrotta) reports, "Attorneys representing two former executives of Computer Associates, the Long Island, N.Y., company caught up in a massive accounting scandal, argued last week that federal prosecutors are misusing a criminal statute revised as part of the Sarbanes-Oxley Act, possibly leading to severe prison sentences — up to 20 years — that were not intended by federal legislators." The Times continues, "The dispute involves the prosecution of Sanjay Kumar, the former chairman and CEO of Computer Associates, and Stephen Richards, a former sales executive, on various fraud and obstruction charges. Federal prosecutors accuse both men of lying to the government and lying to their company's outside counsel, Wachtell, Lipton, Rosen & Katz, which was conducting an internal investigation of the company's accounting practices." The Times adds, "Kumar and Richards are in a fight over the meaning of a federal criminal statute that was amended as part of the Sarbanes-Oxley Act. … While defense attorneys argue that the SOX revisions have created a narrow statute that applies only to physical evidence, such as documents, the government contends it reaches beyond that to include any conduct that could obstruct an official proceeding."

Milberg Weiss Worried About Indicted Attorney's Actions. The California Recorder (1/3, Scheck) reports, "Nearly 12 years ago, an internal memo from the Southern California firm Best Best & Krieger expressed concerns that it was acting as a conduit for legally questionable payments from the plaintiff firm Milberg Weiss to Seymour Lazar, the lead plaintiff in dozens of securities class actions." The Recorder continues, "The memo, filed in court by prosecutors last week, expresses particular worry about the Best firm recording payments from the firm then known as Milberg Weiss Bershad Hynes & Lerach to Lazar as firm income, which would then be secretly credited to Lazar for future legal services. … 'To us it just smells bad,' the memo says, 'and probably would to an investigator.'" The Recorder adds, "That concern came to fruition in June, when Lazar and his attorney, Paul Selzer -- a former partner at the Best firm -- were indicted by a Los Angeles federal grand jury for allegedly taking more than $2 million in illegal kickbacks from Milberg Weiss. … The L.A. U.S. Attorney's Office has spent the past five years probing whether Milberg Weiss -- which split in 2004 when star partner William Lerach broke off to form his own San Diego-based firm -- paid illegal kickbacks to lead plaintiffs in class actions. … After several years of investigation with few public developments, the Lazar and Selzer indictments were widely seen as an effort to force the two defendants to testify against Milberg Weiss and its partners. … Prosecutors have also given immunity to at least two other former clients who say they received kickbacks from the firm via other attorneys. Lawyers familiar with the case say their allegations are similar to those detailed in the Lazar indictment."

NYTimes Bemoans Inflated Corporate Executive Pay. The New York Times (1/2) editorializes, "It would be nice to see corporate America put more effort - and money - into quality control and fair living wages for workers and less into exorbitant pay packages and bonuses for corporate chieftains. We remain hopeful."

CRIMINAL LAW:

Abramoff Plea Bargain Could Be Announced Today. The CBS Evening News (1/02, story 4, 2:30, Schieffer) reported, "In Washington, law enforcement sources told CBS News tonight that a plea bargain deal involving Washington lobbyist Jack Abramoff could be announced as early as tomorrow. We are told that the deal could implicate lawmakers who allegedly took illegal gifts from him. Abramoff has already been charged in connection with a corruption case in Florida. His attorneys had no immediate comment."

Abramoff Under Pressure To Take Plea Deal. With Abramoff under pressure from Federal authorities to accept a plea bargain, many Washington observers expect the arrangement would lead to the implication of several members of Congress. ABC World News Tonight (1/1, story 5, 2:15, Harris) reported Federal officials are "investigating

what's likely to be one of the biggest influence-pedaling scandals in history. The potential that Abramoff is cooperating is making some people in Congress very nervous. ABC's Geoff Morrell has that story." ABC (Morrell) added prosecutors believe Abramoff "used that money to bribe members of Congress and are now pressuring him to name names." Melanie Sloan, former Federal prosecutor: "I think people are going to be amazed when they learn the extent of the bribery that Jack Abramoff was involved with members of Congress." Morrell: "Tonight, the only lawmaker known to be under scrutiny is Bob Ney of Ohio. But several others are scrambling to distance themselves from Abramoff. Montana Sen. Conrad Burns, who raked in nearly $60,000 from the disgraced lobbyist, now says 'I hope Abramoff goes to jail and we never see him again. I wish he had never been born.'" Sloan: "I think by the time this is over, this is going to be the biggest congressional scandal in history."

Abramoff Plea Would "Send Shockwaves Through Washington." U.S. News and World Report (1/9, Brush) reports that Abramoff is "reportedly close to cutting his own deal with federal investigators, a development that would send shock waves through Washington. Abramoff's testimony could implicate lawmakers in a vast influence-peddling case, and those once friendly with the man known as 'Casino Jack' are now ducking for cover." Abramoff "is reportedly close to an agreement with prosecutors that might include cooperation with investigators looking into his lobbying tactics. A spokesman for Abramoff declined to comment." Lawmakers "are scrambling to return campaign contributions. According to the Center for Responsive Politics, 210 federal lawmakers have received donations to their campaigns or political action committees from either Abramoff or his clients, since 1999; most big recipients were Republicans. Republican Sen. Conrad Burns of Montana, who's up for re-election this year, has returned $150,000, saying the donations 'served to undermine the public's confidence in its government.' … Sen. Max Baucus, a Montana Democrat, is returning roughly $19,000. Sen. Byron Dorgan, a North Dakota Democrat and ranking member of the Senate Indian Affairs Committee, which is investigating Abramoff, is returning $67,000. Rep. Denny Rehberg, a Montana Republican, returned $18,000 to Indian tribes and donated to charity the $2,000 he received directly from Abramoff."

Congressional Hearings To Add Drama To Conflicts With White House. The Christian Science Monitor (1/3, Chaddock, 61K) reports Congress "is gearing up for the most dramatic slate of hearings since the Clinton impeachment fracas." The "high-profile probes underscore efforts by Congress to reclaim power from a war-time White House. And they could reshape this fall's midterm elections." Lawmakers "on both sides of the aisle set in motion an aggressive oversight agenda, ranging from secret prisons and the treatment of detainees under US control, to the president's authorization of domestic eavesdropping without a warrant." In addition, "more members of Congress find themselves under scrutiny," as Abramoff "and his former associates work out plea agreements promising cooperation in a widening bribery investigation on Capitol Hill. Former House majority leader Tom DeLay, meanwhile, will face charges of money laundering in court later this month." The "scrutiny on - and from - Congress is a sharp turnaround for a Republican-controlled body that came to power extolling ethics, and one that has been deferential to the Bush presidency about its conduct in the war on terrorism." A "major reason for the new posture on Capitol Hill is the willingness of GOP moderates to challenge the Bush administration's war policies."

Maryland Tech Firm Owner To Plead Guilty To Bribing DC School Officials. The Legal Times (1/2, Kelley) reports, "The owner of a Maryland-based technology firm is expected to plead guilty this week to bribing District of Columbia Public School officials in exchange for contracts." The Times continues, "On Dec. 7 the U.S. Attorney's Office for the District of Columbia charged Charles Wiggins, the owner of Wiggins Telecommunications in Temple Hills, Md., with one felony count of bribing public officials. Within a week of being charged, Wiggins agreed to plead guilty and cooperate." The Times adds, "Wiggins' attorney, Sidney Friedman of Baltimore, says he is not authorized to comment on the deal reached with prosecutors. Assistant U.S. Attorney Daniel Butler, who is handling the prosecution, could not be reached for comment. … In charging documents, the prosecution alleges that from early 2001 through 2003, Wiggins doled out nearly $50,000 in bribes to a DCPS office manager and an elementary school principal. The two school officials, who so far are identified only as 'Individual 1' and 'Individual 2' in court documents, allegedly gave Wiggins preferential treatment in exchange for receiving a cut of the profits generated by his DCPS contracts."

Prince George's County Community No Longer Immune From Violence. The Washington Post (1/3, Thomas-Lester) reports, "Three miles beyond the Capital Beltway, Woodmore South seems far removed from the violence and fear that has infested some Prince George's County neighborhoods. … The upscale subdivision, with its rolling green lawns along wide and winding roads, reflects what draws many residents to the county: a chance for a classic suburban life in a community where most neighbors and political leaders are African American. … But consider the past several months: In June, a Woodmore South boy was beaten at nearby Six Flags America, and a teenage girl was shot after leaving a neighborhood graduation party. At

one nearby shopping mall, a young man was beaten to death in early November. At another, a District man was shot Dec. 10. Earlier that day, an argument at a popular restaurant led to a fatal shooting a few blocks away." The Post continues, "The county and its incorporated cities recorded 173 homicides in 2005 -- surpassing the record 154 set during the crack epidemic in 1991 -- and a car was stolen every half hour. Although most of the crime remains concentrated inside the Beltway, residents in such suburban enclaves as Mitchellville, Bowie and Fort Washington are going through an upheaval, psychic and otherwise. … Some residents, who fled crime in the District a generation ago, are considering leaving Prince George's. Others, still drawn by the appeal of one of the nation's largest black, middle-class communities, are staying put -- but fortifying their homes and hiring off-duty police officers. … Some have lost faith in a county police department stretched thin by rapid growth: In November, Bowie voters decided overwhelmingly to set up their own department, and College Park residents gave their City Council the option." The Post notes, "Just as telling and troubling, the rise in crime has fueled perceptions among some middle-income residents that their low-income neighbors from the District or elsewhere in the county are preying on their prosperity."

Grant Seeking More FBI Agents To Fight Corruption In Chicago. The Chicago Sun Times (1/2, Korecki) reports, "If you're a government employee or contractor and you thought last year was a bad time to be corrupt in Chicago, you better look out in 2006. While the Chicago FBI just added a third public corruption squad in September to make the unit the largest in the country -- it still isn't enough. FBI Special Agent in Charge Robert Grant said he and U.S. Attorney Patrick Fitzgerald have asked Washington, D.C., for more resources to help root out public fraud. 'We asked headquarters to give us more bodies,' Grant told the Chicago Sun-Times. … Though new corruption cases continue to hit the Dirksen federal courthouse at a brisk pace, 'there are areas we want to explore that we haven't even gotten to yet,' Grant said." The Sun Times notes, "Grant wouldn't say how many additional agents he's seeking. But he said he thinks Chicago has a good chance of getting the boost in manpower because public corruption has become a bureau priority nationally and 'they know we're doing such a good job here.'" The AP (1/3) posts a truncated version of the Sun Times story.

Ryan, Warner Expected To Take Stand. The Chicago Sun Times (1/3, Korecki) reports, "In all, jurors have endured testimony from nearly 50 witnesses in the 13 weeks since George Ryan's public corruption trial began. But there's still one person who could drastically reshape their impressions: the former governor himself. And he may have that opportunity, because it seems likely that Ryan will take the stand in his own defense. Lawyers representing Ryan and his co-defendant Lawrence Warner said last week they expect to put their clients on the stand after the prosecution rests this month." Ryan attorney Dan Webb and Warner lawyer Ed Genson "said they'll make a final decision when the prosecution rests, which is expected mid-month. Neither would go into the tactical reasoning of doing something that defense lawyers typically avoid.

Tennessee State Trooper Transferred For Own Safety After Helping FBI Probe. The Knoxville News (1/2, Stambaugh) reports, "A Tennessee Highway Patrol trooper was recently transferred from Cocke County to keep him out of harm's way after his cooperation with the FBI was revealed during legal proceedings, court records show." Trooper Kevin Kimbrough "is one of at least three local lawmen who have been secretly recording their conversations with other officers at the behest of federal and state authorities as part of a four-year probe into public corruption and organized crime." The News notes, "The probe has relied heavily on undercover officers, informants and wiretaps in Tennessee, North Carolina, Georgia and Florida. Thus far, seven Cocke County lawmen have been arrested, two illegal cockfighting compounds have been uncovered, two brothels have been shut down and more than 150 people have faced criminal charges."

Indicted Lawmakers Vow To Attend Ethics Special Session. The AP (1/2) reports, "Two Tennessee Democratic senators facing federal bribery charges say they will attend a special session on ethics this month despite calls from Republican leaders that they not." Sens. Ward Crutchfield and Kathryn Bowers "are among five current or former lawmakers indicted on bribery and extortion charges in an FBI investigation that focused on a bogus company called E-Cycle Management." Sen. Jim Bryson "has written a letter to both Crutchfield and Bowers urging them not to participate in the special session. 'What I hope not to do, but will do if I have to, is present a resolution to the Senate, urging them not to attend,' Bryson said." The Tennessean (1/1, de la Cruz) notes, "Bowers supports many proposals in the ethics bill that will be the focal point of the session but does not like the ban on cash contributions, she said last week. At the same time, cash transactions have been at the heart of the public corruption case. A cash payment is what snared Bowers in the bribery sting."

Reform Provision Would Ban Cash Contributions. The Memphis Commercial Appeal (1/2, Locker) reports, "It was one of the eye-popping aspects of the FBI's 'Tennessee Waltz' bribery investigation: a handful of state legislators accepting hundreds of dollars in cash from undercover FBI agents posing as business executives. The acceptance of

cash by some of the legislators was perfectly legal: It was properly disclosed as a campaign contribution on their campaign-finance reports, was within the $1,000 limit on individual contributions, and was not, they said, payment for legislative action. … But campaign contributions in cash will be banned if the sweeping ethics reform bill legislators will consider in a special session starting Jan. 10 is approved. Contributions will be by check, money order or some form other than cash."

Chat Room Solicitation Leads To Kansas Man's Arrested For Child Porn. The AP (1/2) reports, "Law enforcement officers in two states used high-tech tools to crack what they believe is the largest child porn case in Wichita history." Steven Craig Perrine "was charged last week with possession and distribution of child pornography after investigators said they searched his home and found more than 16,000 sexually explicit images involving children. … Authorities said the case began Sept. 9, when a Leetsdale, Pa., man visited an Internet chatroom and began talking to someone using the screen name 'Stevedragonslayer,'" who "asked if he wanted to see a 'hot video,' FBI Special Agent Rebecca Martin wrote in an affidavit. The video showed naked girls who looked younger than 10 walking around a bathroom, Martin wrote." The Pennsylvania man, James Vanlandingham, reported the incident to state authorities; and, The Pittsburgh Post-Gazette (12/31, Ayad, 261K) notes, "With only a screen name to aid his search," Pennsylvania State Police Computer Crimes Task Force Officer Reginald Humbert "located IP addresses…with subpoenas of Yahoo! Inc. and Cox Communications Inc. that led FBI investigators and the Sedwick-Witchita County Exploited and Missing Child Unit straight to the two computers Mr. Perrine was using."

Detectives In DC Nightclub Slaying Probe Under Investigation. The Washington Post (1/3, B1, Cauvin) reports, "The witness didn't know what to think. … A few days earlier, she had seen a dying man dragged off the dance floor at a popular Northwest Washington nightclub. Now two homicide detectives wanted her to change her story, she said. Instead of saying that the man in the black shirt was stabbing the victim, she was told she should make it seem as though it was the man in the white shirt." The Post continues, "So she did, she later testified. … 'I was confused,' the witness said, 'but I figured that it's their job. They know what they're doing. I guess they got it under control.'" The Post adds, "In fact, the investigation into the Feb. 13 death of Terrence Brown at Club U was about to spin out of control. The two detectives, hoping to pursue murder charges against a suspect, apparently wanted the woman -- and two other witnesses -- to revise their accounts to point to their suspect and reflect the medical examiner's conclusion that the 31-year-old Brown died from a deep stab wound. Everything fell apart when prosecutors grew suspicious. … Nearly a year later, Brown's killing remains unsolved, clouded and complicated by an investigation into the detectives' conduct. Recently filed documents in D.C. Superior Court provide the most complete picture yet of how the high-profile case was derailed. They depict the detectives as determined to close the case even though the evidence and witnesses' statements suggested that the suspect they had in their sights could not have inflicted the fatal wound. … The theory didn't fly, and it was the two detectives, Erick Brown and Milagros Morales, who wound up in trouble. Brown, 40, was taken off the case almost immediately, and Morales, 41, was removed several days later. They have been stripped of their badges and guns and are under investigation by prosecutors and the police internal affairs unit." The Post notes, "It is a remarkable turn for both. Brown, a police officer for 15 years, is a onetime homicide detective of the year, according to David Schertler, a defense attorney for both detectives, and law enforcement officials. Morales, a police officer for 20 years, was once an investigator for internal affairs, the unit that investigates police corruption, Schertler and the officials said. … Schertler said they did nothing wrong. 'The detectives strongly disagree with the characterization that they tried to pressure or coerce any witness into saying anything that wasn't true,' he said."

Warner May Order New DNA Test In 1992 Execution. As his term nears its end, Virginia Gov. Mark Warner is facing a decision on whether to order DNA testing that could determine if Virginia executed an innocent man in 1992. The AP (1/3, Gelineau) reports, "If the tests show Roger Keith Coleman did not rape and murder his sister-in-law in 1981, it would mark the first time in the United States an executed person is scientifically proven innocent, say death-penalty opponents, who are keenly aware that such a result could sway public opinion their way." Warner, who is seen as a likely presidential candidate in 2008, "hopes to finalize negotiations over how the test would be conducted before his term ends Jan. 14, said spokesman Kevin Hall." Coleman's attorneys "argued he didn't have time to commit the crime, that tests showed semen from two men was found inside Miss McCoy and that another man bragged about murdering her."

Executions, Death Sentences Becoming More Rare In The US. The Washington Post (1/2, A11, Lane) reports, "As 2005 gives way to 2006, the death penalty remains a major item of business on the Supreme Court's docket. In addition to a steady flow of stay-of-execution applications, the court has four capital punishment cases to decide. … Yet in one important sense, this activity is misleading: The justices may be busy with death penalty cases, but capital

punishment is on the wane in the United States." The Post notes, "In the year just completed, 60 convicted killers were executed. That is a drop of 39 percent from the recent peak of 98 in 1999. … Perhaps more significant, death sentences are dwindling. In 2005, there were 96 new death sentences, according to the center. This is down 70 percent from 1996."

Tennessee Case Seen As First Test Of Roberts' Influence On Death Penalty Cases. The Los Angeles Times (1/2, Savage) reports, "The major death penalty case before the Supreme Court this year reads like a 'whodunit,' as one judge put it. But if there is doubt about who did it, should the defendant be on death row? … Though they might not solve the murder mystery, the case should give an early clue on whether the high court, now led by Chief Justice John G. Roberts Jr., is willing to overturn a death sentence if an inmate's guilt is in doubt." In the case from Tennessee, "The justices will now decide whether to make it easier to reopen old cases when new evidence — including DNA testing -- raises real doubts about the defendant's guilt."

DC Region Homicides Rose In 2005. The Washington Post (1/2, A1, Klein) reports, "The Washington region saw a rise in bloodshed in 2005, largely fueled by a spike in slayings in the D.C. suburbs, most dramatically in Prince George's County. … Across the region, there were 466 homicides in 2005, compared with 420 in 2004 -- a rise of about 11 percent. About half of those slayings have been solved. It was the first time the District has recorded fewer than 200 homicides in consecutive years since the mid-1980s. At the same time, the total in Prince George's climbed from 148 to 173, a grim record for the county."

WPost Calls Bush Record On Pardons "Dismal." An editorial in the Washington Post (1/3, A16, 744K) says that although President Bush is "a big fan of presidential power," he "still has not exercised his veto," and he "prefers to forget that Article II of the Constitution gives him the 'Power to grant Reprieves and Pardons for Offenses against the United States.' Mr. Bush, who famously proclaims himself a 'compassionate conservative,' has shown mercy fewer times than any president in recent history (though he has granted more pardons than President Bill Clinton had at the comparable point in his presidency). He has granted clemency less than a fifth the number of times of presidents Jimmy Carter, Ronald Reagan or Gerald Ford, who served not even a full term in office." The Post adds that Bush's record on pardons "dismal" and "a far cry from the manner in which the Framers of the Constitution envisioned the power."

CIVIL LAW:

DC Appeals Court Institutes Mediation Program For Civil Appeals. The Legal Times (1/2, Broida) reports, "In a continuing effort to reduce the backlog of cases at the D.C. Court of Appeals, the court has instituted a one-year appellate mediation program for civil appeals." The Times continues, "Starting this week, all parties who are represented by counsel will be required to attend alternative dispute mediation sessions to see if their appeal can be settled without being brought before the court." The Times adds, "The yearlong pilot program is an outgrowth of a similar limited mediation program that was successfully tried at the court this summer. … Ed Schwab, head of the appellate division of the D.C. Attorney General's Office, says his office had a positive experience with the program. He cited one case that was settled within three hours. 'So we were quite happy,' he says. … But Schwab cautions that not every case can be settled, especially those that don't involve money. In some cases, citizens will be seeking a remedy for a government action, and in cases like those, mediation may not work. Nevertheless, he says, 'Anytime you can settle, I think it is a good idea.'"

WPost Says Drug Safety Disputes Should Not Be Decided In Court. An editorial in the Washington Post (1/2, A12) says, "The New England Journal of Medicine's recent retraction of a 2000 article that helped establish the popularity of Vioxx, the controversial painkiller, should give doctors, hospitals and journal authors reason to think harder about how drug safety information is processed. The retraction, published last month, stated that the article's authors -- including scientists in the employ of Merck & Co., which makes Vioxx -- knew in advance of publication that 20 out of more than 2,000 patients taking part in a study of Vioxx suffered from heart attacks after taking the drug, not 17 as the article reported. They left out the information, they say, on the grounds that the three heart attacks in question occurred after the study had technically ended. But as a result, the level of heart attack risk associated with Vioxx appeared in the article to be slightly lower than it should have been." The revelation "raises legitimate questions about the relationship between scientists, who are often paid by drug companies, and medical journals, which should do a better job of stating authors' conflicts of interest. It should also lead doctors who prescribe drugs and are ultimately responsible for understanding their side effects to read such journals with greater skepticism. It does not, however, alter our view that the courts are the wrong place to resolve disputes about drug safety. … Scientific judgments about the risks and advantages of drugs are not black and white -- which is why

they are best made by scientists and by the regulatory agency that employs them, not by jurors through the lens of hindsight."

CIVIL RIGHTS:

High Court To Hear Two Fourth Amendment Cases This Month. The Supreme Court will hear two Fourth Amendment cases this month. The Washington Times (1/2, Taylor) reports, "Hudson v. Michigan, which the justices will hear when the court reconvenes Jan. 9, questions whether police violated the Fourth Amendment 'knock and announce rule' when they burst into a suspected cocaine dealer's home in Detroit. The following week, the justices will consider rules pertaining to searches conducted with special 'anticipatory' warrants, which become operative only after 'triggering events' indicate probable cause."

District Of Columbia Activists Seek Approval For Gay Marriages. The Washington Post (1/2, B1, Weiss) reports, "The D.C. Council is considering measures that would amount to the greatest expansion of rights for same-sex couples in a decade. But for some in the District's large and influential gay community, the package of tax and inheritance benefits is perhaps most notable for what it is not: a move to legalize gay marriage. With Massachusetts having legalized gay marriage and other states coming close, some gay activists are saying that now is the time to push for full marriage rights in the District." The Post notes Sen. Sam Brownback "warned that the city would trigger a sharp backlash from Congress if it pursued gay marriage."

Democrats' Approach To Religion Seen As Wrongheaded. In an op-ed for the New York Times (1/2) Joseph Loconte, a research fellow in religion at the Heritage Foundation, writes, "Nancy Pelosi…sounded like an Old Testament prophet recently when she denounced the Republican budget for its 'injustice and immorality' and urged her colleagues to cast their no votes 'as an act of worship' during this religious season. This, apparently, is what the Democrats had in mind when they vowed after President Bush's re-election to reclaim religious voters for their party. … A look at the tactics and theology of the religious left, however, suggests that this is exactly what American politics does not need. If Democrats give religious progressives a stronger voice, they'll only replicate the misdeeds of the religious right. For starters, we'll see more attempts to draw a direct line from the Bible to a political agenda."

Many Counties Remain In Turmoil Over New Voting Technology. The Los Angeles Times (1/3, Levey, 958K) reports that California and other states "are embroiled in a contentious debate over how voters should cast their ballots." With "electronic machines under attack as unreliable and vulnerable to hackers, there is little consensus about what the new technology should look like. That has left many counties nationwide in turmoil as they struggle with unproven technology while state regulations remain in flux and the federal government offers minimal guidance." The Times adds, "Congress in 2002 passed the Help America Vote Act, pledging nearly $4 billion to help states upgrade their voting systems. The same year, California passed its own $200-million bond for the same purpose. The flood of money fueled a nationwide spending spree on high-tech machines that were expected to revolutionize vote counting. But the machines often have not proved as reliable as hoped. And while states and counties rushed to buy them, elections officials struggled to regulate how machines should record votes and safeguard results."

Voting Act Puts County Registrars In Bind. The Sacramento Bee (1/2, Yamamura) reports, "Mikel Haas is running out of time and patience, but he says he'll give it one more month before he really starts to panic. … With an April 11 special election fast approaching, the San Diego County registrar of voters still doesn't have any California-certified machines to meet the requirements of the 2002 U.S. Help America Vote Act." The Bee continues, "Most counties in California - and many across the country - officially fell out of compliance Sunday with rules mandating that election systems be accessible to voters with disabilities. But the San Diego County special election puts Haas at the head of the line when it comes to compliance. … While the legal deadline has passed, Secretary of State Bruce McPherson has tried to assure county officials and voters that California will resolve its Help America Vote Act issues by the June primary, the first statewide election with federal races. … But McPherson has not certified any new accessible voting machines since August, making some registrars nervous and others downright angry." The Bee adds, "McPherson's spokeswoman, Jennifer Kerns, said that at least six election systems are 'in the pipeline' and that McPherson is confident multiple options will be available for the June primary. … But registrars like Haas are torn. They say they respect McPherson's need to put controversial equipment through a battery of tests. But they also face the practical need of having to run an election in a matter of months."

Timing Of Evolution Sticker Petitions Still In Dispute. The Fulton County (GA) Daily Report (1/2, Land) reports, "Federal appeals judges are still wrestling with factual inconsistencies over how a petition -- pushed by Marjorie Rogers, a self-described 'six-day biblical creationist' -- affected the Cobb County, Ga., school board's decision to

amend new science textbooks with stickers questioning the validity of evolution." The Report continues, "A panel of the 11th U.S. Circuit Court of Appeals last month heard the school board's appeal of a federal judge's 2005 decision that the stickers, which say that evolution is 'a theory, not a fact,' amounted to an unconstitutional endorsement of religion. Selman v. Cobb County School District, 390 F. Supp 2d 1286. (The 11th Circuit case is No. 05-10341-1.) … During the arguments, judges sounded highly skeptical of the ruling by U.S. District Judge Clarence Cooper. They also upbraided Jeffrey O. Bramlett, the lawyer for the plaintiffs challenging the stickers, for making statements about the timeline of the case that 11th Circuit Judge Edward E. Carnes called 'just wrong.'" The Report adds, "Carnes demanded that Bramlett provide a written explanation of his assertions that the stickers had been placed in the textbooks as a result of Rogers' petition drive. … Bramlett's claims had been called into question by Cobb County's attorney, Ernest Linwood Gunn IV, whose brief said the petition had not been circulated until four months after the disclaimers were inserted into the books. … On Dec. 22, a week after the argument, Bramlett filed a 127-page response that said there were two petitions -- one by Rogers, with more than 2,300 signatures delivered to the school board before the books were purchased, and a smaller petition delivered after the sticker plan was implemented. … The day the 11th Circuit received Bramlett's response, the court issued a one-page letter to Gunn instructing him, by today, to provide 'any evidence regarding the timing of any petitions that may have been filed with the School Board.'"

Federal Workforce Trails Private Sector In Hiring Hispanics. Under the headline, "Hispanics Underrepresented In The Federal Workforce," the Washington Post (1/3, A16, Fears, 744K) reports, "Hispanics represent 7 percent of employees in federal government when the group's population is growing faster than all others. The five-percentage-point gap between Hispanics working in the public and private domains translates to thousands of jobs and billions of dollars in potential pay, according to a coalition of Hispanic federal employees. The private sector tracks with the 13 percent of Hispanics in the general population, 40 million people, not including an estimated 11 million undocumented workers living in the country illegally." The Post adds, "The consequences are felt nationwide, Hispanic advocates say. The government suffers from a shortage of Spanish-speaking workers who could help non-English speakers navigate Social Security and other federal documents. In the chaotic aftermath of hurricanes Katrina and Rita, the government discovered that it could not effectively communicate with displaced immigrants, legal and undocumented."

ANTITRUST:

Columnist Predicts Mergers For Coming Year.

In a column for New York Magazine (1/2), James Cramer writes, "The start of the year is a time for crystal-ball gazing. Sure, I could give you the standard fare, the typical Wall Street gibberish that you will hear in a virtual 24-hour loop for the next few weeks: untried Fed chairman, big-budget deficits, uncertain presidential leadership, a peak in real estate, an end to the interest-rate-tightening cycle. Know what? You know all that already. I'd rather tell you about some things that could happen that could make you some huge money in 2006. I can't guarantee any of them will come to pass, but if they do, well, remember your friend Cramer tipped you to them." Cramer continues, "Citigroup Will Merge With Goldman Sachs … For the past few years, Citigroup has been in the doghouse with regulators. Now new honcho Chuck Prince, a buttoned-down lawyer, has eliminated the cowboys and stopped the culture of trying to sell anything to customers as long as it had a big fee. That may soon give him the green light to make an acquisition. Citigroup has been taking a huge backseat to other players as it gets its ethical house in order. An acquisition could make Citigroup dominant again worldwide." Cramer adds, "Comcast Will Buy CBS … In 2004, when Comcast made its aborted offer for Disney—something that Comcast actually thought that Disney wanted, when nothing could have been further from the truth—I figured that win or lose, Comcast would remain a key, if not the key, player in the distribution of television programming in this country. But Intel, Broadcom, Qualcomm, Apple, Microsoft, Texas Instruments, Motorola, Nokia, Dell, and Marvell Technology Group all have another agenda, which is to make a new device that makes your phone calls, gets you on the Internet (wirelessly), and downloads TV programming, sans commercials, when you want, on the channel you want it. Late in 2006, we're bound to see one or more of these great tech companies unveil a product that will allow you to purchase, download, and watch anything that you want, from sports programs to movies to television shows to video games. The device will smash the current cable paradigm and will make all those stocks worth owning once again, as they were in the year just past." Cramer continues, "Pfizer And Bristol-Myers Squibb Will Merge, And Merck Will Snap Up Schering-Plough … My crystal ball sees no end to the turmoil afflicting the pharmaceutical industry. With the government as the biggest payer in the system, courtesy of the changes in Medicare, the drug companies will be forced to discount drugs well below where they thought they might have to. That combination of price squeeze and endless overhead will force Bristol-Myers and Pfizer to merge, and Merck and Schering-Plough will get together."

Arizona Questions Competition Problems With Development Deal. The Arizona Republic (1/2, Alltucker) reports, "State regulators want to scrutinize Cox Communications' role in arranging a special deal that effectively prevented rivals from seeking customers in a massive new-home development in Peoria." The Republic continues, "A new report by the Arizona Corporation Commission suggests there is "clear and convincing evidence" that in December 2003 a deal was struck between Cox Communications and a private developer to curb competition for phone, cable and high-speed Internet services at the 17,000-home Vistancia community. … The Corporation Commission wants to hold a public hearing to examine the deal and discuss potential fines against Cox." The Republic adds, "Although the arrangement was proposed by the developer, Shea Sunbelt, state regulators said Cox was an "active participant," with 15 employees helping write and revise terms of the deal. … The arrangement came to light after a tiny telephone company, Accipiter Communications, filed a complaint with state regulators alleging it was shut out of Vistancia. The arrangement also triggered an investigation by the federal Department of Justice's antitrust division."

Columnist Decries Government-Sanctioned Monopolies. In a column for the Orange County Register (1/2), Tibor R. Machan writes, "In Silverado Canyon, there is a tiny post office where each weekday we pick up our mail. One or two of the people who work there are, unfortunately, quite often absent because of illness or something else and, more often than not, the mail now doesn't get distributed until late in the afternoon. The Postal Service says they have to have the mail out by 5 p.m. but it used to be in our boxes by 10:30 a.m. or even earlier, until recently. … OK, so there has been more mail this time of year, but here is how that eventuality should play out. The post office should either hire more people so the mail gets out earlier or an alternative mail service should appear on the scene and offer competing first-class delivery service." Machan continues, "That latter alternative, of course, is illegal. Competition in first-class mail delivery is against the law, nevermind the demand. Accordingly, the post office can keep being later and later with mail distribution and does not have to hire any extra help since no one's about to come in and take the business from them. … This is but one of the relatively innocuous results of the monopoly in first-class mail service. Other monopolies are far more insidious. Take the New York Metropolitan Transit Authority, which last month was struck by the public-employee union to which all its workers belong. … " When there's a strike in a free market, people often have other vendors from whom they can receive service. There is usually competition, so that if Chrysler's autoworkers go on strike, there are Ford, Toyota, General Motors and other carmakers still in business." Machan adds, "Just why the American public is mostly passive about the many monopolies protected or operated by government is a mystery to me - one reason might be is that the government schools do not explain in their economics classes just how unnecessary and unjust such monopolies are, seeing that the schools themselves are a case in point. But perhaps with some voices making a bit of noise about the situation others will catch on and in time we can get a system in which my little post office would either shape up or find itself competing with an alternative mail-delivery agency."

Homeowners' Web Site In Wisconsin Competes With Realtors. The New York Times (1/3, Bailey) reports, "Across the country, the National Association of Realtors and the 6 percent commission that most of its members charge to sell a house are under assault by government officials, consumer advocates, lawyers and ambitious entrepreneurs. But the most effective challenge so far emanates from a spare bedroom in the modest home here of Christie Miller." The Times continues, "Ms. Miller, 38, a former social worker who favors fuzzy slippers, and her cousin, Mary Clare Murphy, 51, operate what real estate professionals believe to be the largest for-sale-by-owner Web site in the country." The Times adds, "They have turned Madison, a city of 208,000 known for its liberal politics, into one of the most active for-sale-by-owner markets in the country. And their success suggests that, in challenging the Realtor association's dominance of home sales, they may have hit on a winning formula that has eluded many other upstarts. Their site, FsboMadison.com (pronounced FIZZ-boh) holds a nearly 20 percent share of the Dane County market for residential real estate listings. … The site, which charges just $150 to list a home and throws in a teal blue yard sign, draws more Internet traffic than the traditional multiple listing service controlled by real estate agents." The Times notes, "Madison is home to the University of Wisconsin and a city where the percentage of residents who graduated from college is twice the national level. It is also a hotbed of antibusiness sentiment, which turns out to be the perfect place for a free-market real estate revolution. Bucking the system is a civic pastime here. … Elsewhere, the Justice Department, free-market scholars, plaintiffs' lawyers and countless entrepreneurs are vowing to make real estate more competitive and to bring down sales commissions. To do that, they advocate forcing the Realtors' association to share control of its established listing services. Those critics seem to view the listings as an unassailable monopoly. … And who can blame them? Those 800-plus local listing services, controlled by local branches of the Realtors' association, help dole out about $60 billion a year in commissions to real estate agents and the firms that employ them. Despite numerous

attacks, the association has been remarkably successful to date at protecting its turf. Through lobbying, litigation and legislation, the Realtors' group has managed to keep control of the crucial listings."

Unlikely Alliance Develops Between Rivals Sony, Samsung. The Wall Street Journal (1/3, Dvorak, Ramstad) reports, "For years, Samsung Electronics Co.'s key mission was to unseat rival Sony Corp. as the world's top electronics maker. Long seen as a South Korean underdog, Samsung has in the past few years surpassed its Japanese rival in market capitalization, revenue and profits. In television sets, Sony's traditional stronghold, Samsung now jockeys with Sony and a handful of top players for the No. 1 share of sales globally." The Journal continues, "But the relationship between Sony's Hiroshi Murayama and Samsung's Jang Insik tells a different story. The two engineers symbolize how the two companies have increasingly come to depend on each other since 2003. That's when Sony, looking for a source of panels for its new flat-panel TV line, asked to become a partner in a $2 billion factory Samsung was building to produce liquid-crystal displays." The Journal adds, "Messrs. Jang and Murayama phone each other from their bases in South Korea and Japan respectively several times a day and visit in person every month to discuss how to make better panels. Mr. Murayama persuaded Mr. Jang and his bosses to speed their development of key technologies, and Samsung let Mr. Murayama use some of those technologies in Sony's TV panels even before its own products. Sony's TVs that use those new panels ended up outselling Samsung's LCD sets by more than three to one this fall in major U.S. retailers. … But Samsung is still keen to work with Sony because it's getting a crash course in how to improve LCD panels, which it had mostly used in computer monitors and cellphones, in the important TV segment. … The unlikely alliance shows just how tangled the connections have become between consumer-electronics companies as competition in the industry intensifies. … The same trend is happening across Asian electronics makers, which have traditionally prided themselves on doing as much as they could in-house, from the design of their gadgets to the technology that goes into them."

ENVIRONMENT/INDIAN AFFAIRS:

Health Officials Note Progress In Preparations For Bird Flu Epidemic. Health officials said yesterday that the US is making progress in preparing for a bird flu epidemic. This includes measures to close schools and quarantine the sick. However, the AP (1/2, Yen) reports that vaccine supplies remain inadequate. Julie Gerberding, director of the national Centers for Disease Control and Prevention, said on CBS' Face the Nation, "We've got a lot of work to do." Citing "'bottlenecks' in vaccine production and the delivery of health care if there's an outbreak," Gerberding added, "We've got to get more and better anti-viral drugs. And we've got to have every single link in our public health system as strong as it can be so it can detect this problem." The AP adds, "Health and Human Services Secretary Mike Leavitt, appearing on CNN's 'Late Edition,' praised the money approved by Congress as a good step that will fund one year of preparedness efforts. Still, he said the U.S. is not ready, saying additional money is needed to ensure there would be enough vaccine supplies for all Americans within six months of an initial outbreak. State and local governments also need to step up efforts, Leavitt said."

Gerberding said on CBS' Face the Nation (1/1, Schieffer) she does not know whether "it is just a matter of time" before Avian flu appears in the US, but "we've got to take the steps now to get prepared for that." She added, "Frankly, we're not as prepared as we need to be. We're certainly doing more today than we were even two years ago so we're making fast progress. But we've got a lot of work to do. We've got to get a vaccine supply that we can count on. We've got to get more and better anti- viral drugs."

Leavitt Says US Still Has Work To Do. HHS Secretary Michael Leavitt said on CNN's Late Edition (1/1, Blitzer) that the avian flu virus "continues to spread in wild birds across the world. There is no reason to believe that at some point it will stop. That means that ultimately it would find its way to the United States. We need to be prepared. … We are not as prepared as we aspire to be. We have a great deal of work to do."

Plan To Change Toxic Release Reporting Requirements Draws Fire. The Washington Post (1/3, D1, Skrzycki, 744K) reports in its "The Regulators" column, "Opposition is growing to a Bush administration plan to change the reporting requirements of" the Toxic Release Inventory, the "highly successful public information program that collects data annually on releases of toxic chemicals." The inventory "has been a roadmap for individuals and community groups interested in pinpointing where the country's most-polluting facilities are located." The business community has pushed "over the past decade to reduce the 'burden' of having to fill out a five-page form for each chemical they use every year. This form includes detailed information on the quantity of the chemical, how it is made and processed, and how much of it is released. After considering several options, the [EPA] in October proposed changes that would allow more companies to file a shorter report, known as Form A, which contains less information about their use of toxic chemicals." The EPA "dropped

another bombshell at the same time, telling Congress that it is thinking about eliminating annual filing in favor of every other year. … The twin ideas prompted outrage from environmental and public-interest groups." The Post adds, "Environmental and community groups, in particular, consider the reporting program a great success. And it has become even more useful since the agency has required reports on more chemicals and from more industrial sectors, including mining and electrical utilities."

Other States Adopting California's Strict Greenhouse Gas Rules. The Washington Post (1/3, D1, Freeman, 744K) reports, "On Friday, Massachusetts joined Oregon, Connecticut and five other states in adopting California's tough greenhouse gas rules, which limit the amount of carbon dioxide and other gases that can be emitted from vehicle tailpipes. These new rules would supplement federal exhaust pollutant standards already in place. Two other states are in the process of adopting the rules. The carbon dioxide regulations are so strict, the auto industry argues, that they would cause extensive design changes to new vehicles, driving up prices and crippling new-car sales. Every major automaker that sells vehicles in the United States is suing to have the new rules overturned, even as states on the West Coast and in the Northeast are moving quickly to adopt them." The California rule "requires a 30 percent reduction in greenhouse gases by 2016. The rules are one element of a wider trend of states enacting their own energy policies to govern auto and factory emissions and appliance energy efficiency, updating older federal rules or writing new rules where none exist."

Novak Praises Romney Decision To Pull Out Of RGGI. Robert Novak (1/2) writes in his syndicated column, "Massachusetts Gov. Mitt Romney on Dec. 16 made a significant move that will benefit the pocketbooks of his state's consumers and perhaps boost his own Republican presidential prospects. He pulled Massachusetts out of the compact of Northeastern states requiring a reduction in power plant emissions of carbon dioxide. The Regional Greenhouse Gas Initiative (RGGI) would cut the emissions by 10 percent by 2019, forcing up electricity prices because of greater dependence on increasingly expensive natural gas. … The defection of Romney, originally inclined to support RGGI, represents a major setback for the Greens." Novak adds, "Green pressure can lead politicians to make promises that they would regret. … It appears Mitt Romney will avoid that pitfall on his long uphill climb to the White House."

Government Seeks To Remove Grizzly Bears From Endangered List. NBC Nightly News (1/1, story 12, 2:20, Seigenthaler) reported, "The Federal Government has declared grizzly bears in Yellowstone recovered, clearing the way to remove it from the endangered list." NBC (O'Neil) added, "By 1975 it was clear the grizzlies needed to be put on the endangered species list." Biologist Kerry Gunther: "We've gone from a population of less than 200 to a population of 600 and increasing population. It's a great success story." O'Neil: "A sorely needed victory for the act which some in Washington want to water down. The grizzly is only on of a handful to ever be declared recovered."

Texas, Oklahoma Continue To Be Plagued By Wildfires. The CBS Evening News (1/02, story 2, 2:30, Schieffer) reported, "The fires in Texas and Oklahoma now spreading to New Mexico are being fueled by the worst drought in decades. The fires killed four people last week and searchers were set to look for any victims from two small towns in Texas that burned last night. Since early November, the Oklahoma fires have destroyed some 200 buildings and at least 270,000 acres." CBS (Cowan) added, "Nearly 100 more homes were lost to flames that burned into the wee hours of the morning. Some communities like Ringgold near the Texas-Oklahoma border were erased."

NBC Nightly News (1/2, story 5, 1:50, Teague) reported, "Fire crews have spent more than a week battling grass fires that have raged across Oklahoma, Texas, and New Mexico and burned again today. Nearly 300,000 acres have been scorched so far and more than 400 homes. The weather simply won't give fire crews a break." The AP (1/3, Flynn) runs a similar report.

Damage From California Flooding Now In Hundreds Of Millions Of Dollars. The CBS Evening News (1/02, story 3, 2:30, Schieffer) reported, "Back-to-back storms drenched California and caused an estimated $100 million in flood damage. Most of it is the result of rivers that have spilled out of their banks in Northern California. Now the storms are threatening the southern part of the state." CBS (Hughes) added, "The pounding rain was too much for vulnerable hillsides above Los Angeles, burned bare by this year's wild fires. Rescue workers were watching for any sign that nearby residents needed to pack up and run from the hills. The second wave of storms to hit this weekend is swamping parts of Southern California. Up to four inches of rain is expected in the valleys and eight in some mountain areas."

NBC Nightly News (1/2, story 4, 2:20, Lewis) reported, "In California's wine country, where hundreds of homes and businesses are flooded out, they're just beginning to assess the damage, estimated in the hundreds of millions of dollars." In Pasadena, "there were plenty of raindrops on roses at 117th annual Rose parade. Defying the elements, the USC marching band wore plastic ponchos and sunglasses. As a

smaller-than-usual crowd of spectators watched." Governor Arnold Schwarzenegger has "issued a state of emergency in seven California counties most adversely affected by the storm."

Cato Fellows Argue Strategic Petroleum Reserve Should Be Scrapped. Jerry Taylor and Peter Van Doren, senior fellows at the Cato Institute, write in the New York Times (1/3, 1.19M), "The rise in fuel prices that followed Hurricanes Katrina and Rita has prompted many members of Congress to call for new and expanded federal reserves of crude oil, diesel fuel, home heating oil, jet fuel and propane. Proponents of stockpiling claim that if the government were to hoard those commodities when prices were low, it could unleash them on the market when supplies are tight, thus dampening price increases and stabilizing the market. But the experience in this country with the strategic petroleum reserve strongly suggests that such government-managed stockpiles are a waste of taxpayers' money. Rather than increasing the stockpile, the reserve should be emptied and closed." Economists "agree that every barrel of oil we put in the public reserve displaces oil that might otherwise have gone into private inventories. How much displacement occurs is unclear, but there is little doubt that it's significant. If the reserve is thought of as an insurance policy against high prices, the cost of the policy has been more expensive than the dangers the stockpile is meant to prevent. Americans should resist the drive to expand public stockpiles. Instead, we should sell while the selling is good."

Opponents Of ICC Said To Have Little To Stand On. The Washington Post (1/2) editorializes, "With a key federal approval expected soon for the proposed intercounty connector -- the east-west toll highway that would transverse Maryland suburbs -- the road's opponents are mounting an eleventh-hour anti-ICC campaign. Having failed over the years to sway the traffic-weary public with other arguments (environmental impact, cost, effect on traffic), the foes are focusing on how much the road will cost to use. This, too, is a losing argument."

Loyal Mdewakanton Tribe Wins Court Battle Over Minnesota Land. Indian Country Today (1/3, Melmer) reports, "Membership in a Dakota tribe is expected to more than double after an accurate list of lineal descendants of the Loyalist Mdewakanton is complied and verified, as ordered by a federal court." ICT continues, "U.S. Court of Federal Claims Judge Charles Lettow has denied a U.S. Justice Department motion to reconsider his earlier ruling that gave the descendants of the Loyalist Mdewakanton rights to land in Minnesota. … Lettow also ruled that the federal government breached its trust obligations to the Loyalist Mdewakantons and their descendants when in a 1980 congressional act it put the land into trust for three federally recognized Dakota communities - Prairie Island, Shakopee and Lower Sioux. That act violated an 1886 contract signed by Mdewakanton leader John Bluestone, which gave that land to the Mdewakanton who were descendants of those who pledged loyalty to the United States in 1862. … Previously the land was either assigned to individual loyalists or leased, with the proceeds from the lease paid to the loyalists." ICT adds, "The loyalists want the land returned to them and Mdewakanton tribal membership, with full political power, restored. Lease revenues that were given to groups other than the loyalist's lineal descendants constitutes a breach of the contractual agreement by the federal government, the plaintiffs argued. Today's lineal descendants want compensation for the lost revenues. … Lettow's latest decision rejected the federal government's claim that it didn't mismanage the trust on behalf of the lineal descendants. He also rejected the argument that the 1886 contract did not authorize a trust responsibility to the loyalists. … Lettow ordered the government to perform an accounting to determine the size of financial compensation that is owed the loyalists' descendants."

Navajos Try To Stop Arizona Uranium Rush. The Arizona Republic (1/3, Shaffer) reports, "The price of uranium has tripled in the past two years, bringing with it the possibility of another uranium rush in Arizona, the state with the richest deposits of the ore and, along with New Mexico, the worst legacy associated with its mining." The Republic continues, "Last year, 700 mining claims were filed and 100 test holes were bored into the wild, remote high desert in northern Arizona. … Scott Florence, director of the Bureau of Land Management's Arizona Strip district in St. George, Utah, said those numbers are significantly higher than any year since the frenzy of the 1980s. … 'Finding the right mine site is a real art. But it seems like everyone and their mother is trying now,' he said." The Republic adds, "Secondary supplies of uranium on the world market have virtually dried up, and China, India and Japan are clamoring for uranium for their burgeoning domestic nuclear-power industries. Uranium now fetches $36 a pound on the spot market. Four years ago, it was going for just over $7 a pound. … But not everyone is happy about the search for new mine sites. Navajo Nation President Joe Shirley Jr., stirred to action by the memory of how dangerous uranium mining can be, issued an executive order in November banning negotiations with uranium companies or uranium exploration on the three-state Navajo Nation, which was engulfed by a public health tragedy after the first wave of uranium mining began on its reservation in the 1950s. Dozens of premature deaths of Navajo miners and

passed-on genetic defects have been attributed to uranium exposure."

FBI/DEA/ATF/USMS:

FBI Photographer Sues Over Mistreatment Due To Tourette's Syndrome. The Legal Times (1/2, Kelley) reports, "As a photographer for the Federal Bureau of Investigation, Jeffrey Bell was frequently tapped to work on high-profile cases. Between 1991 and 2000 he was deployed throughout the United States and abroad to photograph matters involving terrorism, forensics, counterintelligence, and emergency response. … But according to a lawsuit Bell, a 43-year-old with Tourette's syndrome, filed recently in the U.S. District Court for the District of Columbia, all that changed after an incident stemming from his disorder led to retaliation from his employer. Bell's trial is expected to start this week." The Times continues, "Court papers filed by Bell's attorney, Edith Marshall of Powers Pyles Sutter & Verville, state that Bell was taking a new medication to control his Tourette's when he became involved in a verbal altercation with a co-worker. Bell explained that the outburst was a side effect of his medicine, but he claims he was treated differently from that point on because of his Tourette's, a neurological disorder that can cause involuntary tics and vocalizations as well as obsessive-compulsive tendencies and hyperactivity." The Times adds, "Bell alleges that because of his Tourette's he was regarded as a 'problem personality' and often blamed for any workplace conflict that occurred."

Doctors Said To Fear DEA Action When Prescribing Pain Medications. In an story titled "Painful Choices: Physicians Challenged By Quest To End Suffering" the Deseret (UT) Morning News (1/2, Collins, Jarvik) writes, "The perception among doctors is that the regulatory environment has become more hostile, says Micke Brown, director of advocacy for the American Pain Foundation, headquartered in Baltimore. 'Many health care providers are running scared,' especially primary care physicians, she says. 'Some are even backing away from managing people's pain.'" Pain management doctor Lynn Webster, who heads the Utah Academy of Pain, "is an opioid advocate. … He argues that the undertreatment of pain is 'still a major problem' in Utah, in part because of doctors' fears of punishment by the federal Drug Enforcement Agency (DEA) and the state Division of Occupational and Professional Licensing (DOPL). … Pain experts are waiting anxiously for the DEA to clarify its interpretation of the federal law that governs prescribing controlled substances for pain. DEA said the guidance was imminent more than a year ago. But pain experts, still waiting, continue to warn colleagues to err on the side of stricter federal interpretations."

Maryland Tax Dollars Said To Be Disproportionately Tied Up In Locking Up Addicts. In the Washington Post (1/1, B8), Tara Andrews, director of Justice Maryland and Democratic candidate for the state Senate from Baltimore City, writes "By the latest count, more than 250,000 Marylanders are in need of substance-abuse treatment. Even in Montgomery County, considered the state's wealthiest county, the treatment gap is great. Yet despite population growth, state funding for treatment has declined. More than three-quarters of those in Maryland prisons report having an alcohol or drug problem, and four out of 10 entering the state's prisons every year are locked up for drug offenses. Maryland has the third-highest percentage of prison admissions for drug offenses in the country. … Maryland tax dollars are disproportionately locked up by the incarceration of drug addicts, while providers of substance-abuse treatment make do with crumbs. A shift of dollars away from incarceration and toward a dedicated fund for treatment would make a world of difference and a world of sense."

Plan Colombia Credited With Record Number Of Cocaine Seizures. Reuters (12/31) reports, "Colombia seized a record 186 tons of cocaine [in 2005] thanks to a Washington-backed program aimed at cutting imports of the illegal drug to the United States, the Colombian government said on Friday. The haul, seized using equipment and expert advice provided by 'Plan Colombia,' was 26 percent more than last year and had a U.S. street value of $4.7 billion, Defense Minister Camilo Ospina told reporters. He said the increase was possible thanks in part to more than $3 billion in mostly military aid that the United States has provided since 2000 to help fight drug-running Marxist rebels fighting a decades-old insurgency. Washington says cocaine is becoming more expensive on U.S. streets, a sign that the money, largely steered toward aerial spraying of coca bushes used to make cocaine, is making the drug less available."

IMMIGRATION:

Migrant Advocacy Group Celebrates 10 Years. The Miami Herald (1/2, Chardy) reports, "Alfredo López-Sánchez languished for months at a detention center for migrant children in Southwest Miami-Dade -- until an attorney for a local immigrant rights group realized the Guatemalan did not understand Spanish." The Herald continues, "The lawyer from the Miami-based Florida Immigrant Advocacy Center

eventually found an interpreter who spoke López-Sánchez's Mayan language. … That was September 2001. A year later, López-Sánchez -- then 17 -- was free and on his way to getting a green card." The Herald adds, "Such successes have turned the Florida Immigrant Advocacy Center into a powerhouse in national advocacy for persecuted migrants too poor to hire a lawyer. … FIAC, as the group is known in the immigrant rights community, is marking its 10th anniversary today -- with a string of victories, and some defeats, in what often seems an uphill battle against ever-tougher immigration laws. It plans a 10th anniversary celebration dinner March 6. … The group began in 1996 -- two years after former House Speaker Newt Gingrich's conservative revolution swept Congress with calls to close the borders and even to shut the school door to children of undocumented immigrants. In the end, Congress amended immigration law, making it extremely difficult for any immigrant without proper papers to avoid detention or deportation -- though lawmakers dropped provisions that would have let states bar children from public schools if their parents entered the country illegally. … Ten years later, in the fallout from the Sept. 11, 2001, terrorist attacks, immigration law is again facing calls from conservatives in Congress to toughen the rules for citizenship, including barring U.S.-born children of illegal immigrants from becoming automatic citizens and the deportation of migrants encountered on the streets without the right to a court review to plead their case."

Conflicting Public Attitudes On Illegal Immigration Noted. The Washington Post (1/3, A7, Balz, 744K) notes the "sometimes conflicting public attitudes" on illegal immigration. A Washington Post-ABC News poll taken in mid-December "found Americans alarmed by the federal government's failure to do more to block the flow of illegal immigration and critical of the impact of illegal immigration on the country but receptive to the aspirations of undocumented immigrants living and working in the United States. … The Post-ABC News poll found that four in five Americans think the government is not doing enough to prevent illegal immigration, with three in five saying they strongly hold that view. The same poll found that 56 percent of Americans believe that illegal immigrants have done more to hurt the country than to help it, with 37 percent saying they help the country. About three in five Republicans and a bare majority of Democrats agreed that illegal immigrants are detrimental to the country. The only groups in the poll who disagreed were people with postgraduate degrees, those with incomes exceeding $100,000 and nonwhite respondents. The Post-ABC poll did not include enough Hispanics to provide an accurate reading of their sentiment, but a Pew Hispanic Center survey last summer found that two in three Latinos said that undocumented migrants help the economy. … In the recent Post-ABC News poll, President Bush got his lowest marks on immigration, with 33 percent saying they approved of how he was handling the issue. That may largely reflect irritation over the government's failure to control the borders."

Hayworth Set To Publish An "Anti-Immigration Manifesto." Time (1/9, Allen) reports in its "Notebook" column that Rep. J.D. Hayworth "is about to publish an anti-immigration manifesto, Whatever It Takes, that should rile up right-wing radio just as the White House was hoping to gain traction for a broad immigration-reform package." In the book Hayworth "calls for deploying active-duty troops to the border and considering a 'border security fence from the Pacific Ocean to the Gulf of Mexico.'" Hayworth "contends that Bush's plan to confer temporary legal status on Mexicans working in the U.S. amounts to 'false compassion.' But Senator John McCain plans to push hard this winter for such a program. House Republican leaders say they might accept one if immigrants had to return home to apply for temporary work permits. Hayworth tells TIME that even that would be too lenient, designed to appease 'left-wing grievance mongers' and businesses that want cheap labor. Bush may have sounded as if he were running for sheriff during his recent border visits, but to convince the likes of Hayworth, he'll have to talk a lot tougher."

CONGRESS-ADMINISTRATION:

Alito Argued President Should Issue "Interpretive Signing Statements." As a Justice Department lawyer in 1986, Supreme Court nominee Samuel Alito made the case or presidential power, laying out a strategy under which the president would routinely issues statements about the meaning of statutes when he signs the into law. The Washington Post (1/2, A11, Lee) reports that such "'interpretive signing statements' would be a significant departure from run-of-the-mill bill signing pronouncements, which are 'often little more than a press release,' Alito wrote. The idea was to flag constitutional concerns and get courts to pay as much attention to the president's take on a law as to 'legislative intent.'" The Post adds, "The Reagan administration popularized the use of such statements and subsequent administrations continued the practice. (The courts have yet to give them much weight, though.) President Bush has been especially fond of them, issuing at least 108 in his first term, according to presidential scholar Phillip J. Cooper of Portland State University in Oregon."

Alito Said To Have An "Everyman Appeal." The New York Times(1/2, Kirkpatrick) says that according to people who have participated in Alito's rehearsals for this

week's confirmation hearings say he "will never be as polished and camera-ready as Chief Justice John G. Roberts Jr. was at his own hearings a few months ago." But two of Judge Alito's supporters who participated in the murder boards, speaking about the confidential sessions on condition of anonymity for fear of White House reprisals, said they emerged convinced that his demeanor was a political asset because it gave him an Everyman appeal." The Times adds, "Senators of both parties have said it will not be easy to follow Chief Justice Roberts," and "some Democrats said they already had much more pointed questions waiting for Judge Alito, focusing mainly on strongly worded statements that he made as lawyer in the Reagan administration about his conservative approach to the Constitution, abortion rights and other issues. Leading Democratic senators have said his responses will be a deciding factor in whether they seek to block the nomination by filibustering."

Alito Hearings Will Test Domestic Spying Program's Political Resonance. Time (1/9, Tumulty, Allen) the opening of Supreme Court nominee Samuel Alito's confirmation hearings this week will be the first test of the domestic spying program's "political resonance." According to Time, Alito opponents, "who had planned to put the abortion issue on center stage, are quickly retooling their strategy. … Alito's record could give his critics plenty of ammunition. The Third Circuit judge has long been an advocate of the unitary-executive concept, a constitutional interpretation that is a favorite of Bush's and Vice President Dick Cheney's, which argues that the President should have nearly total control of Executive Branch agencies and resist any incursion on that power by Congress." Time adds, "Administration officials concede that the controversy will inject a volatile new element into the confirmation debate but say Alito will resist getting drawn in."

Alito's Writings Suggest He Will Accelerate Court's Shift To The Right. U.S. News and World Report (1/9, Halloran) says the battle over Alito "shows every sign of achieving Borkian dimensions. As Alito prepares for his confirmation hearings before the Senate Judiciary Committee next week, the portraits being painted of him have become ever more cartoonish, nasty, and one-dimensional. … Behind the caricatures, however, are real questions. Who, really, is Sam Alito, and what kind of a justice would he be? An analysis of Alito's writings as a Reagan administration lawyer, and of his opinions from the bench, reveals him to be a solidly conservative jurist but one who also pays deference to precedent. … His lengthy paper trail suggests he will accelerate the court's shift to the right on several important issues," including abortion, civil rights, capital punishment and federalism.

Roberts, Alito Seen As Likely Allies Of Business. Academics and business experts say Chief Justice John Roberts and Alito are likely to be allies of manufacturers and business, The AP (1/1, Cassata) reported, "One represented corporate interests as a private attorney; the other often sided with employers in lawsuits filed by workers. Beyond their decisions in individual cases, the Roberts court also has the potential to craft a consistent philosophy on business issues, something that several academics argue has been lacking in recent years since the departure of Lewis Powell in 1987. … The court's highly selective docket for the current term will give Roberts and Alito, assuming the latter is confirmed, ample opportunity to shape the court. Among the critical issues for companies are the Supreme Court's decisions in antitrust cases, government regulation of land development and the commerce clause. … Abortion and social issues dominate the public debate over the Supreme Court, but business matters make up a significant portion of the justices' work."

Interest Groups To Intensify Rhetoric In Debate Over Alito Nomination. USA Today (1/3, Kiely, Memmott, 2.31M) reports the Senate hearings on Judge Samuel Alito's nomination to the Supreme Court "are set to begin Monday. This week, groups on both sides of the debate plan to launch elaborate phone, e-mail and ad campaigns." Ralph Neas of the People for the American Way said, "There's no question there will be an acceleration of efforts." Neas "plans a wave of TV ads" in opposition to the nomination. Meanwhile, Christian Myers of Progress for America said, "It's game time now, and we're making a serious push." The "conservative group will spend $500,000 to broadcast a pro-Alito ad on cable television and in four states where senators may be undecided." Other groups, "from the conservative Focus on the Family to the liberal Leadership Council on Civil Rights, plan phone banks, e-mail blitzes and visits to newspaper editorial boards and radio hosts." But "relatively few senators will get most of the attention. One is Senate Judiciary Committee Chairman Arlen Specter, a centrist Pennsylvania Republican who will preside over Alito's confirmation hearings." Both sides are "focusing on senators whose votes will help determine whether there's enough Senate support for a filibuster." The key senators "are centrists; all say they're undecided about Alito. Several face re-election fights this year. The biggest group is 'red state Democrats.'"

The New York Times (1/3, Kirkpatrick, 1.19M) reports that in the "final days before" the Alito hearings, "partisans on both sides are pulling out all the stops in an effort to sway public opinion. Moving beyond Judge Alito's judicial record, a coalition of liberal groups is preparing commercials attacking his integrity and credibility instead, several people involved in the effort said Monday." Conservatives, "for their part, are capitalizing on ethnic pride to rally Italian-American support for Judge Alito with public events and newspaper advertisements. The efforts are aimed particularly at the

Northeastern States, where some moderate Republican senators have expressed doubts about his confirmation." The advertising campaigns "on both sides are the most visible components of a last-minute push by advocacy groups anticipating a potentially close Senate vote." People "involved in the liberal coalition, which includes People for the American Way, the legal group Alliance for Justice, the A.F.L.-C.I.O., the N.A.A.C.P., the Sierra Club and abortion rights groups, said it planned to run new commercials, beginning this week with radio and television advertisements in selected states intended to undercut Judge Alito's credibility." The sources "said the first advertisements would focus on occasional lapses from a pledge Judge Alito made at the 1990 hearings for his confirmation to the appeals court that he would recuse himself from cases involving the companies that managed his mutual fund investments, Vanguard and Smith Barney."

Alito View's On Reapportionment Cases Seen As Debatable. In a New York Times editorial observer story (1/3), Adam Cohen says, "There has been a lot of talk about the abortion views of Judge Alito, President Bush's Supreme Court nominee. But his views on the redistricting cases may be more important." Sen. Joseph Biden "said recently that Judge Alito's statements about one person one vote could do more to jeopardize his nomination than his statements about Roe v. Wade. Rejecting the one-person-one-vote principle is a radical position. If Judge Alito still holds this view today, he could lead the court to accept a very different vision of American democracy, one in which it would be far easier for powerful special interests to get a stranglehold on government."

Critics Said To Be Wrong For Seizing On Alito's Memos In Abortion, Wiretap Cases. In a New York Times op-ed (1/3), former Reagan Administration solicitor general Charles Fried says Judge Alito's "opponents have seized upon two memorandums he wrote when he was a junior lawyer in the office of the solicitor general: one on the Thornburgh case, which dealt with Roe v. Wade, and the other on Mitchell v. Forsyth, which addressed the attorney general's personal liability for wiretaps found to violate the Constitution. Determined to fit the man to the Scalito caricature with which they hope to defeat his nomination to the Supreme Court, Judge Alito's detractors ignore the context and the content of both documents." But "these were not the writings of a political operative seeking to make trouble or advance an agenda. The solicitor general takes a case to the Supreme Court only when some other part of the government - perhaps a division of the Department of Justice or another agency - recommends it." As in "every case, a junior staff member was assigned to analyze these recommendations and propose a course of action to the solicitor general. It fell to Judge Alito to write those memos." But what is "remarkable in both cases is that Judge Alito recommended against taking the position that more senior, politically appointed officials were urging the solicitor general to take before the court. In the abortion case, not only the head of the civil division but also other high-ranking officials were urging that I, as the solicitor general at the time, ask the court to overturn Roe v. Wade. The bottom line of Judge Alito's memo was that I should not do that."

Roberts Calls For Tighter Court Security, Pay Raises For Judges. US Chief Justice John Roberts yesterday called for better court security and higher salaries to ensure a diverse mix of judges on the bench. Reuters (1/2, Charles) reports that Roberts wrote in his 2005 Report on the Federal Judiciary, "I recognize that it is a bit presumptuous for me to issue this report at this time, barely three months after taking the oath as chief justice," but, "But I do not intend to start the new year by breaking with a 30-year-old tradition, and so will highlight in this report issues that are pressing and apparent." Reuters adds, "Roberts expressed concern over violence directed at judges and in courts in the past year. He mentioned the murders of a U.S. district judge's husband and mother in Chicago by an angry litigant, and a court shooting in Atlanta that left a judge, court reporter and deputy dead. … Roberts also returned to a theme that Rehnquist regularly mentioned in his annual reports: the need to raise pay for judges. … Roberts said the real pay of federal judges has declined since 1969 by almost 24 percent, while the real pay of the average American worker during the same period had increased by more than 15 percent."

Bush Team Notable For Lack Of Turnover. The Washington Times/AP (1/3) reports the loyalty of President Bush's aides have limited turnover. After "two wars, devastating strikes by terrorists and hurricanes, a bruising re-election and countless legislative battles, President Bush's team is continuing the trend -- defying history and shake-up rumors to remain almost entirely intact five years in." Only a "handful of the president's most senior aides have departed since Mr. Bush came to Washington in 2001. Though some have shifted roles, it's a familiar cast of characters at the president's side: Vice President Dick Cheney, Chief of Staff Andrew H. Card Jr., political guru Karl Rove, Deputy Chief of Staff Joe Hagin, counselor Dan Bartlett, budget chief Joshua B. Bolten, White House Counsel Harriet Miers and press secretary Scott McClellan." Bush's Cabinet "has seen more turnover than his top-level White House staff. Still, a third of the 21 Cabinet-rank positions are held by the same person as when Mr. Bush came to Washington." David Gergen said, "I don't think there's any other president in the modern era that has seen this kind of stability."

Medicare Drug Program Gets Off To An "Uneven" Start. A somewhat negative story in the New York Times (1/3, Pear, 1.19M) says the Medicare prescription drug program "got off to an uneven start across the country" this week. The Times says that while people "who applied early and had identification cards in hand were often able to fill prescriptions through the new program," others "were stymied in their efforts to take advantage of the drug benefit, as pharmacists spent hours trying to confirm eligibility and enrollment by telephone and computer." The Times adds, "Dr. Mark B. McClellan, administrator of the Centers for Medicare and Medicaid Services, said he was pleased with the first days' experience. 'Many thousands of people were able to get their prescriptions filled,' he said."

Many Seniors Still Befuddled As Medicare Drug Benefit Takes Effect. ABC World News Tonight (1/1, story 2, 2:35, Harris) reported, "The beginning of 2006 means millions of senior citizens can get prescription drug benefits through Medicare. Pharmacists say tomorrow may be the busiest day of the year, with many seniors coming in with many questions about their plans. While 43 million seniors are eligible, only 1 million have signed up for what some consider the most confusing government benefits ever." ABC (Yang) added, "Medicare officials say there's still plenty of time. Enrollment ends May 15th. They're now running TV ads, encouraging people to help their moms and dads. … Medicare officials say one of the most efficient ways to sort through all the options is on the Internet. But 75% of seniors say they've never even been online."

The CBS Evening News (1/1, story 5, 2:20, Roberts) reported, "Huge fanfare and a lot of confusion are accompanying the biggest change in Medicare history. The government's new prescription drug plan which is supposed to make drugs more afford to believe millions of Americans seniors goes into effect today." CBS (Chen) added, "20 million low income Americans" are "being forced off state drug coverage programs and into the myriad of prescription plans run by private insurance companies. Supporters expect as many as 10 million more will voluntarily sign up, though only one million have so far."

Gingrich Urges GOP To Propose Lobbying Reforms. Former Speaker of the House Newt Gingrich was asked on CBS' Face the Nation (1/1, Schieffer) if Republicans are in danger of suffering losses in this year's elections due to scandals tied to several GOP congressmen. Gingrich relied, "I think that this coming year…is going to be a very big year of decision for Republicans. We have to be the party of reform. We can't just be the party of pork barrel. … I'd look very seriously at completely rethinking the relationship with lobbyists. I'd require every lobbying activity to be listed on the Thomas system, the computer system people can access, so you'd know if your member of Congress, whether they went golfing, whether they had dinner. I'd make this stuff public and transparent. I'd consider not allowing fund-raisers in Washington. I think this whole system has grown, frankly, a little sick with insiders raising money for insiders to re-elect insiders to do favors for insiders. I think this is not just a Republican problem. Don't misunderstand me. But I think we are much more naturally the party of reform than the Democrats are."

Cheney, Rumsfeld Have Neighboring Estates On Maryland's Eastern Shore. A lengthy story on the front page of the Washington Post's (1/3, C1, Montgomery) Style section looks at the "expensive waterfront estates" of Vice President Dick Cheney and Defense Secretary Donald Rumsfeld in St. Michael's, Maryland. Rumsfeld's retreat, Mount Misery and Cheney's place, Ballintober, are "are separated by two miles of narrow lanes." The Post reports, "What gives? Is a secret weekend war cabinet forming? Are yachts and duck decoys part of the plan to transform the military? Did Cheney tire of his secure undisclosed hideaway and opt to join Rummy in his serene disclosed getaway? We are probably thinking too hard. The search for obscure meaning -- that reflex for overinterpretation -- is so Western Shore. The Bay Bridge is where you lighten up and leave behind your fevered quest for the matrix behind the mask. … Cheney may be the first part-time resident with a full Secret Service detail, but the famous, the rich and the powerful of Washington (and New York, Baltimore, Philadelphia, Pittsburgh) have been setting a course for St. Michaels and the wider, watery Talbot County for generations. The area has functioned like the Adirondacks did for the swells of the Gilded Age, Newport for the robber barons and the Hamptons for Wall Street. But somehow St. Michaels…survives as an anti-Newport, a non-Nantucket, an un-Hamptons. Not overrun, overpriced, overglitzed. Not yet."

Mankiw Offers New Year's Resolutions For Lawmakers. In Wall Street Journal (1/3, 2.11M), N. Gregory Mankiw, former chairman of President Bush's Council of Economic Advisers, offers a list of New Year's resolutions, which "any senator, congressman or presidential wannabe is free to adopt… as his or her own." Among Mankiw's resolutions: "This year I will be straight about the budget mess. I know that the federal budget is on an unsustainable path. I know that when the baby-boom generation retires and becomes eligible for Social Security and Medicare, all hell is going to break loose. I know that the choices aren't pretty -- either large cuts in promised benefits or taxes vastly higher than anything ever experienced in U.S. history. I am going to admit these facts to the American

people, and I am going to say which choice I favor." Mankiw adds, "This year I will admit that there are some good taxes. Everyone hates taxes, but the government needs to fund its operations, and some taxes can actually do some good in the process. I will tell the American people that a higher tax on gasoline is better at encouraging conservation than are heavy-handed CAFE regulations. It would not only encourage people to buy more fuel-efficient cars, but it would encourage them to drive less, such as by living closer to where they work." Mankiw also writes, "This year I will be modest about what government can do. I know that economic prosperity comes not from government programs but from entrepreneurial inspiration."

Grassley Makes Case For GOP Deficit Reduction Bill. Senate Finance Committee Chairman Charles Grassley writes in USA Today (1/3, 2.31M), "In such a partisanship-first environment, any fair-minded move toward a more responsible budget is surely welcomed by the taxpayers. The GOP-sponsored deficit reduction bill is that sort of initiative. It's modest, representing just one-half of 1% of what would otherwise be spent during the next five years. Its Medicaid provisions reflect what governors nationwide -- Republicans and Democrats -- asked Congress to do to help them manage the program in their states and ensure its viability for low-income pregnant women and children." Grassley adds, "The tax relief in question is also part of stemming the red ink in Washington. The tax policies passed by the Senate and House aren't new at all. They merely extend expiring tax laws so that taxpayers aren't hit with a tax increase. This legislation is needed to protect 14 million families from the alternative minimum tax meant for wealthy individuals. It includes tax breaks for higher education and teachers who buy classroom supplies. It closes tax shelter loopholes. And it includes pro-growth measures that have helped fuel our economy." Grassley concludes, "Congress needs to do a lot more to control spending and reduce the deficit, but it's wrong to dismiss a step in the right direction."

USA Today Says GOP Bill Lacks Conscience. An accompanying editorial in USA Today (1/3, 2.31M) says "it would be nice to see in Washington a new commitment to fiscal restraint and a resolve to bequeath a solvent government and robust economy to future generations. To listen to many Republican lawmakers, a move in that direction is underway. … It would be nice to see it that way, but to believe that is to believe in fairy tales. This political sleight of hand is simply too small to matter and is designed to evade the real financial predicament — runaway health care costs, unsustainable retirement benefits and tax rates receipts well below historical averages. The cowardice in that is bad enough, but the measure is also cruel. Virtually all of Congress' cuts are made to programs for the poor and the young, who lack organized lobbies. Absent congressional conscience, they are simply targets of political opportunity. And be assured conscience is lacking." USA adds, "Congress will not deserve credit until it takes on health costs, tells seniors it can't sustain a Social Security system in which one of every three adults collects benefits, and raises taxes for the wealthy back to more reasonable levels. Until then, each year will bring the nation and the federal government only closer to fiscal crisis."

OTHER NEWS:

West Virginia Coal Miners Trapped After Mine Explosion. Rescue crews yesterday sought desperately to reach 13 West Virginia coal miners trapped after a mine explosion in Tallmansville. The story was the lead on both CBS and NBC last night; ABC was preempted for college football last night. The CBS Evening News (1/02, lead story, 4:00, Schieffer) reported, "They are still not certain what caused it. A lightning strike is the best guess now, but before dawn this morning, there was an explosion at a coal mine in Tallmansville in central West Virginia. Tonight 13 minors are trapped there, some 160 feet underground. They have air purifying equipment but no oxygen. For most of the day, poisonous gas has kept rescue workers from trying to reach them. But late today, rescue workers did enter the mine." CBS (Orr) added, "An eight-man rescue team has just entered the mine and are now traveling a tunnel in the hill behind me going some two miles inside the hill trying to reach the miners who are trapped there. So far it's a bit grim because there's no communication with the trapped miners."

NBC Nightly News (1/2, lead story, 3:15, Holt) reported, "Tonight, a life and death drama is taking place outside a coal mine in West Virginia." NBC Nightly News (1/2, story 2, 2:45, Holt) also spoke with NBC News Robert Hager, who covered the 2002 Quecreek Mine accident, where nine miners were successfully rescued after begin trapped by a flood. Hager said, "This one looks grimmer to me, mostly because in that case, they were dealing with a flood. In this case, it's been an explosion, and an explosion does two things. It creates a lot of debris and it's blocked the shaft, and eats up oxygen." The Washington Times/AP (1/3, Smith), Washington Post (1/3, A1, Tyson, Vedantam, 744K) and New York Times (1/3, Dao, 1.19M), among other newspapers, also report the story.

Bernanke Faces Difficult Balance Sheet, Greenspan Comparisons. The Wall Street Journal (1/3, Ip, 2.11M) reports that incoming Federal Reserve Chairman Ben Bernanke faces "two major stumbling blocks" as he steps into the post being vacated by outgoing chairman Alan Greenspan: "difficult comparisons" with Greenspan and

"a balance sheet with potential land mines." Bernanke's job "is complicated by a balance sheet loaded with debt and possibly overvalued assets. … 'It could be argued that Greenspan is handing Bernanke a poisoned chalice: an economy with an impressive track record, but one burdened with unprecedented financial imbalances,' Martin Barnes, editor of the Bank Credit Analyst, a forecast journal, wrote in November. 'It will be hard to rebuild household savings, reduce the current-account deficit and stabilize the housing sector without causing some economic pain.'"

Economy Expected To Grow For Fifth Straight Year, But At Slower Rate. The Wall Street Journal (1/3, Gerena-Morales, Annett, 2.11M) reports, "Strong spending by businesses should power the nation's economy to a fifth straight year of expansion in 2006, according to a survey of economists' forecasts, but a softening housing market is likely to slow the overall pace of growth. For the past five years, real-estate wealth has supported the economy by providing consumers with cash to buy everything from designer kitchens to luxury vacations to new or second homes. Some economists believe that the boom has been responsible for creating more than one million American jobs since 2000." But "as home sales start to slow and the inventory of unsold homes climbs, many economists believe that home prices will rise more gradually, or even decline, delivering a jolt that causes consumers to rein in spending. That, in turn, may cause economic growth to slow." The Journal adds, "The consensus forecast of 56 economists surveyed by The Wall Street Journal is that the nation's gross domestic product -- the broadest measure of economic output -- will grow at an annual rate of 3.5% in the first half of 2006 and 3.1% in the second half. While those growth rates are considered respectable, they would fall short of the 4.1% average of the past 2½ years. … On the positive side, economists expect overall inflation to moderate this year."

Hubbard Credits Bush Tax Cuts With Helping Economy After Recession. Former Chairman of the Council of Economic Advisers Glenn Hubbard said on Fox News' Special Report (1/2), "The economy is growing at a potential rate of around 3.5 percent, which is truly extraordinary. It really traces the two things, I think. One is how well financial markets work to allocate risk and capital in the country. And the other is how amazingly flexible American labor markets are. There's really no economy in the world that has capital and labor markets as efficient as this one." Asked about polls showing that President Bush is getting credit for the "revival of the economy," Hubbard said that "the president deserves credit for a set of tax policies that really helped the economy bounce back from the recession. But the underlying strength of the economy has little to do with Washington and a lot to do with the kind of institutions that helped the economy absorb technological change and absorb shocks, whether those shocks in financial markets or the real economy in your Katrina example. That is really the heart and soul of this high growth rate for the economy."

Stock Market "A Dud" In '00s. USA Today (1/3, Shell, 2.31M) reports, "This isn't your father's bull market. The '80s were great. The '90s were even better. But the '00s so far have been pretty much a dud. … It's unlikely, for example, that the Dow Jones industrial average, which declined 0.6% in 2005, will be able to come anywhere near its 228% gain in the '80s and its 318% gain in the '90s. The blue-chip barometer is actually down 6.8% since the end of 1999."

However, the New York Times (1/3, Dash, 1.19M) runs a report under the headline "After A Resilient '05, Wall St. Isn't Counting Out '06," in which it says "the economy proved more resilient than the worriers expected. Consumers continued to spend. The housing market did not collapse. Economic growth has been robust. And the stock market even had a year-end rally going - with the Dow Jones industrial average flirting with 11,000 - until it fizzled in the final weeks." So "it is not surprising that Wall Street has muted the alarms about 2006. Over all, analysts are relatively bullish in their outlooks. But concerns remain about the health of consumer spending and the effects of higher interest rates. Five Wall Street analysts who were surveyed predicted that the Standard & Poor's 500-stock index, which closed 2005 at 1,248.49, would end 2006 between 1,170 and 1,400."

Recession Worries Said To Be Rising For 2006. The CBS Evening News (1/1, story 6, 2: 20, Roberts) reported, "Like a roller coaster, the stock market had some wild ups and downs in 2005, but ended up right where it started. So what's next?" CBS (Alfonsi) added, "With big business struggling, unsteady interest rates, and signs of a recession, the best some forecasters are hoping for 2006 is an average year." A lot of investors "saw less-than-strong stock returns in 2005. The Dow finished in the red for the first time since 2002. The S&P was flat and the tech-heavy Nasdaq didn't fare much better. If you consider a year marked with soaring gas prices and natural disasters, those flat numbers don't look too bad. But what was bad news in 2005 could be good news for the market in 2006."

Dallas-Area Among Regions Reporting Robust Employment Numbers. The Dallas Morning News (1/2, Kreimer) reports, "An expanding economy and a skilled labor shortage have sparked a resurgence in the recruitment of employed and unemployed workers alike, including those at the high end of the pay scale, hiring experts say. That makes this year's outlook for job seekers the best since the turn of the millennium. … The Dallas-area job market hasn't seen growth that robust since 2000, when employment rose 3.9 percent, according to Texas Workforce Commission data."

Only Some Parts Of US Said To Be Experiencing Housing Bubble. The New York Times' Paul Krugman (1/2) writes, "In spite of record home prices, housing in most of America remains surprisingly affordable, thanks to low interest rates. That fact may seem to say that there's no housing bubble. But it doesn't. … It's…worth noting that the reason housing was so expensive in 1981 and 1982 was that mortgage interest rates were extremely high. That made recovery easy, because all it took to make housing affordable again was for interest rates to return to normal levels. This time, with interest rates already low by historical standards, restoring affordability will require a big fall in housing prices."

Minimum Wage In 17 States, District Of Columbia Higher Than Federal Level. Nearly half of the US civilian labor force lives in states where the pay if higher than the minimum wage set by the federal government. The New York Times (1/2, Broder) reports, "Seventeen states and the District of Columbia have acted on their own to set minimum wages that exceed the $5.15 an hour rate set by the federal government, and this year lawmakers in dozens of the remaining states will debate raising the minimum wage. Some states that already have a higher minimum wage than the federal rate will be debating further increases and adjustments for inflation." The federal minimum wage was raised from $4.75 in 1997. Since then, "efforts in Congress to increase the amount have been stymied largely by Republican lawmakers and business groups who argued that a higher minimum wage would drive away jobs. Thwarted by Congress, labor unions and community groups have increasingly focused their efforts at raising the minimum wage on the states, where the issue has received more attention than in Republican-dominated Washington, said Bill Samuel, the legislative director of the national A.F.L.-C.I.O."

NYTimes Says Congress Should Raise Minimum Wage. An editorial in the New York Times (1/3, 1.19M) says, "The federal minimum wage has been a paltry $5.15 an hour for more than eight years. Polls show that there is strong popular support for raising it, but Congress has resisted. Unions, community groups and advocates for the poor are increasingly taking the matter directly to voters through state referendums to raise their states' minimum wages, according to an article yesterday in The Times. Their intentions are laudable, but the efforts only highlight Congress's failure to set the federal minimum wage at a reasonable level." The Times adds, "State minimum-wage referendums are not ideal. Policy matters of this kind are best handled by legislatures, and the nation would be better off with a uniform federal standard. But given where the federal minimum wage now stands, state-level initiatives are the only game in town. Those grass-roots debates may shame Congress into taking long-overdue action to help the lowest-paid workers."

WSJournal Decries NEA Use Of Members' Dues. An editorial in the Wall Street Journal (1/3, 2.11M) says "If we told you that an organization gave away more than $65 million last year to Jesse Jackson's Rainbow PUSH Coalition, the Gay and Lesbian Alliance Against Defamation, Amnesty International, AIDS Walk Washington and dozens of other such advocacy groups, you'd probably assume we were describing a liberal philanthropy. In fact, those expenditures have all turned up on the financial disclosure report of the National Education Association, the country's largest teachers union. Under new federal rules pushed through by Secretary of Labor Elaine Chao, large unions must now disclose in much more detail how they spend members' dues money." The Journal adds that "even a cursory glance at the NEA's recent filings" exposes "the union as a honey pot for left-wing political causes that have nothing to do with teachers, much less students. … It's well understood that the NEA is an arm of the Democratic National Committee. (Or is it the other way around?) But we wonder if the union's rank-and-file stand in unity behind this laundry list of left-to-liberal recipients of money that comes out of their pockets."

WSJournal Praises Yale's Refusal To Give Anarchist Professor Tenure. The Wall Street Journal (1/3, 2.11M) editorializes, "Until recently, David Graeber was an associate professor of anthropology at Yale University, with a field specialty in Madagascar and a salary of $63,000. He is also a self-declared anarchist who has been arrested at antiglobalization rallies. Last spring, Yale denied him tenure. Mr. Graeber was outraged, suspecting the decision might have something to do with his politics." The journal adds, "One might fairly ask of Mr. Graeber why, if his anarchist convictions are sincere, he would seek to join the very employing class that he is otherwise pledged to struggle against. … In recent interviews, Mr. Graeber has given his answer: 'I'm not really an anarchist as a professor,' he told the New York Times. 'I figured I'd be a scholar in New Haven and an activist in New York.' So it turns out that even anarchists have their bourgeois ambitions. That's fair enough, but so is Yale's decision to deny Mr. Graeber tenure, and for what we suspect were not political motives. Among the qualities that characterize Ivy League faculties these days, hostility to liberal or radical politics isn't among them."

WPost Says Baltimore's Problems Predate O'Malley. An editorial in the Washington Post (1/3, A16, 744K) says, "No doubt, Baltimore Mayor Martin O'Malley rues the day when, as a candidate for office, he pledged to reduce the number of murders in the city to 150 annually. Instead,

Baltimore's murder rate has remained stubbornly high -- it has not dipped below 250 since Mr. O'Malley took office in 1999 -- and this year the numbers attest again to the ongoing bloodbath. … Now that Mr. O'Malley is trying to become governor, Baltimore's murder rate represents a natural soft target for his political foes. … The question is how much blame can be fairly apportioned to Mr. O'Malley. Under his administration, overall violent crime in Baltimore, including rapes, robberies and assaults, has dropped sharply -- more sharply, in fact, than it has in other large cities. Real estate values have soared and, probably more significantly, Baltimore has stanched the outflow of middle-class residents who fled the city for years, right through the 1990s. Mr. O'Malley's popularity in the city is broad and deep, and no one accuses him of not trying to attack the murder rate head-on." The Post adds, "Political opponents of Mr. O'Malley can make all the hay they want, but the failures in Baltimore that have contributed to the ghastly murder rampage -- including low-performing schools and inefficient parole, probation and juvenile justice systems as well as the drug scourge -- predated his time in office. At issue is how effectively has Mr. O'Malley stepped up to those problems as well. His attempts and failures to rein in the murder rate deserve scrutiny, but so do government and society at large in Maryland -- and at all levels."

New State Laws Deal With Technology, Security. The Christian Science Monitor (1/3, Scherer, 61K) reports on new state laws which will take effect this year. The Monitor reports, "A number of state legislatures have focused on the impact of technology. For example, some automobile companies are installing 'black boxes' in their more expensive models. These devices, like those in airplanes, record the direction and speed of a car, steering and braking performance, and the status of the driver's seat belt. Now, Nevada has enacted legislation that requires manufacturers to notify buyers if a car contains such a device and what the black box can record. In addition, the information in the box can be downloaded or retrieved only by the owner of the vehicle. … Many states have also become alarmed over 'security breaches,' especially by companies with credit-card or Social Security information. Six states - Connecticut, Illinois, Louisiana, Maine, Minnesota, and Nevada - are requiring companies to notify consumers if sensitive financial information has been stolen. Connecticut goes even further: Residents can "freeze" their credit reports if there has been a slip-up. New Jersey and Virginia, meanwhile, have barred making public a person's Social Security number."

Liberal Crusader Hirschkop Nears Retirement. The Legal Times (1/2, McLure) reports on the impending retirement of long-time liberal attorney Philip Hirschkop, who is "known not only for his legal prowess but his bombastic and outspoken manner. Hirschkop, now 69, is preparing to close his law offices in Old Town Alexandria, Va., marking the end of a colorful, four-decade career that made him an icon among left-wing lawyers." The Times continues, "For the past two decades, Hirschkop has served as the outside general counsel for People for the Ethical Treatment of Animals, the controversial animal rights group known for its militant advocacy of vegetarianism and its proclivity for throwing pies at fur-wearing fashionistas. … But long before he hoisted PETA's standard in battle, Hirschkop had made his mark as a civil rights lawyer and as an opponent of the Vietnam War. Perhaps his most significant case was Loving v. Virginia, a landmark 1967 U.S. Supreme Court case that overturned Jim Crow-era laws banning interracial marriage — a case in which Hirschkop presented the main argument when he was just two years out of law school." The Times adds, "Since that auspicious start, he's worked for a member of the House Un-American Activities Committee, donned a Viet-Cong armband to protest the war, and stood for the free-speech rights of the American Nazi Party. In one six-year span, 17 disciplinary complaints were brought against him at the Virginia State Bar — a distinction Hirschkop bears proudly. The complaints, he says, were 'never for screwing a client, only for making public statements' about pending litigation."

Relief Agency Head Urges Donors To Choose Charities Carefully. Richard M. Walden, president of the international relief agency Operation USA, writes in the New York Times (1/3, 1.19M), "Money is the mother's milk of disaster relief. And over the last 12 months - with the Indian Ocean tsunami, the hurricanes on the Gulf Coast and the Pakistan earthquake - fund-raising records have been broken by the King Kong of relief agencies, the American Red Cross, and by many smaller organizations as well. … In late November it was reported that the American Red Cross still had $400 million of the $567 million it had collected for the tsunami since Dec. 26, 2004. Meanwhile, many of the countries hit by the waves, all of which have their own national Red Cross or Red Crescent societies, continue to beg for more help with housing, health and education programs. Why our Red Cross holds on to so much money is a mystery, but it is hardly the only agency that does so. A survey by InterAction, an umbrella group of relief agencies, found that many other charities reported spending far less than they took in last year; an average of just 42 percent of the money received by 62 relief groups providing tsunami relief has been spent." Walden adds, "With the incendiary combination of huge government contracts, Internet fund-raising and appeals based on mass disasters, the charity business has entered a new age. Americans should continue

to help those in dire need, but they should also look around before sending a check or clicking the 'donate' button."

Two Rescued After Plane Crashes Near New York City. NBC Nightly News (1/2, story 6, :20, Holt) reported, "A successful rescue today just north of New York City. Police and Coast Guard helicopters pulled two men out of the frigid Hudson River after their single-engine plane went down shortly after the pilot had issued a mayday call. An FAA spokesman says the men were a flight instructor and his student. Both are being treated tonight for hypothermia."

New Rules Could Lead To Increased Minimum Credit Card Payments. NBC Nightly News (1/2, story 7, 2:20, Holt) reported, "Just in time for those post-holiday bills to start piling up in your mailbox, some new rules that banks are now enforcing that will lead to higher minimum credit card payments for everyone. As of now, 13% of credit card holders pay just the minimum payment each month. And if you're among them you may be in for a surprise when you open that next bill." NBC (Shamlian) added, "Too many customers are saying 'charge it' too often. At least, that's the view of banking regulators who are behind the guidelines aimed at getting people to pay more, so they can get out of debt quicker. In the past, some minimums didn't cover even the interest due. The government guidelines say payments should cover at least 1% of principal, plus interest and fees. As of this month, all banks are complying." Nessa Feddis, American Bankers Assn.: "For the consumers in the long term, it means they'll pay less interest and they'll pay the balance off more quickly." Shamlian: "It could be a painful transition. On a balance of $5,000, the payment would jump from $100 to $200 a month. But that larger minimum payment means the debt would be erased in about two and a half years instead of almost seven years."

Questions Raised About Attorney Suing Ex-Client For Former Adversary. The Wall Street Journal (1/3, Davies) reports, "Don King makes a good living off boxers in the ring, and Judd Burstein has done well off Mr. King in the courtroom. … Since 1997, Mr. Burstein, a Manhattan lawyer, has scored a string of legal victories representing fighters in contract disputes against boxing's most famous promoter. In all, Mr. Burstein estimates he has cost Mr. King $25 million and pocketed $3 million to $4 million for himself." The Journal continues, "The acrimony between the two has been so intense over the years that Mr. Burstein once referred to the promoter as a 'cancer' on boxing. Mr. King described Mr. Burstein as an 'insidious insect.' … But now, Mr. Burstein finds himself in Mr. King's corner. The pugnacious attorney has switched sides and is representing the fight promoter in a lawsuit against Christopher Byrd, the International Boxing Federation heavyweight champ, whom Mr. Burstein recently represented in a suit against Mr. King. 'It's good to have him on my payroll now,' Mr. King says of Mr. Burstein." The Journal adds, "There's no rule explicitly prohibiting lawyers from representing someone they once sued. But legal experts say it's rare for an attorney to sue one person on behalf of a client and then sue the former client on behalf of the former adversary. … Complicating matters: The previous lawsuit and the current one involve a dispute over the same contract."

Texas Said To Be At Epicenter Of 2006 Congressional Races. The Dallas Morning News (1/2, Gillman) says Texas "is sure to be the epicenter of this year's congressional races, thanks to some unique factors, especially the trial of former House Majority Leader Tom DeLay and Democrats' efforts to leverage his ethics problems into a national wave." Unless DeLay "is convicted or the court throws out Texas' current congressional map, voters can expect spirited contests in only three Texas districts, and the campaign that officially begins today– the deadline for candidates to file paperwork to run in the March 7 primaries – probably won't alter the lineup much." DeLay "has his legal woes. Freshman Rep. Henry Cuellar, a Laredo Democrat, won the primary by just 58 votes two years ago after several bitter recounts. And Rep. Chet Edwards of Waco is a Democrat in a heavily Republican district." DeLay's district "is solidly Republican, but analysts say he's vulnerable, noting that he drew just 55 percent of the vote in winning an 11th term in 2004." Cuellar "served as Gov. Rick Perry's secretary of state and volunteered on the Bush presidential campaign, and his rivals say he's a Republican in disguise. … The district is solidly Democratic. The challenge will be to win without a runoff in April." Edwards "won his eighth term with just 51 percent. Two Republicans have spent months vying for the right to take him on in President Bush's hometown district: Iraq war veteran Van Taylor and Tucker Anderson, a former aide to Dallas Rep. Pete Sessions, a Republican."

GOP Said To Be At Disadvantage In 2006 Midterm Elections. The Washington Times (1/3, Lambro, 90K) reports President Bush and the Republicans "face a tougher midterm election landscape in 2006, due largely to the closely divided American electorate and, ironically, the gains the Republicans have made in the past decade." Few analysts "expect the Democrats to regain control of the House or Senate in November, but many think they likely will pick up seats in both chambers and cut into the Republican advantage in governorships. Republicans have a larger number of vulnerable seats to defend, particularly in Democratic-leaning 'blue' states." Political analyst Stuart Rothenberg said, "This year still looks very much like a

Democratic year, and the only question is how big a year it will be for the Democratic Senatorial Campaign Committee and the Democratic Congressional Committee. … At this point, Democratic gains appear to be inevitable." The Times identifies Senate race opportunities for the Democrats in Pennsylvania, Rhode Island, and Ohio, and for Republicans in Minnesota, Maryland, and New Jersey. In the House, "most analysts say Democrats could pick up a half dozen seats, well below the 15-seat gain they would need to win majority control." In the state houses, Democrats "appear likely to make modest gains…where Republicans hold a 28 to 22 advantage."

Dionne Says GOP Disunity Could Hurt Showing In Midterms. In his Washington Post column (1/3, A17), E.J. Dionne says, "The 2006 elections will determine whether Rove's brilliantly constructed machine has staying power or falls apart in the face of adversity. And there was adversity in abundance during 2005." But it is "three strikes and you're out: The social-issues right can't help Bush if its support drives away too many moderates. Pro-business economics can't help if it drives away many in the middle class. And the war on terrorism doesn't help if Bush is seen as managing it badly." It is "customary in columns of this sort to say somewhere around now that the Democrats will need to come up with a plan, a message, a program, etc., etc. I'm all for such things. But in 1958, 1966 and 1978, the out party gained ground largely by exploiting the failures of the party in power and exacerbating the contradictions in its coalition. If the Democrats prosper in 2006, it will be because whatever program they come up with achieves those goals."

Schneider "Political Earthquake" Required For Democrats To Retake Congress In 2006. William Schneider said on CNN's Lou Dobbs Tonight (1/2), "Ever hear of the six-year itch? It's a disease presidents often get after their party has held the White House for six years. The symptoms? Big setbacks for the president's party at the polls. It happened to the Democrats in 1938 and 1966. And to the Republicans in 1958, 1974, and 1986. On the average, the president's party lost 44 House seats and seven Senate seats in those elections. Democrats need to gain just 16 seats this year to win control of the House of Representatives, and seven to take over the Senate. Piece of cake? Not exactly. Very few seats change party these days. Most House seats are safe for one party, and only three Republican senators running for re-election are from blue states." It "would take a political earthquake for the Democrats to win control of Congress this year. But you know, earthquakes have been known to happen."

Barone Also Says Democrats Are Unlikely To Retake House. Michael Barone of US News and World Report said on Fox News' Special Report (1/2), "Democrats need a net gain of 15 seats to win the House, that doesn't seem very many. But if there are only 25 races that are very seriously contested, a net gain of 15 is pretty hard to achieve. So, [DCCC Chairman Rahm] Emanuel is trying to broaden the field and make some districts seriously contested that people would not have thought were in the past." Barone added that retaking the House is "a long shot for the Democrats."

Barnes Says Democrats Won't Win House Or Senate Control. Fred Barnes was asked on Fox News' Special Report (1/3) for his predictions for 2006. Barnes said, "I think Democrats will win House seats, but not the House. They'll win Senate seats, but not control of the Senate. I expect Arnold to be reelected as governor of California. And President Bush's job approval rating, which has bumped up to 50 percent in a couple of polls already. Will stay around 50 percent or higher for most of 2006." Barnes added, "The emerging star among Democratic presidential candidates is Russ Feingold, a Wisconsin senator. Among Republican presidential candidates is George Allen, the Virginia senator."

Trump Rules Out Gubernatorial Bid, Hints At Run For White House. The New York Post (1/3, Dicker, 624K) reports that Donald Trump on Monday "flatly ruled out running for governor this year -- but hinted he may go for president in 2008. Trump, in a phone call to The Post…declared, 'I'm not going to run for governor because I'm having too much fun doing what I'm doing now." While Trump "repeatedly ruled out a race for statewide office, he strongly suggested he was interested in entering the national political arena in 2008. Trump, who considered an independent run for president in 2000, pointedly noted that his decision not to run governor this year 'doesn't preclude me from doing something [political] in the future.' He then repeatedly ducked questions on whether he would consider running for the White House, repeating that he's too busy for electoral politics. But a political figure close to Trump told The Post, 'Donald is definitely interested in running for president in 2008, possibly as an independent candidate.'"

NYC Transit Strike Seen As Avoidable. In an op-ed for the New York Times (1/2) Meyer S. Frucher and Joseph M. Bress, former directors of the Governor's Office of Employee Relations for New York State, write, "New York City's transit workers are back on the job. … The city, meanwhile, lost an estimated $1 billion during a frigid holiday shopping week that saw seven million commuters stranded. There's a better way than this to get a contract, and we can institute it simply by building on existing New York state law." The authors note that Gov. Mario Cuomo "signed an amendment to the Taylor Law that specifically addressed transit negotiations, offering a binding arbitration procedure to break deadlocked talks."

Bolton Initiatives Would Give Security Council Members Enhanced Power. he Washington Post (1/2, A7, Lynch) reports John R. Bolton, the U.S. ambassador to the United Nations, "said he will start the new year by reinvigorating stalled efforts to restructure management of the world body, beginning with a controversial push to seek assurances that the Security Council's five major powers will be guaranteed posts on a new Human Rights Council. Bolton said in an interview that the Bush administration wants to ensure that the United States is never again denied membership in the United Nations' principal human rights body, as it was in 2001, when Austria, France and Sweden defeated a U.S. bid for membership in the Geneva-based Human Rights Commission. … The proposal is part of a broader drive by Bolton to place the five permanent Security Council members -- Britain, China, France, Russia and the United States -- at the center of U.N. decision making."

Musharraf Backs Off Pledge To Take On Madrassas. The New York Times (1/2, Masood) reports, "As the incendiary training at some of Pakistan's seminaries drew renewed focus in the weeks after the July 7 bombings in London, President Pervez Musharraf promised to bring the schools into the mainstream and expel their foreign students by the end of the year." But" his tough pledge has fizzled." Last week, "the government backed away from its deadline and said it would not use force to deport the students." The schools then "said they would resist any effort to round up the students, and on Sunday, a coalition representing the seminaries called the government's plan 'inhuman, immoral and totally illegal,' The Associated Press reported." The schools, called madrasas, "were once the Islamic equivalent of Sunday school. … Of the four suicide bombers in the London attacks, at least one had spent time at a madrasa here with connections to militant groups."

The Washington Times (1/2, Ansari) adds "Western intelligence agencies suspect that madrassas served as rendezvous points between senior al Qaeda operatives and Tanweer, Khan and other British recruits." Musharraf, however, "relented on Thursday after clerics said they would rather be incarcerated than comply with orders to expel foreigners or give their names to the authorities."

UN Asks To Interview Assad In Hariri Probe. The Financial Times (1/3, Biedermann) reports, "United Nations investigators on Monday said they want to interview Bashar al-Assad, Syria's president, and Farouq al-Shara'a, his foreign minister, in connection with the murder of Rafiq al-Hariri, Lebanon's former prime minister." The announcement "came days after Abdel-Halim Khaddam, Syria's former vice-president, indicated that Mr Assad might have been personally involved in the run-up to the murder." The UN probe "was awaiting answers from Syria after requesting to speak to Mr Assad, Mr Shara'a and others, a spokesperson for the commission said."

The New York Times (1/3, Fattah, 1.19M) says "the request compounds pressure on the Syrian government just days after a stunning public attack on the president by his former vice president raised new questions about whether the government had been complicit in the assassination." A spokesman for the United Nations investigation told The Associated Press "the commission had sent a request to interview Mr. Assad and Mr. Sharaa, among others," but "would not specify when the request was made. It was not immediately clear whether the request had any connection to the allegation by former Vice President Abdul-Halim Khaddam on Friday that Mr. Assad threatened Mr. Hariri's life months before the assassination."

Former Syrian Vice President Breaks With Assad On Hariri Probe. The Financial Times (1/2, Biedermann) reports, "Syria's former vice-president Abdel-Halim Khaddam said on Friday that he has 'full confidence' in the UN-investigation into the assassination. The UN-team, until recently led by the German prosecutor Detlev Mehlis, has implicated senior Lebanese and Syrian officials." Speaking on the Arab satellite television station al-Arabiya from Paris, "where he has been staying for the last couple of months," Khaddam "announced a break with his country's leadership. He blamed President Bashar al-Assad for a deterioration in Syria's international position. And he said that if Syria had indeed killed Mr Hariri, it could not have happened without the knowledge of Mr. Assad."

Protestors Demand To Know Fate Of Missing Lebanese. The Washington Post (1/2, A1, Shadid) reports, "In the heart of downtown Beirut…women every day…protest demanding to know the fate of their children. Many believe they languish in jails in neighboring Syria. Others are not sure. Behind them, their children's faces stare from pictures tacked to billboards, blank faces with generation-old haircuts, the dates of their disappearances reading like a war memorial yet to be built. The protest…serves as a stark reminder, organizers say, that Lebanese society has yet to confront, much less resolve, the legacy of the most cataclysmic event in its modern history -- the 1975-90 civil war. Fifteen years later, that conflict is still shrouded in silence. Under a 1991 amnesty law, all but a handful of killings were placed beyond prosecution." The Post adds, "The protest's longevity reflects the changes unleashed by the departure of Syrian troops last spring after a 29-year presence. It is a sign of new transparency in public discourse as Lebanon."

Abbas May Delay Palestinian Elections. The New York Times (1/3, Erlanger, 1.19M) reports, "The Palestinian president, Mahmoud Abbas, on Monday raised for

the first time the possibility of delaying legislative elections this month, saying the vote would be impossible if Israel did not allow residents of East Jerusalem to participate." Said Abbas, "We are all in agreement that Jerusalem has to be included in the election. … And if it is not included, all the factions agree that there will be no elections." But "a Hamas official in the Gaza Strip, Mahmoud Zahar, told reporters there had been no agreement to accept another delay." Hamas "agreed last summer to postpone the elections, originally scheduled for July, but has insisted on the vote's going ahead this month."

British Hostages Freed In Gaza. The Financial Times (1/2, Davi) reports, "Three Britons held hostage in the Gaza Strip were released by their kidnappers on Friday night, according to unconfirmed reports from Palestine. Human rights worker Kate Burton, 24, and her parents had been freed, Palestinian mediator Kamal Sharafi said. However, the Foreign Office in London was unable to confirm the reports." The Times adds, "Concern grew through the day over the fate of the Britons, after the Palestinian police chief earlier said there had been no demands or contacts from the unidentified hostage-takers."

Palestinian Security Officers Free Italian Hostage. The New York Times/AP (1/2) reports, "Palestinian security officers stormed a building on Sunday where an Italian hostage was being held, freeing the captive in a shootout with his kidnappers." It was "a rare show of force in a wave of kidnappings, shootouts and other violence in the Gaza Strip that has embarrassed the Palestinian president, Mahmoud Abbas, threatening to undermine his Fatah Party in Jan. 25 legislative elections and to strengthen Hamas, the Islamic militant group." The hostage, Alessandro Bernardini, an aide in the European Parliament, "was abducted early Sunday in Khan Younis." The Washington Times (1/2, Barzak) runs the same AP story.

Italian Tourists Taken Hostage In Yemen. The Washington Times (1/2, Mounassa) reports, "Yemeni tribesmen took five Italian tourists hostage yesterday -- one day after freeing a German family of five that included a former ambassador to Washington. Of the five Italians, three women refused to be released later in the day, insisting on returning to their male companions who remained in captivity, local officials said." It was "the fourth abduction of foreigners in the country in three months."

Ahmadinejad Reportedly Causing Unease Inside Iran. The Los Angeles Times (1/2, Siamdoust) reports, "On the surface, little seems to have changed in the Iranian capital since President Mahmoud Ahmadinejad took office in August. … But underneath the veneer of normality, Iranians are watching as their controversial president settles into office — and their country hardens under his fundamentalist leadership." The Times goes on to report, "To both insiders and outsiders, the political face of Iran seems to have drastically changed. … Ahmadinejad, draped in a Palestinian kaffiyeh, the scarf that he has appropriated to signal his struggle against perceived injustice, has stirred international ire with virulent anti-Israel rhetoric. Meanwhile, his habit of immersing politics in sacred Islamic tradition has chafed critics within Iran." According to the Times, "But even in Iran's mostly conservative parliament, the hard-line president has found himself unable to get traction. In a first for the Islamic Republic, lawmakers turned down four of the ministers Ahmadinejad asked them to approve. It took him three months and four candidates to seat an oil minister. Some reformist legislators even agitated for hearings on the president's 'lack of political competence.'"

Krauthammer Predicts Israel Will Attack Iran This Year. Syndicated columnist Charles Krauthammer, on Fox News Sunday (1/1, Wallace), predicted, "Israel will launch a military strike on Iranian nuclear facilities. There are rumors today in German newspapers that the U.S. and NATO are talking about this. I don't imagine the U.S. or NATO will do this." Israel "will feel that the world isn't acting, and it's going to act on its own."

Sharon To Undergo Heart Surgery. The AP (1/2, Federman) reports, "Israeli Prime Minister Ariel Sharon will undergo a heart procedure Thursday to close a small hole that apparently led to his recent stroke, his office announced Sunday." Doctors "said last week that the procedure, known as a cardiac catheterization, would virtually eliminate the risk of Sharon suffering a similar stroke."

In Abrupt Reversal, Russia Restores Most Gas To Ukraine Pipeline. The Washington Post (1/3, A12, Finn, 744K) reports, "Russia retreated abruptly Monday from its confrontation with Ukraine over natural gas prices, after an uproar in West European capitals over dead-of-winter cuts in gas supplies threatened to undermine Russia's ambition to expand its highly profitable role as a strategic energy partner of the European Union." The "state-controlled Russian energy giant Gazprom" said it "would almost completely restore reductions it made Sunday in the gas it pumps into Ukrainian pipelines that connect to the rest of the continent." The New York Times (1/3, Kramer, 1.19M) adds Gazprom "officials…presented the decision not as a reversal but as a response to Ukraine's 'theft' of natural gas." But "it became clear almost immediately that the driving force in Russia's decision was the sharp criticism across Europe, including countries like Germany that are usually reliable allies."

The Financial Times (1/3, Correspondents) says "European countries on Monday suffered large cuts to their

gas supplies as a bitter stand-off between Russia and Ukraine over gas prices intensified. Supplies of Russian gas to Italy fell by 25 per cent, according to Eni, the country's biggest oil and gas supplier. Deliveries of Russian gas to France dropped up to 30 per cent, Gaz de France said. Many central and eastern European countries, which depend heavily on gas from Russia, reported even larger declines."

The Wall Street Journal (1/3, White, Cummins, 2.11M) notes "the sudden crisis highlighted concerns about Europe's dependence on Russia, which supplies a quarter of the continent's gas, at a time of growing fears that the Kremlin is using energy as a political weapon." The Christian Science Monitor (1/3, Weir, 61K) runs a similar report in which it says that "with 80 percent of Russian gas exports flowing through Ukraine, wintry Europe could be hard hit." The Washington Times/Reuters (1/3, Clothier) runs a similar story.

In an analysis piece, the New York Times (1/3, Chivers, 1.19M) says for "President Vladimir V. Putin and Russia, 2006 was supposed to be a banner year. Instead, it has begun badly, and with problems of the Kremlin's own making. The Kremlin, which labored in 2005 to distance itself from the ill will that accompanied its destruction of the Yukos oil company and the bungled handling of the rigged Ukrainian presidential election in 2004, has begun the new year with a display of politics and bullying, followed by partial retreat, that is raising fresh questions about its reliability as an international energy partner."

CNN's Lou Dobbs Tonight (1/2, Romans) said "critics of President Putin say he's using Soviet-style tactics to bully Russia's neighbors." In an editorial, the Wall Street Journal (1/3, 2.11M) says, "Putin certainly has a flair for timing. The Russian President is assuming the chairmanship of the G-8 democratic nations in the same week that he's been attempting some Soviet-style energy extortion against Ukraine. … The Kremlin's real goal here isn't money so much as political influence over its democratic, free-thinking and formerly subservient Slavic neighbor. A year ago Ukraine's Viktor Yushchenko used his 'Orange Revolution' to defeat the Kremlin's handpicked presidential candidate and turn toward the West. The energy squeeze is Mr. Putin's attempt at revenge, notably coming less than three months before Ukraine's parliamentary elections."

David Satter, who is "affiliated" with the Hoover Institution, the Hudson Institute and Johns Hopkins, writes in the Wall Street Journal (1/3, 2.11M), "With Sunday's accession of Vladimir Putin to the presidency of the G-8, post-Soviet Russia has achieved a new level of recognition and prestige as a democratic state. The recognition is undeserved. Instead of being democratic or even becoming democratic, Russia is daily sinking deeper into authoritarianism and lawlessness. … The Putin regime cannot ignore the views of G-8 colleagues. This is why the West needs to use all its influence to counteract Russia's self-destructive behavior."

Winter Weather Cuts Aid To Earthquake Refugees In Pakistan. The Washington Post/AP (1/3, A14, Khan) reports Pakistani earthquake survivors "struggled Monday to keep their children warm as the bitter winter hit Kashmir, grounding helicopter aid flights and blocking roads for the second straight day. … The Pakistan meteorological office forecast continued rain and snow for the next two days and low temperatures of 21 degrees Fahrenheit in the plains and 7 degrees Fahrenheit above 5,000 feet. For the second straight day, helicopters from the United Nations, foreign militaries and Pakistan's army were not able to deliver winterized tents, clothes, food and other provisions in the quake zone because of poor visibility, said Maj. Farooq Nasir, an army spokesman. They were trying to move supplies by truck, but mudslides and snow have also made some roads impassable, he said."

New Russian Law On NGOs Seen As Stifling Democracy. NBC Nightly News (1/1, story 10, 2:20, Mendenall) reported, "This week, Russia passed a new law that tightens the Kremlin's control over nearly a half million non-governmental organizations or NGOs, many of which have been critical of the president. Like Human Rights Watch, which says the Kremlin, irked by reports of human rights abuses, could use the new law to close it down. … The law also makes it harder to operate for other prominent US organizations promoting democracy, which Putin has accused of spying and supporting political revolutions on Russia's borders in Ukraine and Georgia, something the Kremlin doesn't want to spread much to Russia's borders."

Last Alternative Russian News Outlet Beset By Turmoil. The New York Times (1/2, Kishkovsky) reports, "Recent turmoil in the news department of REN-TV, Russia's last nationwide television network with independent news programming, has caused concern among media analysts and free-speech advocates in the country. … REN-TV has been known for critical news reporting that offered an alternative to state channels' uniformly positive coverage of President Vladimir V. Putin, media analysts said. Its signal reaches more than 113 million people, although its audience share hovers around 5 percent."

Taiwan's President Calls For Increased Defense Spending. The New York Times (1/2, Bradsher) reports Taiwanese President Chen Shui-bian "called Sunday for increased arms purchases and warned against greater economic ties to mainland China, in a televised speech that silenced months of speculation that he might soon seek to improve relations across the Taiwan

Strait." The Times notes, "The speech was Mr. Chen's first major policy address since his Democratic Progressive Party fared badly in islandwide municipal elections on Dec. 3. … The Nationalist Party, which favors closer relations with Beijing, did much better in those elections."

Pakistan Negotiating Purchase Of Chinese Nuclear Reactors. The Financial Times (1/3, Bokhari) reports, "Pakistan is negotiating the purchase of between six and eight nuclear power reactors from China during the next decade in the most ambitious expansion yet of the country's nuclear energy capability. … The plants are expected to be completed by 2025, with construction starting by 2015, a senior Pakistani official told the Financial Times."

Sudanese Refugees In Egypt Vulnerable Following Deadly Riot. The New York Times (1/3, Slackman, 1.19M) reports, "Hundreds of Sudanese have been released from police detention camps onto the streets of this city with no money, no place to live - and in many cases, no shoes - three days after the riot police attacked a squatter camp set up as a protest to press the United Nations to relocate the migrants to another country. … The attack officially left 26 dead, including seven small children, and many others injured." The Times adds, "So many were left dead, and the international condemnation was so embarrassing, that President Hosni Mubarak has told the attorney general to investigate. But the government's official position is that the Sudanese were to blame. Magdy Rady, the government's chief spokesman, said the Sudanese injured their own people by trampling those who collapsed, and he said they also attacked the police, injuring more than 70 officers." The Times notes, "The Sudanese were unarmed and many were barefoot. The police were wearing riot gear, including helmets with face shields, and wielded truncheons."

Korean Retailers Exert Power In China. The New York Times (1/2, Onishi) reports, "At Korea City, on the top floor of the Xidan Shopping Center, a warren of tiny shops sell hip-hop clothes, movies, music, cosmetics and other offerings in the South Korean style. To young Chinese shoppers, it seemed not to matter that some of the products, like New York Yankees caps or Japan's Astro Boy dolls, clearly have little to do with South Korea. Or that most items originated, in fact, in Chinese factories. … From clothes to hairstyle, music to television dramas, South Korea has been defining the tastes of many Chinese and other Asians for the past half decade."

Morales Election Seen As Evidence Of Castro's Growing Influence. The Washington Post's Jackson Diehl (1/2) writes, "Here's a sad but safe new year's prediction: U.S. relations with Latin America, which plunged to their lowest point in decades in 2005, will get still worse in 2006." Bolivia's Evo Morales "will probably take instruction from Chavez, Kirchner and Fidel Castro -- who at age 79 must believe he is finally seeing the emergence of the totalitarian bloc he and Che Guevara tried and failed to create in the 1960s."

Bolivia's Morales Says He Will Be America's "Worst Nightmare." Time (1/9, Padgett) reports that Bolivia's President-elect Evo Morales "won a stunning landslide in last month's election in no small part because he pledged to legalize far more cultivation of coca, which Aymara Indians like him have chewed for centuries for traditional medicinal purposes and which the U.S. has tried for decades to eradicate in Bolivia because drug traffickers use it to make cocaine. Morales impishly claims that coca-leaf extract is part of the formula of the classic American beverage Coca-Cola (a legend the company has consistently declined to comment on) and adds, 'It's not right that exporting coca is legal for Coca-Cola but not for the rest of us!' The Yankee baiting is part of Morales' stated intention to be the U.S.'s 'worst nightmare.'" The Bush Administration "has reason to be spooked. Morales' win has helped build momentum for a resurgence of leftist and often anti-U.S. candidates around Latin America. At least nine presidential races are slated for the region this year, and leftists could win at least five -- including those in the two most populous countries, Brazil and Mexico, as well as in coca producers like Peru and Ecuador. Leftists have toppled conservative governments in Uruguay and Honduras, and socialist Michelle Bachelet is favored to win Chile's presidential runoff on Jan. 15. To punctuate the situation, the radical left-wing President of oil-rich Venezuela, Hugo Chavez…is all but certain to be re-elected at year's end."

Ivory Coast Military Installation Attacked. The New York Times/AP (1/3) reports, "Gunmen attacked the main military barracks in Abidjan, Ivory Coast's largest city, on Monday, with gunfire and heavy explosions that shook the surrounding area, authorities said. The armed forces chief, Gen. Phillipe Mangou, said that the attack occurred around 6 a.m. at Camp Akuedo, and that military forces had repulsed it. There was no word on who carried out the assault."

Subsistence Farming Said To Encourage Child Labor In Ethiopia. The Washington Post (1/3, A1, Wax, 744K) reports Ethiopia "has one of the highest rates of child labor in the world," according to the UN. Nine million children "are employed, 90 percent of them in the agricultural sector. … Factors pushing children into the fields include ancient farming techniques, overworked land, the AIDS epidemic and a booming population of 74 million." The Post notes, "It is

also an impoverished rural society where 85 percent of the population farms two-acre plots of land, too small to turn a profit, and nearly every plot is worked to exhaustion. Studies have shown that cultures dependent on subsistence farming also have the highest rates of child labor."

Former Political Prisoners Detail Burmese Junta's Abuses. The Washington Post (1/3, A12, Sipress, Nakashima, 744K) reports on Burmese political prisoners Min Ko Naing and Myo Myint both of whom "passed more than a third of his life in prison when both were released in 2004. Min Ko Naing, 44, remained in Burma, under scrutiny of the secret police. Myo Myint, 43, fled to a small town just over the border in Thailand. Their testimony, provided in separate interviews last month, highlights the psychological and physical abuse endured by political prisoners in Burma, which is ruled by a military junta. More than 1,100 people remain in jail for seeking democratic reform, according to Amnesty International. The two men's accounts reveal how determined they remain to press for social change despite torture inside prison walls and only the remote prospect for a shift in power outside them. Myo Myint now works with a group advocating prisoner rights. Min Ko Naing is urging the government and its opponents to set aside political differences to ease the country's deepening poverty and treat spreading disease."

Strike Follows Purge At Beijing Newspaper. The Christian Science Monitor (1/3, Marquand, 61K) reports, "An emotional strike by 100 journalists at [Beijing's] most popular and lively newspaper follows a 16-month campaign to quash a broad range of 'unapproved' public speech in areas verging on politics or society. … In the case of Beijing News, whose progressive editor Yang Bin was replaced without warning last week, Chinese authorities dealt a seemingly fatal blow to a publishing project that two years ago gave the press some freedom to experiment. Last June the paper reported on violent land disputes in Hebei province, and last month, in what may have precipitated the purge, it published tame, but independent, stories on the official coverup of a massive benzene chemical spill in the Songhua River. Last Thursday, in a gritty south Beijing neighborhood, nearly 100 reporters left the news offices. They began a short-lived strike - a rarity in China - and signed a petition asking for Mr. Yang's reinstatement."

Kirchner Seen As Moving Argentina To Left. The New York Times (1/3, Rohter, 1.19M) reports, "Just four years ago, Argentina's economy was prostrate and its politics in chaos, after a financial crisis resulted in bank deposits being frozen, the government defaulting on more than $100 billion in debt and five presidents holding office in two weeks. But on Tuesday, the country is expected to pay off the last of its debt to the International Monetary Fund and simply walk away from further negotiations with the group. … The $9.8 billion payment is an important symbolic milestone and just one of several recent signs that President Néstor Kirchner appears to be concentrating more power in his own hands and steering his government to the left. Since a midterm election victory in October, Mr. Kirchner has also moved to establish an alliance with Venezuela's populist leader, Hugo Chávez, and, as a traditional Peronist, to extend the hand of the state deeper into the economy, the judiciary and the news media."

LATimes Says North Korea Worsening Famine With Secrecy. The Los Angeles Times (1/2) editorializes, "Many third world countries would have been driven to the wall by back-to-back years of floods and drought. But North Korea, which suffered nature's disasters a decade ago, makes its problems worse with its leader's paranoid, Stalinist determination to isolate the nation from outsiders. For 10 years, the United Nations' World Food Program has done what it could to limit the number of deaths by famine, providing millions of tons of food worth more than $1 billion. When Pyongyang sometimes refused to let U.N. officials visit a province, the organization cut off the food. Its policy of 'no access, no food aid' is necessary to ensure that dictators such as North Korea's Kim Jong Il don't take the milk and grain and give it to their soldiers and trusted civil servants, rather than those who need it most. But now North Korea has forbidden private charities and the U.N. agency to deliver food. Pyongyang claims an improved harvest last year, and help from China and South Korea, will provide enough to feed its 23 million people. But outside experts are doubtful. A more likely reason for stopping food aid is to keep foreigners away and increase the already tight control by Kim's regime."

NYTimes Says Administration "Name-Calling" Against Korea Is Counter Productive. The New York Times (1/3, 1.19M) editorializes, "Calling North Korea nasty names is easy and satisfying. Negotiating is hard and frustrating. So for four years, the Bush administration put more creative energy into name-calling than into serious talks. The main result was that the North moved four years further along toward being able to threaten its neighbors with nuclear weapons. … The North can afford to take its time over resolving the nuclear issue, wasting diplomatic energy on disruptive and bullying tactics. The United States cannot afford that luxury. It makes little sense for the Bush administration to return to name-calling or to rule out high-level talks on the Patriot Act sanctions." According to the Post, "The window that briefly opened for diplomacy after John Bolton moved from nonproliferation issues to the United Nations is once again in danger of being slammed shut,

reportedly at the urging of Vice President Dick Cheney and Mr. Bolton's successor in the nonproliferation job, Robert Joseph."

THE BIG PICTURE:

Headlines From Today's Front Pages.

Los Angeles Times:
"Cantonese Is Losing Its Voice."
"Voting System Results Still Out."
"New Beginning In U.S. Comes At Agonizing Cost."
"W. Virginia Blast Leaves 13 Coal Miners Trapped."
"Storm Stoked By Fierce Winds."
"Rain Dampens Everything But Spirit."

USA Today:
"Hospital Building Booms In 'Burbs."
"Dangerous Gas Hinders Effort; Mine Had Safety Citations."
"Bush Entering A Tough Time For Two-Termers."

New York Times:
"New Rules Set Fr Giving Out Antiterror Aid."
"Russia Restores Most Of Gas Cut To Ukraine Line."
"Blast Traps 13 In A Coal Mine In West Virginia."
"As Argentina's Debt Dwindles, President's Power Steadily Grows."
"Owners' Web Gives Realtors Run For Money."

Washington Post:
"Independence To End Flights On Thursday."
"Pr. George's Community A Sanctuary No More."
"U.S. Cedes Duties In Rebuilding Afghanistan."
"As Rural Ethiopians Struggle, Child Labor Can Mean Survival."
"Obese Patients Increase Need For Specialized Medical Care."
"West Virginia Mine Explosion Traps 13."

Washington Times:
"Redskins Celebrate Long Awaited Playoff Return."
"Discount Carrier To Stop Flying."
"Europe Spurs Russia To Turn On Gas."
"Iraq, Economy Return To Top Of Bush Agenda."
"Saddam Prefers Death By Shooting."
"13 W. Va Miners Trapped By Blast; Resuce Team Sent."

Atlanta Journal-Constitution:
"Bulldogs Lose Nail Biter At Dome."
"Crews Dig For Miners."
"Storms Rake Metro Area."
"A Tiny Town That's Fit To Be Tied - Twice."

Dallas Morning News:
"Town Destroyed By Fire."

Houston Chronicle:
"Abramoff Plea Bargain Announcement Expected."
"Strayhorn Declares She'll Run As Independent."
"Fed Up With Gunshots, One Man Calls On The Angels."
"Absentee Ballots Show Turn In Mexico's Politics."
"4 KBR Contractors Killed In Collision At Iraq Base."
"Texans Let Capers, Two Top Assistants Go."

Story Lineup From Last Night's Network News:
ABC: Preempted by College Football.
CBS: WV Mine Accident; TX-OK Brushfires; CA Flooding; Abramoff Plea Bargain; Food Labels; American Heroes; Iraqi Burials; Japan Birthrate.
NBC: WV Mine Accident; Mine Accident Analysis; Mine Accident Witness; CA Flooding; TX-OK Brushfires; NY Plane Accident; Credit Card Payments; Iraq-Oil Prices; Indonesia Flooding; Germany-Ice Rink Collapse; Iraq-US Teen.

Story Lineup From This Morning's Radio News Broadcasts:
ABC: WV-mine explosion; CA-levee repairs; CA-heavy rains; OK, TX-wildfires.
CBS: WV-mine explosion; CA-heavy rains; OK, TX-wildfires.
NPR: WV-mine explosion; Independence Air shut down; Haiti-presidential candidate arrested; Germany-ice rink collapse; CA-heavy rains; Midwest, South-tornadoes; Israel-Gaza car bombing.

WASHINGTON'S SCHEDULE:

Today's Events In Washington.

White House:

PRESIDENT BUSH – Participates in a meeting on the Patriot Act, Roosevelt Room, White House. Pool at bottom.

VICE PRESIDENT CHENEY – No public schedule.

US Senate: FLOOR SCHEDULE _ 12 p.m. The Senate will convene for a pro forma session. Notes: Once today's session adjourns, the Senate is not expected to meet until 10:00 a.m. on Wednesday, Jan. 18, 2006.

US House: No Scheduled Events.

Other. ASSOCIATION OF AMERICAN LAW SCHOOLS _ The Association of American Law Schools holds their five day annual meeting. Workshops and plenary sessions for law professors, researchers and professionals. Topics will include the Iraqi Constitution, educational diversity, balancing life in law school, religious law, contracts, economics and international law. Location: Most events at Washington Marriott Wardman Park, 2660 Woodley Road NW.

URBAN SECURITY-CHERTOFF _ 10:30 a.m. Homeland Security Secretary Michael Chertoff participates in a news conference on 2006 Urban Area Security Initiative

Grants. Location: Building 21, Nebraska Avenue Complex, 3801 Nebraska Ave, NW.

THE ATTORNEY GENERAL'S *NEWS BRIEFING*

PREPARED FOR THE OFFICE OF PUBLIC AFFAIRS, U.S. DEPARTMENT OF JUSTICE

TO: THE ATTORNEY GENERAL AND SENIOR STAFF

DATE: TUESDAY, JANUARY 3, 2006 7:45 AM EST

TODAY'S EDITION

Antitrust:

Environment/Indian Affairs:

FBI/DEA/ATF/USMS:

Immigration:

Congress-Administration:

Other News:

The Big Picture:

TERRORISM NEWS:

White House Plans Focus On Iraq, Economy For 2006. In a story that runs over 2100 words highlighting political and policy opportunities for the Administration -- as well as potential pitfalls, USA Today (1/3, Jackson, Page, 2.31M) says that while past president have faced their greatest difficulties during the sixth year of their tenure, the White House is making preparations for a "better year" ahead. USA adds that for President Bush, 2005 "was a year of growing public impatience with the Iraq war, angst over record gas prices, devastation from Hurricane Katrina, the collapse of his Social Security plan and, finally, a firestorm over his decision to authorize targeted domestic spying without court warrants. Now he faces a challenge that has upended the best-laid plans of his predecessors: his sixth year in office." However, the White House "and its allies see opportunities, though, sixth year or not." Top aides "say Bush aims to travel more often and speak out more forcefully, touting the economy as underappreciated good news." To "avoid the sort of stalemate that undermined his Social Security proposal, Bush will downsize his domestic agenda, proposing changes in immigration law but shelving, at least for now, plans for a tax overhaul." White House spokesman Scott McClellan "says the basic game plan is simple: 'The economy and progress in Iraq.'" USA adds Bush's "most powerful aide, Karl Rove, has invited think-tank analysts, authors and others to the White House for ideas to help reinvigorate the president's domestic agenda." But there is "trouble on the horizon, too, and events that are outside White House control," such as in Iraq, the CIA leak investigation, and the Abramoff probe. USA then outlines the White House's planned strategy across a number of policy fronts.

The Washington Times (1/3, Sammon, 90K) reports President Bush "is planning to spend 2006 getting back to the basics of his agenda by making the case for his policies on Iraq and the economy instead of pursuing lofty new domestic initiatives." White House spokesman Trent Duffy said, "The president will begin the new year very much in the way he left 2005, which is to discuss the country's two top priorities, keeping our economy strong and growing stronger and creating jobs, and also winning the war on terrorism." The Times adds that is "not to say Mr. Bush will not reveal new initiatives in his State of the Union address, tentatively scheduled for Jan. 31. But those initiatives are expected to be more modest than his ambitious quest to reform Social Security, partly because it will be harder to enact his agenda in a congressional re-election year." Aides "hinted that Mr. Bush will try to make his tax cuts permanent, pass an immigration reform law and push for additional energy legislation, including a measure to open oil exploration in the Arctic National Wildlife Refuge in Alaska. Although he has not officially abandoned Social Security reform, he will spend less time promoting the long-shot initiative."

Democrats To Attack Bush, GOP On Privacy Issues. The Washington Times (1/3, Hurt, 90K) reports congressional Democrats "are drafting a strategy to attack the Bush administration and Republicans as having little regard for the privacy of Americans." Before Christmas, Senate Minority Whip Richard Durbin said, "We will initiate at the beginning of this year one of the most serious debates and discussions on Capitol Hill in our history about individual rights and liberties." The Times adds the "topic will be a major focus of the Supreme Court confirmation hearings of federal Judge Samuel A. Alito Jr. as privacy rights -- the political code phrase for abortion rights -- already has become a major issue, Mr. Durbin said." Democratic leaders "then plan to keep the issue alive as they continue their opposition to key parts of the USA Patriot Act, which is set to expire in early February unless extended." But the "real payoff, Democrats say, will be the hearings into President Bush's authorization of warrantless spying on terror suspects."

Comey Opposed Parts Of NSA Domestic Spying Program. CNN's Lou Dobbs Tonight (1/2, Romans) reported, "The White House is vowing to aggressively defend its program to secretly wiretap Americans in the days and weeks ahead. But this upcoming offensive comes amid new reports of serious internal debate in the Bush administration over the legality of this program." CNN (Quijano) added, "Government officials say during at least part of James Comey's tenure as deputy attorney general, he vigorously opposed parts of the National Security Agency's secret domestic surveillance program and refused to sign off on its renewal." On Sunday, President Bush "would not comment directly when asked whether he was aware of any high-level resistance to the NSA program. Instead, he again forcefully defended its use, calling it legal and necessary." CNN added that "sources have told CNN that the surveillance program was stopped in 2004 for a short time because of legal questions. Some changes were then made to the program, but it's not clear what those changes were."

Williams Says Domestic Spying Program Is Hard To Defend. Pete Williams said on MSNBC's Hardball (1/2) that the domestic surveillance program is "a hard program to defend, because we don't know the extent of it or precisely how it worked. … Now, the legal justification they make is twofold. First, they say, the president has a constitutional authority as commander-in-chief to do this. And secondly, they say, when Congress authorized the use of military force, which was right after 9/11, it gave the president whatever authority he needed to do in wartime. Intelligence gathering, the administration argued, is incident to making war and the president has authority under that law as well. That's been their legal argument.

Mitchell Says Administration Needs To Be "More Out Front" About Eavesdropping. Andrea Mitchell of NBC News said on MSNBC's Hardball (1/2), "I think [Senate Judiciary Committee Chairman Arlen] Specter is a bellwether. … Right now the administration is pressing Specter to give this up and let the intelligence community do this in secret. And he's been arguing that this needs to be the Judiciary Committee. That there are major legal issues involved. One of the things that the White House probably is still resisting, but really needs to do, is be a little bit more out front, because it's not just a handful of cases. It's at least 500 people at a time being eavesdropped upon. And in fact, there were millions and millions of calls and e-mails that were swept up in this electronic vacuum cleaner.'

Thomas Says Presidents Always Give Themselves Power In Times Of War. Evan Thomas of Newsweek said on MSNBC's Hardball (1/2) that this is "an historic moment. A couple hundred years of presidents in times of crisis reaching out, giving a lot of power to themselves. Inevitably, there's a reaction, first it starts with a bureaucracy, it's a little slow and then seeps into the public. You can trace this after Watergate, Vietnam, World War II, World War I, every time we have a war, presidents do this. Eventually there's a reaction. I think that reaction is beginning now. What's not clear is how severe it is, whether the president is going to get whapped back, but you can feel some emanations off of Capitol Hill, as often where it starts, that people are starting to say, hey, maybe the balance is a little bit out of whack here."

Bush Defends Domestic Wiretap Program. President Bush on Sunday visited San Antonio to meet with wounded Iraq veterans and staff at the Brooke Army Medical Center. That visit, however, was largely upstaged by what NBC called his "strongly worded defense" of the Administration's use of the National Security Agency to wiretap people in the US. Other reports also tended to state say Bush defended the program "strongly" or "fiercely." The President made the remarks as media reports indicated there was some dissension within the Justice Department over the legality of the program -- and as four senators backed holding hearings. The story was the lead on NBC, while CBS covered it in a full segment and ABC mentioned it briefly. Today's major newspapers also cover the story in depth.

NBC Nightly News (1/1, lead story, 2:30, Costello) reported the President said, "yet again, in a very strongly worded defense," that "if al Qaeda is trying to call someone, the government should now who and why." Bush "felt compelled again to defend the secret White House program to monitor email traffic and listen into the phone calls of as many as 500 Americans each day without court approval. Mr. Bush said only international calls to and from the US and involving known al Qaeda sympathizers were tapped." President Bush: "It seems logical to me if we know a phone number associated with al Qaeda and or an al Qaeda affiliate, and they are making phone calls, it makes sense to find out why." Costello: "The President again emphasized Congress was kept informed of the program, which was regularly reviewed by the Justice Department and found to be legal. But the New York Times reported that then-Deputy Attorney General James Comey resisted approving parts of the spying program out of concern that it wasn't legal. And Newsweek reports in a cover story that then-Attorney General John Ashcroft refused to overrule Comey, while Time magazine reports that the President even bypassed top Justice Department attorneys who normally reviewed top-secret intelligence programs."

The CBS Evening News (1/1, story 4, 2:00, Roberts) reported, "Bush again fiercely defended his domestic spying program, one that authorizes the government to monitor conversations to and from the US without a court warrant." In an "attempt to dissuade congressional hearings its legality, he says even the program's disclosure has damaged national security and in answer to criticisms about possible civil liberty violations he argues that spying is limited in scope." President Bush: "If somebody from al Qaeda is calling you, we'd like to know why. In the meantime, this program is conscious of people's civil liberties, as am I." Roberts: "Today four US Senators, including Richard Lugar, the Republican Chairman of the Foreign Relations Committee said that hearings on the President's authorization of domestic spying without warrants are appropriate."

The New York Times (1/2, Lichtblau) reports Senator Arlen Specter, "a Pennsylvania Republican and chairman of the Judiciary Committee, has already pledged to make hearings into the program one of his highest priorities." In a letter to Specter on Sunday, "Senator Charles E. Schumer, a New York Democrat who is also on the committee, said the panel should also explore 'significant concern about the legality of the program even at the very highest levels of the Department of Justice.'"

Lugar, appearing on CNN's Late Edition (1/1, Blitzer), said, "I can understand in the context of 9/11 that there may have been, in a common sense way, a reason why calls coming from the Middle East or Afghanistan to America might

be intercepted, but I think the Congress quite rightly is trying to take a look at now that we're past 9/11, we're going to have to live with the war on terror for a long, long while." Asked if he advocated holding hearings on the matter, Lugar responded, "I do. I think this is an appropriate time. … I think we want to see what in the course of time really works best and the FISA Act has worked pretty well from the time of President Carter's day to the current time."

Sen. Mitch McConnell, on Fox News Sunday (1/1, Wallace), said, "Thank goodness the Justice Department is investigating to find out who has been endangering our national security by leaking this information so that our enemies now have a greater sense of what our techniques are in going after terrorists. The overwhelming majority of the American people understand that we need new techniques in the wake of 9/11 in order to protect us. … This needs to be investigated, because whoever leaked this information has done the U.S. and its national security a great disservice."

ABC World News Tonight (1/1, story 6, :20, Harris) reported, "There are reports that high-level officials at the Justice Department objected to the Administration's controversial domestic spying program." Reuters (1/2, Zakaria) notes the New York Times "reported on Sunday that James Comey, a deputy to then-Attorney General John Ashcroft, was concerned about the legality of the NSA program and refused to extend it in 2004." White House aides "then turned to Ashcroft while the attorney general was hospitalized for gallbladder surgery, the Times said." The AP (1/2, Riechmann) says Bush "didn't answer a reporter's question about whether he was aware of any resistance to the program at high levels of his administration and how that might have influenced his decision to approve it."

The New York Post (1/2, Mangan, Dicker) reports, "President Bush belittled top Justice Department official James Comey with the nickname 'Cuomo' after the former Manhattan U.S. attorney balked at allowing controversial warrantless eavesdropping to catch terrorists, a new report claims." The Post continues, "Comey acquired the nickname — which referred to New York ex-Gov. Mario Cuomo — after Bush administration officials concluded he was not a 'team player' on that and other issues, Newsweek reports. … Comey, who now is general counsel for the Lockheed Martin corporation, could not be reached for comment. … But Cuomo laughingly told The Post, 'I'll say this — Comey and Cuomo have this in common: They both agree that the president was wrong.' … The White House denied that Bush, who has a penchant for doling out nicknames, tagged Comey with the scornful sobriquet."

New York Daily News (1/2, Siemaszko) reports, "Schumer also said he will ask Specter to question top White House officials such as former Acting Attorney General Jim Comey, who reportedly opposed the secret domestic eavesdropping on legal grounds. … 'When Comey, who was one of the premier terrorism prosecutors in this country, said that he thought this program violated the law ... it calls into question the way the president and the vice president went about changing it,' Schumer said on 'Fox News Sunday.'"

Schumer, on Fox News Sunday (1/1, Wallace), commented, "The problem here is that the President thought there was a problem -- that's legitimate -- but instead of coming to people and saying 'okay, I need changes in the law,' he just changed it on his own. And today's revelations…really heighten the concerns about this. When [former Deputy Attorney General James] Comey, who was one of the premiere terrorism prosecutors in this country, said that he thought this program violated the law, when it's reported that people at the NSA -- and none of these people are left-wing liberals -- had real doubts about the program, it calls into question the way the president and vice president went about changing it."

The Los Angeles Times (1/2, Roche, Chen) says Bush "strongly defended the domestic eavesdropping program," and quotes the President saying, "If somebody from Al Qaeda is calling you, we'd like to know why. … We're at war with a bunch of coldblooded killers."

The Washington Post (1/2, A1, Rein) notes it was Bush's "third defense in two weeks of his secret domestic spying program." The Post quotes Bush saying, "This is a limited program designed to prevent attacks on the United States of America, and I repeat limited." The Post later says, "The president's first public comments of the new year after no public appearances last week offered a glimpse into how his administration intends to deflect congressional inquiries into his authorization of wiretaps on terrorism suspects -- with a vigorous defense of the program as a matter of national security."

The Washington Times (1/2, Curl) adds the President also "criticized anew the leaker who revealed the program to the New York Times, which published a front-page article about it on the day the Senate was scheduled to vote on an extension of the Patriot Act. 'There's an enemy out there. They read newspapers, they listen to what you write, they listen to what you put on the air, and they react,' said Mr. Bush, who added that the leak of the program causes great harm to national security."

NSA Surveillance Credited With Stopping Terror Attacks Post-9/11. Syndicated columnist Charles Krauthammer, appearing on Fox News Sunday (1/1, Wallace), said, "There's a great irony here. Everybody has been asking of themselves for the last four years why haven't we had a second attack. … But what we've heard over the last six months with these revelations, these so-called scandals, of the secret prisons where high-level Al Qaida have been held, the coercive interrogation which is under attack in the McCain amendment, and now the NSA eavesdropping -- we have the untold story which the

administration could not tell. It knew why we had been protected. … We had a means, technological, in the NSA eavesdropping, and also other means in capturing these terrorists, of getting information. It's worked. It's held us safe."

DOJ Probes Of High-Level Leaks Seldom Meet With Success. Knight Ridder (1/2, Mondics) reports, "When President Bush defended the National Security Agency after the disclosure that it had spied on hundreds of Americans, he angrily denounced media leaks about the program, and the Justice Department has now opened a criminal probe. … But an ongoing Justice investigation of the president's own staff in an unrelated leak case and the handling of hundreds of other leak allegations each year suggest that the probe of the NSA leak - which focuses on the disclosure of classified information to The New York Times - faces huge obstacles." Knight Ridder continues, "Only two government officials have ever been convicted of leaking classified information to a news organization. Samuel L. Morison, a Navy intelligence analyst, was prosecuted for leaking three spy satellite photos to Jane's Defence Weekly in 1984; Jonathan Randel, a former Drug Enforcement Administration analyst, was convicted in 1999 of leaking confidential information about DEA investigations to a London newspaper." Knight Ridder adds, "More recently, special prosecutor Patrick Fitzgerald acknowledged difficulty proving that any laws governing the release of classified information were broken in the White House leak to the media of a CIA operative's identity. Fitzgerald did win an indictment Oct. 28 of I. Lewis "Scooter" Libby, former chief of staff to Vice President Cheney, for allegedly lying to investigators in the case. But after two years, Fitzgerald has charged no one with illegally releasing sensitive national security information - the charge that prompted the investigation. … Mark Corallo, a former Justice spokesman who is now a spokesman for Bush adviser Karl Rove in matters related to the Fitzgerald investigation, said the department typically received hundreds of requests a year from intelligence agencies to investigate leaks, and most cases went nowhere. … One reason is that the Justice Department, despite a handful of high-profile cases, has been reluctant to subpoena reporters who for reasons of confidentiality declined to testify; another is that laws governing such prosecutions require the government to show that the leaker intended to break the law - a difficult hurdle to clear."

Bush Will Begin 2006 "Preoccupied" By Domestic Spying Controversy. Time (1/9, Lacayo) reports that President Bush's 2002 Executive Order allowing the NSA to eavesdrop without a warrant on phone conversations, e-mail and other electronic communications "remained a closely guarded secret" for four years. Time adds, "Because the NSA program was so sensitive, Administration officials tell TIME, the 'lawyers' group,' an organization of fewer than half a dozen government attorneys the National Security Council convenes to review top-secret intelligence programs, was bypassed. Instead, the legal vetting was given to Alberto Gonzales, then White House counsel. In the weeks since Dec. 16, when the program was disclosed by the New York Times, it has set off a ferocious debate in Washington and around the country about how the rule of law should constrain the war on terrorism. That development ensures that the President will start the new year preoccupied for a while with a fight over whether his responsibility to prevent another attack gave him the power to push aside an act of Congress -- or, to use the terms of his harshest critics, to break the law."

In a separate story, Time (1/9, Tumulty, Allen) reports that "the revelation that his Administration has been spying in this country without warrants -- illegally, critics say -- may have put a crimp in Bush's plan to climb back on top of the agenda as the new legislative session begins. 'When Congress comes back,' warns a top G.O.P. congressional aide, 'domestic surveillance and privacy issues will be all over the front pages.' To which the President and his strategists seem to be saying, Bring it on." From the Time the story broke, the Administration "decided its strategy would be to 'overwhelm the skeptics, not back off, not change anything about the program and really home in very strongly on the fact that this is a legitimate part of presidential warmaking power,' says an adviser." GOP strategists "argue that Democrats have little leeway to attack on the issue because it could make them look weak on national security and because some of their leaders were briefed about the National Security Agency (NSA) no-warrant surveillance before it became public knowledge. Some key Democrats even defend it."

"Ferocious" Administration Infighting Delayed Domestic Spying Program For A Time. Newsweek (1/9, Thomas, Klaidman) reports, "NEWSWEEK has learned, ferocious behind-the-scenes infighting stalled for a time the administration's ambitious program of electronic spying on U.S. citizens at home and abroad." Newsweek adds, "It does not appear that President Bush -- determined to stand tall in the war on terror -- or Vice President Cheney, a staunch believer in executive power, hesitated to circumvent FISA. Asserting the broad warmaking powers conferred on the president by Article 2 of the Constitution and by a post-9/11 congressional resolution authorizing the use of force to combat global terror, Bush repeatedly approved of what the NSA calls a 'special collection program' that eavesdropped -- without warrants -- on about 500 Americans a day."

"Reassertion Of Presidential Power" Said To Be At Heart Of Spying Debate. U.S. News and World Report (1/9, Kaplan) reports, "At the heart of the debate over domestic spying is a reassertion of presidential power. Legal advisers to the president have made a case for sweeping executive authority during wartime. The White House's authority to

render terrorism suspects jailed without trial and run warrantless eavesdropping, they argue, is authorized by a congressional war resolution passed after 9/11 and by the Constitution's grant of war-making power to the commander in chief. Among the prime supporters of this position is Vice President Dick Cheney, who as White House chief of staff under Gerald Ford saw Congress take back considerable amounts of executive power after the abuses of the Nixon era. But Congress and the courts may now be pushing back. Legal challenges to the administration's detention policy and the FBI's national security letters are winding their way through the courts." Likewise, Time (1/9, Lacayo) says the White House "has been developing a very robust interpretation of presidential power" to "support its aggressive conduct." Vice President Dick Cheney "in particular believes that presidential power has been unreasonably confined since the 1970s." Time adds, "Because they required the President to plainly bypass an act of Congress, the no-warrant wiretaps may be the sharpest expression yet of the Administration's willingness to expand the scope of Executive power."

Domestic Spying Efforts May Be More Widespread Than Previously Thought. U.S. News and World Report (1/9, Kaplan) reports, "A string of revelations in recent weeks suggests that domestic spying programs may be far broader than previously thought." Government officials "have offered spirited defenses" of these programs. They say these allegations of spying "have been misinterpreted and exaggerated," and they "insist that the public expects law enforcement and intelligence agencies to be aggressive in the age of terrorism. President Bush was unapologetic about the NSA's warrantless intercepts. … The FBI, too, has mounted a strong defense. No investigations are opened, officials say, unless there is 'specific information about a potential criminal or terrorist threat.' Mere mention of groups or individuals in an FBI file, agents say, does not mean they are under investigation."

Allegations Have Sparked Lawmakers Into Action. U.S. News and World Report (1/9, Kaplan) reports that "the mounting allegations of domestic spying have sparked widespread concern and prompted members of Congress to action, among them Arlen Specter, the Pennsylvania Republican who chairs the Senate Judiciary Committee and who will convene hearings later this month. 'I want to know precisely what they did,' Specter said. 'How the NSA utilized their technical equipment, whose conversations they overheard, how many conversations they overheard, what they did with the material, what purported justification there was.' Democrat Rep. Robert Wexler is demanding documents on the Defense Department's secret monitoring program, part of a little-known agency called the Counterintelligence Field Activity."

Time (1/9, Lacayo) adds that "the House and Senate Intelligence Committees are almost certain to make deeper inquiries. Meanwhile, the Justice Department is launching an investigation of its own, into how word of the secret program was leaked." Justice officials "have refused to say whether the overall legality of the NSA program will also be investigated."

Bush Administration "Implored" NYTimes Editors Not To Publish Domestic Spying Story. Time (1/9, Ratnesar) reports on New York Times reporters James Risen and Eric Lichtblau, who broke the story "that the Bush Administration was running a covert domestic-spying program." It "took Risen more than a year to get the story into print -- and not before President Bush personally implored Times editors not to publish Risen and Lichtblau's account of how Bush authorized the National Security Agency to wiretap telephone and e-mail communications inside the US without court-sanctioned warrants." Time adds, "At the center of the article's backstory is Risen, who unsuccessfully pushed to publish the wiretap report last year, then took a leave to write a book, State of War: The Secret History of the CIA and the Bush Administration. It now appears he may pay a price for the disclosure: last Friday the Justice Department opened an investigation into who leaked the existence of the NSA program to the Times, raising the prospect of Risen's being compelled to reveal the identities of the 'nearly dozen' current and former officials who spoke to him about the program or face jail time for contempt of court."

Domestic Spying Debate Follows A "Predictable" Wartime Pattern. Newsweek (1/9, Thomas, Klaidman) reports in its cover story, "The current debate over national security and civil liberties is not new. It follows a predictable pattern of a democracy in wartime. … To understand the current struggle -- and judge how seriously to take the Bush and Cheney bids for power -- it is useful to compare this battle to all the balancing acts that have come before. The facts change, but the pattern varies little: In national crises, presidents reach for power." A president "will almost always choose to violate individual rights over the risk of losing a war." Newsweek adds, "Congress lies low and goes along. … Typically, in times of national peril, Congress gets swept along on a wave of patriotism. … The bureaucracy pushes back. … Though 'bureaucrat' can be a bad name, government careerists are sometimes the only ones who will uphold standards of fairness or decency. They know, too, that they can be left holding the bag if later congressional hearings look into dubious secret operations. … The public and the politicians react -- and overreact. Historically, wartime encroachments on civil liberties have spawned backlashes. … The American public may be less than sympathetic to the targets of the Bush antiterror crackdown. But if the administration is shown to have violated the civil liberties of

mainstream peace groups or (heaven forbid!) members of the press, the outcry could produce an overreaction."

More Commentary. Columnist Ruth Marcus, meanwhile, writes in today's Washington Post (1/2) about Bush's domestic spying, and comments, "Perhaps, in the aftermath of Sept. 11, that's how the country wants its intelligence activities conducted." But "living on the edge inevitably risks falling off a cliff - especially if you choose to live there on your own and in secret." Marcus says "the need for legal checks, the importance of congressional oversight, the missteps that inevitably occur when the executive branch is accountable only to itself -- seem to have been ignored by all the parties involved. As Congress gears up for another needed round of hearings, the challenge is not only to discover what happened but also not to forget, again, what was already, painfully learned."

DOJ IG Finds Terror Specialists At US Attorney's Offices Failing To Coordinate. The Washington Times (1/3, Seper, 90K) reports that a report from the Justice Department's Office of Inspector General has concluded that "Intelligence specialists at the 93 US attorneys' offices assigned to identify terrorist activity and assist in prosecutions are not coordinating their efforts and lack guidance." According to the report, though the offices "have made 'valuable' individual contributions to counterterrorism efforts, their overall effectiveness needs to increase through improved coordination and guidance." The IG report "made eight recommendations to improve the use of the specialists, including identifying and providing the standard tools they should use, defining the types of results they should produce, and establishing the quality standards those results should meet. "

Former CIA Official Says Agency May Need A Decade To Build Up Anti-Terror Service. Reuters (1/2, Morgan) reports, "A former CIA counterterrorism officer who tracked Osama bin Laden through the mountains of Afghanistan says the U.S. spy agency could need a decade to build up its clandestine service for the U.S. war on terrorism." Gary Berntsen, "a decorated espionage officer who led a paramilitary unit code-named 'Jawbreaker' in the war that toppled the Taliban after the September 11 attacks," said CIA Director Porter Goss "faces an uphill battle to fill the agency's senior ranks with aggressive, seasoned operatives." Berntsen said in an interview, "He's probably more aggressive than most of the senior officers in the clandestine service. So I think he's having to pull them along a bit." Goss, he added, "is trying to improve the situation. But it's going to be tough. The rebuilding is going to take years. A decade, at least."

Experts Say Padilla Dispute Could Jeopardize Terror War. The Legal Times (1/2, Henning) reports, "This time, audacity may not pay off for Bush administration lawyers. …. Having aggressively — and in the view of their critics, arrogantly — pursued an expansive view of executive power since the start of the war on terrorism, they could see their plans derailed by an escalating skirmish over 'enemy combatant' Jose Padilla." The Times continues, "Last week was punctuated by another round, in a rancorous and highly unusual exchange between the U.S. Court of Appeals for the 4th Circuit and the Bush administration over the detention of Padilla, a U.S. citizen whose case is regarded as a crucial legal litmus test of anti-terrorism tactics. … In late November the government abruptly asked the appeals court to vacate a Sept. 9 decision granting President George W. Bush the right to detain indefinitely U.S. citizens as enemy combatants without charge or trial. It was a move that alienated one of the administration's most reliable judicial allies, the largely conservative 4th Circuit." The Times adds 'The administration's abandonment of its aggressive position in a case that it has touted as crucial to battling terrorists confounded outsiders and infuriated the judges who had previously given the White House a highly favorable ruling. … 'This is perhaps the most important constitutional litigation since September 11,' says Timothy Lynch, director of the Cato Institute's Project on Criminal Justice. 'They severely underestimated the reaction by the judiciary and other legal observers. Maybe they missed the forest for the trees and lost sight of how big this was, but this is going to hurt the credibility of the Justice Department in other terrorism cases.'"

The Pittsburgh Post-Gazette (1/2, McGough) reports, "It must have seemed like a good idea at the time. Fearful of another test of presidential power in the U.S. Supreme Court, the Bush administration in November decided to cut its losses and end the 3 1/2-year-long confinement of Jose Padilla as an 'enemy combatant.' .. Mr. Padilla, a Brooklyn-born convert to Islam, was arrested at Chicago's O'Hare Airport in May 2002 and was identified by then-Attorney General John Ashcroft as a participant in an al-Qaida plot to explode a radioactive 'dirty bomb' in the United States. A federal appeals court upheld his detention, but Mr. Padilla's lawyers appealed to the Supreme Court. … Then the Bush administration executed a legal U-turn. It secured an indictment of Mr. Padilla by a federal grand jury in Florida on terrorism charges unrelated to a 'dirty bomb,' announced that he would be transferred from a Navy brig in Charleston, S.C., to a civilian prison in Miami and asked the 4th U.S. Circuit Court of Appeals in Richmond to vacate its decision upholding Mr. Padilla's confinement." The Post-Gazette adds, "The 4th Circuit, one of the administration's favorite tribunals, wouldn't play. It refused to vacate its order or approve of Mr. Padilla's transfer from military to civilian custody. In an

opinion by Judge J. Michael Luttig, a conservative icon often mentioned as a possible Bush appointee to the Supreme Court, the 4th Circuit worried about 'an appearance that the government may be attempting to avoid consideration of our decision by the Supreme Court.' … Last week the administration shot back, demanding that the Supreme Court authorize Mr. Padilla's transfer. In a petition filed with the Supreme Court, Solicitor General Paul D. Clement fumed that 'the 4th Circuit's order defies both law and logic' and constituted an 'unwarranted attack' on President Bush's authority. Besides, Mr. Clement said, Mr. Padilla's lawyers hadn't objected to transferring their client. … It is true that in an earlier filing with the 4th Circuit, Mr. Padilla's attorneys had indicated that they wouldn't object to the transfer because they could continue to challenge Mr. Padilla's designation as an enemy combatant. But last week they took a different tack. … The battle of the briefs between the government and Mr. Padilla's lawyers turns on the proper interpretation of a federal court rule that says prisoners seeking a writ of habeas corpus -- as Mr. Padilla is doing -- ordinarily can't be transferred from one jailer to another. But the larger issue in the turf war between the 4th Circuit and the Bush administration is the same one raised in Mr. Padilla's original legal challenge: the scope of presidential power in the 'war on terror.'"

WPost Comments On Changing Government Tactics In The Padilla Case. The Washington Post (1/2) editorializes, "Just when it appeared the case of accused enemy combatant Jose Padilla couldn't get any weirder, the two parties have switched sides. In an emergency brief filed before the Supreme Court last week, the Justice Department asked the justices to step in and allow the government to transfer Mr. Padilla immediately from military to civilian custody so that he can face the criminal charges recently filed against him. This is the same Justice Department that had been arguing for 3 1/2 years that Mr. Padilla could be held without charge on President Bush's order as an al Qaeda fighter - for much of that time without even having access to his lawyers. … The government is now seeking to release Mr. Padilla from his legal limbo, and Mr. Padilla is objecting."

US Said To Be Underutilizing Arab, Muslim Community In War On Terror. Randa Fahmy Hudome, former associate deputy energy secretary in the Bush administration, in an op-ed in the Wall Street Journal (1/3, A24, 2.11M) writes that while the US government "has focused on the vital national security challenges posed in the post-9/11 environment -- challenges in law enforcement, intelligence gathering and public diplomacy," there is "an untapped resource in all 50 states that can provide insight into many of these challenges -- the American Arab and Muslim community." However, "they have been underutilized on the frontlines of the global war on terror. While President Bush has appointed more Arab- and Muslim-Americans to senior positions than any previous administration, the rest of the government has been slow to follow his lead." Fahmy Hudome states, "The Department of State should create an Arab- and Muslim-American Advisory Board -- made up of experts who reflect the religious, ethnic and geographic diversity of the Middle East -- to advise the US government about issues, sensitivities, perceptions and misperceptions both here and abroad."

Administration Action On Hamadi Release Called Inadequate. Ken Stethem, brother of US Navy Diver Robert Stethem, who was murdered during the 1985 TWA hijacking, was asked on MSNBC's Scarborough Country (1/2), why he wrote to the Bush Administration complaining about the release by German authorities of Mohammed Ali Hamadi, who was convicted of the murder. Stethem said, "We're absolutely unsatisfied with the indifference and the action that they took upon Hamadi's release. … We've gotten two phone calls, one from Andrew Card, wishing us well and saying he's sorry. And then we got one from [State Department Counterterrorism Coordinator] Ambassador [Henry] Crumpton…saying basically the same thing." Stethem went on to say he has not "heard anything" from Congress, "and it's unbelievable." When asked what the Administration's response to his requests has been, Stethem said, "Nothing! We've been trying to get meetings with Condoleezza Rice in the State Department, through the Justice Department since May. And we've not been given the opportunity once. … It's incredible, just incredible to see the president soliciting support for the war on terrorism, the same week that Hamadi is released and the Administration knew about his impending release while the president was preparing that speech."

PATRIOT ACT:

White House To Step Up Defense Of Patriot Act, NSA Surveillance. The Financial Times (1/3, Daniel) reports the White House "will this week step up efforts to defend its policy on the Patriot Act as well as its controversial decision to conduct domestic surveillance on US citizens without a warrant from a judge, in the face of mounting concerns from civil liberties groups." President Bush "began the counter-offensive with a strong defence of his decision in 2001 to authorise the National Security Agency to eavesdrop on those suspected of links to al-Qaeda and of his legal authority to prosecute the war on terror." On Tuesday, Bush "will take part in a meeting on the Patriot Act, the anti-terrorism legislation that Congress failed to renew before the Christmas break. On Wednesday he will make a

statement on the 'war on terror' at the Pentagon." As "part of a co-ordinated approach, Dick Cheney, vice-president, will also give a speech about terrorism."

HOMELAND RESPONSE:

Chertoff To Announce Changes To Homeland Security Grant Program. Several media outlets this morning are reporting on the upcoming announcement of changes to the Urban Area Security Initiative. The AP indicates that Secretary Chertoff has sought the changes, while the New York Times notes that he is prepared for some negative response. The New York Times (1/3, Lipton, 1.19M) reports, "Facing cuts in antiterrorism financing, the Department of Homeland Security plans to announce today that it will evaluate new requests for money from an $800 million aid program for cities based less on politics and more on assessments of where terrorists are likely to strike and potentially cause the greatest damage, department officials say. The changes to the program, the Urban Area Security Initiative, are being driven in part by a reduction in the overall pool of money for antiterrorism efforts." Homeland Security Secretary Michael Chertoff, who is to announce the shift, said in a speech last month that "the changes he was considering would require an acknowledgment that the nation could not protect itself against all risks." DHS officials "would not offer predictions of what the likely outcome would be in terms of how many cities would see their grants eliminated or cut significantly." Meanwhile, "Mr. Chertoff has made clear that he expects protests when the final grant awards are announced."

The Wall Street Journal/AP (1/3, A4) reports, "The change…addresses both the destruction and lack of preparedness seen during Hurricane Katrina. It also reflects…Chertoff's efforts to give his department an all-hazards mission -- even though it was created as a direct result of the Sept. 11, 2001, terror attacks." The AP notes, "Homeland Security spokesman Russ Knocke would not comment on which cities will be eligible for grants this year." A longer version of the AP (1/2, Jordan) story noted, "Calls to city officials around the country and to the US Conference of Mayors for comment were not immediately returned."

Under the headline "More Cities Eligible For Urban Grants, USA Today (1/3, 2.31M) reported, "Homeland Security Secretary Michael Chertoff will announce today which cities will receive part of $765 million in annual Urban Area Security Initiative grants. In past years, the grants have gone to the nation's 50 largest cities for terror-related security measures. This year, cities that risk being hit by a natural disaster or health crisis also are eligible."

DHS Issues Manual On Correspondence For Employees. In its "Verbatim" column, the Washington Post (1/3, A15, 744K) runs a portion of "a new manual for correspondence standards and procedures" sent out by Fred Schwien, the Department of Homeland Security's executive secretary. The portion is headlined, "4.3 Statement of Lateness (Note: Not in use until on or about Feb 1, 2006)," and reads, "If a component response does not meet the five-day deadline for returning correspondence to the ES, a statement of lateness is required. … Workload and component priorities are not valid excuses. As stated previously, for the DHS employee tasked with preparing an item for the Secretary or Deputy Secretary signature, there are few, if any, higher priorities."

Deadline Extended For Evacuees To Leave Hotels. Federal officials have extended the deadline for Hurricane Katrina evacuees to check out of their government-funded hotel rooms. The AP (1/3, McGill) reports that the extension comes as the feds "iron out issues arising from a class-action lawsuit. One issue: The Federal Emergency Management Agency, which inherited the program from the American Red Cross, still does not have up-to-date records on the identities of evacuees in the hotel program or where they are staying, according to court papers filed last week by government lawyers. Under a federal judge's ruling last month, FEMA is required to keep the hotel program running until Feb. 7. However, U.S. District Judge Stanwood Duval said FEMA could stop paying for hotel rooms beginning Jan. 7 — Saturday — for evacuees who have been approved or disapproved for other FEMA housing aid, such as a trailer or rental assistance. Now, the Jan. 7 date no longer holds, according to a flier being distributed to hotels in the program. It says: 'The program will continue for all evacuees in all states until further notice pending the resolution of certain issues now in litigation.'"

Residents Await Word On Neighborhood Hit By Katrina Oil Spill. A front page story in the Wall Street Journal (1/3, McKay, 2.11M) reports that when the levees that protected the Chalmette, Louisiana "gave way to Hurricane Katrina on Aug. 29, about 1,800 homes were inundated with floodwaters carrying nearly 1.1 million gallons of oil from a nearby refinery. Thick black crude seeped into homes and yards. Officials sealed off the area. A private contractor hired by the refinery's owner, Murphy Oil Corp. of El Dorado, Ark., began cleaning up. But the crews left most homes and yards untouched for weeks until Murphy Oil could track down their scattered owners to seek permission to clean them, the oil company says. Four months after Katrina hit, oil remains in hundreds of homes and yards. This heavily damaged community, which remains mostly abandoned, raises acute

personal and public-policy questions: How can residents displaced by Katrina determine if it's safe to return to their homes, and when? And who ultimately should decide?" The Journal notes that "neither federal nor state nor local officials have provided residents with any clear answers. Parish leaders and residents say they expected the federal Environmental Protection Agency to manage the cleanup process and determine when the neighborhood was safe. But the EPA says it's not up to it to decide whether the community should be resettled."

I-10 Repairs Cited As An Example For All Gulf Coast Rebuilding Projects. The New York Times (1/3, Schwartz, 1.19M) reports that while the repair of the twin spans of Interstate 10 over Louisiana's Lake Pontchartrain "has gone unusually right, coming in ahead of time and under budget. By cannibalizing one bridge to fix the other, and then using temporary steel spans to fix the first bridge, the State of Louisiana and the contractor were able to open one span in October and plan to have traffic flowing on the other as early as Jan. 6, nearly two weeks ahead of schedule." The Times adds that following Katrina, "one of the highest priorities was getting the Interstate open, and doing so quickly required creative thinking, dedication and no small amount of luck. … The work was financed by the Federal Highway Administration, which advised Louisiana on the project. Norman Y. Mineta, the federal transportation secretary, said through a spokeswoman that the project was 'serving as a model for the kinds of efficiencies we should try to achieve in all gulf rebuilding projects.'"

Local Gulf Coast Contractors Feel Cut Out Of Katrina Cleanup. The CBS Evening News (1/1, story 7, Roberts) reported, "In the months since Hurricane Katrina hit, Federal agencies have poured billions of dollars into the battered gulf region. But in Mississippi, Bill Whitaker heard complaints from local contractors who say few of those dollars have come their way." CBS (Whitaker) added, "Big players like Ashbritt of Pompano Beach, Florida, awarded a Federal contract worth $500 million and others like Bechtel and Halliburton subsidiary Kellog Brown and Root got contracts for tens of millions dollars more." Socrates Garrett: "And the network of good old boys were already in place." Whitaker: "Socrates Garrett's company is the biggest in Mississippi yet trucks and workers he has in place sit idle." Garrett: "If we can't work then you can bet that other smaller minority firms don't even have a chance." Whitaker: "Mississippi Congressman Thompson says his state's businesses are suffering because FEMA and the Army Corps of Engineers and other Federal agencies responsible for cleanup are playing politics." Rep. Bennie Thompson: "Those are the contracts that have gone to companies that were well connected, had the right lobbyists, contributed to the right party in power." Whitaker: "Ashbritt says it wasn't politics but hard work that won the contracts." Randal Perkins, Ashbritt: "At the end of the day if you're not qualified and capable and ready to handle the challenge given to you you're not getting the contract." Whitaker: "He says most of Ashbritt's subcontracts have gone to Mississippi companies, but Congressman Thompson says they're getting the dregs, the little jobs and little of the Federal money. Mississippi's Republican governor agrees." Gov. Haley Barbour: "We don't think there's a high enough percentage of the work going to local contractors. There's some, unquestionably, but we think there needs to be more."

Nagin Says New Orleans Could Take Three To Five Years To Regain Population. The AP (1/2) reports, "New Orleans Mayor C. Ray Nagin yesterday said it could take three to five years to regain the city's population of nearly half a million before Hurricane Katrina. Mr. Nagin said on CBS' Face the Nation that reopening several public and private schools this month would help raise New Orleans' population to about 200,000, double the current level, as families returned with their children. Shortages of suitable housing would limit further growth over the near term, he said."

Emergency Officials Include Animal Rescue In Emergency Plans. The Washington Post (1/2, B1, Wan) reports on the "merging field of disaster planning for pets, filled with doomsday scenarios, four-legged victims and people who love them. For years, despite an estimated 69 million U.S. households with a pet, animal advocates have been relegated to the fringes of emergency planning. After Katrina, however, and the sight of people in New Orleans refusing to evacuate and in some cases dying with their pets, emergency officials are starting to take animal rescue seriously. By saving the pets, advocates said, owners can be saved as well." The Post adds, "The concept is as old as Noah's Ark, but modern pet disaster planning didn't truly begin, U.S. experts said, until after Hurricane Andrew in 1992. When Andrew tore through South Florida, it killed more than 100 animals in the Miami Metrozoo. Hundreds of others, including baboons, antelope and 500-pound Galapagos tortoises, wandered off through the rubble. Escaped horses drowned in canals. … After Andrew, the federal government created Veterinary Medical Assistance Teams, to be deployed wherever animal-threatening disasters hit. The 1992 hurricane also prompted the Humane Society to establish a department devoted to disaster planning and rescue."

Gulf Coast Seeing Puppy Boom Following Hurricane Katrina. The Washington Post (1/3, A10,

Reeves, 744K) reports on a boom in the birth of puppies in the wake of Hurricane Katrina. According to the Post, "Officials say more than 6,000 pets were saved in the region after Katrina came ashore Aug. 29, and many of them were relocated to new homes elsewhere in the country. An unknown number drowned in the floodwaters or died later of injuries. But thousands of animals remain, and humane organizations are beginning to see the result of even small numbers of animals running loose for weeks in neighborhoods where fences were flattened and owners fled.'

Charleston Post & Courier Lauds FBI's Nuclear Monitoring. The Charleston (SC) Post & Courier (1/3) editorializes, "A federal program to monitor radiation levels has quietly sought to defuse one of the greatest terror threats to the nation. Radiation surveillance seeks to diminish the likelihood that terrorists could set off a so-called "dirty bomb" containing radioactive material or, worse, detonate a nuclear explosive." The P&C continues, "The program was recently reported on the Web site of U.S. News & World report, and confirmed by federal officials. It hasn't received the same media attention as electronic eavesdropping and other forms of domestic spying, though it has been criticized by some Muslim groups who feel they are being targeted." The P&C adds, "Radioactivity monitors have been installed at a variety of public locations, including ports and subways since 9/11. There should be no reluctance to use passive monitoring as broadly as is warranted. … Monitoring potential sources of radioactivity by 'sniffing the air' clearly doesn't raise the same issues of privacy as wiretapping. Keeping radioactive material out of the hands of potential terrorists is essential to national security and public safety."

WAR NEWS:

Shiites, Kurds May Drop Allawi From Coalition, Give Sunnis Role. The Los Angeles Times (1/3, Daragahi, 958K) reports, "The victors in last month's parliamentary election indicated Monday that they were prepared to cut a secular politician backed by Washington out of the new government in favor of Iraq's main Sunni Arab slate. The pro-Western politician, former interim Prime Minister Iyad Allawi, did poorly in the Dec. 15 balloting despite spending heavily on a sleek television campaign." The Times adds that "the emerging political alliance lumps together Shiites, Kurds and Islamist Sunni Arabs — and excludes secular Iraqis, hard-core Sunni Arab nationalists and those sympathetic to the Baath Party of ex-dictator Saddam Hussein."

USA Today/AP (1/3) adds "Iraq's main Sunni Arab group made an unprecedented trip north to see Kurd leaders and agreed Monday for the first time on broad outlines for a coalition government." The move "opens a way out of the political turmoil that has gripped the country since disputed parliamentary elections Dec. 15." The agreement "struck by Kurdistan regional President Massoud Barzani and representatives of the main Sunni Arab group, the Iraqi Accordance Front, could lead to a broad-based government." The Accordance Front "will be part of a future government," said Foreign Minister Hoshyar Zebari, "a Kurd who sat in on the meetings."

The New York Times (1/3, Oppel Jr., 1.19M) also reports on the "broad framework for a coalition government," which "drew a rebuke from other Sunni Arab political leaders who accused the Sunni consensus party of violating an agreement to press ahead with claims of Sunni disenfranchisement during the vote on Dec. 15 and to not bargain on their own for a role in the new government."

Despite Poor Election Results, Chalabi Could Play Key Role. Knight Ridder (1/3, Hannah, Youssef) reports, "Even though Ahmad Chalabi apparently lost badly in last month's parliamentary election here, the former Pentagon favorite is still likely to be a big player in the next Iraqi government." The Dec. 15 vote "went largely to ethnic and sectarian coalitions at the expense of secular slates, including his, preliminary returns indicate. That could leave him without a seat in parliament." Yet "the former exile who helped spur the US-led invasion by feeding false intelligence to Washington about Saddam Hussein's alleged weapons of mass destruction, and who returned to Iraq after Saddam's fall to craft himself into a political leader, still has more cards to play. Characteristically, Chalabi, 61, could land on his feet in a high government post even though he failed to win even a minimum of votes from the Iraqi people."

Iraq Facing Fuel Crisis As Oil Minister Quits. NBC Nightly News (1/2, story 8, :30, Holt) reported, "There are growing concerns tonight about an oil crisis in Iraq. Fuel prices for Iraqi citizens are way up, supplies are growing scarce and new numbers out today show Iraq's oil exports hit their lowest levels since the war. Today, Iraq's oil minister quit." The AP (1/3, Juhi) adds "Iraq's exports of oil hit their lowest level in December since the war, as the country's oil minister resigned Monday in the wake of protests and riots over soaring gas prices and lengthening lines at the pump. Only 34.4 million barrels were exported in December, or about 1.1 million barrels per day," which was "the lowest average since Iraq resumed exports after the U.S.-led invasion in March 2003, according to figures released Monday." The Washington Post (1/3, A12, Hernandez, 744K) also reports the story.

Twelve Iraqis Killed In Insurgent Attacks. NBC Nightly News (1/2, story 8, :30, Holt) reported, "At least 12 people, including two children, were killed in violence today.

In the worst incident, a suicide bomber rammed his car into a bus full of Iraqi policemen, killing seven and injuring 13." The CBS Evening News (1/02, story 7, 2:00, Schieffer) reported, "No American deaths were reported in Iraq today but insurgent violence killed at least a dozen Iraqis."

The Los Angeles Times (1/3, Daragahi, 958K) reports the US military also "reported the deaths of four American civilian contractors involved in a motor vehicle accident on the Asad Air Base in western Iraq on Sunday. Nineteen others, including a Marine, were also injured when their bus was struck by a 7-ton truck, the military said."

Iraqi Volunteer Buries Unclaimed Bodies Of Those Slain In Violence. The CBS Evening News (1/02, story 7, 2:00, Schieffer) reported on the "story of a remarkable man who has devoted himself to honoring the dead, no matter who they were." CBS (Alfonsi) added on Sheikh Jamal-al Sudani's effort to bury the unclaimed bodies of about 250 of those killed in insurgent attacks. Al-Sudani "and his group of volunteers aren't paid. They do this grim job, they say, solely for God's rewards." The "group drives the bodies from Baghdad to Najaf through Iraq. The final stop is the Valley Cemetery, a holy place because a number of prophets are buried there and a practical place because the loose soil makes it easy to bury so many bodies. The bodies of Sunnis, Shiites, Muslims and Christians are all carefully washed and wrap." Terrorists "want to kill him because he cares for the victim of their suicide attacks others because he buries the suicide bombers but he is no stranger to threats. He's been doing this work for 15 years."

Poll Finds Support Among Military For Bush Policies Drops To 60%.

Agence France-Presse (1/3) reports, "Support for President George W. Bush's Iraq policy has fallen among the US armed forces to just 54 percent from 63 percent a year ago, according to a poll by the magazine group Military Times. In its annual survey of the views of military personnel, the group reported on its website that support for Bush's overall policies dropped over the past year to 60 percent from 71 percent." AFP adds, "While still significantly more supportive of the president than the broad US population, the fall in support by military personnel tracks a similar decline in the president's popularity among the general public."

Murtha Says He Wouldn't Join Military Today.

Reuters (1/3) reports, "Rep. John Murtha, a key Democratic voice who favors pulling U.S. troops from Iraq, said in remarks airing on Monday that he would not join the US military today. A decorated Vietnam combat veteran who retired as a colonel after 37 years in the U.S. Marine Corps, Murtha told ABC News' 'Nightline' program that Iraq 'absolutely' was a wrong war for President George W. Bush to have launched." "Would you join (the military) today?," he was asked in an interview taped on Friday. He replied, "No." The interviewer retorted, "And I think you're saying the average guy out there who's considering recruitment is justified in saying 'I don't want to serve.'" Said Murtha, "Exactly right."

On ABC News Nightline (1/2), Murtha said the Administration "got awful lot of bad information" about the situation in Iraq because "they don't talk to Congress. … They don't listen to people with experience." When asked if President Bush "doesn't really know what's going on" in Iraq, Murtha said, "Yes, that's what happens. The President mischaracterizes things because he gets bad information." In the run-up to the Gulf War, former President Bush "would get all kinds of criticism from Democrats and Republicans, and he would patiently listen to it, and then do what he thought was right." The American public "is way ahead of this president. If they think they're fooling the public with their rhetoric, they're wrong. You can't operate that way in today's world. … The American people want to see a clear mission, they want to see an exit strategy."

Father Calls Son's Death In Iraq "A Waste." Paul E. Schroeder, managing director of a trade development firm in Cleveland, writes in the Washington Post (1/3, A17, 744K), "Early on Aug. 3, 2005, we heard that 14 Marines had been killed in Haditha, Iraq. Our son, Lance Cpl. Edward 'Augie' Schroeder II, was stationed there. At 10:45 a.m. two Marines showed up at our door. After collecting himself for what was clearly painful duty, the lieutenant colonel said, 'Your son is a true American hero.' … I am outraged at what I see as the cause of his death. For nearly three years, the Bush administration has pursued a policy that makes our troops sitting ducks. While Secretary of State Condoleezza Rice told the Senate Foreign Relations Committee that our policy is to 'clear, hold and build' Iraqi towns, there aren't enough troops to do that. … Though it hurts, I believe that his death -- and that of the other Americans who have died in Iraq -- was a waste" if "Americans stop hiding behind flag-draped hero masks and stop whispering their opposition to this war. Until then, the lives of other sons, daughters, husbands, wives, fathers and mothers may be wasted as well. This is very painful to acknowledge, and I have to live with it. So does President Bush."

Abizaid Optimistic About Turning Control Over To Iraqi Government.

USA Today (1/3, Komarow, 2.31M) reports, "The top US general in the Iraq region says he is optimistic the United States will succeed this year in turning a substantial part of the country over to Iraqi government control, moving US forces into a backup role. The ability of Iraq's military to secure the country is a key condition for the eventual withdrawal of US forces." In an interview this weekend, Gen. John Abizaid, who "was on a

short visit to Iraq, prodded his subordinates to turn control of their sectors over to Iraqi forces as soon as the Iraqis are ready. U.S. commanders must overcome their reluctance to turn over control to less-experienced Iraqi forces, Abizaid said." Said Abizaid, "Look, there is always a risk in taking a chance on the people that you've come to help. … There's also a risk of condescension (where) you look at them and say, 'They're not ready.'" Abizaid, "head of US Central Command, declined to speculate on what American troop levels will be at the end of 2006."

Administration Boosts Peacekeeping, Post-War Capabilities. The Wall Street Journal (1/3, King Jr., Jaffe, 2.11M) reports, "The difficulties of rebuilding Iraq after toppling Saddam Hussein have taught President Bush a painful lesson: Aftermaths can be tougher than wars. Now the administration is trying to recalibrate the military and foreign service to better handle postwar developments in future conflicts. For the first time, the Pentagon has declared that, along with battling foes, the ability to foster stability and reconstruction is one of its core missions." The Administration also "planted the seed for a corps of trained nation builders in 2004 when it created an Office of the Coordinator for Reconstruction and Stabilization in the State Department. The 55-person shop is staffed largely by officials on loan from the Defense Department, the Central Intelligence Agency and other agencies. It tries to anticipate the next global hot spot -- be it Sudan or North Korea -- and prepares to deploy as the main US postwar coordinator wherever a need might arise." However, "with finances tight, Congress isn't rushing to budget the money. One senior Pentagon official says he has heard objections from both Democrats and Republicans on Capitol Hill. Their worry: elevating the importance of nation-building will, over time, divert funds from the nation's ability to wage all-out war and leave the military less prepared to counter an unexpected major threat from a country such as China. And legislators in both parties are wary of more Iraq-style adventures."

Budget Request To Include No New Iraq Rebuilding Funds.

The Wall Street Journal (1/3, Dreazen, 2.11M) reports, "The US and its key foreign allies are likely to fall short of their funding pledges to help rebuild Iraq, as violence in the war-torn country absorbs contributions and deters nations from making new ones. T he reconstruction shortfall may total one-third of promised funds, adding to the challenges for Iraq's next government." The White House and "some US lawmakers have made clear that this year they want Iraqi security forces to take the lead in combating the insurgency, laying the groundwork for a gradual US military withdrawal." The new year also "marks a turning point in the administration's goal to rebuild Iraq -- an effort that has had mixed success." The Journal adds, "The $18.4 billion US rebuilding program was established with a three-year term that expires in the fall, and lawmakers -- mindful of contractor overcharges, corruption and security issues that have surfaced -- have made clear that they are unwilling to authorize a follow-up program. The budget request for Fiscal Year 2007 that the White House sends Congress next month will include no new Iraq rebuilding money, according to an official familiar with the matter. News that the White House won't seek Iraq reconstruction funds for fiscal 2007 was reported earlier by the Washington Post."

Book Claims CIA Ignored Information That Iraq Had No WMD.

The AP (1/3) reports, "A new book on the government's secret anti-terrorism operations describes how the CIA recruited an Iraqi-American anesthesiologist in 2002 to obtain information from her brother, who was a figure in Saddam Hussein's nuclear program." Dr. Sawsan Alhaddad of Cleveland "made the dangerous trip to Iraq on the CIA's behalf. The book said her brother was stunned by her questions about the nuclear program because -- he said -- it had been dead for a decade." New York Times reporter James Risen "uses the anecdote to illustrate how the CIA ignored information that Iraq no longer had weapons of mass destruction. His book, 'State of War: The Secret History of the CIA and the Bush Administration' describes secret operations of the Bush administration's war on terrorism." The major revelation in the book "has already been the subject of extensive reporting by Risen's newspaper: the National Security Agency's eavesdropping of Americans' conversations without obtaining warrants from a special court." The book said Dr. Alhaddad "flew home in mid-September 2002 and had a series of meetings with CIA analysts. She relayed her brother's information that there was no nuclear program. A CIA operative later told Dr. Alhaddad's husband that the agency believed her brother was lying."

Clinton Administration Said Saddam Was Reconstituting His WMD. In its "History Lessons" column, the Washington Times (1/3, 90K) excerpts the State Department's Daily Press Briefing of November 10, 1998 in which then-Assistant Secretary of State James Rubin said, "[T]his can't go on indefinitely; that if Saddam [Hussein] continues to block UNSCOM and we do not respond, he will be able to reconstitute his weapons of mass destruction in a matter of months, not a matter of years. This is a dangerous situation; this is why we have considered it a grave situation. If we fail to act, he will feel emboldened to threaten the region further, armed, possibly, with the most dangerous kinds of weapons."

Saddam Says He Prefers To Be Shot If Sentenced To Death.

The Washington Times (1/3,

Martin, 90K) reports, "Saddam Hussein has told his lawyers that he wants to be shot by firing squad, not hanged, if sentenced to death during his murder trial, which resumes later this month in Baghdad." Saddam "maintains that he is still commander in chief of Iraq's armed forces -- and that a firing squad is 'the right way' to execute a military leader."

US Teen Returns Home From Winter Vacation Trip To Baghdad. NBC Nightly News (1/2, story 11, 1:50, Holt) reported 16-year-old Farris Hassan is "returned home last night from his ill-advised solo journey to Iraq. And it's not just his mom who wants answers." NBC (Sanders) added, "Maybe it's a sign of the times when a 16-year-old tells his family he's more nervous about facing the US media than traveling to a war zone. But he may have good reason after his arrival at Miami International Airport last night. He certainly appeared self-assured late this afternoon." Farris Hassan: "Yes. Right now, I came back and I'm pretty tired and I'm preparing my statement this time." Sanders: "Today, it was Farris' day off. He says he'll talk the details about his trip tomorrow." Hassan "reportedly told selected friends he gone to Iraq to witness democracy in progress. But after talking to the Associated Press there, the US Embassy told him he couldn't make any more statements." USA Today (1/3, Koch, 2.31M) and New York Times/AP (1/3), among others, also report the story.

Magazine Notes Iraq War Game Staging Ground In Louisiana. The Washington Post (1/3, C1, Carlson, 744K) reports Harper's magazine "has found a big, heartwarming silver lining inside that gloomy old Global War on Terrorism. Here it is: Our government has hired a bunch of poor souls who lost their arms and legs in accidents and has rigged them up with bags of fake blood so they can play wounded civilians in war games down at Fort Polk, La." Cubic, "the defense contractor that produces these games, has also hired 250 Arabic-speaking immigrants at $220 a day as 'Cultural Role Players' in the war games. They've also hired hundreds of local Louisianans to play random Arab civilians, plus 'dozens of scriptwriters' to come up with realistic scenarios for the war games." Wells Tower, "author of this jaw-droppingly bizarre article," said, "The military spends an average of $9 million staging each 3 1/2 -week mission rehearsal exercise," which "works out to about $117 million a year." That "doesn't include the $49 million spent constructing the state-of-the-art fake city of Suliyah, which contains 29 buildings."

US Giving NATO, Allies Growing Role In Afghanistan. The Washington Post (1/3, A1, Witte, 744K) reports, "Four years into a mammoth reconstruction effort here that has been largely led, funded and secured by Americans, the United States is showing a growing willingness to cede those jobs to others. The most dramatic example will come by this summer, when the US military officially hands over control of the volatile southern region -- plagued by persistent attacks from Islamic militias -- to an international force led by the NATO alliance." The United States "will cut its troop strength by 2,500, even though it is not clear how aggressively NATO troops will pursue insurgents, who have shown no sign of relenting." The Post ads, "At the same time, the U.S. government is increasingly allowing Western allies, or Afghans themselves, to take on the tasks of rebuilding a country that has suffered more than two decades of fighting and remains beset by poverty, drugs and insurgency."

Bush Awards Purple Hearts To Soldiers Wounded In Iraq. The Houston Chronicle (1/2, Hedges) reports, "President Bush's first official act of the new year was pinning Purple Hearts on US soldiers wounded in Iraq, a signal that for the White House, 2006 would be another year dominated by the war." The President "gave the military award to nine soldiers during a private session today with veterans of Iraq and Afghanistan and some family members at the Brooke Army Medical Center." The soldiers "were among more than 2,300 wounded service members treated there since the beginning of the two wars, and Bush took note of their plight as he restated his reasons for the unpopular Iraq war." Said Bush, "There's horrible consequences to war -- that's what you see in this building. … On the other hand, we also see (soldiers) who say, 'I'd like to go back in, Mr. President, what we're doing is the right thing,' because many of these troops understand that by defeating the enemy there, we don't have to face them here. And they understand that by helping the country and the Middle East become a democracy, we are, in fact, laying the foundation for future peace."

The AP (1/2, Riechmann) says the President "boarded the Marine One presidential helicopter before dawn on his ranch in Crawford and flew more than an hour to Randolph Air Force Base. His motorcade drove to Brooke Army Medical Center, a 224-bed hospital at nearby Fort Sam Houston, to meet with about 50 injured members of various branches of the armed forces and their families." Said Bush, "This hospital is full of healers and compassionate people that care deeply about our men and women in uniform. … It's also full of courageous young soldiers and marines, airmen. I'm just overwhelmed by the great strength of character of not only those who have been wounded but of their loved ones as well."

Reuters (1/2) adds Bush "returned to Washington later in the day to tackle his agenda for 2006, another year in which the Iraq war is expected to be a dominating factor with

critics calling for US troops to withdraw." The Los Angeles Times (1/2, Chen) also mentions Bush's visit.

As 2006 Begins, Bush's Focus Is On Economy, Iraq, War On Terror. According to the AP (1/2, Riechmann), President Bush is starting 2006 trumpeting upturns in the US economy, defending US actions in Iraq and challenging critics of his policies in the war on terror. The AP adds, "White House officials hope this week sets the tone for its top priorities as Bush visits the Pentagon on Wednesday to discuss the war on terror and then flies to Chicago on Friday to try to convince Americans that the economy is on solid footing." On Sunday, Bush visited wounded US troops in San Antonio, and this week, he will use "the backdrop of the White House to meet with a bipartisan group of former secretaries of state and defense to discuss terrorism and Iraq and to surround himself with U.S. attorneys to pressure lawmakers to renew the Patriot Act."

Brownstein Compares Bush, Polk Presidencies. Ron Brownstein writes in the Los Angeles Times (1/2), "The president whom George W. Bush may resemble most is not his biological father, George H.W. Bush, or even Ronald Reagan, who often seems his ideological father, but James K. Polk, a dynamic and willful leader few discuss anymore. … Polk may be the only predecessor who matched Bush's determination to drive massive change on a minute margin of victory. Polk won by fewer than 38,000 votes of 2.7 million cast. Over four tumultuous years, he pursued an ambitious, highly partisan agenda that offered little to those who had voted against him. Sound familiar? … It's worth considering Polk's record not because Americans will take up arms against each other anytime soon — although you might never know that from listening to talk radio — but because it suggests that a president who slights the need to build national consensus can seed long-term problems that aren't immediately apparent amid short-term successes."

Bush Will Not Ask Congress For Additional Iraq Reconstruction Funding.

The Washington Post (1/2, A1, Knickmeyer), in a front-page article, reports that the Bush administration "does not intend to seek any new funds for Iraq reconstruction in the budget request going before Congress in February, officials say. The decision signals the winding down of an $18.4 billion US rebuilding effort in which roughly half of the money was eaten away by the insurgency, a buildup of Iraq's criminal justice system and the investigation and trial of Saddam Hussein. … US officials in Baghdad have made clear, other foreign donors and the fledgling Iraqi government will have to take up what authorities say is tens of billions of dollars of work yet to be done merely to bring reliable electricity, water and other services to Iraq's 26 million people."

Army Officer Shows Off Baghdad Reconstruction Projects. The Washington Post (1/2, A10, Knickmeyer) traveled around Baghdad with Maj. John Hudson of the U.S. Army Corps of Engineers on a tour his "Prides and joys," the many reconstruction projects going on in the city. At "an Army Corps of Engineers office in the Green Zone -- the fortified site of much of the Iraqi government -- Hudson, in flak jacket and helmet, spread his hands lovingly on a map of Baghdad. 'Two youth centers. Two fire stations -- those are in some of your poorer neighborhoods. Baghdad highway patrol. A facility for the SWAT team. A new perimeter wall for Doura,' a power plant in Baghdad's insurgency-ridden south. A checkpoint on a southern road into the city. An electrical substation. … The projects are among 90 under his domain and among 3,600 projects in an $18.4 billion reconstruction package for Iraq due to peak, and be completed, this year." The Post adds, "Hudson will return to Colorado Springs around March. Money for the U.S. reconstruction package here is scheduled to run out around the end of the year. International donors largely have not kept their pledges to pick up the tab for reconstruction. Iraqis have balked at the painful economic reforms necessary to win foreign loans to do the work. Insurgents want to destroy it all. Civil war would do the same."

DOJ:

New Maryland US Attorney Restructures Staff, Targets Violent Crime.

The Baltimore Sun (1/2, Dolan) reports, "Maryland's top federal prosecutor is both expanding his office and reorganizing his staff to emphasize a commitment to fighting violent crime." The Sun continues, "Maryland U.S. Attorney Rod J. Rosenstein said he would start this month by restructuring his criminal division. It's part of an effort, he said, to coordinate better with local and federal law enforcement agents. … 'I had a meeting with the FBI's public corruption unit, and there was a real question of where that responsibility lay in our office,' Rosenstein said. 'It's a question of accountability.' The Sun adds, "Starting this year, federal prosecutors handling criminal cases in Baltimore will be required to focus on either terrorism and national security, fraud and public corruption, violent crime, drugs or major crimes - a catch-all section including civil rights violations and child pornography. They'll be expected to stay in their subjects for at least two years, Rosenstein said. … The division's managers have all been asked to reapply for their jobs, he added. … Five months into the job, the moves come as Rosenstein has established a reputation as a genial and intense leader known for his thoroughness and his prolific e-mails to his staff. … James Wyda, the federal public defender for Maryland, praised Rosenstein for his new hires and complimented the quality of his staff. … But Wyda also cautioned that Rosenstein is early in his tenure. He said Rosenstein would be judged, in part, on how he handles the

substantial number of capital murder cases that have been transferred into the federal system in Maryland."

CORPORATE SCANDALS:

Attorneys For CA Defendants Claim US Misusing Sarbanes-Oxley. The Legal Times (1/2, Perrotta) reports, "Attorneys representing two former executives of Computer Associates, the Long Island, N.Y., company caught up in a massive accounting scandal, argued last week that federal prosecutors are misusing a criminal statute revised as part of the Sarbanes-Oxley Act, possibly leading to severe prison sentences — up to 20 years — that were not intended by federal legislators." The Times continues, "The dispute involves the prosecution of Sanjay Kumar, the former chairman and CEO of Computer Associates, and Stephen Richards, a former sales executive, on various fraud and obstruction charges. Federal prosecutors accuse both men of lying to the government and lying to their company's outside counsel, Wachtell, Lipton, Rosen & Katz, which was conducting an internal investigation of the company's accounting practices." The Times adds, "Kumar and Richards are in a fight over the meaning of a federal criminal statute that was amended as part of the Sarbanes-Oxley Act. … While defense attorneys argue that the SOX revisions have created a narrow statute that applies only to physical evidence, such as documents, the government contends it reaches beyond that to include any conduct that could obstruct an official proceeding."

Milberg Weiss Worried About Indicted Attorney's Actions. The California Recorder (1/3, Scheck) reports, "Nearly 12 years ago, an internal memo from the Southern California firm Best Best & Krieger expressed concerns that it was acting as a conduit for legally questionable payments from the plaintiff firm Milberg Weiss to Seymour Lazar, the lead plaintiff in dozens of securities class actions." The Recorder continues, "The memo, filed in court by prosecutors last week, expresses particular worry about the Best firm recording payments from the firm then known as Milberg Weiss Bershad Hynes & Lerach to Lazar as firm income, which would then be secretly credited to Lazar for future legal services. … 'To us it just smells bad,' the memo says, 'and probably would to an investigator.'" The Recorder adds, "That concern came to fruition in June, when Lazar and his attorney, Paul Selzer -- a former partner at the Best firm -- were indicted by a Los Angeles federal grand jury for allegedly taking more than $2 million in illegal kickbacks from Milberg Weiss. … The L.A. U.S. Attorney's Office has spent the past five years probing whether Milberg Weiss -- which split in 2004 when star partner William Lerach broke off to form his own San Diego-based firm -- paid illegal kickbacks to lead plaintiffs in class actions. … After several years of investigation with few public developments, the Lazar and Selzer indictments were widely seen as an effort to force the two defendants to testify against Milberg Weiss and its partners. … Prosecutors have also given immunity to at least two other former clients who say they received kickbacks from the firm via other attorneys. Lawyers familiar with the case say their allegations are similar to those detailed in the Lazar indictment."

NYTimes Bemoans Inflated Corporate Executive Pay. The New York Times (1/2) editorializes, "It would be nice to see corporate America put more effort - and money - into quality control and fair living wages for workers and less into exorbitant pay packages and bonuses for corporate chieftains. We remain hopeful."

CRIMINAL LAW:

Abramoff Plea Bargain Could Be Announced Today. The CBS Evening News (1/02, story 4, 2:30, Schieffer) reported, "In Washington, law enforcement sources told CBS News tonight that a plea bargain deal involving Washington lobbyist Jack Abramoff could be announced as early as tomorrow. We are told that the deal could implicate lawmakers who allegedly took illegal gifts from him. Abramoff has already been charged in connection with a corruption case in Florida. His attorneys had no immediate comment."

Abramoff Under Pressure To Take Plea Deal. With Abramoff under pressure from Federal authorities to accept a plea bargain, many Washington observers expect the arrangement would lead to the implication of several members of Congress. ABC World News Tonight (1/1, story 5, 2:15, Harris) reported Federal officials are "investigating what's likely to be one of the biggest influence-pedaling scandals in history. The potential that Abramoff is cooperating is making some people in Congress very nervous. ABC's Geoff Morrell has that story." ABC (Morrell) added prosecutors believe Abramoff "used that money to bribe members of Congress and are now pressuring him to name names." Melanie Sloan, former Federal prosecutor: "I think people are going to be amazed when they learn the extent of the bribery that Jack Abramoff was involved with members of Congress." Morrell: "Tonight, the only lawmaker known to be under scrutiny is Bob Ney of Ohio. But several others are scrambling to distance themselves from Abramoff. Montana Sen. Conrad Burns, who raked in nearly $60,000 from the disgraced lobbyist, now says 'I hope Abramoff goes to jail and we never see him again. I wish he had never been born.'" Sloan: "I think by the time this is over, this is going to be the biggest congressional scandal in history."

Abramoff Plea Would "Send Shockwaves Through Washington." U.S. News and World Report (1/9, Brush) reports that Abramoff is "reportedly close to cutting his own deal with federal investigators, a development that would send shock waves through Washington. Abramoff's testimony could implicate lawmakers in a vast influence-peddling case, and those once friendly with the man known as 'Casino Jack' are now ducking for cover." Abramoff "is reportedly close to an agreement with prosecutors that might include cooperation with investigators looking into his lobbying tactics. A spokesman for Abramoff declined to comment." Lawmakers "are scrambling to return campaign contributions. According to the Center for Responsive Politics, 210 federal lawmakers have received donations to their campaigns or political action committees from either Abramoff or his clients, since 1999; most big recipients were Republicans. Republican Sen. Conrad Burns of Montana, who's up for re-election this year, has returned $150,000, saying the donations 'served to undermine the public's confidence in its government.' … Sen. Max Baucus, a Montana Democrat, is returning roughly $19,000. Sen. Byron Dorgan, a North Dakota Democrat and ranking member of the Senate Indian Affairs Committee, which is investigating Abramoff, is returning $67,000. Rep. Denny Rehberg, a Montana Republican, returned $18,000 to Indian tribes and donated to charity the $2,000 he received directly from Abramoff."

Congressional Hearings To Add Drama To Conflicts With White House. The Christian Science Monitor (1/3, Chaddock, 61K) reports Congress "is gearing up for the most dramatic slate of hearings since the Clinton impeachment fracas." The "high-profile probes underscore efforts by Congress to reclaim power from a war-time White House. And they could reshape this fall's midterm elections." Lawmakers "on both sides of the aisle set in motion an aggressive oversight agenda, ranging from secret prisons and the treatment of detainees under US control, to the president's authorization of domestic eavesdropping without a warrant." In addition, "more members of Congress find themselves under scrutiny," as Abramoff "and his former associates work out plea agreements promising cooperation in a widening bribery investigation on Capitol Hill. Former House majority leader Tom DeLay, meanwhile, will face charges of money laundering in court later this month." The "scrutiny on - and from - Congress is a sharp turnaround for a Republican-controlled body that came to power extolling ethics, and one that has been deferential to the Bush presidency about its conduct in the war on terrorism." A "major reason for the new posture on Capitol Hill is the willingness of GOP moderates to challenge the Bush administration's war policies."

Maryland Tech Firm Owner To Plead Guilty To Bribing DC School Officials. The Legal Times (1/2, Kelley) reports, "The owner of a Maryland-based technology firm is expected to plead guilty this week to bribing District of Columbia Public School officials in exchange for contracts." The Times continues, "On Dec. 7 the U.S. Attorney's Office for the District of Columbia charged Charles Wiggins, the owner of Wiggins Telecommunications in Temple Hills, Md., with one felony count of bribing public officials. Within a week of being charged, Wiggins agreed to plead guilty and cooperate." The Times adds, "Wiggins' attorney, Sidney Friedman of Baltimore, says he is not authorized to comment on the deal reached with prosecutors. Assistant U.S. Attorney Daniel Butler, who is handling the prosecution, could not be reached for comment. … In charging documents, the prosecution alleges that from early 2001 through 2003, Wiggins doled out nearly $50,000 in bribes to a DCPS office manager and an elementary school principal. The two school officials, who so far are identified only as 'Individual 1' and 'Individual 2' in court documents, allegedly gave Wiggins preferential treatment in exchange for receiving a cut of the profits generated by his DCPS contracts."

Prince George's County Community No Longer Immune From Violence. The Washington Post (1/3, Thomas-Lester) reports, "Three miles beyond the Capital Beltway, Woodmore South seems far removed from the violence and fear that has infested some Prince George's County neighborhoods. … The upscale subdivision, with its rolling green lawns along wide and winding roads, reflects what draws many residents to the county: a chance for a classic suburban life in a community where most neighbors and political leaders are African American. … But consider the past several months: In June, a Woodmore South boy was beaten at nearby Six Flags America, and a teenage girl was shot after leaving a neighborhood graduation party. At one nearby shopping mall, a young man was beaten to death in early November. At another, a District man was shot Dec. 10. Earlier that day, an argument at a popular restaurant led to a fatal shooting a few blocks away." The Post continues, "The county and its incorporated cities recorded 173 homicides in 2005 -- surpassing the record 154 set during the crack epidemic in 1991 -- and a car was stolen every half hour. Although most of the crime remains concentrated inside the Beltway, residents in such suburban enclaves as Mitchellville, Bowie and Fort Washington are going through an upheaval, psychic and otherwise. … Some residents, who fled crime in the District a generation ago, are considering leaving Prince George's. Others, still drawn by the appeal of one of the nation's largest black, middle-class communities, are staying put -- but fortifying their homes and hiring off-duty police officers. … Some have lost faith in a county police department stretched thin by rapid growth: In November, Bowie voters decided overwhelmingly to set up their own

department, and College Park residents gave their City Council the option." The Post notes, "Just as telling and troubling, the rise in crime has fueled perceptions among some middle-income residents that their low-income neighbors from the District or elsewhere in the county are preying on their prosperity."

Grant Seeking More FBI Agents To Fight Corruption In Chicago. The Chicago Sun Times (1/2, Korecki) reports, "If you're a government employee or contractor and you thought last year was a bad time to be corrupt in Chicago, you better look out in 2006. While the Chicago FBI just added a third public corruption squad in September to make the unit the largest in the country -- it still isn't enough. FBI Special Agent in Charge Robert Grant said he and U.S. Attorney Patrick Fitzgerald have asked Washington, D.C., for more resources to help root out public fraud. 'We asked headquarters to give us more bodies,' Grant told the Chicago Sun-Times. … Though new corruption cases continue to hit the Dirksen federal courthouse at a brisk pace, 'there are areas we want to explore that we haven't even gotten to yet,' Grant said." The Sun Times notes, "Grant wouldn't say how many additional agents he's seeking. But he said he thinks Chicago has a good chance of getting the boost in manpower because public corruption has become a bureau priority nationally and 'they know we're doing such a good job here.'" The AP (1/3) posts a truncated version of the Sun Times story.

Ryan, Warner Expected To Take Stand. The Chicago Sun Times (1/3, Korecki) reports, "In all, jurors have endured testimony from nearly 50 witnesses in the 13 weeks since George Ryan's public corruption trial began. But there's still one person who could drastically reshape their impressions: the former governor himself. And he may have that opportunity, because it seems likely that Ryan will take the stand in his own defense. Lawyers representing Ryan and his co-defendant Lawrence Warner said last week they expect to put their clients on the stand after the prosecution rests this month." Ryan attorney Dan Webb and Warner lawyer Ed Genson "said they'll make a final decision when the prosecution rests, which is expected mid-month. Neither would go into the tactical reasoning of doing something that defense lawyers typically avoid.

Tennessee State Trooper Transferred For Own Safety After Helping FBI Probe. The Knoxville News (1/2, Stambaugh) reports, "A Tennessee Highway Patrol trooper was recently transferred from Cocke County to keep him out of harm's way after his cooperation with the FBI was revealed during legal proceedings, court records show." Trooper Kevin Kimbrough "is one of at least three local lawmen who have been secretly recording their conversations with other officers at the behest of federal and state authorities as part of a four-year probe into public corruption and organized crime." The News notes, "The probe has relied heavily on undercover officers, informants and wiretaps in Tennessee, North Carolina, Georgia and Florida. Thus far, seven Cocke County lawmen have been arrested, two illegal cockfighting compounds have been uncovered, two brothels have been shut down and more than 150 people have faced criminal charges."

Indicted Lawmakers Vow To Attend Ethics Special Session. The AP (1/2) reports, "Two Tennessee Democratic senators facing federal bribery charges say they will attend a special session on ethics this month despite calls from Republican leaders that they not." Sens. Ward Crutchfield and Kathryn Bowers "are among five current or former lawmakers indicted on bribery and extortion charges in an FBI investigation that focused on a bogus company called E-Cycle Management." Sen. Jim Bryson "has written a letter to both Crutchfield and Bowers urging them not to participate in the special session. 'What I hope not to do, but will do if I have to, is present a resolution to the Senate, urging them not to attend,' Bryson said." The Tennessean (1/1, de la Cruz) notes, "Bowers supports many proposals in the ethics bill that will be the focal point of the session but does not like the ban on cash contributions, she said last week. At the same time, cash transactions have been at the heart of the public corruption case. A cash payment is what snared Bowers in the bribery sting."

Reform Provision Would Ban Cash Contributions. The Memphis Commercial Appeal (1/2, Locker) reports, "It was one of the eye-popping aspects of the FBI's 'Tennessee Waltz' bribery investigation: a handful of state legislators accepting hundreds of dollars in cash from undercover FBI agents posing as business executives. The acceptance of cash by some of the legislators was perfectly legal: It was properly disclosed as a campaign contribution on their campaign-finance reports, was within the $1,000 limit on individual contributions, and was not, they said, payment for legislative action. … But campaign contributions in cash will be banned if the sweeping ethics reform bill legislators will consider in a special session starting Jan. 10 is approved. Contributions will be by check, money order or some form other than cash."

Chat Room Solicitation Leads To Kansas Man's Arrested For Child Porn. The AP (1/2) reports, "Law enforcement officers in two states used high-tech tools to crack what they believe is the largest child porn case in Wichita history." Steven Craig Perrine "was charged last week with possession and distribution of child pornography after investigators said they searched his home and found more than 16,000 sexually explicit images involving children. … Authorities said the case began Sept. 9, when a

Leetsdale, Pa., man visited an Internet chatroom and began talking to someone using the screen name 'Stevedragonslayer,'" who "asked if he wanted to see a 'hot video,' FBI Special Agent Rebecca Martin wrote in an affidavit. The video showed naked girls who looked younger than 10 walking around a bathroom, Martin wrote." The Pennsylvania man, James Vanlandingham, reported the incident to state authorities; and, The Pittsburgh Post-Gazette (12/31, Ayad, 261K) notes, "With only a screen name to aid his search," Pennsylvania State Police Computer Crimes Task Force Officer Reginald Humbert "located IP addresses…with subpoenas of Yahoo! Inc. and Cox Communications Inc. that led FBI investigators and the Sedwick-Witchita County Exploited and Missing Child Unit straight to the two computers Mr. Perrine was using."

Detectives In DC Nightclub Slaying Probe Under Investigation. The Washington Post (1/3, B1, Cauvin) reports, "The witness didn't know what to think. … A few days earlier, she had seen a dying man dragged off the dance floor at a popular Northwest Washington nightclub. Now two homicide detectives wanted her to change her story, she said. Instead of saying that the man in the black shirt was stabbing the victim, she was told she should make it seem as though it was the man in the white shirt." The Post continues, "So she did, she later testified. … 'I was confused,' the witness said, 'but I figured that it's their job. They know what they're doing. I guess they got it under control.'" The Post adds, "In fact, the investigation into the Feb. 13 death of Terrence Brown at Club U was about to spin out of control. The two detectives, hoping to pursue murder charges against a suspect, apparently wanted the woman -- and two other witnesses -- to revise their accounts to point to their suspect and reflect the medical examiner's conclusion that the 31-year-old Brown died from a deep stab wound. Everything fell apart when prosecutors grew suspicious. … Nearly a year later, Brown's killing remains unsolved, clouded and complicated by an investigation into the detectives' conduct. Recently filed documents in D.C. Superior Court provide the most complete picture yet of how the high-profile case was derailed. They depict the detectives as determined to close the case even though the evidence and witnesses' statements suggested that the suspect they had in their sights could not have inflicted the fatal wound. … The theory didn't fly, and it was the two detectives, Erick Brown and Milagros Morales, who wound up in trouble. Brown, 40, was taken off the case almost immediately, and Morales, 41, was removed several days later. They have been stripped of their badges and guns and are under investigation by prosecutors and the police internal affairs unit." The Post notes, "It is a remarkable turn for both. Brown, a police officer for 15 years, is a onetime homicide detective of the year, according to David Schertler, a defense attorney for both detectives, and law enforcement officials. Morales, a police officer for 20 years, was once an investigator for internal affairs, the unit that investigates police corruption, Schertler and the officials said. … Schertler said they did nothing wrong. 'The detectives strongly disagree with the characterization that they tried to pressure or coerce any witness into saying anything that wasn't true,' he said."

Warner May Order New DNA Test In 1992 Execution. As his term nears its end, Virginia Gov. Mark Warner is facing a decision on whether to order DNA testing that could determine if Virginia executed an innocent man in 1992. The AP (1/3, Gelineau) reports, "If the tests show Roger Keith Coleman did not rape and murder his sister-in-law in 1981, it would mark the first time in the United States an executed person is scientifically proven innocent, say death-penalty opponents, who are keenly aware that such a result could sway public opinion their way." Warner, who is seen as a likely presidential candidate in 2008, "hopes to finalize negotiations over how the test would be conducted before his term ends Jan. 14, said spokesman Kevin Hall." Coleman's attorneys "argued he didn't have time to commit the crime, that tests showed semen from two men was found inside Miss McCoy and that another man bragged about murdering her."

Executions, Death Sentences Becoming More Rare In The US. The Washington Post (1/2, A11, Lane) reports, "As 2005 gives way to 2006, the death penalty remains a major item of business on the Supreme Court's docket. In addition to a steady flow of stay-of-execution applications, the court has four capital punishment cases to decide. … Yet in one important sense, this activity is misleading: The justices may be busy with death penalty cases, but capital punishment is on the wane in the United States." The Post notes, "In the year just completed, 60 convicted killers were executed. That is a drop of 39 percent from the recent peak of 98 in 1999. … Perhaps more significant, death sentences are dwindling. In 2005, there were 96 new death sentences, according to the center. This is down 70 percent from 1996."

Tennessee Case Seen As First Test Of Roberts' Influence On Death Penalty Cases. The Los Angeles Times (1/2, Savage) reports, "The major death penalty case before the Supreme Court this year reads like a 'whodunit,' as one judge put it. But if there is doubt about who did it, should the defendant be on death row? … Though they might not solve the murder mystery, the case should give an early clue on whether the high court, now led by Chief Justice John G. Roberts Jr., is willing to overturn a death sentence if an inmate's guilt is in doubt." In the case from Tennessee, "The justices will now decide whether to make it easier to reopen old cases when new evidence — including DNA testing -- raises real doubts about the defendant's guilt."

DC Region Homicides Rose In 2005. The Washington Post (1/2, A1, Klein) reports, "The Washington region saw a rise in bloodshed in 2005, largely fueled by a spike in slayings in the D.C. suburbs, most dramatically in Prince George's County. … Across the region, there were 466 homicides in 2005, compared with 420 in 2004 -- a rise of about 11 percent. About half of those slayings have been solved. It was the first time the District has recorded fewer than 200 homicides in consecutive years since the mid-1980s. At the same time, the total in Prince George's climbed from 148 to 173, a grim record for the county."

WPost Calls Bush Record On Pardons "Dismal." An editorial in the Washington Post (1/3, A16, 744K) says that although President Bush is "a big fan of presidential power," he "still has not exercised his veto," and he "prefers to forget that Article II of the Constitution gives him the 'Power to grant Reprieves and Pardons for Offenses against the United States.' Mr. Bush, who famously proclaims himself a 'compassionate conservative,' has shown mercy fewer times than any president in recent history (though he has granted more pardons than President Bill Clinton had at the comparable point in his presidency). He has granted clemency less than a fifth the number of times of presidents Jimmy Carter, Ronald Reagan or Gerald Ford, who served not even a full term in office." The Post adds that Bush's record on pardons "dismal" and "a far cry from the manner in which the Framers of the Constitution envisioned the power."

CIVIL LAW:

DC Appeals Court Institutes Mediation Program For Civil Appeals. The Legal Times (1/2, Broida) reports, "In a continuing effort to reduce the backlog of cases at the D.C. Court of Appeals, the court has instituted a one-year appellate mediation program for civil appeals." The Times continues, "Starting this week, all parties who are represented by counsel will be required to attend alternative dispute mediation sessions to see if their appeal can be settled without being brought before the court." The Times adds, "The yearlong pilot program is an outgrowth of a similar limited mediation program that was successfully tried at the court this summer. … Ed Schwab, head of the appellate division of the D.C. Attorney General's Office, says his office had a positive experience with the program. He cited one case that was settled within three hours. 'So we were quite happy,' he says. … But Schwab cautions that not every case can be settled, especially those that don't involve money. In some cases, citizens will be seeking a remedy for a government action, and in cases like those, mediation may not work. Nevertheless, he says, 'Anytime you can settle, I think it is a good idea.'"

WPost Says Drug Safety Disputes Should Not Be Decided In Court. An editorial in the Washington Post (1/2, A12) says, "The New England Journal of Medicine's recent retraction of a 2000 article that helped establish the popularity of Vioxx, the controversial painkiller, should give doctors, hospitals and journal authors reason to think harder about how drug safety information is processed. The retraction, published last month, stated that the article's authors -- including scientists in the employ of Merck & Co., which makes Vioxx -- knew in advance of publication that 20 out of more than 2,000 patients taking part in a study of Vioxx suffered from heart attacks after taking the drug, not 17 as the article reported. They left out the information, they say, on the grounds that the three heart attacks in question occurred after the study had technically ended. But as a result, the level of heart attack risk associated with Vioxx appeared in the article to be slightly lower than it should have been." The revelation "raises legitimate questions about the relationship between scientists, who are often paid by drug companies, and medical journals, which should do a better job of stating authors' conflicts of interest. It should also lead doctors who prescribe drugs and are ultimately responsible for understanding their side effects to read such journals with greater skepticism. It does not, however, alter our view that the courts are the wrong place to resolve disputes about drug safety. … Scientific judgments about the risks and advantages of drugs are not black and white -- which is why they are best made by scientists and by the regulatory agency that employs them, not by jurors through the lens of hindsight."

CIVIL RIGHTS:

High Court To Hear Two Fourth Amendment Cases This Month. The Supreme Court will hear two Fourth Amendment cases this month. The Washington Times (1/2, Taylor) reports, "Hudson v. Michigan, which the justices will hear when the court reconvenes Jan. 9, questions whether police violated the Fourth Amendment 'knock and announce rule' when they burst into a suspected cocaine dealer's home in Detroit. The following week, the justices will consider rules pertaining to searches conducted with special 'anticipatory' warrants, which become operative only after 'triggering events' indicate probable cause."

District Of Columbia Activists Seek Approval For Gay Marriages. The Washington Post (1/2, B1, Weiss) reports, "The D.C. Council is considering measures

that would amount to the greatest expansion of rights for same-sex couples in a decade. But for some in the District's large and influential gay community, the package of tax and inheritance benefits is perhaps most notable for what it is not: a move to legalize gay marriage. With Massachusetts having legalized gay marriage and other states coming close, some gay activists are saying that now is the time to push for full marriage rights in the District." The Post notes Sen. Sam Brownback "warned that the city would trigger a sharp backlash from Congress if it pursued gay marriage."

Democrats' Approach To Religion Seen As Wrongheaded. In an op-ed for the New York Times (1/2) Joseph Loconte, a research fellow in religion at the Heritage Foundation, writes, "Nancy Pelosi…sounded like an Old Testament prophet recently when she denounced the Republican budget for its 'injustice and immorality' and urged her colleagues to cast their no votes 'as an act of worship' during this religious season. This, apparently, is what the Democrats had in mind when they vowed after President Bush's re-election to reclaim religious voters for their party. … A look at the tactics and theology of the religious left, however, suggests that this is exactly what American politics does not need. If Democrats give religious progressives a stronger voice, they'll only replicate the misdeeds of the religious right. For starters, we'll see more attempts to draw a direct line from the Bible to a political agenda."

Many Counties Remain In Turmoil Over New Voting Technology. The Los Angeles Times (1/3, Levey, 958K) reports that California and other states "are embroiled in a contentious debate over how voters should cast their ballots." With "electronic machines under attack as unreliable and vulnerable to hackers, there is little consensus about what the new technology should look like. That has left many counties nationwide in turmoil as they struggle with unproven technology while state regulations remain in flux and the federal government offers minimal guidance." The Times adds, "Congress in 2002 passed the Help America Vote Act, pledging nearly $4 billion to help states upgrade their voting systems. The same year, California passed its own $200-million bond for the same purpose. The flood of money fueled a nationwide spending spree on high-tech machines that were expected to revolutionize vote counting. But the machines often have not proved as reliable as hoped. And while states and counties rushed to buy them, elections officials struggled to regulate how machines should record votes and safeguard results."

Voting Act Puts County Registrars In Bind. The Sacramento Bee (1/2, Yamamura) reports, "Mikel Haas is running out of time and patience, but he says he'll give it one more month before he really starts to panic. … With an April 11 special election fast approaching, the San Diego County registrar of voters still doesn't have any California-certified machines to meet the requirements of the 2002 U.S. Help America Vote Act." The Bee continues, "Most counties in California - and many across the country - officially fell out of compliance Sunday with rules mandating that election systems be accessible to voters with disabilities. But the San Diego County special election puts Haas at the head of the line when it comes to compliance. … While the legal deadline has passed, Secretary of State Bruce McPherson has tried to assure county officials and voters that California will resolve its Help America Vote Act issues by the June primary, the first statewide election with federal races. … But McPherson has not certified any new accessible voting machines since August, making some registrars nervous and others downright angry." The Bee adds, "McPherson's spokeswoman, Jennifer Kerns, said that at least six election systems are 'in the pipeline' and that McPherson is confident multiple options will be available for the June primary. … But registrars like Haas are torn. They say they respect McPherson's need to put controversial equipment through a battery of tests. But they also face the practical need of having to run an election in a matter of months."

Timing Of Evolution Sticker Petitions Still In Dispute. The Fulton County (GA) Daily Report (1/2, Land) reports, "Federal appeals judges are still wrestling with factual inconsistencies over how a petition -- pushed by Marjorie Rogers, a self-described 'six-day biblical creationist' -- affected the Cobb County, Ga., school board's decision to amend new science textbooks with stickers questioning the validity of evolution." The Report continues, "A panel of the 11th U.S. Circuit Court of Appeals last month heard the school board's appeal of a federal judge's 2005 decision that the stickers, which say that evolution is 'a theory, not a fact,' amounted to an unconstitutional endorsement of religion. Selman v. Cobb County School District, 390 F. Supp 2d 1286. (The 11th Circuit case is No. 05-10341-1.) … During the arguments, judges sounded highly skeptical of the ruling by U.S. District Judge Clarence Cooper. They also upbraided Jeffrey O. Bramlett, the lawyer for the plaintiffs challenging the stickers, for making statements about the timeline of the case that 11th Circuit Judge Edward E. Carnes called 'just wrong.'" The Report adds, "Carnes demanded that Bramlett provide a written explanation of his assertions that the stickers had been placed in the textbooks as a result of Rogers' petition drive. … Bramlett's claims had been called into question by Cobb County's attorney, Ernest Linwood Gunn IV, whose brief said the petition had not been circulated until four months after the disclaimers were inserted into the books. … On Dec. 22, a week after the argument, Bramlett filed a 127-page response that said there were two petitions -

- one by Rogers, with more than 2,300 signatures delivered to the school board before the books were purchased, and a smaller petition delivered after the sticker plan was implemented. … The day the 11th Circuit received Bramlett's response, the court issued a one-page letter to Gunn instructing him, by today, to provide 'any evidence regarding the timing of any petitions that may have been filed with the School Board.'"

Federal Workforce Trails Private Sector In Hiring Hispanics. Under the headline, "Hispanics Underrepresented In The Federal Workforce," the Washington Post (1/3, A16, Fears, 744K) reports, "Hispanics represent 7 percent of employees in federal government when the group's population is growing faster than all others. The five-percentage-point gap between Hispanics working in the public and private domains translates to thousands of jobs and billions of dollars in potential pay, according to a coalition of Hispanic federal employees. The private sector tracks with the 13 percent of Hispanics in the general population, 40 million people, not including an estimated 11 million undocumented workers living in the country illegally." The Post adds, "The consequences are felt nationwide, Hispanic advocates say. The government suffers from a shortage of Spanish-speaking workers who could help non-English speakers navigate Social Security and other federal documents. In the chaotic aftermath of hurricanes Katrina and Rita, the government discovered that it could not effectively communicate with displaced immigrants, legal and undocumented."

ANTITRUST:

Columnist Predicts Mergers For Coming Year. In a column for New York Magazine (1/2), James Cramer writes, "The start of the year is a time for crystal-ball gazing. Sure, I could give you the standard fare, the typical Wall Street gibberish that you will hear in a virtual 24-hour loop for the next few weeks: untried Fed chairman, big-budget deficits, uncertain presidential leadership, a peak in real estate, an end to the interest-rate-tightening cycle. Know what? You know all that already. I'd rather tell you about some things that could happen that could make you some huge money in 2006. I can't guarantee any of them will come to pass, but if they do, well, remember your friend Cramer tipped you to them." Cramer continues, "Citigroup Will Merge With Goldman Sachs … For the past few years, Citigroup has been in the doghouse with regulators. Now new honcho Chuck Prince, a buttoned-down lawyer, has eliminated the cowboys and stopped the culture of trying to sell anything to customers as long as it had a big fee. That may soon give him the green light to make an acquisition. Citigroup has been taking a huge backseat to other players as it gets its ethical house in order. An acquisition could make Citigroup dominant again worldwide." Cramer adds, "Comcast Will Buy CBS … In 2004, when Comcast made its aborted offer for Disney—something that Comcast actually thought that Disney wanted, when nothing could have been further from the truth—I figured that win or lose, Comcast would remain a key, if not the key, player in the distribution of television programming in this country. But Intel, Broadcom, Qualcomm, Apple, Microsoft, Texas Instruments, Motorola, Nokia, Dell, and Marvell Technology Group all have another agenda, which is to make a new device that makes your phone calls, gets you on the Internet (wirelessly), and downloads TV programming, sans commercials, when you want, on the channel you want it. Late in 2006, we're bound to see one or more of these great tech companies unveil a product that will allow you to purchase, download, and watch anything that you want, from sports programs to movies to television shows to video games. The device will smash the current cable paradigm and will make all those stocks worth owning once again, as they were in the year just past." Cramer continues, "Pfizer And Bristol-Myers Squibb Will Merge, And Merck Will Snap Up Schering-Plough … My crystal ball sees no end to the turmoil afflicting the pharmaceutical industry. With the government as the biggest payer in the system, courtesy of the changes in Medicare, the drug companies will be forced to discount drugs well below where they thought they might have to. That combination of price squeeze and endless overhead will force Bristol-Myers and Pfizer to merge, and Merck and Schering-Plough will get together."

Arizona Questions Competition Problems With Development Deal. The Arizona Republic (1/2, Alltucker) reports, "State regulators want to scrutinize Cox Communications' role in arranging a special deal that effectively prevented rivals from seeking customers in a massive new-home development in Peoria." The Republic continues, "A new report by the Arizona Corporation Commission suggests there is "clear and convincing evidence" that in December 2003 a deal was struck between Cox Communications and a private developer to curb competition for phone, cable and high-speed Internet services at the 17,000-home Vistancia community. … The Corporation Commission wants to hold a public hearing to examine the deal and discuss potential fines against Cox." The Republic adds, "Although the arrangement was proposed by the developer, Shea Sunbelt, state regulators said Cox was an "active participant," with 15 employees helping write and revise terms of the deal. … The arrangement came to light after a tiny telephone company, Accipiter Communications, filed a complaint with state regulators alleging it was shut out of Vistancia. The arrangement also

triggered an investigation by the federal Department of Justice's antitrust division."

Columnist Decries Government-Sanctioned Monopolies. In a column for the Orange County Register (1/2), Tibor R. Machan writes, "In Silverado Canyon, there is a tiny post office where each weekday we pick up our mail. One or two of the people who work there are, unfortunately, quite often absent because of illness or something else and, more often than not, the mail now doesn't get distributed until late in the afternoon. The Postal Service says they have to have the mail out by 5 p.m. but it used to be in our boxes by 10:30 a.m. or even earlier, until recently. … OK, so there has been more mail this time of year, but here is how that eventuality should play out. The post office should either hire more people so the mail gets out earlier or an alternative mail service should appear on the scene and offer competing first-class delivery service." Machan continues, "That latter alternative, of course, is illegal. Competition in first-class mail delivery is against the law, nevermind the demand. Accordingly, the post office can keep being later and later with mail distribution and does not have to hire any extra help since no one's about to come in and take the business from them. … This is but one of the relatively innocuous results of the monopoly in first-class mail service. Other monopolies are far more insidious. Take the New York Metropolitan Transit Authority, which last month was struck by the public-employee union to which all its workers belong. … " When there's a strike in a free market, people often have other vendors from whom they can receive service. There is usually competition, so that if Chrysler's autoworkers go on strike, there are Ford, Toyota, General Motors and other carmakers still in business." Machan adds, "Just why the American public is mostly passive about the many monopolies protected or operated by government is a mystery to me - one reason might be is that the government schools do not explain in their economics classes just how unnecessary and unjust such monopolies are, seeing that the schools themselves are a case in point. But perhaps with some voices making a bit of noise about the situation others will catch on and in time we can get a system in which my little post office would either shape up or find itself competing with an alternative mail-delivery agency."

Homeowners' Web Site In Wisconsin Competes With Realtors. The New York Times (1/3, Bailey) reports, "Across the country, the National Association of Realtors and the 6 percent commission that most of its members charge to sell a house are under assault by government officials, consumer advocates, lawyers and ambitious entrepreneurs. But the most effective challenge so far emanates from a spare bedroom in the modest home here of Christie Miller." The Times continues, "Ms. Miller, 38, a former social worker who favors fuzzy slippers, and her cousin, Mary Clare Murphy, 51, operate what real estate professionals believe to be the largest for-sale-by-owner Web site in the country." The Times adds, "They have turned Madison, a city of 208,000 known for its liberal politics, into one of the most active for-sale-by-owner markets in the country. And their success suggests that, in challenging the Realtor association's dominance of home sales, they may have hit on a winning formula that has eluded many other upstarts. Their site, FsboMadison.com (pronounced FIZZ-boh) holds a nearly 20 percent share of the Dane County market for residential real estate listings. … The site, which charges just $150 to list a home and throws in a teal blue yard sign, draws more Internet traffic than the traditional multiple listing service controlled by real estate agents." The Times notes, "Madison is home to the University of Wisconsin and a city where the percentage of residents who graduated from college is twice the national level. It is also a hotbed of antibusiness sentiment, which turns out to be the perfect place for a free-market real estate revolution. Bucking the system is a civic pastime here. … Elsewhere, the Justice Department, free-market scholars, plaintiffs' lawyers and countless entrepreneurs are vowing to make real estate more competitive and to bring down sales commissions. To do that, they advocate forcing the Realtors' association to share control of its established listing services. Those critics seem to view the listings as an unassailable monopoly. … And who can blame them? Those 800-plus local listing services, controlled by local branches of the Realtors' association, help dole out about $60 billion a year in commissions to real estate agents and the firms that employ them. Despite numerous attacks, the association has been remarkably successful to date at protecting its turf. Through lobbying, litigation and legislation, the Realtors' group has managed to keep control of the crucial listings."

Unlikely Alliance Develops Between Rivals Sony, Samsung. The Wall Street Journal (1/3, Dvorak, Ramstad) reports, "For years, Samsung Electronics Co.'s key mission was to unseat rival Sony Corp. as the world's top electronics maker. Long seen as a South Korean underdog, Samsung has in the past few years surpassed its Japanese rival in market capitalization, revenue and profits. In television sets, Sony's traditional stronghold, Samsung now jockeys with Sony and a handful of top players for the No. 1 share of sales globally." The Journal continues, "But the relationship between Sony's Hiroshi Murayama and Samsung's Jang Insik tells a different story. The two engineers symbolize how the two companies have increasingly come to depend on each other since 2003. That's when Sony, looking for a source of panels for its new flat-panel TV line, asked to

become a partner in a $2 billion factory Samsung was building to produce liquid-crystal displays." The Journal adds, "Messrs. Jang and Murayama phone each other from their bases in South Korea and Japan respectively several times a day and visit in person every month to discuss how to make better panels. Mr. Murayama persuaded Mr. Jang and his bosses to speed their development of key technologies, and Samsung let Mr. Murayama use some of those technologies in Sony's TV panels even before its own products. Sony's TVs that use those new panels ended up outselling Samsung's LCD sets by more than three to one this fall in major U.S. retailers. … But Samsung is still keen to work with Sony because it's getting a crash course in how to improve LCD panels, which it had mostly used in computer monitors and cellphones, in the important TV segment. … The unlikely alliance shows just how tangled the connections have become between consumer-electronics companies as competition in the industry intensifies. … The same trend is happening across Asian electronics makers, which have traditionally prided themselves on doing as much as they could in-house, from the design of their gadgets to the technology that goes into them."

ENVIRONMENT/INDIAN AFFAIRS:

Health Officials Note Progress In Preparations For Bird Flu Epidemic. Health officials said yesterday that the US is making progress in preparing for a bird flu epidemic. This includes measures to close schools and quarantine the sick. However, the AP (1/2, Yen) reports that vaccine supplies remain inadequate. Julie Gerberding, director of the national Centers for Disease Control and Prevention, said on CBS' Face the Nation, "We've got a lot of work to do." Citing "'bottlenecks' in vaccine production and the delivery of health care if there's an outbreak," Gerberding added, "We've got to get more and better anti-viral drugs. And we've got to have every single link in our public health system as strong as it can be so it can detect this problem." The AP adds, "Health and Human Services Secretary Mike Leavitt, appearing on CNN's 'Late Edition,' praised the money approved by Congress as a good step that will fund one year of preparedness efforts. Still, he said the U.S. is not ready, saying additional money is needed to ensure there would be enough vaccine supplies for all Americans within six months of an initial outbreak. State and local governments also need to step up efforts, Leavitt said."

Gerberding said on CBS' Face the Nation (1/1, Schieffer) she does not know whether "it is just a matter of time" before Avian flu appears in the US, but "we've got to take the steps now to get prepared for that." She added, "Frankly, we're not as prepared as we need to be. We're certainly doing more today than we were even two years ago so we're making fast progress. But we've got a lot of work to do. We've got to get a vaccine supply that we can count on. We've got to get more and better anti- viral drugs."

Leavitt Says US Still Has Work To Do. HHS Secretary Michael Leavitt said on CNN's Late Edition (1/1, Blitzer) that the avian flu virus "continues to spread in wild birds across the world. There is no reason to believe that at some point it will stop. That means that ultimately it would find its way to the United States. We need to be prepared. … We are not as prepared as we aspire to be. We have a great deal of work to do."

Plan To Change Toxic Release Reporting Requirements Draws Fire. The Washington Post (1/3, D1, Skrzycki, 744K) reports in its "The Regulators" column, "Opposition is growing to a Bush administration plan to change the reporting requirements of" the Toxic Release Inventory, the "highly successful public information program that collects data annually on releases of toxic chemicals." The inventory "has been a roadmap for individuals and community groups interested in pinpointing where the country's most-polluting facilities are located." The business community has pushed "over the past decade to reduce the 'burden' of having to fill out a five-page form for each chemical they use every year. This form includes detailed information on the quantity of the chemical, how it is made and processed, and how much of it is released. After considering several options, the [EPA] in October proposed changes that would allow more companies to file a shorter report, known as Form A, which contains less information about their use of toxic chemicals." The EPA "dropped another bombshell at the same time, telling Congress that it is thinking about eliminating annual filing in favor of every other year. … The twin ideas prompted outrage from environmental and public-interest groups." The Post adds, "Environmental and community groups, in particular, consider the reporting program a great success. And it has become even more useful since the agency has required reports on more chemicals and from more industrial sectors, including mining and electrical utilities."

Other States Adopting California's Strict Greenhouse Gas Rules. The Washington Post (1/3, D1, Freeman, 744K) reports, "On Friday, Massachusetts joined Oregon, Connecticut and five other states in adopting California's tough greenhouse gas rules, which limit the amount of carbon dioxide and other gases that can be emitted from vehicle tailpipes. These new rules would supplement federal exhaust pollutant standards already in place. Two other states are in the process of adopting the rules. The carbon dioxide regulations are so strict, the auto industry argues, that they would cause extensive design

changes to new vehicles, driving up prices and crippling new-car sales. Every major automaker that sells vehicles in the United States is suing to have the new rules overturned, even as states on the West Coast and in the Northeast are moving quickly to adopt them." The California rule "requires a 30 percent reduction in greenhouse gases by 2016. The rules are one element of a wider trend of states enacting their own energy policies to govern auto and factory emissions and appliance energy efficiency, updating older federal rules or writing new rules where none exist."

Novak Praises Romney Decision To Pull Out Of RGGI. Robert Novak (1/2) writes in his syndicated column, "Massachusetts Gov. Mitt Romney on Dec. 16 made a significant move that will benefit the pocketbooks of his state's consumers and perhaps boost his own Republican presidential prospects. He pulled Massachusetts out of the compact of Northeastern states requiring a reduction in power plant emissions of carbon dioxide. The Regional Greenhouse Gas Initiative (RGGI) would cut the emissions by 10 percent by 2019, forcing up electricity prices because of greater dependence on increasingly expensive natural gas. … The defection of Romney, originally inclined to support RGGI, represents a major setback for the Greens." Novak adds, "Green pressure can lead politicians to make promises that they would regret. … It appears Mitt Romney will avoid that pitfall on his long uphill climb to the White House."

Government Seeks To Remove Grizzly Bears From Endangered List. NBC Nightly News (1/1, story 12, 2:20, Seigenthaler) reported, "The Federal Government has declared grizzly bears in Yellowstone recovered, clearing the way to remove it from the endangered list." NBC (O'Neil) added, "By 1975 it was clear the grizzlies needed to be put on the endangered species list." Biologist Kerry Gunther: "We've gone from a population of less than 200 to a population of 600 and increasing population. It's a great success story." O'Neil: "A sorely needed victory for the act which some in Washington want to water down. The grizzly is only on of a handful to ever be declared recovered."

Texas, Oklahoma Continue To Be Plagued By Wildfires. The CBS Evening News (1/02, story 2, 2:30, Schieffer) reported, "The fires in Texas and Oklahoma now spreading to New Mexico are being fueled by the worst drought in decades. The fires killed four people last week and searchers were set to look for any victims from two small towns in Texas that burned last night. Since early November, the Oklahoma fires have destroyed some 200 buildings and at least 270,000 acres." CBS (Cowan) added, "Nearly 100 more homes were lost to flames that burned into the wee hours of the morning. Some communities like Ringgold near the Texas-Oklahoma border were erased."

NBC Nightly News (1/2, story 5, 1:50, Teague) reported, "Fire crews have spent more than a week battling grass fires that have raged across Oklahoma, Texas, and New Mexico and burned again today. Nearly 300,000 acres have been scorched so far and more than 400 homes. The weather simply won't give fire crews a break." The AP (1/3, Flynn) runs a similar report.

Damage From California Flooding Now In Hundreds Of Millions Of Dollars. The CBS Evening News (1/02, story 3, 2:30, Schieffer) reported, "Back-to-back storms drenched California and caused an estimated $100 million in flood damage. Most of it is the result of rivers that have spilled out of their banks in Northern California. Now the storms are threatening the southern part of the state." CBS (Hughes) added, "The pounding rain was too much for vulnerable hillsides above Los Angeles, burned bare by this year's wild fires. Rescue workers were watching for any sign that nearby residents needed to pack up and run from the hills. The second wave of storms to hit this weekend is swamping parts of Southern California. Up to four inches of rain is expected in the valleys and eight in some mountain areas."

NBC Nightly News (1/2, story 4, 2:20, Lewis) reported, "In California's wine country, where hundreds of homes and businesses are flooded out, they're just beginning to assess the damage, estimated in the hundreds of millions of dollars." In Pasadena, "there were plenty of raindrops on roses at 117th annual Rose parade. Defying the elements, the USC marching band wore plastic ponchos and sunglasses. As a smaller-than-usual crowd of spectators watched." Governor Arnold Schwarzenegger has "issued a state of emergency in seven California counties most adversely affected by the storm."

Cato Fellows Argue Strategic Petroleum Reserve Should Be Scrapped. Jerry Taylor and Peter Van Doren, senior fellows at the Cato Institute, write in the New York Times (1/3, 1.19M), "The rise in fuel prices that followed Hurricanes Katrina and Rita has prompted many members of Congress to call for new and expanded federal reserves of crude oil, diesel fuel, home heating oil, jet fuel and propane. Proponents of stockpiling claim that if the government were to hoard those commodities when prices were low, it could unleash them on the market when supplies are tight, thus dampening price increases and stabilizing the market. But the experience in this country with the strategic petroleum reserve strongly suggests that such government-managed stockpiles are a waste of taxpayers' money. Rather than increasing the stockpile, the reserve should be emptied

and closed." Economists "agree that every barrel of oil we put in the public reserve displaces oil that might otherwise have gone into private inventories. How much displacement occurs is unclear, but there is little doubt that it's significant. If the reserve is thought of as an insurance policy against high prices, the cost of the policy has been more expensive than the dangers the stockpile is meant to prevent. Americans should resist the drive to expand public stockpiles. Instead, we should sell while the selling is good."

Opponents Of ICC Said To Have Little To Stand On. The Washington Post (1/2) editorializes, "With a key federal approval expected soon for the proposed intercounty connector -- the east-west toll highway that would transverse Maryland suburbs -- the road's opponents are mounting an eleventh-hour anti-ICC campaign. Having failed over the years to sway the traffic-weary public with other arguments (environmental impact, cost, effect on traffic), the foes are focusing on how much the road will cost to use. This, too, is a losing argument."

Loyal Mdewakanton Tribe Wins Court Battle Over Minnesota Land. Indian Country Today (1/3, Melmer) reports, "Membership in a Dakota tribe is expected to more than double after an accurate list of lineal descendants of the Loyalist Mdewakanton is complied and verified, as ordered by a federal court." ICT continues, "U.S. Court of Federal Claims Judge Charles Lettow has denied a U.S. Justice Department motion to reconsider his earlier ruling that gave the descendants of the Loyalist Mdewakanton rights to land in Minnesota. … Lettow also ruled that the federal government breached its trust obligations to the Loyalist Mdewakantons and their descendants when in a 1980 congressional act it put the land into trust for three federally recognized Dakota communities - Prairie Island, Shakopee and Lower Sioux. That act violated an 1886 contract signed by Mdewakanton leader John Bluestone, which gave that land to the Mdewakanton who were descendants of those who pledged loyalty to the United States in 1862. … Previously the land was either assigned to individual loyalists or leased, with the proceeds from the lease paid to the loyalists." ICT adds, "The loyalists want the land returned to them and Mdewakanton tribal membership, with full political power, restored. Lease revenues that were given to groups other than the loyalist's lineal descendants constitutes a breach of the contractual agreement by the federal government, the plaintiffs argued. Today's lineal descendants want compensation for the lost revenues. … Lettow's latest decision rejected the federal government's claim that it didn't mismanage the trust on behalf of the lineal descendants. He also rejected the argument that the 1886 contract did not authorize a trust responsibility to the loyalists. … Lettow ordered the government to perform an accounting to determine the size of financial compensation that is owed the loyalists' descendants."

Navajos Try To Stop Arizona Uranium Rush. The Arizona Republic (1/3, Shaffer) reports, "The price of uranium has tripled in the past two years, bringing with it the possibility of another uranium rush in Arizona, the state with the richest deposits of the ore and, along with New Mexico, the worst legacy associated with its mining." The Republic continues, "Last year, 700 mining claims were filed and 100 test holes were bored into the wild, remote high desert in northern Arizona. … Scott Florence, director of the Bureau of Land Management's Arizona Strip district in St. George, Utah, said those numbers are significantly higher than any year since the frenzy of the 1980s. … 'Finding the right mine site is a real art. But it seems like everyone and their mother is trying now,' he said." The Republic adds, "Secondary supplies of uranium on the world market have virtually dried up, and China, India and Japan are clamoring for uranium for their burgeoning domestic nuclear-power industries. Uranium now fetches $36 a pound on the spot market. Four years ago, it was going for just over $7 a pound. … But not everyone is happy about the search for new mine sites. Navajo Nation President Joe Shirley Jr., stirred to action by the memory of how dangerous uranium mining can be, issued an executive order in November banning negotiations with uranium companies or uranium exploration on the three-state Navajo Nation, which was engulfed by a public health tragedy after the first wave of uranium mining began on its reservation in the 1950s. Dozens of premature deaths of Navajo miners and passed-on genetic defects have been attributed to uranium exposure."

FBI/DEA/ATF/USMS:

FBI Photographer Sues Over Mistreatment Due To Tourette's Syndrome. The Legal Times (1/2, Kelley) reports, "As a photographer for the Federal Bureau of Investigation, Jeffrey Bell was frequently tapped to work on high-profile cases. Between 1991 and 2000 he was deployed throughout the United States and abroad to photograph matters involving terrorism, forensics, counterintelligence, and emergency response. … But according to a lawsuit Bell, a 43-year-old with Tourette's syndrome, filed recently in the U.S. District Court for the District of Columbia, all that changed after an incident stemming from his disorder led to retaliation from his employer. Bell's trial is expected to start this week." The Times continues, "Court papers filed by Bell's attorney, Edith Marshall of Powers Pyles Sutter & Verville, state that Bell was taking a new medication to control his Tourette's when he became involved in a verbal altercation

with a co-worker. Bell explained that the outburst was a side effect of his medicine, but he claims he was treated differently from that point on because of his Tourette's, a neurological disorder that can cause involuntary tics and vocalizations as well as obsessive-compulsive tendencies and hyperactivity." The Times adds, "Bell alleges that because of his Tourette's he was regarded as a 'problem personality' and often blamed for any workplace conflict that occurred."

Doctors Said To Fear DEA Action When Prescribing Pain Medications. In an story titled "Painful Choices: Physicians Challenged By Quest To End Suffering" the Deseret (UT) Morning News (1/2, Collins, Jarvik) writes, "The perception among doctors is that the regulatory environment has become more hostile, says Micke Brown, director of advocacy for the American Pain Foundation, headquartered in Baltimore. 'Many health care providers are running scared,' especially primary care physicians, she says. 'Some are even backing away from managing people's pain.'" Pain management doctor Lynn Webster, who heads the Utah Academy of Pain, "is an opioid advocate. … He argues that the undertreatment of pain is 'still a major problem' in Utah, in part because of doctors' fears of punishment by the federal Drug Enforcement Agency (DEA) and the state Division of Occupational and Professional Licensing (DOPL). … Pain experts are waiting anxiously for the DEA to clarify its interpretation of the federal law that governs prescribing controlled substances for pain. DEA said the guidance was imminent more than a year ago. But pain experts, still waiting, continue to warn colleagues to err on the side of stricter federal interpretations."

Maryland Tax Dollars Said To Be Disproportionately Tied Up In Locking Up Addicts. In the Washington Post (1/1, B8), Tara Andrews, director of Justice Maryland and Democratic candidate for the state Senate from Baltimore City, writes "By the latest count, more than 250,000 Marylanders are in need of substance-abuse treatment. Even in Montgomery County, considered the state's wealthiest county, the treatment gap is great. Yet despite population growth, state funding for treatment has declined. More than three-quarters of those in Maryland prisons report having an alcohol or drug problem, and four out of 10 entering the state's prisons every year are locked up for drug offenses. Maryland has the third-highest percentage of prison admissions for drug offenses in the country. … Maryland tax dollars are disproportionately locked up by the incarceration of drug addicts, while providers of substance-abuse treatment make do with crumbs. A shift of dollars away from incarceration and toward a dedicated fund for treatment would make a world of difference and a world of sense."

Plan Colombia Credited With Record Number Of Cocaine Seizures. Reuters (12/31) reports, "Colombia seized a record 186 tons of cocaine [in 2005] thanks to a Washington-backed program aimed at cutting imports of the illegal drug to the United States, the Colombian government said on Friday. The haul, seized using equipment and expert advice provided by 'Plan Colombia,' was 26 percent more than last year and had a U.S. street value of $4.7 billion, Defense Minister Camilo Ospina told reporters. He said the increase was possible thanks in part to more than $3 billion in mostly military aid that the United States has provided since 2000 to help fight drug-running Marxist rebels fighting a decades-old insurgency. Washington says cocaine is becoming more expensive on U.S. streets, a sign that the money, largely steered toward aerial spraying of coca bushes used to make cocaine, is making the drug less available."

IMMIGRATION:

Migrant Advocacy Group Celebrates 10 Years. The Miami Herald (1/2, Chardy) reports, "Alfredo López-Sánchez languished for months at a detention center for migrant children in Southwest Miami-Dade -- until an attorney for a local immigrant rights group realized the Guatemalan did not understand Spanish." The Herald continues, "The lawyer from the Miami-based Florida Immigrant Advocacy Center eventually found an interpreter who spoke López-Sánchez's Mayan language. … That was September 2001. A year later, López-Sánchez -- then 17 -- was free and on his way to getting a green card." The Herald adds, "Such successes have turned the Florida Immigrant Advocacy Center into a powerhouse in national advocacy for persecuted migrants too poor to hire a lawyer. … FIAC, as the group is known in the immigrant rights community, is marking its 10th anniversary today -- with a string of victories, and some defeats, in what often seems an uphill battle against ever-tougher immigration laws. It plans a 10th anniversary celebration dinner March 6. … The group began in 1996 -- two years after former House Speaker Newt Gingrich's conservative revolution swept Congress with calls to close the borders and even to shut the school door to children of undocumented immigrants. In the end, Congress amended immigration law, making it extremely difficult for any immigrant without proper papers to avoid detention or deportation -- though lawmakers dropped provisions that would have let states bar children from public schools if their parents entered the country illegally. … Ten years later, in the fallout from the Sept. 11, 2001, terrorist attacks, immigration law is again facing calls from conservatives in Congress to toughen the rules for citizenship, including barring U.S.-born children of illegal

immigrants from becoming automatic citizens and the deportation of migrants encountered on the streets without the right to a court review to plead their case."

Conflicting Public Attitudes On Illegal Immigration Noted. The Washington Post (1/3, A7, Balz, 744K) notes the "sometimes conflicting public attitudes" on illegal immigration. A Washington Post-ABC News poll taken in mid-December "found Americans alarmed by the federal government's failure to do more to block the flow of illegal immigration and critical of the impact of illegal immigration on the country but receptive to the aspirations of undocumented immigrants living and working in the United States. … The Post-ABC News poll found that four in five Americans think the government is not doing enough to prevent illegal immigration, with three in five saying they strongly hold that view. The same poll found that 56 percent of Americans believe that illegal immigrants have done more to hurt the country than to help it, with 37 percent saying they help the country. About three in five Republicans and a bare majority of Democrats agreed that illegal immigrants are detrimental to the country. The only groups in the poll who disagreed were people with postgraduate degrees, those with incomes exceeding $100,000 and nonwhite respondents. The Post-ABC poll did not include enough Hispanics to provide an accurate reading of their sentiment, but a Pew Hispanic Center survey last summer found that two in three Latinos said that undocumented migrants help the economy. … In the recent Post-ABC News poll, President Bush got his lowest marks on immigration, with 33 percent saying they approved of how he was handling the issue. That may largely reflect irritation over the government's failure to control the borders."

Hayworth Set To Publish An "Anti-Immigration Manifesto." Time (1/9, Allen) reports in its "Notebook" column that Rep. J.D. Hayworth "is about to publish an anti-immigration manifesto, Whatever It Takes, that should rile up right-wing radio just as the White House was hoping to gain traction for a broad immigration-reform package." In the book Hayworth "calls for deploying active-duty troops to the border and considering a 'border security fence from the Pacific Ocean to the Gulf of Mexico.'" Hayworth "contends that Bush's plan to confer temporary legal status on Mexicans working in the U.S. amounts to 'false compassion.' But Senator John McCain plans to push hard this winter for such a program. House Republican leaders say they might accept one if immigrants had to return home to apply for temporary work permits. Hayworth tells TIME that even that would be too lenient, designed to appease 'left-wing grievance mongers' and businesses that want cheap labor. Bush may have sounded as if he were running for sheriff during his recent border visits, but to convince the likes of Hayworth, he'll have to talk a lot tougher."

CONGRESS-ADMINISTRATION:

Alito Argued President Should Issue "Interpretive Signing Statements." As a Justice Department lawyer in 1986, Supreme Court nominee Samuel Alito made the case or presidential power, laying out a strategy under which the president would routinely issues statements about the meaning of statutes when he signs the into law. The Washington Post (1/2, A11, Lee) reports that such "'interpretive signing statements' would be a significant departure from run-of-the-mill bill signing pronouncements, which are 'often little more than a press release,' Alito wrote. The idea was to flag constitutional concerns and get courts to pay as much attention to the president's take on a law as to 'legislative intent.'" The Post adds, "The Reagan administration popularized the use of such statements and subsequent administrations continued the practice. (The courts have yet to give them much weight, though.) President Bush has been especially fond of them, issuing at least 108 in his first term, according to presidential scholar Phillip J. Cooper of Portland State University in Oregon."

Alito Said To Have An "Everyman Appeal." The New York Times(1/2, Kirkpatrick) says that according to people who have participated in Alito's rehearsals for this week's confirmation hearings say he "will never be as polished and camera-ready as Chief Justice John G. Roberts Jr. was at his own hearings a few months ago." But two of Judge Alito's supporters who participated in the murder boards, speaking about the confidential sessions on condition of anonymity for fear of White House reprisals, said they emerged convinced that his demeanor was a political asset because it gave him an Everyman appeal." The Times adds, "Senators of both parties have said it will not be easy to follow Chief Justice Roberts," and "some Democrats said they already had much more pointed questions waiting for Judge Alito, focusing mainly on strongly worded statements that he made as lawyer in the Reagan administration about his conservative approach to the Constitution, abortion rights and other issues. Leading Democratic senators have said his responses will be a deciding factor in whether they seek to block the nomination by filibustering."

Alito Hearings Will Test Domestic Spying Program's Political Resonance. Time (1/9, Tumulty, Allen) the opening of Supreme Court nominee Samuel Alito's confirmation hearings this week will be the first test of the domestic spying program's "political resonance." According to Time, Alito opponents, "who had planned to put the abortion issue on center stage, are quickly retooling their strategy. … Alito's record could give his critics plenty of

ammunition. The Third Circuit judge has long been an advocate of the unitary-executive concept, a constitutional interpretation that is a favorite of Bush's and Vice President Dick Cheney's, which argues that the President should have nearly total control of Executive Branch agencies and resist any incursion on that power by Congress." Time adds, "Administration officials concede that the controversy will inject a volatile new element into the confirmation debate but say Alito will resist getting drawn in."

Alito's Writings Suggest He Will Accelerate Court's Shift To The Right. U.S. News and World Report (1/9, Halloran) says the battle over Alito "shows every sign of achieving Borkian dimensions. As Alito prepares for his confirmation hearings before the Senate Judiciary Committee next week, the portraits being painted of him have become ever more cartoonish, nasty, and one-dimensional. … Behind the caricatures, however, are real questions. Who, really, is Sam Alito, and what kind of a justice would he be? An analysis of Alito's writings as a Reagan administration lawyer, and of his opinions from the bench, reveals him to be a solidly conservative jurist but one who also pays deference to precedent. … His lengthy paper trail suggests he will accelerate the court's shift to the right on several important issues," including abortion, civil rights, capital punishment and federalism.

Roberts, Alito Seen As Likely Allies Of Business. Academics and business experts say Chief Justice John Roberts and Alito are likely to be allies of manufacturers and business, The AP (1/1, Cassata) reported, "One represented corporate interests as a private attorney; the other often sided with employers in lawsuits filed by workers. Beyond their decisions in individual cases, the Roberts court also has the potential to craft a consistent philosophy on business issues, something that several academics argue has been lacking in recent years since the departure of Lewis Powell in 1987. … The court's highly selective docket for the current term will give Roberts and Alito, assuming the latter is confirmed, ample opportunity to shape the court. Among the critical issues for companies are the Supreme Court's decisions in antitrust cases, government regulation of land development and the commerce clause. … Abortion and social issues dominate the public debate over the Supreme Court, but business matters make up a significant portion of the justices' work."

Interest Groups To Intensify Rhetoric In Debate Over Alito Nomination. USA Today (1/3, Kiely, Memmott, 2.31M) reports the Senate hearings on Judge Samuel Alito's nomination to the Supreme Court "are set to begin Monday. This week, groups on both sides of the debate plan to launch elaborate phone, e-mail and ad campaigns." Ralph Neas of the People for the American Way said, "There's no question there will be an acceleration of efforts." Neas "plans a wave of TV ads" in opposition to the nomination. Meanwhile, Christian Myers of Progress for America said, "It's game time now, and we're making a serious push." The "conservative group will spend $500,000 to broadcast a pro-Alito ad on cable television and in four states where senators may be undecided." Other groups, "from the conservative Focus on the Family to the liberal Leadership Council on Civil Rights, plan phone banks, e-mail blitzes and visits to newspaper editorial boards and radio hosts." But "relatively few senators will get most of the attention. One is Senate Judiciary Committee Chairman Arlen Specter, a centrist Pennsylvania Republican who will preside over Alito's confirmation hearings." Both sides are "focusing on senators whose votes will help determine whether there's enough Senate support for a filibuster." The key senators "are centrists; all say they're undecided about Alito. Several face re-election fights this year. The biggest group is 'red state Democrats.'"

The New York Times (1/3, Kirkpatrick, 1.19M) reports that in the "final days before" the Alito hearings, "partisans on both sides are pulling out all the stops in an effort to sway public opinion. Moving beyond Judge Alito's judicial record, a coalition of liberal groups is preparing commercials attacking his integrity and credibility instead, several people involved in the effort said Monday." Conservatives, "for their part, are capitalizing on ethnic pride to rally Italian-American support for Judge Alito with public events and newspaper advertisements. The efforts are aimed particularly at the Northeastern States, where some moderate Republican senators have expressed doubts about his confirmation." The advertising campaigns "on both sides are the most visible components of a last-minute push by advocacy groups anticipating a potentially close Senate vote." People "involved in the liberal coalition, which includes People for the American Way, the legal group Alliance for Justice, the A.F.L.-C.I.O., the N.A.A.C.P., the Sierra Club and abortion rights groups, said it planned to run new commercials, beginning this week with radio and television advertisements in selected states intended to undercut Judge Alito's credibility." The sources "said the first advertisements would focus on occasional lapses from a pledge Judge Alito made at the 1990 hearings for his confirmation to the appeals court that he would recuse himself from cases involving the companies that managed his mutual fund investments, Vanguard and Smith Barney."

Alito View's On Reapportionment Cases Seen As Debatable. In a New York Times editorial observer story (1/3), Adam Cohen says, "There has been a lot of talk about the abortion views of Judge Alito, President Bush's Supreme Court nominee. But his views on the redistricting cases may be more important." Sen. Joseph Biden "said recently that Judge Alito's statements about one person one vote could do more to jeopardize his nomination than his statements about Roe v. Wade. Rejecting the one-person-one-vote principle is a radical position. If Judge Alito still holds this view today, he

could lead the court to accept a very different vision of American democracy, one in which it would be far easier for powerful special interests to get a stranglehold on government."

Critics Said To Be Wrong For Seizing On Alito's Memos In Abortion, Wiretap Cases. In a New York Times op-ed (1/3), former Reagan Administration solicitor general Charles Fried says Judge Alito's "opponents have seized upon two memorandums he wrote when he was a junior lawyer in the office of the solicitor general: one on the Thornburgh case, which dealt with Roe v. Wade, and the other on Mitchell v. Forsyth, which addressed the attorney general's personal liability for wiretaps found to violate the Constitution. Determined to fit the man to the Scalito caricature with which they hope to defeat his nomination to the Supreme Court, Judge Alito's detractors ignore the context and the content of both documents." But "these were not the writings of a political operative seeking to make trouble or advance an agenda. The solicitor general takes a case to the Supreme Court only when some other part of the government - perhaps a division of the Department of Justice or another agency - recommends it." As in "every case, a junior staff member was assigned to analyze these recommendations and propose a course of action to the solicitor general. It fell to Judge Alito to write those memos." But what is "remarkable in both cases is that Judge Alito recommended against taking the position that more senior, politically appointed officials were urging the solicitor general to take before the court. In the abortion case, not only the head of the civil division but also other high-ranking officials were urging that I, as the solicitor general at the time, ask the court to overturn Roe v. Wade. The bottom line of Judge Alito's memo was that I should not do that."

Roberts Calls For Tighter Court Security, Pay Raises For Judges. US Chief Justice John Roberts yesterday called for better court security and higher salaries to ensure a diverse mix of judges on the bench. Reuters (1/2, Charles) reports that Roberts wrote in his 2005 Report on the Federal Judiciary, "I recognize that it is a bit presumptuous for me to issue this report at this time, barely three months after taking the oath as chief justice," but, "But I do not intend to start the new year by breaking with a 30-year-old tradition, and so will highlight in this report issues that are pressing and apparent." Reuters adds, "Roberts expressed concern over violence directed at judges and in courts in the past year. He mentioned the murders of a U.S. district judge's husband and mother in Chicago by an angry litigant, and a court shooting in Atlanta that left a judge, court reporter and deputy dead. … Roberts also returned to a theme that Rehnquist regularly mentioned in his annual reports: the need to raise pay for judges. … Roberts said the real pay of federal judges has declined since 1969 by almost 24 percent, while the real pay of the average American worker during the same period had increased by more than 15 percent."

Bush Team Notable For Lack Of Turnover. The Washington Times/AP (1/3) reports the loyalty of President Bush's aides have limited turnover. After "two wars, devastating strikes by terrorists and hurricanes, a bruising re-election and countless legislative battles, President Bush's team is continuing the trend -- defying history and shake-up rumors to remain almost entirely intact five years in." Only a "handful of the president's most senior aides have departed since Mr. Bush came to Washington in 2001. Though some have shifted roles, it's a familiar cast of characters at the president's side: Vice President Dick Cheney, Chief of Staff Andrew H. Card Jr., political guru Karl Rove, Deputy Chief of Staff Joe Hagin, counselor Dan Bartlett, budget chief Joshua B. Bolten, White House Counsel Harriet Miers and press secretary Scott McClellan." Bush's Cabinet "has seen more turnover than his top-level White House staff. Still, a third of the 21 Cabinet-rank positions are held by the same person as when Mr. Bush came to Washington." David Gergen said, "I don't think there's any other president in the modern era that has seen this kind of stability."

Medicare Drug Program Gets Off To An "Uneven" Start. A somewhat negative story in the New York Times (1/3, Pear, 1.19M) says the Medicare prescription drug program "got off to an uneven start across the country" this week. The Times says that while people "who applied early and had identification cards in hand were often able to fill prescriptions through the new program," others "were stymied in their efforts to take advantage of the drug benefit, as pharmacists spent hours trying to confirm eligibility and enrollment by telephone and computer." The Times adds, "Dr. Mark B. McClellan, administrator of the Centers for Medicare and Medicaid Services, said he was pleased with the first days' experience. 'Many thousands of people were able to get their prescriptions filled,' he said."

Many Seniors Still Befuddled As Medicare Drug Benefit Takes Effect. ABC World News Tonight (1/1, story 2, 2:35, Harris) reported, "The beginning of 2006 means millions of senior citizens can get prescription drug benefits through Medicare. Pharmacists say tomorrow may be the busiest day of the year, with many seniors coming in with many questions about their plans. While 43 million seniors are eligible, only 1 million have signed up for what some consider the most confusing government benefits ever." ABC (Yang) added, "Medicare officials say there's still plenty of time. Enrollment ends May 15th. They're now running TV ads, encouraging people to help their moms and dads. … Medicare officials say one of the most efficient ways to sort

through all the options is on the Internet. But 75% of seniors say they've never even been online."

The CBS Evening News (1/1, story 5, 2:20, Roberts) reported, "Huge fanfare and a lot of confusion are accompanying the biggest change in Medicare history. The government's new prescription drug plan which is supposed to make drugs more afford to believe millions of Americans seniors goes into effect today." CBS (Chen) added, "20 million low income Americans" are "being forced off state drug coverage programs and into the myriad of prescription plans run by private insurance companies. Supporters expect as many as 10 million more will voluntarily sign up, though only one million have so far."

Gingrich Urges GOP To Propose Lobbying Reforms. Former Speaker of the House Newt Gingrich was asked on CBS' Face the Nation (1/1, Schieffer) if Republicans are in danger of suffering losses in this year's elections due to scandals tied to several GOP congressmen. Gingrich relied, "I think that this coming year…is going to be a very big year of decision for Republicans. We have to be the party of reform. We can't just be the party of pork barrel. … I'd look very seriously at completely rethinking the relationship with lobbyists. I'd require every lobbying activity to be listed on the Thomas system, the computer system people can access, so you'd know if your member of Congress, whether they went golfing, whether they had dinner. I'd make this stuff public and transparent. I'd consider not allowing fund-raisers in Washington. I think this whole system has grown, frankly, a little sick with insiders raising money for insiders to re-elect insiders to do favors for insiders. I think this is not just a Republican problem. Don't misunderstand me. But I think we are much more naturally the party of reform than the Democrats are."

Cheney, Rumsfeld Have Neighboring Estates On Maryland's Eastern Shore. A lengthy story on the front page of the Washington Post's (1/3, C1, Montgomery) Style section looks at the "expensive waterfront estates" of Vice President Dick Cheney and Defense Secretary Donald Rumsfeld in St. Michael's, Maryland. Rumsfeld's retreat, Mount Misery and Cheney's place, Ballintober, are "are separated by two miles of narrow lanes." The Post reports, "What gives? Is a secret weekend war cabinet forming? Are yachts and duck decoys part of the plan to transform the military? Did Cheney tire of his secure undisclosed hideaway and opt to join Rummy in his serene disclosed getaway? We are probably thinking too hard. The search for obscure meaning -- that reflex for overinterpretation -- is so Western Shore. The Bay Bridge is where you lighten up and leave behind your fevered quest for the matrix behind the mask. … Cheney may be the first part-time resident with a full Secret Service detail, but the famous, the rich and the powerful of Washington (and New York, Baltimore, Philadelphia, Pittsburgh) have been setting a course for St. Michaels and the wider, watery Talbot County for generations. The area has functioned like the Adirondacks did for the swells of the Gilded Age, Newport for the robber barons and the Hamptons for Wall Street. But somehow St. Michaels…survives as an anti-Newport, a non-Nantucket, an un-Hamptons. Not overrun, overpriced, overglitzed. Not yet."

Mankiw Offers New Year's Resolutions For Lawmakers. In Wall Street Journal (1/3, 2.11M), N. Gregory Mankiw, former chairman of President Bush's Council of Economic Advisers, offers a list of New Year's resolutions, which "any senator, congressman or presidential wannabe is free to adopt… as his or her own." Among Mankiw's resolutions: "This year I will be straight about the budget mess. I know that the federal budget is on an unsustainable path. I know that when the baby-boom generation retires and becomes eligible for Social Security and Medicare, all hell is going to break loose. I know that the choices aren't pretty -- either large cuts in promised benefits or taxes vastly higher than anything ever experienced in U.S. history. I am going to admit these facts to the American people, and I am going to say which choice I favor." Mankiw adds, "This year I will admit that there are some good taxes. Everyone hates taxes, but the government needs to fund its operations, and some taxes can actually do some good in the process. I will tell the American people that a higher tax on gasoline is better at encouraging conservation than are heavy-handed CAFE regulations. It would not only encourage people to buy more fuel-efficient cars, but it would encourage them to drive less, such as by living closer to where they work." Mankiw also writes, "This year I will be modest about what government can do. I know that economic prosperity comes not from government programs but from entrepreneurial inspiration."

Grassley Makes Case For GOP Deficit Reduction Bill. Senate Finance Committee Chairman Charles Grassley writes in USA Today (1/3, 2.31M), "In such a partisanship-first environment, any fair-minded move toward a more responsible budget is surely welcomed by the taxpayers. The GOP-sponsored deficit reduction bill is that sort of initiative. It's modest, representing just one-half of 1% of what would otherwise be spent during the next five years. Its Medicaid provisions reflect what governors nationwide -- Republicans and Democrats -- asked Congress to do to help them manage the program in their states and ensure its viability for low-income pregnant women and children." Grassley adds, "The tax relief in question is also part of

stemming the red ink in Washington. The tax policies passed by the Senate and House aren't new at all. They merely extend expiring tax laws so that taxpayers aren't hit with a tax increase. This legislation is needed to protect 14 million families from the alternative minimum tax meant for wealthy individuals. It includes tax breaks for higher education and teachers who buy classroom supplies. It closes tax shelter loopholes. And it includes pro-growth measures that have helped fuel our economy." Grassley concludes, "Congress needs to do a lot more to control spending and reduce the deficit, but it's wrong to dismiss a step in the right direction."

USA Today Says GOP Bill Lacks Conscience. An accompanying editorial in USA Today (1/3, 2.31M) says "it would be nice to see in Washington a new commitment to fiscal restraint and a resolve to bequeath a solvent government and robust economy to future generations. To listen to many Republican lawmakers, a move in that direction is underway. … It would be nice to see it that way, but to believe that is to believe in fairy tales. This political sleight of hand is simply too small to matter and is designed to evade the real financial predicament — runaway health care costs, unsustainable retirement benefits and tax rates receipts well below historical averages. The cowardice in that is bad enough, but the measure is also cruel. Virtually all of Congress' cuts are made to programs for the poor and the young, who lack organized lobbies. Absent congressional conscience, they are simply targets of political opportunity. And be assured conscience is lacking." USA adds, "Congress will not deserve credit until it takes on health costs, tells seniors it can't sustain a Social Security system in which one of every three adults collects benefits, and raises taxes for the wealthy back to more reasonable levels. Until then, each year will bring the nation and the federal government only closer to fiscal crisis."

OTHER NEWS:

West Virginia Coal Miners Trapped After Mine Explosion. Rescue crews yesterday sought desperately to reach 13 West Virginia coal miners trapped after a mine explosion in Tallmansville. The story was the lead on both CBS and NBC last night; ABC was preempted for college football last night. The CBS Evening News (1/02, lead story, 4:00, Schieffer) reported, "They are still not certain what caused it. A lightning strike is the best guess now, but before dawn this morning, there was an explosion at a coal mine in Tallmansville in central West Virginia. Tonight 13 minors are trapped there, some 160 feet underground. They have air purifying equipment but no oxygen. For most of the day, poisonous gas has kept rescue workers from trying to reach them. But late today, rescue workers did enter the mine." CBS (Orr) added, "An eight-man rescue team has just entered the mine and are now traveling a tunnel in the hill behind me going some two miles inside the hill trying to reach the miners who are trapped there. So far it's a bit grim because there's no communication with the trapped miners."

NBC Nightly News (1/2, lead story, 3:15, Holt) reported, "Tonight, a life and death drama is taking place outside a coal mine in West Virginia." NBC Nightly News (1/2, story 2, 2:45, Holt) also spoke with NBC News Robert Hager, who covered the 2002 Quecreek Mine accident, where nine miners were successfully rescued after begin trapped by a flood. Hager said, "This one looks grimmer to me, mostly because in that case, they were dealing with a flood. In this case, it's been an explosion, and an explosion does two things. It creates a lot of debris and it's blocked the shaft, and eats up oxygen." The Washington Times/AP (1/3, Smith), Washington Post (1/3, A1, Tyson, Vedantam, 744K) and New York Times (1/3, Dao, 1.19M), among other newspapers, also report the story.

Bernanke Faces Difficult Balance Sheet, Greenspan Comparisons. The Wall Street Journal (1/3, Ip, 2.11M) reports that incoming Federal Reserve Chairman Ben Bernanke faces "two major stumbling blocks" as he steps into the post being vacated by outgoing chairman Alan Greenspan: "difficult comparisons" with Greenspan and "a balance sheet with potential land mines." Bernanke's job "is complicated by a balance sheet loaded with debt and possibly overvalued assets. … 'It could be argued that Greenspan is handing Bernanke a poisoned chalice: an economy with an impressive track record, but one burdened with unprecedented financial imbalances,' Martin Barnes, editor of the Bank Credit Analyst, a forecast journal, wrote in November. 'It will be hard to rebuild household savings, reduce the current-account deficit and stabilize the housing sector without causing some economic pain.'"

Economy Expected To Grow For Fifth Straight Year, But At Slower Rate. The Wall Street Journal (1/3, Gerena-Morales, Annett, 2.11M) reports, "Strong spending by businesses should power the nation's economy to a fifth straight year of expansion in 2006, according to a survey of economists' forecasts, but a softening housing market is likely to slow the overall pace of growth. For the past five years, real-estate wealth has supported the economy by providing consumers with cash to buy everything from designer kitchens to luxury vacations to new or second homes. Some economists believe that the boom has been responsible for creating more than one million American jobs since 2000." But "as home sales start to slow and the inventory of unsold homes climbs, many economists believe that home prices will rise more gradually, or even decline, delivering a jolt that causes consumers to rein in spending. That, in turn, may cause economic growth to slow." The

Journal adds, "The consensus forecast of 56 economists surveyed by The Wall Street Journal is that the nation's gross domestic product -- the broadest measure of economic output -- will grow at an annual rate of 3.5% in the first half of 2006 and 3.1% in the second half. While those growth rates are considered respectable, they would fall short of the 4.1% average of the past 2½ years. … On the positive side, economists expect overall inflation to moderate this year."

Hubbard Credits Bush Tax Cuts With Helping Economy After Recession. Former Chairman of the Council of Economic Advisers Glenn Hubbard said on Fox News' Special Report (1/2), "The economy is growing at a potential rate of around 3.5 percent, which is truly extraordinary. It really traces the two things, I think. One is how well financial markets work to allocate risk and capital in the country. And the other is how amazingly flexible American labor markets are. There's really no economy in the world that has capital and labor markets as efficient as this one." Asked about polls showing that President Bush is getting credit for the "revival of the economy," Hubbard said that "the president deserves credit for a set of tax policies that really helped the economy bounce back from the recession. But the underlying strength of the economy has little to do with Washington and a lot to do with the kind of institutions that helped the economy absorb technological change and absorb shocks, whether those shocks in financial markets or the real economy in your Katrina example. That is really the heart and soul of this high growth rate for the economy."

Stock Market "A Dud" In '00s. USA Today (1/3, Shell, 2.31M) reports, "This isn't your father's bull market. The '80s were great. The '90s were even better. But the '00s so far have been pretty much a dud. … It's unlikely, for example, that the Dow Jones industrial average, which declined 0.6% in 2005, will be able to come anywhere near its 228% gain in the '80s and its 318% gain in the '90s. The blue-chip barometer is actually down 6.8% since the end of 1999."

However, the New York Times (1/3, Dash, 1.19M) runs a report under the headline "After A Resilient '05, Wall St. Isn't Counting Out '06," in which it says "the economy proved more resilient than the worriers expected. Consumers continued to spend. The housing market did not collapse. Economic growth has been robust. And the stock market even had a year-end rally going - with the Dow Jones industrial average flirting with 11,000 - until it fizzled in the final weeks." So "it is not surprising that Wall Street has muted the alarms about 2006. Over all, analysts are relatively bullish in their outlooks. But concerns remain about the health of consumer spending and the effects of higher interest rates. Five Wall Street analysts who were surveyed predicted that the Standard & Poor's 500-stock index, which closed 2005 at 1,248.49, would end 2006 between 1,170 and 1,400."

Recession Worries Said To Be Rising For 2006. The CBS Evening News (1/1, story 6, 2: 20, Roberts) reported, "Like a roller coaster, the stock market had some wild ups and downs in 2005, but ended up right where it started. So what's next?" CBS (Alfonsi) added, "With big business struggling, unsteady interest rates, and signs of a recession, the best some forecasters are hoping for 2006 is an average year." A lot of investors "saw less-than-strong stock returns in 2005. The Dow finished in the red for the first time since 2002. The S&P was flat and the tech-heavy Nasdaq didn't fare much better. If you consider a year marked with soaring gas prices and natural disasters, those flat numbers don't look too bad. But what was bad news in 2005 could be good news for the market in 2006."

Dallas-Area Among Regions Reporting Robust Employment Numbers. The Dallas Morning News (1/2, Kreimer) reports, "An expanding economy and a skilled labor shortage have sparked a resurgence in the recruitment of employed and unemployed workers alike, including those at the high end of the pay scale, hiring experts say. That makes this year's outlook for job seekers the best since the turn of the millennium. … The Dallas-area job market hasn't seen growth that robust since 2000, when employment rose 3.9 percent, according to Texas Workforce Commission data."

Only Some Parts Of US Said To Be Experiencing Housing Bubble. The New York Times' Paul Krugman (1/2) writes, "In spite of record home prices, housing in most of America remains surprisingly affordable, thanks to low interest rates. That fact may seem to say that there's no housing bubble. But it doesn't. … It's…worth noting that the reason housing was so expensive in 1981 and 1982 was that mortgage interest rates were extremely high. That made recovery easy, because all it took to make housing affordable again was for interest rates to return to normal levels. This time, with interest rates already low by historical standards, restoring affordability will require a big fall in housing prices."

Minimum Wage In 17 States, District Of Columbia Higher Than Federal Level. Nearly half of the US civilian labor force lives in states where the pay if higher than the minimum wage set by the federal government. The New York Times (1/2, Broder) reports, "Seventeen states and the District of Columbia have acted on their own to set minimum wages that exceed the $5.15 an hour rate set by the federal government, and this year lawmakers in dozens of the remaining states will debate raising the minimum wage. Some states that already have a higher minimum wage than the federal rate will be debating further increases and adjustments for inflation." The federal minimum wage was raised from $4.75 in 1997. Since then, "efforts in Congress to increase the amount have been stymied largely by Republican lawmakers and business groups who argued that a higher minimum wage would drive

away jobs. Thwarted by Congress, labor unions and community groups have increasingly focused their efforts at raising the minimum wage on the states, where the issue has received more attention than in Republican-dominated Washington, said Bill Samuel, the legislative director of the national A.F.L.-C.I.O."

NYTimes Says Congress Should Raise Minimum Wage. An editorial in the New York Times (1/3, 1.19M) says, "The federal minimum wage has been a paltry $5.15 an hour for more than eight years. Polls show that there is strong popular support for raising it, but Congress has resisted. Unions, community groups and advocates for the poor are increasingly taking the matter directly to voters through state referendums to raise their states' minimum wages, according to an article yesterday in The Times. Their intentions are laudable, but the efforts only highlight Congress's failure to set the federal minimum wage at a reasonable level." The Times adds, "State minimum-wage referendums are not ideal. Policy matters of this kind are best handled by legislatures, and the nation would be better off with a uniform federal standard. But given where the federal minimum wage now stands, state-level initiatives are the only game in town. Those grass-roots debates may shame Congress into taking long-overdue action to help the lowest-paid workers."

WSJournal Decries NEA Use Of Members' Dues. An editorial in the Wall Street Journal (1/3, 2.11M) says "If we told you that an organization gave away more than $65 million last year to Jesse Jackson's Rainbow PUSH Coalition, the Gay and Lesbian Alliance Against Defamation, Amnesty International, AIDS Walk Washington and dozens of other such advocacy groups, you'd probably assume we were describing a liberal philanthropy. In fact, those expenditures have all turned up on the financial disclosure report of the National Education Association, the country's largest teachers union. Under new federal rules pushed through by Secretary of Labor Elaine Chao, large unions must now disclose in much more detail how they spend members' dues money." The Journal adds that "even a cursory glance at the NEA's recent filings" exposes "the union as a honey pot for left-wing political causes that have nothing to do with teachers, much less students. … It's well understood that the NEA is an arm of the Democratic National Committee. (Or is it the other way around?) But we wonder if the union's rank-and-file stand in unity behind this laundry list of left-to-liberal recipients of money that comes out of their pockets."

WSJournal Praises Yale's Refusal To Give Anarchist Professor Tenure. The Wall Street Journal (1/3, 2.11M) editorializes, "Until recently, David Graeber was an associate professor of anthropology at Yale University, with a field specialty in Madagascar and a salary of $63,000. He is also a self-declared anarchist who has been arrested at antiglobalization rallies. Last spring, Yale denied him tenure. Mr. Graeber was outraged, suspecting the decision might have something to do with his politics." The journal adds, "One might fairly ask of Mr. Graeber why, if his anarchist convictions are sincere, he would seek to join the very employing class that he is otherwise pledged to struggle against. … In recent interviews, Mr. Graeber has given his answer: 'I'm not really an anarchist as a professor,' he told the New York Times. 'I figured I'd be a scholar in New Haven and an activist in New York.' So it turns out that even anarchists have their bourgeois ambitions. That's fair enough, but so is Yale's decision to deny Mr. Graeber tenure, and for what we suspect were not political motives. Among the qualities that characterize Ivy League faculties these days, hostility to liberal or radical politics isn't among them."

WPost Says Baltimore's Problems Predate O'Malley. An editorial in the Washington Post (1/3, A16, 744K) says, "No doubt, Baltimore Mayor Martin O'Malley rues the day when, as a candidate for office, he pledged to reduce the number of murders in the city to 150 annually. Instead, Baltimore's murder rate has remained stubbornly high -- it has not dipped below 250 since Mr. O'Malley took office in 1999 -- and this year the numbers attest again to the ongoing bloodbath. … Now that Mr. O'Malley is trying to become governor, Baltimore's murder rate represents a natural soft target for his political foes. … The question is how much blame can be fairly apportioned to Mr. O'Malley. Under his administration, overall violent crime in Baltimore, including rapes, robberies and assaults, has dropped sharply -- more sharply, in fact, than it has in other large cities. Real estate values have soared and, probably more significantly, Baltimore has stanched the outflow of middle-class residents who fled the city for years, right through the 1990s. Mr. O'Malley's popularity in the city is broad and deep, and no one accuses him of not trying to attack the murder rate head-on." The Post adds, "Political opponents of Mr. O'Malley can make all the hay they want, but the failures in Baltimore that have contributed to the ghastly murder rampage -- including low-performing schools and inefficient parole, probation and juvenile justice systems as well as the drug scourge -- predated his time in office. At issue is how effectively has Mr. O'Malley stepped up to those problems as well. His attempts and failures to rein in the murder rate deserve scrutiny, but so do government and society at large in Maryland -- and at all levels."

New State Laws Deal With Technology, Security. The Christian Science Monitor (1/3, Scherer, 61K) reports on new state laws which will take effect this

year. The Monitor reports, "A number of state legislatures have focused on the impact of technology. For example, some automobile companies are installing 'black boxes' in their more expensive models. These devices, like those in airplanes, record the direction and speed of a car, steering and braking performance, and the status of the driver's seat belt. Now, Nevada has enacted legislation that requires manufacturers to notify buyers if a car contains such a device and what the black box can record. In addition, the information in the box can be downloaded or retrieved only by the owner of the vehicle. … Many states have also become alarmed over 'security breaches,' especially by companies with credit-card or Social Security information. Six states - Connecticut, Illinois, Louisiana, Maine, Minnesota, and Nevada - are requiring companies to notify consumers if sensitive financial information has been stolen. Connecticut goes even further: Residents can "freeze" their credit reports if there has been a slip-up. New Jersey and Virginia, meanwhile, have barred making public a person's Social Security number."

Liberal Crusader Hirschkop Nears Retirement. The Legal Times (1/2, McLure) reports on the impending retirement of long-time liberal attorney Philip Hirschkop, who is "known not only for his legal prowess but his bombastic and outspoken manner. Hirschkop, now 69, is preparing to close his law offices in Old Town Alexandria, Va., marking the end of a colorful, four-decade career that made him an icon among left-wing lawyers." The Times continues, "For the past two decades, Hirschkop has served as the outside general counsel for People for the Ethical Treatment of Animals, the controversial animal rights group known for its militant advocacy of vegetarianism and its proclivity for throwing pies at fur-wearing fashionistas. … But long before he hoisted PETA's standard in battle, Hirschkop had made his mark as a civil rights lawyer and as an opponent of the Vietnam War. Perhaps his most significant case was Loving v. Virginia, a landmark 1967 U.S. Supreme Court case that overturned Jim Crow-era laws banning interracial marriage — a case in which Hirschkop presented the main argument when he was just two years out of law school." The Times adds, "Since that auspicious start, he's worked for a member of the House Un-American Activities Committee, donned a Viet-Cong armband to protest the war, and stood for the free-speech rights of the American Nazi Party. In one six-year span, 17 disciplinary complaints were brought against him at the Virginia State Bar — a distinction Hirschkop bears proudly. The complaints, he says, were 'never for screwing a client, only for making public statements' about pending litigation."

Relief Agency Head Urges Donors To Choose Charities Carefully. Richard M. Walden, president of the international relief agency Operation USA, writes in the New York Times (1/3, 1.19M), "Money is the mother's milk of disaster relief. And over the last 12 months - with the Indian Ocean tsunami, the hurricanes on the Gulf Coast and the Pakistan earthquake - fund-raising records have been broken by the King Kong of relief agencies, the American Red Cross, and by many smaller organizations as well. … In late November it was reported that the American Red Cross still had $400 million of the $567 million it had collected for the tsunami since Dec. 26, 2004. Meanwhile, many of the countries hit by the waves, all of which have their own national Red Cross or Red Crescent societies, continue to beg for more help with housing, health and education programs. Why our Red Cross holds on to so much money is a mystery, but it is hardly the only agency that does so. A survey by InterAction, an umbrella group of relief agencies, found that many other charities reported spending far less than they took in last year; an average of just 42 percent of the money received by 62 relief groups providing tsunami relief has been spent." Walden adds, "With the incendiary combination of huge government contracts, Internet fund-raising and appeals based on mass disasters, the charity business has entered a new age. Americans should continue to help those in dire need, but they should also look around before sending a check or clicking the 'donate' button."

Two Rescued After Plane Crashes Near New York City. NBC Nightly News (1/2, story 6, :20, Holt) reported, "A successful rescue today just north of New York City. Police and Coast Guard helicopters pulled two men out of the frigid Hudson River after their single-engine plane went down shortly after the pilot had issued a mayday call. An FAA spokesman says the men were a flight instructor and his student. Both are being treated tonight for hypothermia."

New Rules Could Lead To Increased Minimum Credit Card Payments. NBC Nightly News (1/2, story 7, 2:20, Holt) reported, "Just in time for those post-holiday bills to start piling up in your mailbox, some new rules that banks are now enforcing that will lead to higher minimum credit card payments for everyone. As of now, 13% of credit card holders pay just the minimum payment each month. And if you're among them you may be in for a surprise when you open that next bill." NBC (Shamlian) added, "Too many customers are saying 'charge it' too often. At least, that's the view of banking regulators who are behind the guidelines aimed at getting people to pay more, so they can get out of debt quicker. In the past, some minimums didn't cover even the interest due. The government guidelines say payments should cover at least 1% of principal, plus interest and fees. As of this month, all banks are complying." Nessa Feddis, American Bankers Assn.: "For the consumers in the long term, it means they'll pay less interest and they'll pay the

balance off more quickly." Shamlian: "It could be a painful transition. On a balance of $5,000, the payment would jump from $100 to $200 a month. But that larger minimum payment means the debt would be erased in about two and a half years instead of almost seven years."

Questions Raised About Attorney Suing Ex-Client For Former Adversary. The Wall Street Journal (1/3, Davies) reports, "Don King makes a good living off boxers in the ring, and Judd Burstein has done well off Mr. King in the courtroom. … Since 1997, Mr. Burstein, a Manhattan lawyer, has scored a string of legal victories representing fighters in contract disputes against boxing's most famous promoter. In all, Mr. Burstein estimates he has cost Mr. King $25 million and pocketed $3 million to $4 million for himself." The Journal continues, "The acrimony between the two has been so intense over the years that Mr. Burstein once referred to the promoter as a 'cancer' on boxing. Mr. King described Mr. Burstein as an 'insidious insect.' … But now, Mr. Burstein finds himself in Mr. King's corner. The pugnacious attorney has switched sides and is representing the fight promoter in a lawsuit against Christopher Byrd, the International Boxing Federation heavyweight champ, whom Mr. Burstein recently represented in a suit against Mr. King. 'It's good to have him on my payroll now,' Mr. King says of Mr. Burstein." The Journal adds, "There's no rule explicitly prohibiting lawyers from representing someone they once sued. But legal experts say it's rare for an attorney to sue one person on behalf of a client and then sue the former client on behalf of the former adversary. … Complicating matters: The previous lawsuit and the current one involve a dispute over the same contract."

Texas Said To Be At Epicenter Of 2006 Congressional Races. The Dallas Morning News (1/2, Gillman) says Texas "is sure to be the epicenter of this year's congressional races, thanks to some unique factors, especially the trial of former House Majority Leader Tom DeLay and Democrats' efforts to leverage his ethics problems into a national wave." Unless DeLay "is convicted or the court throws out Texas' current congressional map, voters can expect spirited contests in only three Texas districts, and the campaign that officially begins today– the deadline for candidates to file paperwork to run in the March 7 primaries – probably won't alter the lineup much." DeLay "has his legal woes. Freshman Rep. Henry Cuellar, a Laredo Democrat, won the primary by just 58 votes two years ago after several bitter recounts. And Rep. Chet Edwards of Waco is a Democrat in a heavily Republican district." DeLay's district "is solidly Republican, but analysts say he's vulnerable, noting that he drew just 55 percent of the vote in winning an 11th term in 2004." Cuellar "served as Gov. Rick Perry's secretary of state and volunteered on the Bush presidential campaign, and his rivals say he's a Republican in disguise. … The district is solidly Democratic. The challenge will be to win without a runoff in April." Edwards "won his eighth term with just 51 percent. Two Republicans have spent months vying for the right to take him on in President Bush's hometown district: Iraq war veteran Van Taylor and Tucker Anderson, a former aide to Dallas Rep. Pete Sessions, a Republican."

GOP Said To Be At Disadvantage In 2006 Midterm Elections. The Washington Times (1/3, Lambro, 90K) reports President Bush and the Republicans "face a tougher midterm election landscape in 2006, due largely to the closely divided American electorate and, ironically, the gains the Republicans have made in the past decade." Few analysts "expect the Democrats to regain control of the House or Senate in November, but many think they likely will pick up seats in both chambers and cut into the Republican advantage in governorships. Republicans have a larger number of vulnerable seats to defend, particularly in Democratic-leaning 'blue' states." Political analyst Stuart Rothenberg said, "This year still looks very much like a Democratic year, and the only question is how big a year it will be for the Democratic Senatorial Campaign Committee and the Democratic Congressional Committee. … At this point, Democratic gains appear to be inevitable." The Times identifies Senate race opportunities for the Democrats in Pennsylvania, Rhode Island, and Ohio, and for Republicans in Minnesota, Maryland, and New Jersey. In the House, "most analysts say Democrats could pick up a half dozen seats, well below the 15-seat gain they would need to win majority control." In the state houses, Democrats "appear likely to make modest gains…where Republicans hold a 28 to 22 advantage."

Dionne Says GOP Disunity Could Hurt Showing In Midterms. In his Washington Post column (1/3, A17), E.J. Dionne says, "The 2006 elections will determine whether Rove's brilliantly constructed machine has staying power or falls apart in the face of adversity. And there was adversity in abundance during 2005." But it is "three strikes and you're out: The social-issues right can't help Bush if its support drives away too many moderates. Pro-business economics can't help if it drives away many in the middle class. And the war on terrorism doesn't help if Bush is seen as managing it badly." It is "customary in columns of this sort to say somewhere around now that the Democrats will need to come up with a plan, a message, a program, etc., etc. I'm all for such things. But in 1958, 1966 and 1978, the out party gained ground largely by exploiting the failures of the party in power and exacerbating the contradictions in its coalition. If the Democrats prosper in 2006, it will be because whatever program they come up with achieves those goals."

Schneider "Political Earthquake" Required For Democrats To Retake Congress In 2006. William Schneider said on CNN's Lou Dobbs Tonight (1/2), "Ever hear of the six-year itch? It's a disease presidents often get after their party has held the White House for six years. The symptoms? Big setbacks for the president's party at the polls. It happened to the Democrats in 1938 and 1966. And to the Republicans in 1958, 1974, and 1986. On the average, the president's party lost 44 House seats and seven Senate seats in those elections. Democrats need to gain just 16 seats this year to win control of the House of Representatives, and seven to take over the Senate. Piece of cake? Not exactly. Very few seats change party these days. Most House seats are safe for one party, and only three Republican senators running for re-election are from blue states." It "would take a political earthquake for the Democrats to win control of Congress this year. But you know, earthquakes have been known to happen."

Barone Also Says Democrats Are Unlikely To Retake House. Michael Barone of US News and World Report said on Fox News' Special Report (1/2), "Democrats need a net gain of 15 seats to win the House, that doesn't seem very many. But if there are only 25 races that are very seriously contested, a net gain of 15 is pretty hard to achieve. So, [DCCC Chairman Rahm] Emanuel is trying to broaden the field and make some districts seriously contested that people would not have thought were in the past." Barone added that retaking the House is "a long shot for the Democrats."

Barnes Says Democrats Won't Win House Or Senate Control. Fred Barnes was asked on Fox News' Special Report (1/3) for his predictions for 2006. Barnes said, "I think Democrats will win House seats, but not the House. They'll win Senate seats, but not control of the Senate. I expect Arnold to be reelected as governor of California. And President Bush's job approval rating, which has bumped up to 50 percent in a couple of polls already. Will stay around 50 percent or higher for most of 2006." Barnes added, "The emerging star among Democratic presidential candidates is Russ Feingold, a Wisconsin senator. Among Republican presidential candidates is George Allen, the Virginia senator."

Trump Rules Out Gubernatorial Bid, Hints At Run For White House.

The New York Post (1/3, Dicker, 624K) reports that Donald Trump on Monday "flatly ruled out running for governor this year -- but hinted he may go for president in 2008. Trump, in a phone call to The Post…declared, 'I'm not going to run for governor because I'm having too much fun doing what I'm doing now." While Trump "repeatedly ruled out a race for statewide office, he strongly suggested he was interested in entering the national political arena in 2008. Trump, who considered an independent run for president in 2000, pointedly noted that his decision not to run governor this year 'doesn't preclude me from doing something [political] in the future.' He then repeatedly ducked questions on whether he would consider running for the White House, repeating that he's too busy for electoral politics. But a political figure close to Trump told The Post, 'Donald is definitely interested in running for president in 2008, possibly as an independent candidate.'"

NYC Transit Strike Seen As Avoidable.

In an op-ed for the New York Times (1/2) Meyer S. Frucher and Joseph M. Bress, former directors of the Governor's Office of Employee Relations for New York State, write, "New York City's transit workers are back on the job. … The city, meanwhile, lost an estimated $1 billion during a frigid holiday shopping week that saw seven million commuters stranded. There's a better way than this to get a contract, and we can institute it simply by building on existing New York state law." The authors note that Gov. Mario Cuomo "signed an amendment to the Taylor Law that specifically addressed transit negotiations, offering a binding arbitration procedure to break deadlocked talks."

Bolton Initiatives Would Give Security Council Members Enhanced Power.

he Washington Post (1/2, A7, Lynch) reports John R. Bolton, the U.S. ambassador to the United Nations, "said he will start the new year by reinvigorating stalled efforts to restructure management of the world body, beginning with a controversial push to seek assurances that the Security Council's five major powers will be guaranteed posts on a new Human Rights Council. Bolton said in an interview that the Bush administration wants to ensure that the United States is never again denied membership in the United Nations' principal human rights body, as it was in 2001, when Austria, France and Sweden defeated a U.S. bid for membership in the Geneva-based Human Rights Commission. … The proposal is part of a broader drive by Bolton to place the five permanent Security Council members -- Britain, China, France, Russia and the United States -- at the center of U.N. decision making."

Musharraf Backs Off Pledge To Take On Madrassas.

The New York Times (1/2, Masood) reports, "As the incendiary training at some of Pakistan's seminaries drew renewed focus in the weeks after the July 7 bombings in London, President Pervez Musharraf promised to bring the schools into the mainstream and expel their foreign students by the end of the year." But" his tough pledge has fizzled." Last week, "the government backed away from its deadline and said it would not use force to deport the students." The schools then "said they would resist any effort to round up the students, and on Sunday, a coalition representing the seminaries called the government's plan 'inhuman, immoral and totally illegal,' The Associated Press reported." The

schools, called madrasas, "were once the Islamic equivalent of Sunday school. … Of the four suicide bombers in the London attacks, at least one had spent time at a madrasa here with connections to militant groups."

The Washington Times (1/2, Ansari) adds "Western intelligence agencies suspect that madrassas served as rendezvous points between senior al Qaeda operatives and Tanweer, Khan and other British recruits." Musharraf, however, "relented on Thursday after clerics said they would rather be incarcerated than comply with orders to expel foreigners or give their names to the authorities."

UN Asks To Interview Assad In Hariri Probe. The Financial Times (1/3, Biedermann) reports, "United Nations investigators on Monday said they want to interview Bashar al-Assad, Syria's president, and Farouq al-Shara'a, his foreign minister, in connection with the murder of Rafiq al-Hariri, Lebanon's former prime minister." The announcement "came days after Abdel-Halim Khaddam, Syria's former vice-president, indicated that Mr Assad might have been personally involved in the run-up to the murder." The UN probe "was awaiting answers from Syria after requesting to speak to Mr Assad, Mr Shara'a and others, a spokesperson for the commission said."

The New York Times (1/3, Fattah, 1.19M) says "the request compounds pressure on the Syrian government just days after a stunning public attack on the president by his former vice president raised new questions about whether the government had been complicit in the assassination." A spokesman for the United Nations investigation told The Associated Press "the commission had sent a request to interview Mr. Assad and Mr. Sharaa, among others," but "would not specify when the request was made. It was not immediately clear whether the request had any connection to the allegation by former Vice President Abdul-Halim Khaddam on Friday that Mr. Assad threatened Mr. Hariri's life months before the assassination."

Former Syrian Vice President Breaks With Assad On Hariri Probe. The Financial Times (1/2, Biedermann) reports, "Syria's former vice-president Abdel-Halim Khaddam said on Friday that he has 'full confidence' in the UN-investigation into the assassination. The UN-team, until recently led by the German prosecutor Detlev Mehlis, has implicated senior Lebanese and Syrian officials." Speaking on the Arab satellite television station al-Arabiya from Paris, "where he has been staying for the last couple of months," Khaddam "announced a break with his country's leadership. He blamed President Bashar al-Assad for a deterioration in Syria's international position. And he said that if Syria had indeed killed Mr Hariri, it could not have happened without the knowledge of Mr. Assad."

Protestors Demand To Know Fate Of Missing Lebanese. The Washington Post (1/2, A1, Shadid) reports, "In the heart of downtown Beirut…women every day…protest demanding to know the fate of their children. Many believe they languish in jails in neighboring Syria. Others are not sure. Behind them, their children's faces stare from pictures tacked to billboards, blank faces with generation-old haircuts, the dates of their disappearances reading like a war memorial yet to be built. The protest…serves as a stark reminder, organizers say, that Lebanese society has yet to confront, much less resolve, the legacy of the most cataclysmic event in its modern history -- the 1975-90 civil war. Fifteen years later, that conflict is still shrouded in silence. Under a 1991 amnesty law, all but a handful of killings were placed beyond prosecution." The Post adds, "The protest's longevity reflects the changes unleashed by the departure of Syrian troops last spring after a 29-year presence. It is a sign of new transparency in public discourse as Lebanon."

Abbas May Delay Palestinian Elections. The New York Times (1/3, Erlanger, 1.19M) reports, "The Palestinian president, Mahmoud Abbas, on Monday raised for the first time the possibility of delaying legislative elections this month, saying the vote would be impossible if Israel did not allow residents of East Jerusalem to participate." Said Abbas, "We are all in agreement that Jerusalem has to be included in the election. … And if it is not included, all the factions agree that there will be no elections." But "a Hamas official in the Gaza Strip, Mahmoud Zahar, told reporters there had been no agreement to accept another delay." Hamas "agreed last summer to postpone the elections, originally scheduled for July, but has insisted on the vote's going ahead this month."

British Hostages Freed In Gaza. The Financial Times (1/2, Davi) reports, "Three Britons held hostage in the Gaza Strip were released by their kidnappers on Friday night, according to unconfirmed reports from Palestine. Human rights worker Kate Burton, 24, and her parents had been freed, Palestinian mediator Kamal Sharafi said. However, the Foreign Office in London was unable to confirm the reports." The Times adds, "Concern grew through the day over the fate of the Britons, after the Palestinian police chief earlier said there had been no demands or contacts from the unidentified hostage-takers."

Palestinian Security Officers Free Italian Hostage. The New York Times/AP (1/2) reports, "Palestinian security officers stormed a building on Sunday where an Italian hostage was being held, freeing the captive in a shootout with his kidnappers." It was "a rare show of force in a wave of kidnappings, shootouts and other violence in the Gaza Strip that has embarrassed the Palestinian president, Mahmoud Abbas, threatening to undermine his Fatah Party in Jan. 25 legislative elections and to strengthen Hamas, the Islamic militant group." The hostage, Alessandro Bernardini, an aide in the European Parliament, "was abducted early Sunday in

Khan Younis." The Washington Times (1/2, Barzak) runs the same AP story.

Italian Tourists Taken Hostage In Yemen. The Washington Times (1/2, Mounassa) reports, "Yemeni tribesmen took five Italian tourists hostage yesterday -- one day after freeing a German family of five that included a former ambassador to Washington. Of the five Italians, three women refused to be released later in the day, insisting on returning to their male companions who remained in captivity, local officials said." It was "the fourth abduction of foreigners in the country in three months."

Ahmadinejad Reportedly Causing Unease Inside Iran. The Los Angeles Times (1/2, Siamdoust) reports, "On the surface, little seems to have changed in the Iranian capital since President Mahmoud Ahmadinejad took office in August. … But underneath the veneer of normality, Iranians are watching as their controversial president settles into office — and their country hardens under his fundamentalist leadership." The Times goes on to report, "To both insiders and outsiders, the political face of Iran seems to have drastically changed. … Ahmadinejad, draped in a Palestinian kaffiyeh, the scarf that he has appropriated to signal his struggle against perceived injustice, has stirred international ire with virulent anti-Israel rhetoric. Meanwhile, his habit of immersing politics in sacred Islamic tradition has chafed critics within Iran." According to the Times, "But even in Iran's mostly conservative parliament, the hard-line president has found himself unable to get traction. In a first for the Islamic Republic, lawmakers turned down four of the ministers Ahmadinejad asked them to approve. It took him three months and four candidates to seat an oil minister. Some reformist legislators even agitated for hearings on the president's 'lack of political competence.'"

Krauthammer Predicts Israel Will Attack Iran This Year. Syndicated columnist Charles Krauthammer, on Fox News Sunday (1/1, Wallace), predicted, "Israel will launch a military strike on Iranian nuclear facilities. There are rumors today in German newspapers that the U.S. and NATO are talking about this. I don't imagine the U.S. or NATO will do this." Israel "will feel that the world isn't acting, and it's going to act on its own."

Sharon To Undergo Heart Surgery. The AP (1/2, Federman) reports, "Israeli Prime Minister Ariel Sharon will undergo a heart procedure Thursday to close a small hole that apparently led to his recent stroke, his office announced Sunday." Doctors "said last week that the procedure, known as a cardiac catheterization, would virtually eliminate the risk of Sharon suffering a similar stroke."

In Abrupt Reversal, Russia Restores Most Gas To Ukraine Pipeline. The Washington Post (1/3, A12, Finn, 744K) reports, "Russia retreated abruptly Monday from its confrontation with Ukraine over natural gas prices, after an uproar in West European capitals over dead-of-winter cuts in gas supplies threatened to undermine Russia's ambition to expand its highly profitable role as a strategic energy partner of the European Union." The "state-controlled Russian energy giant Gazprom" said it "would almost completely restore reductions it made Sunday in the gas it pumps into Ukrainian pipelines that connect to the rest of the continent." The New York Times (1/3, Kramer, 1.19M) adds Gazprom "officials…presented the decision not as a reversal but as a response to Ukraine's 'theft' of natural gas." But "it became clear almost immediately that the driving force in Russia's decision was the sharp criticism across Europe, including countries like Germany that are usually reliable allies."

The Financial Times (1/3, Correspondents) says "European countries on Monday suffered large cuts to their gas supplies as a bitter stand-off between Russia and Ukraine over gas prices intensified. Supplies of Russian gas to Italy fell by 25 per cent, according to Eni, the country's biggest oil and gas supplier. Deliveries of Russian gas to France dropped up to 30 per cent, Gaz de France said. Many central and eastern European countries, which depend heavily on gas from Russia, reported even larger declines."

The Wall Street Journal (1/3, White, Cummins, 2.11M) notes "the sudden crisis highlighted concerns about Europe's dependence on Russia, which supplies a quarter of the continent's gas, at a time of growing fears that the Kremlin is using energy as a political weapon." The Christian Science Monitor (1/3, Weir, 61K) runs a similar report in which it says that "with 80 percent of Russian gas exports flowing through Ukraine, wintry Europe could be hard hit." The Washington Times/Reuters (1/3, Clothier) runs a similar story.

In an analysis piece, the New York Times (1/3, Chivers, 1.19M) says for "President Vladimir V. Putin and Russia, 2006 was supposed to be a banner year. Instead, it has begun badly, and with problems of the Kremlin's own making. The Kremlin, which labored in 2005 to distance itself from the ill will that accompanied its destruction of the Yukos oil company and the bungled handling of the rigged Ukrainian presidential election in 2004, has begun the new year with a display of politics and bullying, followed by partial retreat, that is raising fresh questions about its reliability as an international energy partner."

CNN's Lou Dobbs Tonight (1/2, Romans) said "critics of President Putin say he's using Soviet-style tactics to bully Russia's neighbors." In an editorial, the Wall Street Journal (1/3, 2.11M) says, "Putin certainly has a flair for timing. The Russian President is assuming the chairmanship of the G-8 democratic nations in the same week that he's been

attempting some Soviet-style energy extortion against Ukraine. … The Kremlin's real goal here isn't money so much as political influence over its democratic, free-thinking and formerly subservient Slavic neighbor. A year ago Ukraine's Viktor Yushchenko used his 'Orange Revolution' to defeat the Kremlin's handpicked presidential candidate and turn toward the West. The energy squeeze is Mr. Putin's attempt at revenge, notably coming less than three months before Ukraine's parliamentary elections."

David Satter, who is "affiliated" with the Hoover Institution, the Hudson Institute and Johns Hopkins, writes in the Wall Street Journal (1/3, 2.11M), "With Sunday's accession of Vladimir Putin to the presidency of the G-8, post-Soviet Russia has achieved a new level of recognition and prestige as a democratic state. The recognition is undeserved. Instead of being democratic or even becoming democratic, Russia is daily sinking deeper into authoritarianism and lawlessness. … The Putin regime cannot ignore the views of G-8 colleagues. This is why the West needs to use all its influence to counteract Russia's self-destructive behavior."

Winter Weather Cuts Aid To Earthquake Refugees In Pakistan. The Washington Post/AP (1/3, A14, Khan) reports Pakistani earthquake survivors "struggled Monday to keep their children warm as the bitter winter hit Kashmir, grounding helicopter aid flights and blocking roads for the second straight day. … The Pakistan meteorological office forecast continued rain and snow for the next two days and low temperatures of 21 degrees Fahrenheit in the plains and 7 degrees Fahrenheit above 5,000 feet. For the second straight day, helicopters from the United Nations, foreign militaries and Pakistan's army were not able to deliver winterized tents, clothes, food and other provisions in the quake zone because of poor visibility, said Maj. Farooq Nasir, an army spokesman. They were trying to move supplies by truck, but mudslides and snow have also made some roads impassable, he said."

New Russian Law On NGOs Seen As Stifling Democracy. NBC Nightly News (1/1, story 10, 2:20, Mendenall) reported, "This week, Russia passed a new law that tightens the Kremlin's control over nearly a half million non-governmental organizations or NGOs, many of which have been critical of the president. Like Human Rights Watch, which says the Kremlin, irked by reports of human rights abuses, could use the new law to close it down. … The law also makes it harder to operate for other prominent US organizations promoting democracy, which Putin has accused of spying and supporting political revolutions on Russia's borders in Ukraine and Georgia, something the Kremlin doesn't want to spread much to Russia's borders."

Last Alternative Russian News Outlet Beset By Turmoil. The New York Times (1/2, Kishkovsky) reports, "Recent turmoil in the news department of REN-TV, Russia's last nationwide television network with independent news programming, has caused concern among media analysts and free-speech advocates in the country. … REN-TV has been known for critical news reporting that offered an alternative to state channels' uniformly positive coverage of President Vladimir V. Putin, media analysts said. Its signal reaches more than 113 million people, although its audience share hovers around 5 percent."

Taiwan's President Calls For Increased Defense Spending. The New York Times (1/2, Bradsher) reports Taiwanese President Chen Shui-bian "called Sunday for increased arms purchases and warned against greater economic ties to mainland China, in a televised speech that silenced months of speculation that he might soon seek to improve relations across the Taiwan Strait." The Times notes, "The speech was Mr. Chen's first major policy address since his Democratic Progressive Party fared badly in islandwide municipal elections on Dec. 3. … The Nationalist Party, which favors closer relations with Beijing, did much better in those elections."

Pakistan Negotiating Purchase Of Chinese Nuclear Reactors. The Financial Times (1/3, Bokhari) reports, "Pakistan is negotiating the purchase of between six and eight nuclear power reactors from China during the next decade in the most ambitious expansion yet of the country's nuclear energy capability. … The plants are expected to be completed by 2025, with construction starting by 2015, a senior Pakistani official told the Financial Times."

Sudanese Refugees In Egypt Vulnerable Following Deadly Riot. The New York Times (1/3, Slackman, 1.19M) reports, "Hundreds of Sudanese have been released from police detention camps onto the streets of this city with no money, no place to live - and in many cases, no shoes - three days after the riot police attacked a squatter camp set up as a protest to press the United Nations to relocate the migrants to another country. … The attack officially left 26 dead, including seven small children, and many others injured." The Times adds, "So many were left dead, and the international condemnation was so embarrassing, that President Hosni Mubarak has told the attorney general to investigate. But the government's official position is that the Sudanese were to blame. Magdy Rady, the government's chief spokesman, said the Sudanese injured their own people by trampling those who collapsed, and he said they also attacked the police, injuring more than 70 officers." The Times notes, "The Sudanese were unarmed

and many were barefoot. The police were wearing riot gear, including helmets with face shields, and wielded truncheons."

Korean Retailers Exert Power In China. The New York Times (1/2, Onishi) reports, "At Korea City, on the top floor of the Xidan Shopping Center, a warren of tiny shops sell hip-hop clothes, movies, music, cosmetics and other offerings in the South Korean style. To young Chinese shoppers, it seemed not to matter that some of the products, like New York Yankees caps or Japan's Astro Boy dolls, clearly have little to do with South Korea. Or that most items originated, in fact, in Chinese factories. … From clothes to hairstyle, music to television dramas, South Korea has been defining the tastes of many Chinese and other Asians for the past half decade."

Morales Election Seen As Evidence Of Castro's Growing Influence. The Washington Post's Jackson Diehl (1/2) writes, "Here's a sad but safe new year's prediction: U.S. relations with Latin America, which plunged to their lowest point in decades in 2005, will get still worse in 2006." Bolivia's Evo Morales "will probably take instruction from Chavez, Kirchner and Fidel Castro -- who at age 79 must believe he is finally seeing the emergence of the totalitarian bloc he and Che Guevara tried and failed to create in the 1960s."

Bolivia's Morales Says He Will Be America's "Worst Nightmare." Time (1/9, Padgett) reports that Bolivia's President-elect Evo Morales "won a stunning landslide in last month's election in no small part because he pledged to legalize far more cultivation of coca, which Aymara Indians like him have chewed for centuries for traditional medicinal purposes and which the U.S. has tried for decades to eradicate in Bolivia because drug traffickers use it to make cocaine. Morales impishly claims that coca-leaf extract is part of the formula of the classic American beverage Coca-Cola (a legend the company has consistently declined to comment on) and adds, 'It's not right that exporting coca is legal for Coca-Cola but not for the rest of us!' The Yankee baiting is part of Morales' stated intention to be the U.S.'s 'worst nightmare.'" The Bush Administration "has reason to be spooked. Morales' win has helped build momentum for a resurgence of leftist and often anti-U.S. candidates around Latin America. At least nine presidential races are slated for the region this year, and leftists could win at least five -- including those in the two most populous countries, Brazil and Mexico, as well as in coca producers like Peru and Ecuador. Leftists have toppled conservative governments in Uruguay and Honduras, and socialist Michelle Bachelet is favored to win Chile's presidential runoff on Jan. 15. To punctuate the situation, the radical left-wing President of oil-rich Venezuela, Hugo Chavez…is all but certain to be re-elected at year's end."

Ivory Coast Military Installation Attacked. The New York Times/AP (1/3) reports, "Gunmen attacked the main military barracks in Abidjan, Ivory Coast's largest city, on Monday, with gunfire and heavy explosions that shook the surrounding area, authorities said. The armed forces chief, Gen. Phillipe Mangou, said that the attack occurred around 6 a.m. at Camp Akuedo, and that military forces had repulsed it. There was no word on who carried out the assault."

Subsistence Farming Said To Encourage Child Labor In Ethiopia. The Washington Post (1/3, A1, Wax, 744K) reports Ethiopia "has one of the highest rates of child labor in the world," according to the UN. Nine million children "are employed, 90 percent of them in the agricultural sector. … Factors pushing children into the fields include ancient farming techniques, overworked land, the AIDS epidemic and a booming population of 74 million." The Post notes, "It is also an impoverished rural society where 85 percent of the population farms two-acre plots of land, too small to turn a profit, and nearly every plot is worked to exhaustion. Studies have shown that cultures dependent on subsistence farming also have the highest rates of child labor."

Former Political Prisoners Detail Burmese Junta's Abuses. The Washington Post (1/3, A12, Sipress, Nakashima, 744K) reports on Burmese political prisoners Min Ko Naing and Myo Myint both of whom "passed more than a third of his life in prison when both were released in 2004. Min Ko Naing, 44, remained in Burma, under scrutiny of the secret police. Myo Myint, 43, fled to a small town just over the border in Thailand. Their testimony, provided in separate interviews last month, highlights the psychological and physical abuse endured by political prisoners in Burma, which is ruled by a military junta. More than 1,100 people remain in jail for seeking democratic reform, according to Amnesty International. The two men's accounts reveal how determined they remain to press for social change despite torture inside prison walls and only the remote prospect for a shift in power outside them. Myo Myint now works with a group advocating prisoner rights. Min Ko Naing is urging the government and its opponents to set aside political differences to ease the country's deepening poverty and treat spreading disease."

Strike Follows Purge At Beijing Newspaper. The Christian Science Monitor (1/3, Marquand, 61K) reports, "An emotional strike by 100 journalists at [Beijing's] most popular and lively newspaper follows a 16-month campaign to quash a broad range of 'unapproved' public speech in areas verging on politics or society. … In the case of Beijing News, whose progressive editor Yang Bin was replaced without warning last week, Chinese authorities dealt a seemingly fatal blow to

a publishing project that two years ago gave the press some freedom to experiment. Last June the paper reported on violent land disputes in Hebei province, and last month, in what may have precipitated the purge, it published tame, but independent, stories on the official coverup of a massive benzene chemical spill in the Songhua River. Last Thursday, in a gritty south Beijing neighborhood, nearly 100 reporters left the news offices. They began a short-lived strike - a rarity in China - and signed a petition asking for Mr. Yang's reinstatement."

Kirchner Seen As Moving Argentina To Left. The New York Times (1/3, Rohter, 1.19M) reports, "Just four years ago, Argentina's economy was prostrate and its politics in chaos, after a financial crisis resulted in bank deposits being frozen, the government defaulting on more than $100 billion in debt and five presidents holding office in two weeks. But on Tuesday, the country is expected to pay off the last of its debt to the International Monetary Fund and simply walk away from further negotiations with the group. … The $9.8 billion payment is an important symbolic milestone and just one of several recent signs that President Néstor Kirchner appears to be concentrating more power in his own hands and steering his government to the left. Since a midterm election victory in October, Mr. Kirchner has also moved to establish an alliance with Venezuela's populist leader, Hugo Chávez, and, as a traditional Peronist, to extend the hand of the state deeper into the economy, the judiciary and the news media."

LATimes Says North Korea Worsening Famine With Secrecy. The Los Angeles Times (1/2) editorializes, "Many third world countries would have been driven to the wall by back-to-back years of floods and drought. But North Korea, which suffered nature's disasters a decade ago, makes its problems worse with its leader's paranoid, Stalinist determination to isolate the nation from outsiders. For 10 years, the United Nations' World Food Program has done what it could to limit the number of deaths by famine, providing millions of tons of food worth more than $1 billion. When Pyongyang sometimes refused to let U.N. officials visit a province, the organization cut off the food. Its policy of 'no access, no food aid' is necessary to ensure that dictators such as North Korea's Kim Jong Il don't take the milk and grain and give it to their soldiers and trusted civil servants, rather than those who need it most. But now North Korea has forbidden private charities and the U.N. agency to deliver food. Pyongyang claims an improved harvest last year, and help from China and South Korea, will provide enough to feed its 23 million people. But outside experts are doubtful. A more likely reason for stopping food aid is to keep foreigners away and increase the already tight control by Kim's regime."

NYTimes Says Administration "Name-Calling" Against Korea Is Counter Productive. The New York Times (1/3, 1.19M) editorializes, "Calling North Korea nasty names is easy and satisfying. Negotiating is hard and frustrating. So for four years, the Bush administration put more creative energy into name-calling than into serious talks. The main result was that the North moved four years further along toward being able to threaten its neighbors with nuclear weapons. … The North can afford to take its time over resolving the nuclear issue, wasting diplomatic energy on disruptive and bullying tactics. The United States cannot afford that luxury. It makes little sense for the Bush administration to return to name-calling or to rule out high-level talks on the Patriot Act sanctions." According to the Post, "The window that briefly opened for diplomacy after John Bolton moved from nonproliferation issues to the United Nations is once again in danger of being slammed shut, reportedly at the urging of Vice President Dick Cheney and Mr. Bolton's successor in the nonproliferation job, Robert Joseph."

THE BIG PICTURE:

Headlines From Today's Front Pages.

Los Angeles Times:
"Cantonese Is Losing Its Voice."
"Voting System Results Still Out."
"New Beginning In U.S. Comes At Agonizing Cost."
"W. Virginia Blast Leaves 13 Coal Miners Trapped."
"Storm Stoked By Fierce Winds."
"Rain Dampens Everything But Spirit."

USA Today:
"Hospital Building Booms In 'Burbs."
"Dangerous Gas Hinders Effort; Mine Had Safety Citations."
"Bush Entering A Tough Time For Two-Termers."

New York Times:
"New Rules Set Fr Giving Out Antiterror Aid."
"Russia Restores Most Of Gas Cut To Ukraine Line."
"Blast Traps 13 In A Coal Mine In West Virginia."
"As Argentina's Debt Dwindles, President's Power Steadily Grows."
"Owners' Web Gives Realtors Run For Money."

Washington Post:
"Independence To End Flights On Thursday."
"Pr. George's Community A Sanctuary No More."
"U.S. Cedes Duties In Rebuilding Afghanistan."
"As Rural Ethiopians Struggle, Child Labor Can Mean Survival."

"Obese Patients Increase Need For Specialized Medical Care."
"West Virginia Mine Explosion Traps 13."

Washington Times:
"Redskins Celebrate Long Awaited Playoff Return."
"Discount Carrier To Stop Flying."
"Europe Spurs Russia To Turn On Gas."
"Iraq, Economy Return To Top Of Bush Agenda."
"Saddam Prefers Death By Shooting."
"13 W. Va Miners Trapped By Blast; Resuce Team Sent."

Atlanta Journal-Constitution:
"Bulldogs Lose Nail Biter At Dome."
"Crews Dig For Miners."
"Storms Rake Metro Area."
"A Tiny Town That's Fit To Be Tied - Twice."

Dallas Morning News:
"Town Destroyed By Fire."

Houston Chronicle:
"Abramoff Plea Bargain Announcement Expected."
"Strayhorn Declares She'll Run As Independent."
"Fed Up With Gunshots, One Man Calls On The Angels."
"Absentee Ballots Show Turn In Mexico's Politics."
"4 KBR Contractors Killed In Collision At Iraq Base."
"Texans Let Capers, Two Top Assistants Go."

Story Lineup From Last Night's Network News:
ABC: Preempted by College Football.
CBS: WV Mine Accident; TX-OK Brushfires; CA Flooding; Abramoff Plea Bargain; Food Labels; American Heroes; Iraqi Burials; Japan Birthrate.
NBC: WV Mine Accident; Mine Accident Analysis; Mine Accident Witness; CA Flooding; TX-OK Brushfires; NY Plane Accident; Credit Card Payments; Iraq-Oil Prices; Indonesia Flooding; Germany-Ice Rink Collapse; Iraq-US Teen.

Story Lineup From This Morning's Radio News Broadcasts:
ABC: WV-mine explosion; CA-levee repairs; CA-heavy rains; OK, TX-wildfires.
CBS: WV-mine explosion; CA-heavy rains; OK, TX-wildfires.
NPR: WV-mine explosion; Independence Air shut down; Haiti-presidential candidate arrested; Germany-ice rink collapse; CA-heavy rains; Midwest, South-tornadoes; Israel-Gaza car bombing.

WASHINGTON'S SCHEDULE:

Today's Events In Washington.

White House:

PRESIDENT BUSH – Participates in a meeting on the Patriot Act, Roosevelt Room, White House. Pool at bottom.

VICE PRESIDENT CHENEY – No public schedule.

US Senate: FLOOR SCHEDULE _ 12 p.m. The Senate will convene for a pro forma session. Notes: Once today's session adjourns, the Senate is not expected to meet until 10:00 a.m. on Wednesday, Jan. 18, 2006.

US House: No Scheduled Events.

Other. ASSOCIATION OF AMERICAN LAW SCHOOLS _ The Association of American Law Schools holds their five day annual meeting. Workshops and plenary sessions for law professors, researchers and professionals. Topics will include the Iraqi Constitution, educational diversity, balancing life in law school, religious law, contracts, economics and international law. Location: Most events at Washington Marriott Wardman Park, 2660 Woodley Road NW.

URBAN SECURITY-CHERTOFF _ 10:30 a.m. Homeland Security Secretary Michael Chertoff participates in a news conference on 2006 Urban Area Security Initiative Grants. Location: Building 21, Nebraska Avenue Complex, 3801 Nebraska Ave, NW.

THE ATTORNEY GENERAL'S *NEWS BRIEFING*

PREPARED FOR THE OFFICE OF PUBLIC AFFAIRS, U.S. DEPARTMENT OF JUSTICE

TO: THE ATTORNEY GENERAL AND SENIOR STAFF

DATE: THURSDAY, JANUARY 26, 2006 7:45 AM EST

TODAY'S EDITION

Civil Law:

Civil Rights:

Antitrust:

Environment:

FBI/DEA/ATF/USMS:

Immigration:

Tax:

Congress-Administration:

Other News:

TERRORISM NEWS:

Specter To Question Gonzales On NSA Surveillance. The Pittsburgh Post-Gazette (1/26, McGough) reports, "If Attorney General Alberto R. Gonzales thought he might be spared tough questioning from Republican senators when he testifies about the warrantless wiretapping of Americans thought to be in contact with foreign terrorists, Sen. Arlen Specter, R-Pa., yesterday disabused him of that notion." The Post-Gazette continues, "In a letter sent to the attorney general and shared with the press, the chairman of the Senate Judiciary Committee propounded a series of questions that in a courtroom setting might be called 'leading' and requested that Mr. Gonzales answer them in his opening statement before the committee on Feb. 6. … The combative nature of the letter wasn't altered by the fact that the printed salutation to 'Attorney General Gonzales' was replaced by a hand-written 'Al.'" The Post-Gazette adds, "The letter honed in on the Bush administration's assertion-ridiculed by critics -- that Congress empowered the president to engage in electronic surveillance of Americans without a court order when it passed a resolution after the Sept. 11 2001, attacks authorizing him to 'use all necessary and appropriate force' against terrorists. … Mr. Specter asked: 'In interpreting whether Congress intended to amend the Foreign Intelligence Surveillance Act by the Sept. 14, 2001, resolution, would it be relevant on the issue of congressional intent that the administration did not specifically ask for an expansion for executive powers under FISA?' … Mr. Specter further asked: 'If Congress had intended to amend FISA by the resolution, wouldn't Congress have specifically acted to [do so] as Congress did in passing the Patriot Act giving the executive expanded powers and greater flexibility in using "roving" wiretaps?' … Mr. Specter also made it clear he would press Mr. Gonzales about the administration's other legal rationale for the surveillance -- that it flowed from Mr. Bush's constitutional authority as commander-in-chief."

The National Journal's Technology Daily (1/25, Stirland) reports, "Pressure mounted on the Bush administration Wednesday to provide lawmakers with answers on domestic spying activities. … Senate Judiciary Committee Chairman Arlen Specter, R-Pa., released a three-page letter with detailed questions to Attorney General Alberto Gonzales on the president's decision in 2002 to secretly authorize domestic wiretaps without warrants. … The letter includes many of the questions that constitutional scholars have been posing about the president's order, and several questions could put Gonzales in an awkward position." Technology Daily adds, "At the same time, Democrats on the Senate Intelligence Committee demanded that Chairman Pat Roberts, R-Kan., hold a business meeting so the committee can vote to investigate several aspects of the administration's domestic spying. … Under committee rules, Roberts is obligated to hold a meeting if at least five members formally ask for one. All seven Democrats on the panel signed the request to Roberts." Technology Daily notes, "A majority vote is needed to move ahead with the investigation. Two Republicans on the committee, Sens. Chuck Hagel of Nebraska and Olympia Snowe of Maine, have asked Roberts for a hearing on the matter. Roberts has said nothing publicly about holding a hearing. … Also on Wednesday, a group of Democrats, including Sens. Richard Durbin of Illinois and Charles Schumer of New York, sent a letter to President Bush asking him for specific changes in the law that he believes are necessary to permit effective surveillance of suspected terrorists."

Gonzales Warned To Expect Tough Questions From Senate Committee. The CBS Evening News (1/25, lead

story, 4:00, Roberts) noted, "NSA officials aren't likely to be called in the first round of hearings, but in a letter, the Attorney General was warned by the Judiciary Committee chair, he's in for a full day of grilling on February 6. Among the questions: Why did the President bypass the Federal court that covers wire taps, and how does he justify not more fully informing Congress? The President insists he has informed Congress but complains existing laws aren't nimble enough to cover the explosion of technology through which terrorists communicate."

NBC Nightly News (1/25, lead story, 3:00, Mitchell) also noted, "The White House says when Congress authorized the war on terror after 9/11, it gave the President the power to spy without court orders. But even some powerful Republicans are challenging the program's legality. Today, Judiciary Committee chairman Arlen Specter sent this 'dear Al' letter to Attorney General Alberto Gonzales, listing 15 tough questions he will be asked at a hearing two weeks from now, including whether the spying was an illegal expansion of presidential power." Sen. Specter: "There was no thought when we passed the authorization for the use of force that it had implications for electronic surveillance."

The Baltimore Sun (1/26, Davis, 296K) focuses on Specter's letter, reporting that even as Bush spoke, "questions mounted about the administration's legal justifications for the program. A key Republican senator took issue with Bush's defense of the operation, which was secretly authorized by the president after the Sept. 11, 2001, terrorist attacks and targets some communications inside the United States. Also, new reports surfaced suggesting that the administration had rejected an earlier proposal in Congress that would have made it easier to obtain court approval for domestic wiretapping."

Administration Dismissed 2002 Proposal To Change Surveillance Warrant Standard. The Washington Post (1/26, A4, Eggen) reports, "The Bush administration rejected a 2002 Senate proposal that would have made it easier for FBI agents to obtain surveillance warrants in terrorism cases, concluding that the system was working well and that it would likely be unconstitutional to lower the legal standard." The Post continues, "The proposed legislation by Sen. Mike DeWine (R-Ohio) would have allowed the FBI to obtain surveillance warrants for non-U.S. citizens if they had a 'reasonable suspicion' they were connected to terrorism -- a lower standard than the 'probable cause' requirement in the statute that governs the warrants. … The administration has contended that it launched a secret program of warrantless domestic eavesdropping by the National Security Agency in part because of the time it takes to obtain such secret warrants from federal judges under the Foreign Intelligence Surveillance Act (FISA)." The Post adds, "The wiretapping program, ordered by President Bush in 2001, is used when intelligence agents have a 'reasonable basis to believe' that a target is tied to al Qaeda or related groups, according to recent statements by administration officials. It can be used on U.S. citizens as well as foreign nationals, without court oversight. … Democrats and national security law experts who oppose the NSA program say the Justice Department's opposition to the DeWine legislation seriously undermines arguments by Attorney General Alberto R. Gonzales and others, who have said the NSA spying is constitutional and that surveillance warrants are often too cumbersome to obtain. … 'It's entirely inconsistent with their current position,' said Philip B. Heymann, a deputy attorney general in the Clinton administration who teaches law at Harvard University. 'The only reason to do what they've been doing is because they wanted a lower standard than 'probable cause.' A member of Congress offered that to them, but they turned it down.'" The Post notes, "But Justice Department officials disagreed, saying the standard the department opposed in 2002 is legally different from the one used by the NSA. … 'The FISA "probable cause" standard is essentially the same as the "reasonable basis" standard used in the terrorist surveillance program,' said spokeswoman Tasia Scolinos, using the term for the NSA program the White House has adopted. 'The "reasonable suspicion" standard, which is lower than both of these, is not used in either program.' … Justice officials also said that even under a different standard, the process of obtaining a surveillance warrant would take longer than is necessary for the NSA to efficiently track suspected terrorists."

Under the headline "Words, Deeds On Spying Differed," The Los Angeles Times (1/26, Savage, 958K) also reports on the 2002 bill, noting that the administration's "public position then was the mirror opposite of its rationale today in defending its warrantless domestic spying program, which has come under attack as a violation of civil liberties. … A Justice Department spokesman confirmed Wednesday the administration had opposed changing the law in 2002 in part because it did not want to publicly debate the issue. 'There was a conscious choice not to have a public discussion about it. It could have exposed the program. This was a military defense intelligence program,' said the spokesman." The Times notes Sen. Patrick Leahy "accused the administration of having tried 'to paper over the legality of a secret spying program. If they really believed the current law is too burdensome, the Bush administration should have asked Congress to change it, but they did not. Instead a top lawyer in the Bush administration did just the opposite.'"

Knight Ridder (1/26, Landay) reports, "James A. Baker, the Justice Department's top lawyer on intelligence policy, made the statement before the Senate Intelligence Committee on July 31, 2002. He was laying out the department's position on an amendment to FISA proposed by

Sen. Mike DeWine, R-Ohio. The committee rejected DeWine's proposal, leaving FISA intact. … So while Congress chose not to weaken FISA in 2002, today Bush and his allies contend that Congress implicitly gave Bush the authority to evade FISA's requirements when it authorized him to use force in response to the Sept. 11, 2001, attacks three days after they occurred - a contention that many lawmakers reject." Knight Ridder adds, "Glenn Greenwald, an Internet blogger, first connected the earlier Justice Department statement to the Bush administration's current arguments on his Web log, called Unclaimed Territory. … Baker's 2002 statement drew new attention Wednesday as the White House continued its campaign to justify eavesdropping on Americans who are suspected of being in contact with al-Qaida or other terrorist groups, despite possible violation of FISA." Knight Ridder notes, "Brian Roehrkasse, a Justice Department spokesman, said Wednesday that Gonzales stands by the administration's current view that FISA warrant requirements impose 'additional layers of review' that sacrifice 'critical speed and agility.'"

Administration Launches Campaign To Frame Surveillance Debate. The Dallas Morning News (1/26, Mittelstadt) reports, "The Bush administration raced this week to defend its warrantless domestic spying program, with several aims in mind, experts say: Win over a conflicted public; force Democrats into an arena that plays to GOP strength; and head off talk of impeachment and special prosecutors." The News continues, "With polls showing the public sharply divided over the controversial surveillance program, the White House and its critics – Democrats, small-government conservatives and civil libertarians – are engaged in a high-stakes contest to frame the debate. … 'If it's defined primarily as "government abuse, the president out of control, the White House running roughshod over basic constitutional rights," it would be a major problem for an extended period of time for the president – both on Capitol Hill but also with the voters,' said political analyst Stuart Rothenberg. … 'If the issue is defined more as "protecting national security, keeping people safe, stopping terrorism," then what the Democrats immediately saw might be a good issue for them could actually be turned around for the president and the Republican Party.' … Though the court of public opinion is key, some suggest that the political system or the courts will be the ultimate arbiter of the program's legality – and the far weightier question of whether Mr. Bush is claiming executive powers outside the bounds of the Constitution or the law." The News notes, "Mr. Specter has summoned Attorney General Al Gonzales for a Feb. 6 hearing and is under pressure from Democrats to invite former Deputy Attorney General James Comey and other administration officials who reportedly raised concerns about the legality of the domestic surveillance."

Debate Over Legality Of NSA Surveillance Narrows. Fox News (1/26) reports, "After three days of a Bush administration offensive and weeks of debate and accusations, some legal experts are coming to terms on what is illegal and what is not in the National Security Agency electronic surveillance program. … 'When the president goes around and speaks ... and says we're monitoring calls from overseas from Al Qaeda to the United States, the NSA can go ahead and do that now under the law,' Sen. Edward Kennedy, D-Mass., said after the Senate Judiciary confirmation hearing of Supreme Court nominee Samuel Alito." Fox News continues, "But Kennedy said independent organizations, like the Congressional Research Service, have studied the legality of the NSA program and say the president has gone beyond what the rules allow. Bush, however, says the eavesdropping program is legal and doesn't overstep the boundaries allowed to him by the Constitution and congressional resolution. … According to legal experts, hypothetically, if the NSA had intercepted calls from alleged terrorists such as Khalid Sheikh Mohammed or Ramzi Binalshibb, both now in custody, while they were abroad, then U.S. intelligence agents could listen to the calls without a warrant. That goes for phone calls with people on the other end of the line who happen to be in United States. … Only when the person inside the United States becomes the target of surveillance is a warrant from the Foreign Intelligence Surveillance court required. … Other experts agree that a warrant is not needed until the U.S.-based individual becomes a suspect. … But others argue that the law says domestic communications monitoring rules apply even when only one end of the call is on U.S. soil. They say that's why Bush signed a highly classified directive approving the program and has to re-approve it every 45 days."

Bush Continues Defense Of NSA Domestic Surveillance Program. President Bush defended the NSA domestic surveillance program yesterday. Media reports describe the President continuing to wage a "campaign" style offensive against its critics, with CBS saying Bush used "his strongest words yet to defend the program" and ABC saying he "made the most dramatic link yet between the September 11th attacks and his controversial domestic spying program." ABC, like most print sources this morning, was referring to the President's reference to the latest Osama Bin Laden tape.

Bush said the tape was a reminder of how serious the terror threat is. Reuters (1/26) reports Bush said "he took…bin Laden's threats of another attack seriously and invoked the al Qaeda leader's recent audiotape to defend a domestic eavesdropping program." The AP (1/26, Pickler) also focuses on Bush's Bin Laden argument, as does the Washington Times (1/26, Sammon, 90K), which notes the

President "the unusual step of imploring Americans to heed the warnings of…bin Laden." Likewise, USA Today (1/26, 2.31M) headlines its brief report "Take Bin Laden Threat Seriously, Bush Warns."

The CBS Evening News (1/25, lead story, 4:00, Schieffer) reported, "The President has clearly decided the best defense is a good offense. Democrats and even some within his own party have raised strong criticism of his decision to eavesdrop without warrants on some Americans, but today the President used his strongest words yet to defend the program." CBS (Roberts) added, "Bush privately told NSA staff today they have his 100% support in the eavesdropping program." His "visit was accompanied by a new White House PR line, casting the program as a vital military operation, one that can't wait for courts to consider warrants." Scott McClellan: "Do you expect our commanders in a time of war to go to a court while they're trying to survey the enemy? I don't think so."

ABC's World News Tonight (1/25, story 5, 0:42, Vargas) reported, "Bush made the most dramatic link yet between the September 11th attacks and his controversial domestic spying program." At the NSA he "said had the eavesdropping program been in effect prior to 9/11, the hijackers might have been stopped." Bush: "We know that two of the hijackers who struck the Pentagon were inside the United States, communicating with al Qaeda operatives overseas. But we didn't realize they were here plotting the attack until it was too late. We must be able to connect the dots, before the terrorists strike, so we can stop new attacks."

NBC Nightly News (1/25, lead story, 3:00, Williams) reported, "When it was first disclosed, the critics pounced upon learning that American intelligence personnel were eavesdropping on Americans who were placing suspect phone calls outside of the country. And while many Americans still say it's illegal domestic spying, the president insists on calling it a terrorist surveillance program and insists it's necessary and within his legal powers. And today, he took his argument right to the source." NBC (Mitchell) added, "Inside the NSA, he brushed off critics who say it is illegal." President Bush: "All I would ask them to do is listen to the words of Osama bin Laden and take him seriously. When he says he's going to hurt the American people again, or try to, he means it."

Fox News' Special Report (1/25, Cameron) said Bush "reiterated that the program has helped prevent attacks and saved lives and that the US must detect and track all al Qaeda communications to secure the homeland."

CNN's The Situation Room (1/25, Bash) added, "One of the things that even the President's opponents say that they give him credit for is knowing how to run a campaign, and that's exactly what the White House has been doing in trying to defend the controversial spying program this whole week. They are also really pulling out all the stops. One of the things that they did…was have the President himself" go to the NSA "to not only thank the people who are conducting his program, but also to, of course, make the arguments that we've heard time and time again about why it is legal and necessary. But another thing that sort of fell into the President's lap, if you will, was, of course, the tape from Osama bin Laden. And so the White House, for the first time today, had the President use that in making the argument for this program." CNN added that Bush "spent a lot of time on making the argument at the NSA today that it is just perhaps people who are talking to members of al Qaeda who could be listened in on, that it is not just people in the United States who are being surveilled, if you will. That is an argument that we've heard many times but certainly more so today."

The Washington Post (1/26, A4, VandeHei, 744K) reports, "Bush, whose aides said they consider the issue a clear political winner, is resurrecting tactics from the last campaign to make the NSA spying program a referendum on which party will keep the United States safe from terrorists." He "has dispatched top White House officials almost daily to defend the program and has sent a message to party activists that he considers fighting terrorism with tools such as NSA eavesdropping the defining issue of the November elections." The Post adds, "Exhibiting an obsession to detail not seen in the Social Security rollout a year ago, the White House is even waging a war on the semantics being used in the debate, lashing out at reporters who call the program 'domestic' spying, because the monitored calls involve a person overseas." It is also "putting out pages of highly detailed -- and often hotly disputed -- legal analyses of the program and drawing what Democratic critics and many independent analysts regard as questionable historical parallels to show Bush is following a long wartime tradition."

The Los Angeles Times (1/26, Gerstenzang, 958K) says Bush's visit to NSA headquarters at Ft. Meade, MD, "was part of a stepped-up campaign in recent days to gain public support for the spying program." Earlier, White House Press Secretary Scott McClellan "defended Bush's decision not to ask a special court for warrants to monitor people in the United States. 'This is a time of war. This is about wartime surveillance of the enemy,' McClellan said, adding a refinement of his earlier arguments: 'We don't ask our commanders to go to the court and ask for approval while they're trying to gain intelligence on the enemy.'"

The New York Times (1/26, Bumiller, Lichtblau, 1.19M) reports Bush "first met privately with employees at the agency, then told a small group of reporters who accompanied him that the program, which intercepts international phone calls and e-mail messages of people in the United States suspected of links to Al Qaeda, had been a crucial tool in fighting terrorism."

The President's speech was widely noted by local television news. Local coverage largely mirrored the national newscasts. For example, WGCL-TV Atlanta (1/25, 11:00 p.m.) reported, "Bush continued his aggressive defense of his domestic spying program today." KPRC-TV Houston (1/25, 4:16 p.m.) reported, "The President' s strong defense of a surveillance program is forcing some Democrats to mute criticism." KPNX-TV Phoenix (1/25, 10:12 p.m.) said Democrats '"disagree [with the President] and the Senate will hold hearings," but as KWGN-TV Denver (1/25, 9:24 p.m.) reported, this is a "controversy…the President himself seems almost anxious to keep alive."

White House Confident Public Supports Monitoring Efforts. NBC Nightly News (1/25, lead story, 3:00, Mitchell) reported, "Democrats think their best argument is the move was the power grab the President and will ultimately prove to be unpopular. Despite the furor, the White House is encouraged by recent polls, showing more Americans care about fighting terror than preserving their privacy." Andrew Kohut, independent pollster: "The public is concerned about civil liberties but what they tell us in the polls is they're more concerned about whether the government is doing enough to protect it from another terrorist attack." Mitchell: "Tonight the President plans to reauthorize the spying for as long as terrorists remain a threat."

Claims NSA Program Could Have Prevented 9/11 Attacks Challenged. The CBS Evening News (1/25, story 2, 2:00, Martin) reported, "The man who ran the NSA on 9/11 has made the most powerful argument in favor of the controversial eavesdropping program." Gen. Michael Hayden: "Had this program been in effect prior to 9/11, it is my professional judgment that we would have detected some of the 9/11 al Qaeda operatives in the United States." He "offered no specifics, and Democratic members of the 9/11 commission dispute it." Former 9/11 commissioner Tim Roemer: "Indicating that an intercepted communication would somehow identify and then stop or block parts of 9/11, I think is stretching this argument entirely too far." Former 9/11 commissioner Bob Kerrey: "We lost them. There was a breakdown in communication that many has nothing to do with the inability of getting an intercept permission to listen to people's communication." Martin: "Hayden stopped just short of saying warrantless eavesdropping could have broken up the 9/11 plot, but today, the White House claimed it might have. You can't prove any of that with what the 9/11 commission found."

Republicans May Propose Expanding Administration Wiretapping Authority. As a sign of growing Republican confidence in supporting Bush's terrorist monitoring policy one unidentified GOP Senator may propose expanding the Administration's wiretapping authority. The CBS Evening News (1/25, lead story, 4:00, Roberts) reported, "The growing response from Republicans in Congress: Tell us what you need. We'll write new laws. In fact, one Republican Senator told CBS News tonight, she might consider loosening the standards for approving the wiretap and allowing more officials at the Justice Department, not just the Attorney General, to authorize eavesdropping, so that it could begin just as soon as the NSA needed it." Schieffer: "Now, just a second, John. Are you telling me, there's a feeling amongst Republicans up in the Congress that they're going to give more people in the government the authority to eavesdrop without warrants? Is that what you're saying here?" Roberts: "That's what one Republican Senator is suggesting, that instead of making all eavesdropping or wiretapping requests go through the Attorney General, that some upper-level officials might be available and able to be able to authorize those wiretaps. It would spread it out among dozens of people as opposed to a single one at the top." Schieffer: "What do you think the mood is up there? Do you think anything like that could pass?" Roberts: "It's certainty being considered by the Republicans. They have the majority in the Senate and in the House, and if they want it, they'll probably get it."

Democrats On House Intel Panel Demand Open And Closed Hearings On NSA Spying. CNN's The Situation Room (1/25, Blitzer) reported, "Democrats on the House Intelligence Committee are demanding that the panel hold both open and closed hearings on the NSA surveillance program. In a letter to the Republican chairman, they say they want to know the purpose of the spying, when it began and when it was first authorized. They want to know the targets of the eavesdropping, who decides what information to collect."

Hillary Clinton Calls Bush's Explanations Of Domestic Spying Program "Strange And Farfetched." CNN's The Situation Room (1/25, Blitzer) reported, "Senator Hillary Clinton says she doesn't know if Mr. Bush broke the law by authorizing these wiretaps without warrants, but today the New York Democrat called the President's explanations about domestic spying -- and I'm quoting now – 'strange and farfetched.'"

Under the headline "Rift Between Parties Over NSA Wiretapping Grows," the Washington Post (1/26, A4, VandeHei, 744K) reports, "In the latest sign of the escalating debate on the issue, Sen. Hillary Rodham Clinton (D-N.Y.) called Bush's rationale a 'strange' and dangerous legal stretch." The "conflicting views of the NSA spying program highlighted by the Bush-Clinton exchange reflect a widening divide over warrantless eavesdropping," and "how leaders in both major parties are trying to shape the debate in preparation for upcoming congressional hearings and this year's elections."

LATimes Says Bush Equating Appeasement With Standing Up For Rule Of Law. In an editorial titled "Spying

By Another Name," the Los Angeles Times (1/26, 958K) says, "With polls showing the American public increasingly skeptical about the need to abridge core constitutional freedoms to wage the war on terrorism, the Bush administration launched a major PR offensive this week to justify its decision to conduct warrantless wiretapping within the United States." The White House "deserves credit for at least making its case. Unfortunately for the president, it's a weak case, and repetition doesn't make it any better." The Administration's "legal case remains wobbly, which may explain…Bush's churlish attitude toward his critics." The President "is equating concerns about the legality of bypassing the courts to obtain a warrant to eavesdrop on Americans with a lack of appreciation for the threats posed by Al Qaeda. In Bush's world, only appeasers stand up for the Constitution."

Judge Orders US To Give Moussaoui Defense Documents About Pre-9/11 Intelligence. The AP (1/26) reports US District Judge Leonie Brinkema "has ordered the government to give admitted terrorist conspirator Zacarias Moussaoui's defense team documents describing what officials knew before Sept. 11, 2001, about al-Qaeda threats and some of its hijackers. … 'Several of the categories of information are so critical to the issues in this case that the court can address some of the requests without a response,' Brinkema wrote. 'Moreover, given the increasingly shortening time before the start of the trial, discovery issues must be resolved quickly.' Granted Tuesday under seal, her order was released Wednesday after government censors blacked out about five lines of it." The AP notes that the "data clearly was sought by the defense for use in the first part of the upcoming court proceeding, in which prosecutors will try to convince jurors that the FBI would have prevented the Sept. 11 attacks if Moussaoui had told federal agents what he knew about al-Qaeda's desire to fly planes into U.S. buildings. The defense will argue that agents had more information about the plot than Moussaoui could provide but still could not prevent the attacks."

Scripps Howard (1/25, Gordon) reports, "The ruling could create a legal showdown, for example, if it requires intelligence agencies to produce classified information that they consider too sensitive to release, even to defense lawyers with government security clearances. … Jury selection is set to begin on Feb. 6, with opening arguments slated for March 6 in a sentencing trial to determine whether Moussaoui, who pleaded guilty to six conspiracy counts last April, should live or die."

Al Arian Lawyers Seek To Withdraw From Case If Retried. The AP (1/26) reports Sami al Arian's defense attorneys, Linda Moreno and Bill Moffitt, "asked a federal judge to let them off the case if prosecutors retry the former college professor on charges of aiding terrorists. … A hearing is scheduled for Friday. 'We gave everything we had, and I'm too exhausted to give anymore,' Moffitt…said Tuesday." The AP notes, "Federal prosecutor Terry Zitek told the court that if the case is retried, his team will need until June to present 'a streamlined case,' which should take about two months to present to a jury."

Texas Men Sentenced For Illegal Exports To Libya, Syria. In a widely-distributed story, the AP (1/26) reports Texas "brothers convicted of sending exports from their U.S. company to countries considered sponsors of terrorism were sentenced Wednesday to federal prison, the U.S. Attorney's Office said. Hazim Elashi was sentenced to 5 1/2 years in prison and will be deported after serving his sentence. His brother Ihsan 'Sammy' Elashi was given a six-year term, which will run consecutively to the four-year sentence he is currently serving. Hazim and Ihsan Elashi, their three brothers and their company," InforCom, "were convicted in 2004 on charges of making illegal technology shipments to Libya and Syria." The AP notes, "Agents from the FBI investigated InfoCom for years and raided the business the week before the Sept. 11 terror attacks. Attorney General John Ashcroft announced the original indictments against the brothers, calling it part of a campaign against 'the financiers of terror.'"

ACLU Files Lawsuit In Support Of Tariq Ramadan. The New York Times (1/26, Preston, 1.19M) reports that the ACLU filed a lawsuit in Federal District Court in Manhattan on behalf of scholar Tariq Ramadan, and three national organizations of academics or writers who have invited him to speak to their members yesterday, "seeking to strike down a clause of the USA Patriot Act that bars foreigners who endorse terrorism from entering to this country." Ramadan "has been denied a United States visa since July 2004, when he was on the verge of moving with his family to Indiana to take up a tenured professor's position at the Joan B. Kroc Institute for International Peace Studies at the University of Notre Dame. … The ACLU, joined by the New York Civil Liberties Union, brought the suit against Michael Chertoff, the homeland security secretary, and Secretary of State Condoleezza Rice, asserting that the Patriot Act clause is unconstitutional and that the ban on Mr. Ramadan violates the First Amendment rights of American thinkers who want to meet with him." The Wall Street Journal (1/26, A4, 2.11M) reports, "The lawsuit…intensifies the debate over the Patriot Act and reflects concerns in academia that the US's security precautions are hampering the flow of ideas between foreign and US scholars."

PATRIOT ACT:

US Scholarly Organizations File Lawsuit Over Patriot Act Visa Provision. The Wall Street Journal (1/26, A4, 2.11M) reports, "Three scholarly organizations sued the federal government over its 2004 decision to revoke a visa granted to a European expert on Islam," Tariq Ramadan, "preventing him from taking a faculty position at the University of Notre Dame. The lawsuit…intensifies the debate over the Patriot Act and reflects concerns in academia that the U.S.'s security precautions are hampering the flow of ideas between foreign and U.S. scholars." The Journal adds, "The lawsuit asks the U.S. District Court in New York City to declare unconstitutional a portion of the Patriot Act that denies entry on the grounds of 'ideological exclusion' to those who have endorsed or espoused terrorist activity or who have persuaded others to do so. 'There is simply no evidence' of Mr. Ramadan supporting terrorism, said Barbara DeConcini, executive director of the American Academy of Religion, one of the plaintiff groups." The New York Times (1/26, Preston, 1.19M) notes, "The ACLU, joined by the New York Civil Liberties Union, brought the suit against" DHS Secretary Michael Chertoff "and Secretary of State Condoleezza Rice, asserting that the Patriot Act clause is unconstitutional and that the ban on Mr. Ramadan violates the First Amendment rights of American thinkers who want to meet with him." The AP (1/25, Neumeister) and Knight Ridder (1/26, Strobel) also report on the lawsuit.

HOMELAND RESPONSE:

Georgia ACLU Releases Documents Allegedly Showing Spying On Activist Groups. The Atlanta Journal-Constitution (1/26, Montgomery, 430K) reports, "In the name of fighting terrorism, the U.S. government and police agencies from the federal to the local level have been spying on Georgia anti-war rallies, peace and social action groups, and even a vegan protest, the state legal director of the American Civil Liberties Union charged Wednesday. Documents and surveillance photos obtained by the ACLU through a Freedom of Information Act request reveal a pattern of 'spying on Georgians who are our friends and neighbors, and are leading lawful lives,' attorney Gerald Weber said…outside the Georgia Homeland Security offices in downtown Atlanta. … 'Many of us remember the days of J.Edgar Hoover, and this is another reminder,' said state Rep. Nan Grogan Orrock." The Journal-Constitution adds, "A special agent at the FBI press office in Washington who would not give her name said the FBI 'investigates groups or individuals when we have information or allegations of federal law being broken. We do not investigate groups or persons exercising their constitutional right of protest or dissent.'"

The AP (1/26) reports the ACLU "released two documents from the FBI and DeKalb County Homeland Security," and "Weber says so far the ACLU has received complaints from six organizations and nearly two dozen people who fear they have been spied upon, photographed, videotaped or had their events infiltrated by government agents. He says none of them did anything that would justify surveillance but rather are critics of the Bush administration." The AP notes, "FBI spokesman Bill Carter says all FBI investigations are conducted in response to information that the people being investigated were involved in or might have information about crimes."

White House Declines To Release Documents On Katrina Warning. NBC Nightly News (1/25, story 2, 2:00, Williams) in its story on Federal Katrina relief reported, "Congress also wants answers from the White House about the poor Federal response to Katrina, and tonight members of both parties complain the President is holding back important information about who knew what and when." Sen. Joe Liebermann: "They haven't given us the documents we've asked for. They haven't let us into the people in the White House who were involved in the decision making regarding Hurricane Katrina." Gregory: "The White House cites executive privilege." Scott McClellan, White House Press Secretary: "The President believes that Senator Lieberman ought to have the right to confidential conversations with his advisors, just like all presidents have asserted they ought to have that same right."

The New York Times (1/26, Lipton, 1.19M) reports, "In their four months of digging, House and Senate investigators have collected hundreds of thousands of pages of documents and testimony from governors, mayors, Homeland Security and Pentagon officials and dozens of others touched by Hurricane Katrina." While Republican leaders of the two committees are satisfied with "the mountains of still-accumulating evidence," to Democrats, "crucial holes still remain, particularly related to what senior White House aides and the president knew, and how they reacted to this knowledge, right before the storm and after it." Senator Joseph I. Lieberman "said Wednesday that he realized it was unlikely he could get the information he wanted by threatening to subpoena. Even if one were issued, the administration would probably fight it in court."

MSNBC's Hardball (1/25, Shuster) reported, "Ratcheting up a battle with Congress, the Bush White House is now refusing to turn over Hurricane Katrina related documents or make senior officials available for testimony. The Administration contends executive branch discussions about the storm are not open to review by Congress. … It

was Senator Lieberman, the President's favorite Democrat, who on Tuesday alleged the Bush Administration's refusal to cooperate has killed the Katrina investigation."

Landrieu Says Administration Should Be More Forthcoming. Sen. Mary Landrieu said on MSNBC's Hardball (1/25), "I believe the committee, the Bipartisan Committee of Senator Collins and Lieberman, has asked for those records. They are truly acting in a bipartisan spirit. And we would like a full investigation of actually what happened. Not so that we can spend time blaming…but that we can prevent this from happening again, and we can get on the business of rebuilding New Orleans, Louisiana, and the Gulf Coast. So you'll have to ask them specifically what they asked for, but I would hope they would provide all the records so we could get to the bottom of whose fault it was that the levees broke and how do we fix it in the future." Asked about White House claims that the requested information is privileged, Landrieu said, "I would think it would be in the country's best interest, as we seek to protect the people of this nation from terrorist attacks, from catastrophic events, that we would have a real independent investigation of that. Our governor has turned over a great deal of information. I'm assuming that our mayor and local officials have. The White House needs to step up and be very forthcoming. But more than turning over that information, the White House needs to turn over some good plans for rebuilding. All we've heard is a lot of empty promises and criticism."

Vitter Criticizes Federal, State and Local Responses To Hurricane. Sen. David Vitter said on MSNBC's Hardball (1/25), "We need to understand what broke down at the federal level and the state level and the local level. Because things clearly broke down at every level. This was not a disaster that was predictable. This was a disaster that was utterly predicted in print, in studies like the hurricane pan exercise. And every level of government fell flat." Vitter added, "I was disappointed at the federal response, very disappointed. I said so matter of factly the Friday after the storm. I gave the whole recovery effort an F. And the state response was just as poor and the local response."

White House Rejects Plan To Buy Out Katrina Home Owners.

In a story that characterized the White House as declining to approve aid for Louisiana NBC Nightly News (1/25, story 2, 2:00, Williams) reported on "the long road back for the Gulf Coast, specifically the state of Louisiana. Crippled by Katrina and hoping for a $30 billion Federal relief package that just today was shot down by the Bush White House." NBC (Gregory) added, "Despite lofty promises, the White House has rejected Louisiana's homeowner bailout plan which local officials consider it crucial for recovery." Rep. Richard Baker, New Orleans: "To leave us in that state of disrepair without the hope of recovery is very troubling." Gregory: "The White House considers the" state plan to buy out home owners as "too expensive and bureaucratic suggesting instead the state settle for the more than $6 billion in Federal grants released today to bail out just those homeowners who didn't have insurance because they lived outside the floodplain." Administration officials "say more Federal dollars may come later, but acknowledge that conservatives in Congress are worried about spiraling costs."

The New York Times (1/26, Nossiter, 1.19M) carried a similar tone, reporting, "The White House decision to withhold support from a major Congressional reconstruction plan left Louisiana officials expressing bewilderment on Wednesday over what they characterized as the lack of a workable alternative from the Bush administration. … 'The White House simply needs to tell us what their plan is,' Gov. Kathleen Babineaux Blanco said Wednesday at a news conference in Baton Rouge. 'We don't see an adequate plan. You can't fix a $12 billion problem with $6 billion.'"

Reuters (1/25, Roberts) reported, "A group representing mortgage bankers also said President George W. Bush had yet to offer an alternative that was comparable to the plan proposed in Baker's legislation to create the Louisiana Recovery Corp. 'We'll really pay attention to the State of the Union address because we'll be anxious to see what the president is going to propose as a plan for rebuilding those devastated areas,' said Kurt Pfotenhauer, senior vice president of government affairs at the Mortgage Bankers Association. 'It's clear that some plan has to be in place in order to spur the investment of private capital.'"

USA Today (1/26, Dorell, Konigsmark, 2.31M) reports, "Donald Powell, President Bush's coordinator for Gulf Coast rebuilding, suggested that money from the government's funding grant, announced Wednesday, be doled out to roughly 20,000 homeowners who weren't in a flood zone and did not have flood insurance when Hurricane Katrina hit. State officials must draw up plans for disbursing the money and get federal approval." Blanco said the plan "simply will not work," and added that "she won't use the money as the White House recommends. 'We are not in the business of choosing between our citizens.'"

Highlighting the severity of the damage caused by Hurricane Katrina, NBC Nightly News (1/25, story 10, 1:30, Williams) also reported that some viewers were complaining about NBC's continuing coverage of the impact of Hurricane Katrina. NBC defended the extent of its coverage saying that it reported on the impact of all of last year's hurricane's in the region, but "Katrina is different. Katrina displaced two million Americans. It destroyed 350,000 homes. Not all the bodies have been found yet. It exposed cracks in our society, and it has us talking about race and class and money and relief. It affected what we pay for gas and may affect what we pay in taxes. It literally rearranged the map of the Gulf Coast. There

are many heroes, but no one villain. Tonight, one of the great American cities is partially in ruins, and many of our fellow citizens are hurting and have nothing left. And in some places, nothing's been done yet." And "we intend to keep covering it."

Nagin's Comments Scrutinized. The Washington Post (1/26, C1, Haygood, 744K) reports, "New Orleans Mayor Ray Nagin blew into the original Chocolate City yesterday. Everywhere he goes these days, there seem to be things to explain, his words and comments tossed about as if, well, in yet another hurricane." Attending the winter meeting of the US Conference of Mayors at the Capital Hilton, Nagin said, "I don't get what all the fuss was about when I talked about New Orleans being a chocolate city. I mean, I understand the frustration with my 'God' comments. Maybe I went a little overboard. But Chocolate City? Come on.'"

Flood Insurance Program Administrator Seeks Changes. The New York Times (1/26, 1.19M) reports, "The administrator of the National Flood Insurance Program asked Congress on Wednesday to allow the elimination of discounts on as many as 1.2 million policies and suggested that the government consider requiring millions more homeowners to buy coverage. The program expects to borrow $23 billion from the Treasury to pay claims from Hurricanes Katrina, Rita and Wilma." David I. Maurstad, the administrator, "asked Congress to order the program's parent agency, the Federal Emergency Management Agency, to study expanding coverage requirements to properties in areas known as 500-year flood plains, with a 0.2 percent chance of flooding in any year, and to properties protected by levees and dams. He estimated that would affect four million to six million properties."

The Wall Street Journal (1/26, Schroeder, 2.11M) reports "the Senate Banking Committee is preparing to overhaul the federal flood insurance program, resulting in much higher premiums for many homeowners and a likely taxpayer bailout. … While broad legislation hasn't yet been proposed, several committee members and experts who appeared before the banking panel yesterday agreed that the insurance program needs to be restructured to operate more like a private insurance company."

WAR NEWS:

US, Iraqi Forces Repel Insurgent Attacks In Ramadi. US Marines and Iraqi troops repelled insurgent attacks in Ramadi Tuesday afternoon, killing seven insurgents. The Washington Post (1/26, A18, Finer, 744K) reports, "Five insurgents -- whose assault included mortar, small-arms and machine-gun fire -- were killed by a strike from a Marine Harrier jet as they gathered in a nearby cemetery, according to a statement from Capt. Jeffrey S. Pool, a Marine spokesman in the city. Two other fighters died in a firefight after insurgents used a rocket-propelled grenade to attack a military convoy entering the city's main government compound. No U.S. or Iraqi forces were wounded in the clashes, the statement said." The Post adds, "During the fighting, Zaal Shehan Mahmoud, 30, a cameraman for the Baghdad TV network, was killed by more than 20 bullets to the head, abdomen and legs, according to Mohammed Dulaimi, a doctor at the Ramadi hospital."

Officials See Rift Between Foreign Fighters, Local Insurgents. Maj. Gen. Richard Zahner, deputy chief of staff for intelligence for multinational forces in Iraq says a deepening rift between radical foreign fighters and native Iraqi insurgents has turned violent, creating an opportunity for US forces to try to persuade local guerillas to lay down their arms and join the political process. USA Today (1/26, Jervis, 2.31M) reports, "Iraq's national security adviser, Mouwafak al-Rubaie, also said there is a rift in the insurgency, calling it a 'a major step forward in our fight against terrorism.'" Zahner "said the insurgency consists of about 12,000 to 15,000 hard-core Iraqi fighters and supporters, as well as 1,000 militants loyal to al-Qaeda in Iraq, of which about 10% are foreign."

Videos Of Insurgent Attacks Provide Training Tool For US Forces. USA Today (1/26, Diamond, 2.31M) reports, "Videotapes of insurgent attacks in Iraq have become a potent propaganda tool for militant Islamists but also a handy training aid for U.S. forces, according to Army briefing documents being given to U.S. officers deploying for duty in Iraq. Insurgents routinely videotape their attacks and sometimes post the footage on the Internet as propaganda to show tactical victories against U.S. military convoys or helicopters. A briefing report prepared by the intelligence division of the Army's Training and Doctrine Command shows how the Army is mining the insurgent tapes for ways to avoid casualties." The briefing "report says 55% of U.S. military deaths in Iraq are attributed to improvised explosive devices, the military's term for roadside bombs, and small-arms attacks. It says 59% of U.S. military deaths occurred in Baghdad and Sunni-dominated Anbar province, which runs from just west of Baghdad to the Syrian border. Designed to help soldiers know what to expect and how to counter insurgent tactics, the briefing also warns that Iranian-backed Shiite militants as well as Iraqi Sunnis and foreign Sunni fighters are regularly mounting attacks."

US Troops Train Iraqi Police To Defeat Insurgents, Combat Corruption. NBC Nightly News (1/25, story 6, 2:00, Miklaszewski) reported that Colonel Bushar Hussein, commander of Iraq's first special police brigade, and his "commandos are slowly taking back parts of the city." And

"he isn't doing it alone. For the past nine months, 10-man teams of US military advisors have trained and fought alongside Iraqi police commandos. Major General Joe Peterson heads the increased US effort to turn Iraqi police into an independent fighting force by the end of this year." Peterson: "Our troops are making a significant difference in increasing that capability." Miklaszewski: "Despite some progress, the Iraqi commandos are far from fighting entirely on their own." Peterson: "There are times when a guy will walk off down the street and buy a pack of cigarettes while we are trying to provide security. And I'll have to fix him." Miklaszewski: "In addition, some police units have been infiltrated by militias while others are reportedly ripe with corruption." And "Colonel Bushar warns that government corruption and incompetence may pose more of a threat to the future of Iraq than the insurgents. And in the long run, may be even more difficult to defeat."

US To Release Five Female Iraqi Prisoners.

ABC's World News Tonight (1/25, story 3, 0:25, Woodruff) reported, "Iraq's justice ministry said at least five Iraqi women, in US custody, would be freed soon, possibly tomorrow. This would go a long way toward meeting the demands of militants who kidnapped American journalist Jill Carroll of the Christian Science Monitor. A US spokesman confirmed the release of prisoners would occur, but the US has said consistently that any release would be a coincidence and not a response to the kidnapping."

The CBS Evening News (1/25, story 4, :45, Schieffer) reported, "US officials insist this is not linked to the demand by the kidnappers of American journalist Jill Carroll that US forces release all women detainees."

The Christian Science Monitor (1/26, Murphy, 61K) reports, "Reuters reported that Iraqi officials have suggested the delay in releasing the women was linked to the demands of the kidnappers of American journalist Jill Carroll, who threatened to kill her by last Friday unless all women prisoners were freed. The deadline passed with no word on Ms. Carroll's fate."

However, the Washington Times (1/26, Deshmukh, 90K) says that the Iraqi Justice Ministry official "denied that the release of the women had anything to do with kidnappers' demands, and U.S. forces have stressed they do not negotiate with hostage-takers."

Reporter Recounts Attempted Kidnapping In Iraq. The Washington Post (1/26, C1, 744K) excerpts the book "Tell Them I Didn't Cry: A Young Journalist's Story of Joy, Loss, and Survival in Iraq" by reporter Jackie Spinner. In it, Spinner writes, "For 13 months in 2004 and 2005, my half was in Baghdad, dodging mortar rounds, roadside bombs and potential kidnappers, while [twin sister] Jenny worried from home that I would not be able to keep my promise to my nephew, her young son. 'Aunt Jackie always comes back,' I told him each time I returned to Baghdad, to a place that began to feel more like home the longer I stayed." Spinner recounts a day outside Abu Ghraib prison, "when a stranger grabbed my arm and began dragging me toward a car. … Another man came up behind me and grabbed me around the waist. Someone else grabbed the pillowcase that held my belongings and threw it aside. At first I couldn't fathom what was going on. What was happening to me? Were they trying to kidnap me? They were trying to kidnap me! My heart pounded. … Once the men who grabbed me saw the Marines, they let go, and everyone scattered."

In Wake Of Carroll Kidnapping, Journalist Rethinks Dangers In Iraq. Journalist Alissa Rubin writes in the Los Angeles Times (1/26, 958K), "When Jill Carroll was kidnapped, other journalists in Iraq were aghast that something so horrible had happened to someone they knew. But many insisted privately that it never would have happened to them. … The truth is that we are working in a war zone where no rules apply. No one is safe: not Iraqis, not Westerners, not men, not women." Rubin adds, "For most journalists in Iraq, it's hard to be honest about danger, even though we talk about it all the time. … To family and friends not in Iraq, it is incomprehensible why you came here, and certainly why you returned twice, three times — in my case, over and over for nearly three years. … For me, at least, what is true is that once in a while as a journalist you get the chance to witness history, a moment when tectonic plates shift, when more is at stake than you ever imagined you would touch or see. It's the adrenaline surge of being in a place where people's lives are in the balance, where every decision counts and where what you're writing might, might just matter. … I was aware of the statistics: Since the beginning of the war, 60 journalists, five of them women, had been killed in Iraq and at least 37 abducted, according to a tally by the Committee to Protect Journalists. But like all the other foreign journalists in Iraq — fewer than 75 of us, down from more than a thousand after the war — I needed to believe that I was going to slip through. After [journalist Jill] Carroll's abduction, I don't feel that way anymore." Iraq "is hostile ground and nothing I do can make it safe."

Former General Says Iraq WMD Moved To Syria Before US Invasion.

Former Iraqi general George Sada, author of "Saddam's Secrets, How an Iraqi General Survived Saddam Hussein," in an interview on Fox News' Hannity & Colmes (1/25) said, "I want to make it very clear to everybody in the world that" there were weapons of mass destruction in Iraq "and the regime used them against our Iraqi people. It was used against Kurds in the north. Against Arabs." Asked whether Iraq had the WMD when the US toppled Hussein's regime, Sada replied, "Up to the year

2002, 2002, in summer, they were in Iraq. And then when Saddam realized that the inspectors are coming on first of November and the Americans are coming, so he took the advantage of natural disaster happened in Syria, a dam was broken. So announced to the world that he is going to make an air bridge" and moved the WMD to Syria.

Kurdish Writer's Prosecution Seen As Test Of Iraq's Move Toward Democracy. The New York Times (1/26, Oppel, 1.19M) reports on Kamal Sayid Qadir a Kurd who, from Austria has written articles accusing Kurdish leader Massoud Barzani's Democratic Party of corruption "while calling members of its intelligence service, the Parastin, criminals and its chief -- Mr. Barzani's son -- a 'pimp.'" Qadir is now imprisoned in Iraq, "sentenced last month to 30 years for defaming the Parastin and Kurdish political leaders after a trial that he said had lasted 15 minutes." The Times adds, "His case, while extraordinary, is by no means unique." These prosecutions "indicate how much remains at play in newly democratic Iraq. The nation has made remarkable steps away from totalitarian rule: the overthrow and prosecution of a genocidal dictator, two national elections and the adoption of a Constitution. But it remains to be seen how far Iraq will ultimately travel toward true Western-style democracy." Iraq "is still testing the limits of responsible free speech, and some of the name-calling and rumor-mongering that goes on clearly oversteps the boundaries. Many of Mr. Qadir's criticisms exceeded what would be tolerated in other Middle East countries, particularly his assertions about the sexual proclivities of the Barzani clan. A number of Kurdish journalists who have called Mr. Qadir's imprisonment outrageous say they are nevertheless uncomfortable with some of his writings, calling them offensive and reckless."

Arrest Of Police Strains Relations Between Iraqis, UK Troops. The Los Angeles Times (1/26, Moore, 958K) reports, "Tensions continued to simmer Wednesday between local Iraqi officials and British troops in the Shiite-dominated southern city of Basra, where the British this week arrested 14 law enforcement officials, including two senior police intelligence officers, allegedly linked to political corruption and assassinations. The British released several of the men Wednesday, but a spokesman for the Basra provincial council said that eight remained in custody, including three who had been transferred to a prison facility after British authorities said they had bomb-making materials in their possession. … The province has responded to the arrests by threatening to cut off all cooperation with British forces in Iraq's second-largest city."

Soldiers Make Digital Memorials For Fallen Comrades. The Wall Street Journal (1/26, Searcey, 2.11M) reports, "Digital photography, video and Internet access have let soldiers in Iraq stay closer to distant friends and family than troops in any other war. Now, these electronic records are also creating a powerful and raw new wave of war memorials. … Wartime cinematographers say commanders ask to review the videos before they're shown at memorial services to make sure they don't degrade the image of soldiers with, for example, footage showing them drinking."

Hoagland Says Administration Has Been "Bitten" By Reality In Iraq. Jim Hoagland writes in the Washington Post (1/26, A25, 744K), "Iraq's Dec. 15 balloting was orderly and inspiring, but it has created an aftermath that is neither of those things. It has also forced the Bush administration into a silent reassessment of where Iraq is going and how it is going to get there. Increasingly, the country drifts toward the future as two relatively stable autonomous regions and a violently unstable central zone, all linked by a weak central government and a reduced, reactive U.S. military presence." The Bush Administration "gives no sign of trying to hurry things along as it concedes it must deal with the election results it has, not the results it wanted. Those were canceled by the poor showing of Ayad Allawi and Ahmed Chalabi -- secularists who conceivably could have been strong, independent executives -- and successful electioneering by Iranian-backed Shiite parties distrusted by Washington. … Reality has bitten the Bush administration in Iraq and forced the president to settle for less than he wanted. Let's hope that reality can now do the same with Iraq's newly empowered Shiite leaders."

In 1998, Clinton Said No-Fly Zones Over Iraq Would Be Enforced. In its "History Lessons" column, the Washington Times (1/26, 90K) excerpts a December 28,, 1998 statement by then-President Bill Clinton. Clinton said, "I think I should say a few words about an incident early this morning over the skies of Iraq, where American and British air crews were enforcing a no-fly zone in Northern Iraq. They were fired on by Iraqi surface-to-air missiles. They took evasive action, returned fire on the missile site, and returned safely to their base in Turkey ... They attacked because they were attacked. And they did the appropriate thing. We will continue to enforce the no-fly zones."

Musharaff Blames US Missile Attack For Increasing Domestic Turmoil. The Wall Street Journal (1/26, Champion, Kempe, 2.11M) in an interview with Pakistan President Pervez Musharraf at the World Economic Forum reports Musharraf "said a suspected U.S. missile attack on a Pakistani village that killed civilians this month 'probably' killed five or six al Qaeda operatives, but had

'harmed our interests' by violating his country's sovereignty and feeding domestic unrest." He "said his goal is to transform Pakistani society by ending conflicts like the one in Baluchistan, defusing Islamist extremism and generally calming 'a nation in turmoil.'" Gen. Musharraf said, "We want to guard our own sovereignty." He "also said his close cooperation with the U.S. in the fight against terrorism hadn't been damaged, and that Pakistan needs the technical help the U.S. can offer to gather intelligence. 'Intelligence is far more significant and difficult than operating against [al Qaeda],' he added."

India Provides Aid To Afghanistan. The Washington Times (1/26, Nelson, 90K) reports, "India has poured more than a half-billion dollars of foreign aid into Afghanistan in the past three years in an attempt to create a friendly and stable neighbor in a volatile part of the world." India's "effort, which continues despite a Pakistani blockade of Indian goods bound for Afghanistan, touches all aspects of life." Tensions "between India and Pakistan has complicated proposed energy pipelines from Afghanistan, which would have to run through Pakistan on the way to India." But some observers "think Pakistan is more worried about losing its dominant position in Afghan trade."

Rumsfeld Takes Issue With Reports Saying US Military Is Overstretched. Fox News' Special Report (1/25, Hume) reported, "A couple of new reports suggesting that the US military is overstretched or overstressed or both drew a sharp response from the Secretary of Defense. One report was funded by the Pentagon itself." Fox (Baier) added, "On Capitol Hill today, former officials from the Clinton Administration joined top Democrats to release a new study on the state of the US armed forces. Titled 'The US Military -- Under Strain And At Risk,' it concludes the war in Iraq threatened the battle-readiness of US troops. … At the Pentagon, Defense Secretary Donald Rumsfeld addressed the criticism head on." Rumsfeld "said today's US military, while trying to recover from underfunding…is far from broken." Rumsfeld "pointed out there are more than 2 million troops in the US military if you're counting active duty, National Guard and Reserves and only 136,000 troops in Iraq."

NBC Nightly News (1/25, story 5, :45, Williams) reported, "Two new reports say tonight the US military is so overburdened from the wars in Iraq and Afghanistan that it's near the breaking point. One report flatly warns ground forces are stretched so thin and under such enormous strain, the Pentagon may not be able to recruit and retain enough troops in the all volunteer army to defeat the insurgency. This afternoon, Defense Secretary Donald Rumsfeld responded." Rumsfeld: "This armed force is enormously capable. In addition, it's battle hardened. And it is not a peace time force that has been in barracks or garrisons." Williams: "Rumsfeld pointed out that there are 138,000 US troops in Iraq, out of two million total including the National Guard and Reserve units."

In a brief story The CBS Evening News (1/25, story 3, :45, Schieffer) noted, "Rumsfeld took strong issue today with former Clinton Administration officials who say the wars in Iraq and Afghanistan have stretched the US military to the near breaking point. At a Pentagon news conference, Rumsfeld called that misdirected, and he praised the military as, quote, 'enormously capable and battle hardened.'"

The Wall Street Journal/AP (1/26) says Rumsfeld "spoke a day after the Associated Press reported that an unreleased study conducted for the Pentagon said the Army is being overextended, thanks to the two wars, and may not be able to retain and recruit enough troops to defeat the insurgency in Iraq. Congressional Democrats released a report Wednesday that also concluded the U.S. military is under severe stress."

The Washington Times (1/26, Scarborough, 90K) reports that Rumsfeld responded to the reports with a "combative appearance at a Pentagon press conference. He reminded reporters that during the Clinton years, when the military was sent on about 50 war and peacekeeping missions, that the force suffered from lack of funding and that some units were 'hollow pieces.'" Rumsfeld "said anyone who concludes that the Army is breaking does not know what he or she is talking about. 'I suspect the people writing these things don't know, either, because I suspect that they don't have any more insight than the other people around here do,' he said. 'I just can't imagine someone looking at the United States armed forces today and suggesting that they're close to breaking. That's just not the case.'"

USA Today (1/26, Komarow, 2.31M) says Rumsfeld "dismissed" the reports, "calling their authors ill-informed about America's 'battle-hardened' forces." Speaking at a news conference, Rumsfeld said, "People just don't fully understand," adding that today's military is "battle hardened. It's not a peacetime force that has been in barracks or garrisons."

The Washington Post (1/26, A18, Tyson, 744K) reports that Rumsfeld "said a recent decision to scale back U.S. troop levels in Iraq did not grow out of a need to relieve the strain on American ground forces." Rumsfeld said, "The force is not broken," adding, "I just can't imagine someone looking at the United States armed forces today and suggesting that they're close to breaking. That's just not the case." Rumsfeld called the US military an "'enormously capable force,' as demonstrated to the world by its swift overthrow of governments in Iraq and Afghanistan. Such proven capability

'ought to increase the deterrent rather than weaken it,' he added."

Study Finds Active Duty Reservists Earn More Than In Civilian Jobs. A study released yesterday by the RAND Corporation says that nearly three-fourths of military reservists called to serve in Afghanistan and Iraq are making more money on duty than in their civilian jobs. USA Today (1/26, Komarow, 2.31M) reports, "In many cases, the troops earn a higher gross salary in civilian life. But when the federal tax exemption and other allowances approved by Congress for troops in combat are factored in, about 72% are better off, according to a study by the RAND Corp., a research institute. The RAND study, which was funded by the Pentagon, showed an average benefit of 25% over civilian pay, about $10,000 a year." USA notes, "The study results run counter to complaints by Reserve and Guard troops that they have suffered financially when activated. It is part of an effort to track the war on terrorism's effects on part-time troops."

DOJ:

Federal Judge Extends Temporary Appointment Of Alabama US Attorney. The Mobile (AL) Register (1/26, Kirby) reports, "Chief U.S. District Judge Ginny Granade has extended the term of U.S. Attorney Deborah Rhodes, whose temporary appointment to the Mobile office expires this month." The Register continues, "Rhodes took over for David York, who resigned in September amid reports of an internal Department of Justice investigation into allegations that he had an improper relationship with an assistant prosecutor." The Register adds, "Under the law, the Justice Department could replace York for a maximum of 120 days. The statute gives the chief judge of the district the power to name the U.S. attorney beyond that, and Granade said Tuesday that she complied with a request by the Justice Department to extend Rhodes' tenure until President Bush names a permanent successor. … When appointed to Mobile, Rhodes, 47, was on special assignment to the Justice Department in Washington as a counselor to the assistant attorney general of the criminal division."

DHS Assisting DOJ With Case Management System. Federal Computer Week (1/25, Arnone) reports, "The Homeland Security Department is helping the Justice Department develop new case management systems for the entire federal government, DHS' chief information officer said today." FCW continues, "DHS is working with DOJ to create a Consolidated Enforcement Environment (CEE), which allows access to all available data, analyzes data and links relevant law enforcement partners, DHS' CIO Scott Charbo said. … One goal of the collaboration is to move beyond products and create a layer of information that can be used governmentwide, Charbo said."

CORPORATE SCANDALS:

Enron Trial Seen As Big Test For Federal Prosecutors. The New York Times (1/26, Eichenwald) reports, "In the court of public opinion, they were convicted long ago. But as Kenneth L. Lay and Jeffrey K. Skilling, the onetime leaders of Enron, step into a court of law next week, the outcome of their fraud trial is far from certain, creating one of the most closely watched and hotly contested white-collar criminal cases ever." The Times continues, "On one side of the Houston federal courtroom starting Monday will be two top-flight teams of defense lawyers, who will be taking the risky approach of proclaiming many of the controversial actions of Enron and some much-criticized statements of their clients to be legal and truthful." The Times adds, "On the other, the prosecutors for the Justice Department's Enron Task Force, who have racked up an impressive array of guilty pleas in the case, but whose performance at trial has been decidedly less dazzling. … 'For the government, if they lose the Enron case, it will be seen as a symbolic failure of their rather significant campaign against white-collar crime,' said John C. Coffee Jr., a professor at Columbia Law School. 'It will be seen as some evidence that some cases are too complicated to be brought into the criminal justice process.'" The Times notes, "Of the three major Enron-related criminal cases brought by the government before juries, guilty verdicts stand from only one, which involved Enron's booking what the government said were phantom profits on the sale of Nigerian barges to Merrill Lynch. A second case, against the accounting firm Arthur Andersen, was thrown out by the Supreme Court on appeal. The third, involving the broadband division of Enron, resulted in no convictions, but the five defendants await a retrial."

Success Of Efforts To Curb Corporate Fraud Seen As Problematic. The Washington Post (1/26, D1, Johnson, Ben White) reports, "Four years after the collapse of Enron Corp. spurred the most sweeping revisions in business regulation since the Great Depression, experts warn that the ingredients for a similar financial disaster remain." The Post continues, "Despite new laws and regulations, companies still face enormous pressure to meet short-term financial goals, creating a powerful motive for accounting fraud. Outsized executive compensation grows by the year, offering another rich incentive to cook the books. And there is no certainty that Congress will continue to fund regulatory budgets at current levels. … But some things have changed since December

2001, when Enron's sudden descent into bankruptcy protection rocked investor confidence and left the markets reeling. Accountants face independent oversight for the first time in 70 years. Most corporate board members take their jobs far more seriously. Wall Street is somewhat less willing to accommodate clients' interests." The Post adds, "Nearly a dozen experts contacted by The Washington Post, including regulators, accountants, chief executives, board members and investor advocates, agreed to fill out a corporate governance report card on the eve of the Enron trial. … Congress passed the Sarbanes-Oxley Act in July 2002, imposing new duties on corporate executives, auditors and directors. The Securities and Exchange Commission and the Justice Department spent tens of millions of dollars to root out malfeasance. Along the way, prosecutors won criminal convictions and decades-long prison terms for former leaders of Adelphia Communications Corp., Tyco International Ltd. and WorldCom Inc. … But in a sense, the government efforts may have backfired, inspiring a dangerous overconfidence among investors."

Ex-Enron Employees Still Feel Effects Of Stock Price Plummet. USA Today (1/26, Armour, 2.31M) reports, "Four years after the Texas energy giant began its meltdown -- and on the eve of a criminal trial for its former top executives -- many former Enron employees still feel betrayed." Some of them, "at the end of their careers, have started over again in new jobs -- but working harder to keep up with younger co-workers. They've turned to churches and food pantries to eat, sold homes they could no longer pay for, and endured financial stresses that frayed their marriages."

Former Securities Broker Pleads Guilty To New York Market-Timing Charge. The AP (1/26, Gormley) reports, "A former Las Vegas securities broker pleaded guilty to a felony charge Wednesday in a mutual fund investigation in which investors were defrauded through improper late trading and market timing, according to New York Attorney General Eliot Spitzer." The AP continues, "Daniel Calugar, 52, now of Ponte Vedra, Fla., pleaded guilty in state Supreme Court in New York City to violating a state business integrity law called the Martin Act. He was accused of entering into a secret agreement in August, 2001, that defrauded a mutual fund called the Franklin Small-Mid Cap Growth Fund. … He faces up to four years in prison when he is sentenced March 23." The AP adds, "Earlier this month, Calugar agreed to pay $153 million to settle civil charges brought by the U.S. Securities and Exchange Commission. Calugar will relinquish $103 million in ill-gotten gains and pay a civil penalty of $50 million, the largest penalty regulators have imposed on an individual in a late trading and market timing case, SEC officials said. … Spitzer said Calugar secretly agreed to a deal with an employee of Franklin's investment adviser. Calugar would be allowed to rapidly trade in the mutual fund without paying a 2 percent penalty. Calugar then invested $10 million in another hedge fund run by Franklin and defrauded the fund and its shareholders of more than $1 million in fees that he avoided."

Livedoor Investigation Prompts Re-Examination of Japanese Accounting Standards. The Wall Street Journal (1/26, Hayashi, Morse) reports, "The investigation into Internet company Livedoor Co. has pointed a spotlight" on Japanese accounting standards, which need to be upgraded, the article says. The Journal notes, "Tokyo district prosecutors arrested Livedoor Chief Executive Takafumi Horie on suspicion of violating securities law." Now, "in Japan, experts … are calling for stepped-up efforts to improve accounting standards, as companies .... increasingly use sophisticated and aggressive financial techniques." In particular, the article notes, "Japan has no standards on accounting for special-purpose companies," and no rules "on how to interpret revenue at Internet and software companies, whose business structures tend to differ significantly from those of traditional companies." However, the article notes, changes are beginning to take place, with the Financial Services Agency issuing "a guideline calling for closer examination of accounting firms and requiring companies to rotate their accountants more frequently" and the Accounting Standards Board of Japan adopting "a handful of standards in the past two months, covering areas from mergers and acquisitions to executive compensation."

CRIMINAL LAW:

Leahy Seeks Information From DOJ On Google Subpoena. Reuters (1/26, Vicini) reports, "The Senate Judiciary Committee's top Democrat asked Attorney General Alberto Gonzales what steps are being taken to protect Americans' privacy rights as the Justice Department demands information about Internet searches." Reuters continues, "In the letter released on Wednesday, Sen. Patrick Leahy of Vermont asked Gonzales about the subpoena to Google Inc. and three other companies seeking data about what millions of Americans search for on the Internet's leading search engines." Reuters adds, "Leahy asked about the types of information being sought, how the department intends to use the information while protecting individual privacy rights and civil liberties and whether it will issue any additional subpoenas. … Leahy's letter comes at a time of growing criticism in Congress over the government's monitoring of communications, after the disclosure that the

Bush administration has been conducting domestic eavesdropping after the September 11 attacks."

CNET News (1/25, Broache) reports, "Justice Department spokesman Charles Miller said the department planned to respond accordingly, though he was not sure what the response would entail. … As for the privacy concerns raised by Leahy, 'We've addressed that in our subpoenas and to the search engines,' Miller said. 'We weren't seeking information about the individuals, we were only seeking the search terms....We don't even want to know the names of the people.'"

Rep Davis Questions Google's Response To Subpoeana. Government Computer News (1/25, Grimes) reports, "House Government Reform Committee Chairman Tom Davis (R-Va.) said today that search giant Google Inc. has 'bent over backward' to comply with the Chinese government's demand that it block certain search results in order to operate in that country. So why, he wondered, won't the company cooperate with the U.S. Justice Department in its efforts to fight online pornography?" GCN continues, "Google has refused a Justice Department subpoena for search results, saying it violated users' privacy. The government has said it needs the data to prepare a case regarding the 1998 Child Online Protection Act. … Other search companies have complied with the subpoena. … The company today also launched a Chinese version of its search site after agreeing to censor topics such as Falun Gong and Tibet. … 'Google gave the Chinese everything they wanted. They're not going to put data on there about human rights,' Davis said." GCN notes, "Davis spoke to public-sector CIOs today at a summit hosted by Micrsosoft Corp. Microsoft's MSN service also censors search results in China, as do Yahoo and others. Microsoft, Yahoo and America Online have also reportedly given the Justice Department information it was seeking. … 'What does it mean to be a corporate citizen, working to bring terrorists or child pornographers to bear? What are the boundaries?' Davis said. 'These are new areas for a lot of us that we've got to work our way through.'"

Dow Jones (1/25, Richmond) reports, "In the last week, Google Inc. stood up to one government and acquiesced to another. … The moves show the kind of treacherous terrain the Internet giant, whose corporate philosophy is 'Don't Be Evil,' must traverse as it weighs its ideals and its business interests. It also spotlights how important Google (GOOG) has become as a key waypoint on the global Internet, where individual and government interests around access to information can and do collide. … 'Google is at the cutting edge in terms of trying to figure out what is acceptable and what is not acceptable in this century,' when the Internet is making information more accessible than ever before, says Lauren Gelman, associate director of Stanford Law School's Center for Internet and Society. 'What happens to information Google collects? I think this is a big question for society as new technologies evolve and we have to rethink privacy and censorship.'"

The Christian Science Monitor (1/26, Macdonald) reports that Google is confronting "an age-old business dilemma caught up in the new age of globalization: When governments demand something that compromises the interests of customers, what's a company to do?" The article notes that Google launched service in China and "because of government sensitivities there, will limit what users there can access." However, the article says, Google is also "vigorously fighting US government efforts to obtain data on its users' search habits." The article quotes one expert who lauds Google's decision to fight the subpoena, and another who dislikes Google's decision. The article notes that "So far, Google seems to be winning points for its tough stand against the US Department of Justice. According to one survey released this week, 56 percent of American users of the Internet believe Google should not release information about Web searches to the government." But overseas, the article says, "Google has endured criticism, as has Microsoft's MSN search service, for limiting what Chinese users can find."

Debate In Google Case Not Really About Privacy. The New York Times (1/26, Liptak) reports, "The Justice Department went to court last week to try to force Google, by far the world's largest Internet search engine, to turn over an entire week's worth of searches. The move, which Google is fighting, has alarmed its users, enraged privacy advocates, changed some people's Internet search habits and set off a debate about how much privacy one can expect on the Web. … But the case itself, according to people involved in it and scholars who are following it, has almost nothing to do with privacy. It will turn, instead, on serious but relatively routine questions about trade secrets and civil procedure." The Times continues, "The privacy debate prompted by the case may thus be an instance of the right answer to the wrong question. As recently demonstrated by disclosures of surveillance by the National Security Agency and secret inquiries under the USA Patriot Act, the government is aggressively collecting information to combat terror. And even in ordinary criminal prosecutions and in civil lawsuits, Internet companies including Google routinely turn over authentically private information in response to focused warrants and subpoenas from prosecutors and litigants. … But 'this particular subpoena does not raise serious privacy issues,' said Timothy Wu, a law professor at Columbia. 'These records are completely disconnected. They're just strings of words.'" The Times notes, "In its only extended discussion of its reasons for fighting the subpoena, a Google lawyer told the Justice Department in October that complying would be bad for business. 'Google objects,' the lawyer, Ashok Ramani, wrote,

'because to comply with the request could endanger its crown-jewel trade secrets.' … Mr. Ramani's five-page letter mentioned privacy only once, at the bottom of the fourth page, and then primarily in the context of perception rather than reality. … Even Google's allies are shying away from legal arguments based on privacy. The American Civil Liberties Union, for instance, said it planned to file papers supporting Google. But not on privacy grounds. 'We will probably not be making that argument,' said Aden J. Fine, a lawyer with the civil liberties union." The Times adds, "Other Internet search engine companies, including Yahoo, America Online and MSN, have complied with the same Justice Department subpoena, which also sought a random sample of a million Web addresses. The companies all said there were no privacy issues involved. … A Justice Department spokesman, Brian Roehrkasse, agreed. 'We specifically stated in our requests,' he said, 'that we did not want the names, or any other information, regarding the users of Google.' … None of this is to say that subpoenas for search records linked to individuals are inconceivable. Google maintains information that could be used that way, and a subpoena could ask for it. But the recent subpoena does not."

Louisiana Businessman Pleads Guilty To New Orleans Contract Fraud. The AP (1/26) reports, "A businessman described by federal prosecutors as a key player pleaded guilty Wednesday to conspiring in a kickback scheme for the biggest contract signed while Marc Morial was New Orleans mayor. Terry Songy "admitted taking kickbacks from subcontractors, participating in a larger kickback conspiracy with the city's director of property management, and failing to file federal income tax returns for 2001, U.S. Attorney Jim Letten said." The AP notes, "An affidavit filed with the guilty plea states that, after FBI agents approached him, Songy 'admitted his involvement in a much larger scheme than the government was aware' of. … The indictment described Songy as sharing hundreds of thousands of dollars in kickbacks with the three major defendants: Morial associates Stan 'Pampy' Barre, a restaurant owner and Morial confidant, city property manager Kerry De Cay, and construction company owner Reginald Walker. … All three have denied wrongdoing. Their trial is scheduled Sept. 5 before U.S. District Judge Carl Barbier."

Six Indicted On Bribery Charges In Ongoing Tennessee License Fraud Probe. The Tennessean (1/26, Carey) reports, "A widespread bribery scheme funneled hundreds of illegal aliens into a Winchester, Tenn.-based driving school, netting them fraudulent licenses. And six people, including one current and one former state employee, got more than $146,000, federal prosecutors said yesterday. The U.S. attorney's office yesterday unsealed a six-count indictment of the six people who are accused of helping hundreds of people since May 2004 obtain driver's licenses they didn't earn. … 'Just as in previous investigations, you had those who thought that what they did in secret would never come to light,' said My Harrison, FBI special agent in charge for the Middle and Western Districts of Tennessee. The FBI was one of several agencies involved in the probe. U.S. Attorney Jim Vines said the people who fraudulently received licenses weren't eligible for 'a variety of reasons.'" The Tennessean adds, "The investigation, dubbed Operation Crooked Highway, has been under way by federal and state agencies for 18 months, Vines said yesterday." The Murfreesboro Daily News (1/26) notes, "The FBI charged driver's license examiner Bruce Conklin with taking about $9,200 in cash from July 2005 to January. Agents also charged Bryan Guess, owner of the Winchester Driving School…with paying bribes to Conklin and a former examiner, Teresa Jones.

The AP (1/26) reports, "Authorities said they won't know how many illegal documents were issued until all evidence is studied and declined to speculate on the total. They did say that one state worker accepted $20 per student in bribes for about 1,000 licenses or certificates. 'We come to you with another sad chapter in the book of public corruption in Tennessee,' FBI agent in charge My Harrison said at an afternoon news conference." The AP adds, "Citing a number of recent public corruption investigations in Tennessee, Harrison said agents were getting better with practice. 'If you can hear me and are involved in public corruption, the eyes of law enforcement are upon you,' she said." The Nashville City Paper (1/26, Lewis) also notes Harrison said that "it's the latest 'sad chapter' in a string of Tennessee public corruption cases." She added, "You've heard of Operation Tennessee Waltz, Operation Tarnish Blue and Operation Tarnish Shield. What can I say? Same game, only the names have changed. The title of this new chapter is, Operation Crooked Highway." The City Paper adds that as a result of the investigation, "customs officials took into custody 50 undocumented immigrants and began deportation proceedings against 50 other immigrants who were uncovered in the investigation, said Rick Crocker, assistant special agent in charge of Immigration and Customs Enforcement."

IRS Agent Downplays Ryan's Eventual Declaration Of Campaign Funds As Income. The Chicago Tribune (1/26, O'Connor, 643K) reports IRS Agent Shari Schindler "on Wednesday downplayed that former Gov. George Ryan filed corrected tax returns for 1995, 1996 and 1997 several years later because Ryan knew by then of the federal investigation into his finances." Schindler "said that by the time Ryan filed the amended returns in late 2002, each of his six children had testified before the grand

jury and there had been press coverage of the nature of the probe." On cross-examination, Ryan lawyer Dan Webb "contended that records showed Ryan had paid taxes on most of the travel expenses, but that certain charges hadn't been itemized in campaign disclosure reports, fell through the cracks and mistakenly weren't reported on Ryan's returns." But Assistant US Attorney Laurie Barsella "pointed out that Roger Bickel, Ryan's former chief lawyer, had spelled out for Ryan 'in plain English' that personal use of campaign funds had to be reported on his tax returns." The AP (1/26, Robinson) notes that the "verbal fencing match between" Webb and Schindler "came to an end with no one sure who emerged the victor. Webb repeatedly tried to get her to agree that Ryan couldn't be blamed if he failed to report thousands of dollars in income because he was grappling with vague, complex tax laws. Schindler coolly disagreed, saying Ryan easily could have asked his tax advisers."

Prosecution Hopes To Rest Thursday After FBI Agent's Testimony. The Chicago Tribune (1/26, O'Connor, 643K) also reports Assistant US Attorney Patrick Collins "said he still hopes to rest the prosecution case on Thursday after four months of testimony. The FBI's case agent is scheduled to be the government's last witness." And US District Judge Rebecca Pallmeyer "ruled Wednesday that prosecutors can play a portion of a videotape of Ryan from November when he made a statement to reporters outside the court defending his receipt of $9,675 from the Gramm campaign." The AP (1/26, Robinson) notes, "Prosecutors indicated Wednesday night that just one more prosecution witness remains - Raymond Ruebenson, the veteran FBI man who has long been the case agent for the government's seven-year Operation Safe Road investigation that led to the former governor's indictment. But Ruebenson was absent with a case of the flu Wednesday.

Laski Vows To Fight Bribery Charges, Alleges US Withheld Exculpatory Recordings.

The Chicago Tribune (1/26, Washburn, 643K) reports, "Facing federal corruption charges, a defiant James Laski vowed Wednesday to 'keep fighting,' insisted his office is running smoothly and took sharp issue with claims he was away from his job as Chicago city clerk for a prolonged period before charges were filed. 'Somebody is lying, and it isn't me,' Laski declared. The clerk's comments came after a surprise appearance at a City Council committee meeting, his first visit to the council chamber in nearly two months." The Tribune adds, "Laski implied Wednesday that exonerating portions of the recordings were not released when the U.S. attorney's office announced the charges against him on Jan. 13."

Former Campbell Aides Testify About Relationship With Contractor.

The Atlanta Journal-Constitution (1/26, Suggs, Scott, 430K) reports former Atlanta contracts compliance director Michael Sullivan testified at former Mayor Bill Campbell's corruption trial on Wednesday "that in 1994 he and the former mayor, along with city contractor Ricky Rowe, traveled together to Florida to attend a golf and tennis tournament sponsored by Black Enterprise magazine. Sullivan said the city paid for his trip. He said he was unsure of who paid for Campbell's but noticed that when he and Rowe were checking out of the hotel, Rowe used his credit card for Campbell's incidentals. … 'He was upset that I allowed Mr. Rowe to pay for his incidentals,' Sullivan told the jury. 'He told me that you can't use a credit card to pay for things like that. It leaves a trail.'" The Journal-Constitution adds, "The theme of loyalty to the mayor was played over and over Wednesday, witness after witness, as prosecutors tried to establish that City Hall under Campbell…was a den of cronyism and deal-making between Campbell, his friends and political allies. None of the prosecution's witnesses testified that Campbell made them do anything illegal, nor did they say they saw Campbell doing anything criminal."

Wisconsin Procurement Official Indicted Over Travel Contract Award.

The AP (1/26) reports, "An official in Gov. Jim Doyle's administration was indicted on two felony counts Tuesday for her role in awarding a state travel contract to a company whose executives donated $20,000 to Doyle's campaign. The federal indictment alleges that Georgia Thompson, chief of the Department of Administration's procurement bureau, tried to give her bosses political advantage and help her own job security." The AP notes Thompson, "who was hired before Doyle took office in 2003, served on a committee that awarded a contract to Adelman Travel as part of an effort to cut travel costs. … Questions were raised this summer after media reports that Adelman's CEO donated $10,000 to Doyle before the contract went into effect. An Adelman board member gave another $10,000 afterward, finance reports show."

Former New Jersey Councilman Pleads Guilty To Money Laundering.

The Farmingdale (NJ) News Transcript (1/25, Front Page, Israeli) reports former Marlboro Township Councilman Thomas Broderick "pleaded guilty in federal court last week to one count of money laundering. … Broderick was one of the 11 Monmouth County officials who were arrested…in an FBI investigation known as 'Operation Bid Rig.' … Broderick admitted that he accepted $15,000 for assisting in the laundering of large sums of cash from a cooperating government witness whom he believed was a corrupt demolition contractor." The News Transcript notes, "He is scheduled to be sentenced on April 27. Broderick remains free on $50,000 bail."

Contractor Sentenced To Probation, Fine For SoCom Bribery Scheme. The Tampa Tribune (1/26, Lardner) reports, "A contractor formerly employed by U.S. Special Operations Command was sentenced Wednesday to three years probation and a $4,500 fine for his role in a bribery scheme that has tarnished the war fighting organization's reputation for acquiring equipment used by the nation's elite fighting forces. U.S. District Judge Susan Bucklew, who called William E. Burke's crime 'scary' and a 'bad thing,' could have saddled him with a prison term of up to 16 months and a heftier fine. But Bucklew opted for the lighter penalties mainly because Burke has been cooperating with federal law enforcement agents examining contracting practices at Socom, which is headquartered at MacDill Air Force Base in Tampa."

Texas Hired Abramoff-Linked Firm Due To Access To Rove. The AP (1/26) reports the Texas state government "hired a firm with close ties to lobbyist Jack Abramoff after rejecting competing bids that met more of its selection criteria and cost less." The Austin American-Statesman reported that Cassidy & Associates, the winning firm, has access "all the way to presidential aide Karl Rove. … The firm was awarded a $15,000-a-month contract in 2004 to lobby Congress for the state." On Friday, seven Democratic Texas state legislators sent a letter to Gov. Rick Perry "demanding that Cassidy's contract be canceled."

California Man Pleads Guilty To Cyber Attack. Federal Computer Week (1/26, Brewin) reports, "A hacker indicted for creating botnet armies that infected Defense Information Systems Agency networks and computers at the Naval Air Warfare Center at China Lake, Calif., pleaded guilty to the charges at a hearing earlier this week in the U.S. District Court in Los Angeles, the Justice Department said." FCW continues, "Justice said James Ancheta 20, of Downey, Calif, entered guilty pleas of conspiring to violate the Computer Fraud Abuse Act and causing damage to computers used in national defense." FCW adds, "Justice said the prosecution of Ancheta was the first of its kind in the United States against a hacker who used botnets, armies of computers infected with Trojan horse programs that allowed Ancheta to remotely control the computers. Justice said Ancheta controlled more than 400,000 computers as part of his botnet armies, which in turn infected other computers with unwanted adware."

Former Dietary Supplement Company Executives Admit $100 Million Mail Fraud. The AP (1/26) reports, "Former executives of a mail-order firm admitted that the company bilked buyers out of more than $100 million by charging credit cards without permission and offering refund guarantees it had no intention of honoring. Four former executives of Berkeley Premium Nutraceuticals Inc. detailed their involvement Wednesday with the Cincinnati-based company that sold vitamins and supplements for a variety of ills from fatigue to sexual disfunction. The four executives filed written statements as part of an agreement to plead guilty in U.S. District Court in Cincinnati to charges of conspiracy to commit mail and wire fraud. Federal agencies -- including the FBI, the Internal Revenue Service and the Food and Drug Administration -- have been investigating Berkeley." The AP adds, "The former executives said Berkeley's vitamins and supplements…weren't supported by strong medical proof, according to court documents."

Jury Convicts Palestinian Man Of Being Iraqi Agent. The AP (1/26, Callahan) reports, "Jurors on Wednesday convicted a Palestinian migrant accused of being an Iraqi agent on six federal charges but could not reach a decision on a charge that he tried to sell to Saddam Hussein's regime the names of U.S. operatives and agents." The AP continues, "Shaaban Hafiz Ahmad Ali Shaaban, 53, showed little reaction as the federal jury returned its verdicts finding him guilty of six of seven counts, including acting as an unregistered foreign agent, violating sanctions against Iraq, conspiracy and witness tampering. … They could not decide his guilt on a charge of violating the International Emergency Economic Powers Act by allegedly trying in late 2002 to sell U.S. intelligence secrets to Iraq for $3 million. No evidence was presented during his trial, however, that he had access to that classified information. … U.S. District Judge John Tinder set sentencing for April 13 on the six convictions." The AP notes, "Shaaban represented himself during an 11-day trial that included testimony by a former Iraqi intelligence officer. He repeatedly contended that the government had confused him with a dead identical twin brother who worked for the CIA."

Three Kidnap Suspects Face Federal Charges In Ohio. Cox News Service (1/26, Giordano, Hardy) reports, "The FBI on Wednesday brought criminal charges against three people accused in the abduction, assault and robbery of a Miami University freshman." Cox continues, "Sidney R. Jones, 23, of Richmond, Ind.; Katrina L. Jones, 18, of Oxford; and Seth R. Jett, 21, of Richmond were turned over to federal custody Monday by local authorities, Special Agent Michael E. Brooks said. … The three had been detained at the Butler County Jail following their arrests Jan. 14 and 15 stemming from a case involving MU freshman Ryan Coli. … The charges were the result of a joint effort by the U.S. Marshals Service and the FBI in three states." Cox adds, "The three appeared Wednesday in U.S. District Court

(in Oxford, OH) where Magistrate Judge Timothy S. Hogan ordered them held pending a detention hearing Jan. 30, when the court will determine bond."

Supreme Court To Hear Lethal Injection Case.

The Washington Post (1/26, A3, Lane, 744K) reports, "The Supreme Court agreed yesterday to decide when death row inmates may challenge lethal injection as a method of capital punishment, in a surprise decision issued after the justices dramatically stopped the execution of a Florida prisoner who was already strapped to a gurney preparing to die." The High Court said it will hear convicted murderer Clarence Hill's "claim that he should have an opportunity to argue that his civil rights would be violated because the chemicals used to execute him would cause excessive pain. It is a claim that has been pressed with growing frequency by capital defense lawyers around the country in recent years -- but that has generally not yet succeeded, either in lower courts or at the Supreme Court."

The AP (1/26, Holland) reports, "Lethal injections are used in most states that have capital punishment, and there's been a growing dispute over the way they are carried out. … The Supreme Court has never found a specific form of execution to be cruel and unusual punishment, and the latest case from Florida does not give Court members that opportunity. The justices will, however, spell out what options are available to inmates with last-minute challenges to the way they will be put to death." The AP adds, "Florida inmate Clarence Hill, who filed the appeal, had been strapped to a gurney with intravenous lines running into his arms Tuesday night when he won a temporary Supreme Court stay, Hill's lawyer said. The stay was signed by Justice Anthony M. Kennedy. … The full Court announced Wednesday that the stay would be permanent until justices decide whether an appeals court was wrong to prevent Hill from challenging the lethal injection method. … The argument is expected April 26, with a ruling before July."

Texas Executes Man For 1992 Murders.

The Associated Press (1/25) reported that Marion Dudley, an "Alabama man who was part of a ring that shuttled drugs from Texas to his home state was executed [Wednesday] for the slayings of four people in Houston nearly 14 years ago." But the AP noted that Dudley maintained he wasn't at the house where the murders occurred the night of June 20, 1992, when "six people were shot, four of them fatally, in what authorities said was a drug dealer ripoff." Dudley was "the first Texas inmate put to death this year." The wire service added, "Besides Dudley, Arthur 'Squirt' Brown, of Tuscaloosa, was convicted of capital murder and sentenced to death. Now 35, he remains on death row. A third man, Tony Dunson, also from Alabama and 19 at the time of the shootings, received a life sentence."

ID Theft Complaints Rising, But Rate Of Increase Down.

The Wall Street Journal (1/26, Conkey) reports, "Businesses, law-enforcement agencies and consumers may be beginning to turn the tide in the war against identity theft, data from the Federal Trade Commission suggest. Identity-theft complaints were up again last year to nearly 256,000, the FTC said, but that was only 3.5% higher than the year before. In 2004, complaints rose by 15% and in 2003 by 33%. … Industry officials and analysts say the development and widespread adoption of antifraud technologies are responsible for lower levels of card fraud." The article also said, "the FTC is expected to announce today tough action against" ChoicePoint Inc., which "is expected to agree to pay a multimillion-dollar penalty to settle alleged data-security violations stemming from a yearlong investigation by federal regulators, according to a person briefed on the matter."

Jury Reject Insanity Defense, Convicts Killer of Accused Pedophile Priest.

The New York Times (1/26, Zezima) reports, "Rejecting an insanity defense, a state jury on Wednesday convicted an inmate of the prison murder of John J. Geoghan, a defrocked priest who was accused of molesting 150 boys. … Judge Francis R. Fecteau of Worcester District Court sentenced the inmate, Joseph L. Druce, to life in prison without parole, in addition to the life sentence he is serving for another murder. … Prosecutors argued that Mr. Druce was a calculated killer who planned the murder for weeks and saw Mr. Geoghan as a trophy. But Mr. Druce's lawyer, John LaChance, painted his client as someone who 'never had a chance,' unwanted from birth and the victim of physical and sexual abuse for much of his childhood and teenage years."

Girl's Death Highlights "Dual-Track" Handling Of Abuse Reports.

The Christian Science Monitor (1/26, Ridberg) reports, "Calls to New York's child-abuse hot line have spiked dramatically ever since Nixzmary Brown was buried." The Monitor notes that the girl, allegedly killed by her stepfather, "captured the hearts and minds of New Yorkers who never want to see such a tragedy happen again." However, the article says, "the city is left with the tall task of distinguishing the serious cases of abuse from reports of neglect. This is one of the most controversial challenges facing social welfare systems nationwide." The article says that some states have adopted a dual-track system that divides complaints "into two groups." This approach "aims to ease systems overburdened with poverty-related neglect reports and focus aggressive tactics on the rarer cases of

abuse," the article says. It "has been adopted in various states, including Michigan, Missouri, Minnesota, and North Carolina. In Minnesota, one recent study shows the law improved the safety of children by providing better services for families such as food." However, the article notes, New York City fears that under a dual-track approach "an abused child may be handled as a neglect case."

Fairfax County, VA, Police "Accidentally" Shoot, Kill Optometrist Suspected Of Gambling. The Washington Post (1/26, A1, Jackman) reports, "Fairfax County's police chief said yesterday that one of his officers accidentally shot and killed an optometrist outside the unarmed man's townhouse Tuesday night as an undercover detective was about to arrest him on suspicion of gambling on sports. Police had been secretly making bets with Salvatore J. Culosi Jr., 37, since October as part of a gambling investigation, according to court records." In the incident, "Culosi came out of his townhouse on Cavalier Landing Court about 9:35 p.m. and was standing next to the detective's sport-utility vehicle, police said, when the detective gave a signal to tactical officers assembled nearby to move in and arrest Culosi. 'As they approached him . . . one officer's weapon, a handgun, was unintentionally discharged,' said Fairfax Police Chief David M. Rohrer. Culosi was not making any threatening moves when he was shot once in the upper part of his body, police said. He was taken to Inova Fairfax Hospital, where he was pronounced dead."

Crimes Prompt DC Police To Beef Up Presence In Neighborhood. The Washington Post (1/26, B1, Schwartzman) reports, "A spate of crimes outside Adams Morgan clubs and bars, including two assaults in which victims were left in critical condition, has prompted police to plan greater deployment in the area. … A business group plans to supplement the effort with a contingent of security guards and off-duty police to patrol the area on weekends, said Josh Gibson, executive director of Adams Morgan's newly formed business improvement district. Thousands of people pour into Adams Morgan on weekend nights, drawn by its cafes and clubs."

Father Charged With Gun Offenses In Daycare Shooting. The Washington Post (1/26, B1, Londoño) reports that John L. Hall, who is the "father of an 8-year-old boy arrested in the shooting of a 7-year-old girl at their Germantown day-care center provided his son with violent video games and showed him how to cock and release a gun hammer the day before the boy pulled the trigger, a prosecutor said yesterday" at Hall's bond hearing. The Post reports, "Hall's sister, Darlene Hall, 53, disputed the prosecutor's characterization of her brother's influence over the child." The article adds, "Montgomery District Court Judge Mary Beth McCormick reduced Hall's bond to $75,000 yesterday after authorities charged him Tuesday with leaving a firearm within reach of an unsupervised minor and two other gun charges."

NYTimes Columnist Pans Show About Innocence On Death Row. In a New York Times (1/26) column, Joshua Marquis disapproves of a new ABC drama called "In Justice." He writes, "'In Justice' has received dismal reviews. But that hasn't stopped its premise from permeating the conventional wisdom: that our prisons are chock-full of doe-eyed innocents who have been framed by venal prosecutors and corrupt police officers with the help of grossly incompetent public defenders." Calling this "a misconception that has run through our popular culture," Marquis notes that "only 14 Americans who were once on death row have been exonerated by DNA evidence alone. The hordes of Americans wrongfully convicted exist primarily on Planet Hollywood." Marquis says that it is "understandable that journalists focus on the rare case in which an innocent man or woman is sent to prison." However, he says, "The larger issue is whether those who influence the culture, like an enormous television network, have a moral responsibility to keep the facts straight regardless of their thirst for drama. 'In Justice' may soon find itself on the canceled list, but several million people will still have watched it, and they are likely to have the impression that wrongfully convicted death row inmates are the virtual rule."

Times Writer Wistful For Buttafuoco Era. In a New York Times (1/26) column, Lawrence Downes writes, "Before Angie and Brad, before Monica and Bill, there was Amy and Joey. Amy Fisher and Joey Buttafuoco — the Long Island Lolita and her body-shop lover — with Joey's wife, Mary Jo, formed a triangle of passion, obsession and violence that became the industry standard for tabloid crime way, way back in 1992. There is an entire generation, or at least a cohort, or maybe a handful, or at least one or two journalists who remember working on that day in May when the story broke, and who still marvel at how that strange crime — a housewife in a swanky suburb shot in the face — soon became much stranger. It swelled in significance until it made headlines coast to coast and around the globe. … I miss the Buttafuoco era. Joey and Amy were the Sid Caesar and Howdy Doody of reality TV, relics of a simpler time when crime sold newspapers — imagine that — and when the culture tended to look down on adultery and teenage prostitutes, and when attempted murder carried a hint of shame, which presumably was why Amy, in her perp walk, went to the trouble of hiding her face with her long brown hair."

CIVIL LAW:

Former Kentucky GE Plant Supervisor Files Whistleblower Suit. The AP (1/26) reports, "A former supervisor at a General Electric Co. plant has filed $50.5 million federal lawsuit that claims that he was fired for testifying that GE shipped defective parts to military and commercial customers." The AP continues, "James Richard Gardner, of Madisonville, filed the suit Friday in U.S. District Court in Louisville. Gardner said he repeatedly alerted managers at the Madisonville plant that engine turbine blades were not meeting company and government specifications and that defective parts were shipped with the knowledge of managers to meet production requirements." The AP adds, "Marta Rhyner, a GE spokeswoman, said she couldn't comment on specific allegations made in the lawsuit. She said the company is 'confident in the parts produced by our employees at Madisonville.' … The Defense Department began a criminal investigation at the plant in November 2000. The Justice Department is conducting a civil investigation."

Judge Rules Trustee Request Could Jeopardize Adelphia Bankruptcy. The New York Law Journal (1/26, Lin) reports, "In a decision released Wednesday in the Chapter 11 bankruptcy of cable company Adelphia Communications, the presiding judge said the motions by which one group of creditors sought the appointment of a trustee to oversee disputes and the disqualification of chief Adelphia bankruptcy counsel Willkie Farr & Gallagher constituted a 'nuclear war button' threatening obliteration of a crucial $17.6 billion deal." The Journal continues, "Southern District of New York Bankruptcy Judge Robert Gerber's strongly worded 113-page decision, In re Adelphia, 02-41729, previously filed under seal, clarified his order issued earlier in the week denying the appointment of a trustee but granting the disqualification of Willkie lawyers from participating in the disputes at issue. Willkie remains bankruptcy counsel to Adelphia. … Those disputes, which the requested trustee would have overseen, are between different groups of debt holders, all seeking to maximize their own claims on the bankruptcy estate, most of the assets of which are slated to be sold to rival cable companies Time Warner and Comcast for $17.6 billion." The Journal adds, "The potential appointment of a bankruptcy trustee is almost always controversial, as such trustees are usually granted broad-ranging powers to settle disputes or dispose of assets. … Gerber said the disqualification and trustee motions, brought in November by noteholders of Arahova, a subsidiary through which Adelphia issued some $540 million in debt, seemed designed to 'purposefully' imperil that sale as part of a 'scorched earth litigation strategy' aimed at extracting a larger distribution by threatening dire consequences for all."

GSA's Networx Contract Award Delayed By Unexpectedly High Number Of Bids. The Washington Post (1/26, D5, Mohammed, 744K) reports, "The General Services Administration said yesterday that it got more bids than expected for a $20 billion telecommunications contract known as Networx," a "10-year telecom contract, the largest ever to be awarded by the GSA," which is "forcing the agency to delay the award so it can evaluate the complex proposals."

Lockheed Loses Spy Plane Contract. The Wall Street Journal (1/26, A1, Karp, 2.11M) reports, "In 2004, Lockheed Martin Corp. won an Army spy-plane contract that broke with the past." Instead of building it, they "would serve as the 'lead integrator' -- stuffing somebody else's hardware with high-tech eavesdropping gear." However, "Lockheed engineers proved unable to load the airframe they were buying from Brazil with the equipment the Army wanted. Earlier this month, the Army scrapped Lockheed's contract," in "a setback for Chief Executive Robert Stevens and his young 'integrated solutions' division," and "a signal for the entire defense industry that de-emphasizing old-style hardware in favor of software and systems management isn't a sure path to success."

CIVIL RIGHTS:

Virginia Likely To Vote On Gay Marriage Ban; Similar Measure Unveiled In Maryland. The Washington Post (1/26, A1, Jenkins, 744K) reports, "The state Senate all but guaranteed on Wednesday that Virginia will hold a November referendum on whether to amend its 230-year-old Bill of Rights to bar same-sex marriages. The Senate voted 28 to 11 to follow the House of Delegates in approving the amendment. Though each chamber still must pass the measure adopted by the other, their wording is identical and support among the senators and delegates is strong." Meanwhile, Maryland Republicans "introduced a similar measure in the Senate on Wednesday and said they believe they have the votes they need to bring the matter to an up-or-down vote, despite resistance from leaders of the Democrat-controlled legislature. In the wake of a circuit court ruling last week that declared Maryland's 33-year-old ban on same-sex marriage discriminatory, GOP leaders said it was important to at least put the matter to a vote."

The Washington Times (1/26, Bellantoni, Miller, 90K) notes that Maryland Democratic leaders "appear reluctant to put a constitutional amendment on the ballot because it could

energize conservative voters in an election year in which Gov. Robert L. Ehrlich Jr., a Republican, is seeking re-election, and Lt. Gov. Michael S. Steele, also a Republican, is running for the U.S. Senate." The Times adds, "In Virginia, state Sen. Stephen D. Newman said the constitutional amendment is necessary to guard against 'aggressive' judges in other states, including Maryland, who are trying to redefine marriage. 'A few judges or a few localities are now presuming to change that fundamental meaning for our civilization and their actions have created confusion on the issue,' the Lynchburg Republican said. 'The federal courts are going to leave us with no other recourse.'"

FBI Mississippi SAC Says Report Could Rewrite Till Story. The AP (1/26) reports, "An FBI report on the decades-old murder of 14-year-old Emmett Till could rewrite the story of the slaying that put a young man's face on racial injustice in the South during that period." The AP adds that "some details of the crime could have been distorted or embellished over the past five decades, the FBI special agent in charge of Mississippi, John G. Raucci, told The Associated Press this week. 'The facts were told one way because that's the information that was available at the time,' Raucci said. 'And often times it's through urban legends and folklore -- and people who lived in the community pass along information from generation to generation -- and the next thing you know, they become fact.' Raucci did not rule out the possibility of indictments in the case or provide a timetable for releasing the report." The AP notes that the FBI report "should soon be turned over to District Attorney Joyce Chiles in Greenville. 'That does not necessarily mean that everybody involved in the Emmett Till case or the overt act is still alive or will one day be prosecuted,' Raucci said. … 'Evidence may no longer be available. Individuals who may have witnessed an event, time has now gotten the better of their minds.'"

FBI Reaching Out To NC Hispanics In New Human Trafficking Initiative. The Charlotte Observer (1/25, Ordoñez, 234K) reports that with funding from the Trafficking Victims Protection Reauthorization Act, "The FBI is launching a new effort to raise awareness of human trafficking. Calling it an offense against humanity akin to modern-day slavery, the Federal Bureau of Investigation in Charlotte estimates thousands of victims are trafficked into the state each year for forced labor and prostitution. 'This is something that is flying under the radar,' said Special Agent Kevin Kendrick, who is heading the local campaign. … In conjunction with increased investigative efforts to shut down human trafficking rings, the FBI is teaming up with local advocacy groups and social organizations to get a message out that federal agents should be trusted and not feared. The FBI, Kendrick said, is looking to assist all victims of human trafficking, even if they're living in the country illegally. Not only will the FBI protect victims and their rights, Kendrick said, the agency also will help them remain permanently." The Observer adds, "'This is a reprehensible problem,' said Assistant Special Agent Robert Clifford. 'We'd look at every weapon in FBI's arsenal to countering human trafficking.' … 'We need to let people know it's OK to contact us,' Kendrick said. 'This is an affront against humanity. This goes far past someone's immigration status.'"

Georgia Lawmakers Approve Voter ID Bill. The AP (1/25) reports, "A birth certificate might not be enough to vote in Georgia this year - legislation sent to the governor Wednesday would require photo identification before voters could cast their ballots." The AP continues, "Gov. Sonny Perdue said he would sign it quickly to give counties time to prepare for the primary in July and the general election in November. … The U.S. Justice Department also must approve the requirement before it takes effect." The AP adds, "The legislation would require voters to have a driver's license, military ID or state-issued identification card with a photo. Social Security cards, birth certificates and utility bills would no longer be accepted. … Supporters said it would help fight voter fraud. Critics argued it would disenfranchise the poor, minorities or elderly - people who are less likely to have driver's licenses."

5th Circuit Rules Against Shreveport In Race Bias Suit. The Shreveport (LA) Times (1/26, McCabe) reports, "A federal appellate court changed its stance and ruled today in favor of plaintiffs in a discrimination lawsuit against the city of Shreveport and its Fire Department, overturning a lower court's decision to dismiss the five-year-old case." The Times continues, "The 5th U.S. Circuit Court of Appeals remanded the heart of the discrimination case back to U.S. District Court in Shreveport. … The petition originally was brought against the city in 2000 by Todd Dean, who was not hired by the Fire Department and felt the city's hiring practices discriminated against him because he is white. Dean earned a higher test score than some blacks hired then, his lawsuit alleges. Other men joined the lawsuit soon after." The Times adds, "The 5th Circuit's ruling should compel the city not only to cease race-based hiring procedures in all departments, but also to re-evaluate the continued validity of all city programs that incorporate race as a criteria for participation," said local attorney Pamela R. Jones, who represented Dean, Shawn Sanders and Jason Matthews in the lawsuit. … The department ended race-based hiring practices 11 months before a federal magistrate dismissed Dean's case in December 2004 hoping to avoid further lawsuits, according to officials. Now the department relies on a pass/fail civil service exam, the educational background and

technical training of each candidate and psychological and physical ability exams. … The city has maintained that the Fire Department's hiring practices are based on a complaint brought by the U.S. Justice Department in 1980 that said the department had discriminated against blacks and women. Up to that point, the department had hired only three black men in its history, according to court records."

SIU Changes Web Descriptions Of Challenged Fellowships. The AP (1/26) reports, "While threatened with a federal lawsuit over three graduate fellowships the government considers discriminatory, Southern Illinois University has tweaked the descriptions of at least two of those scholarship programs on its Web site." The AP continues, "The fellowships at issue were said to specifically target minorities or 'underrepresented groups,' before the Justice Department objected last year, but the site now says those programs seek to help 'underserved' populations. … The revisions come as SIU administrators are weighing a Justice Department proposal that would head off a lawsuit threatened by the government, which in demanding that SIU discontinue the fellowship programs has accused the university of engaging in 'intentional discrimination against whites, non-preferred minorities and males.'" The AP adds, "The university has refused to publicly discuss the proposal it got from the Justice Department last week, saying only that administrators and key constituency groups were being tapped this week for feedback before the university responds. … David Gross, a spokesman for the SIU system, said Wednesday the Web site changes were done without the consent of the university's president, the Carbondale school's chancellor or the system's legal counsel and 'do not reflect the proposed offer from Department of Justice.'"

Judge Orders EEOC To Pay $1 Million To Law Firm For Frivolous Action. The AP (1/26) reports, "The U.S. Equal Opportunity Employment Commission must pay more than $1 million to a law firm that it sued unsuccessfully for allegations of sexual harassment and pregnancy discrimination, a federal judge has ruled." The AP continues, "The EEOC action was a 'frivolous' lawsuit against Robert L. Reeves & Associates, which practices immigration law, U.S. District Judge Dickran Tevrizian said in a ruling issued Monday." The AP adds, "Reeves maintained that the EEOC should have known the harassment and discrimination allegations the agency was pursuing were part of a scheme by two of his former law associates to destroy his firm, said a statement from lawyers representing Reeves. … The EEOC has already appealed the judge's findings, said Anna Park, the EEOC regional attorney in charge of the Los Angeles district office's legal division."

ANTITRUST:

Microsoft Offers To Release Part of Its Source Code In EU Antitrust Case. The Financial Times (1/26, Buck) reports, "Microsoft made a concession in its six-year dispute with European competition regulators on Wednesday by offering to give rivals access to parts of its Windows source code. With only three weeks until a compliance deadline set by Brussels, which had threatened fines of €2m ($2.5m) a day, Brad Smith, the group's general counsel, said: 'We are putting our most valuable intellectual property on the table.' … Microsoft's offer … came in response to a European Commission warning last month that it would impose fines unless the software group complied quickly with Brussels' 2004 antitrust ruling against the US group. The daily fines would come on top of the record €497m payment the Commission ordered in 2004. The regulator said Microsoft had failed to comply with a part of the ruling requiring the software group to share information about its Windows operating system."

The USA Today (1/26, Acohido) reports, "The European Commission issued a terse statement saying it would 'study carefully' Microsoft's announcement 'once it has received the full details.' … This is not the first time Microsoft has let outsiders view such code. It has granted governments, academics and business partners varying levels of access under tight restrictions."

Reuters (1/25, Lawsky, Zawadzki) reports, "Critics of Microsoft contend that protocols are standard software and that Microsoft has used what is essentially a digital combination lock to make them inaccessible. … A Commission spokesman said if that turns out to be true then Microsoft has no right to charge for them. … However, Microsoft says that the protocols include valuable patents and that it should be able to charge for their use, an argument under review at the Commission."

The AP (1/25) reports, "The company's chief counsel, Brad Smith, said sharing the part of the Windows workgroup server operating system and desktop software code that helps rival PCs communicate with Windows servers was 'a bold stroke' that should answer both EU and U.S. regulators' concerns. .. He insisted that Microsoft had already complied in December with an EU order to supply technical information by handing over up to 12,000 pages of documentation and offering 500 hours of free technical support to rivals worth some $100,000. … An independent monitor nominated by Microsoft found last month that the documents were 'totally unfit for its intended purpose.'"

Move Comes After Justice Department Complaints. The Wall Street Journal (1/26, Jacoby) reports, "The move came after the Justice Department complained in a court filing

this week about Microsoft's compliance with U.S. legal requirements -- and six years after a U.S. judge found Microsoft violated the Sherman Antitrust Act against monopoly abuse. The Justice Department said the Redmond, Wash., software giant had provided inaccurate information to a technical committee, and described one incident as 'particularly troubling' because it delayed an investigative team that had traveled to India. The filing also said the company had 'fallen significantly behind' in complying with monitors' technical requests. … In 2001, the Bush administration dropped the U.S. government's case against Microsoft, but ordered it to change certain anticompetitive practices."

Guidant Accepts Boston Scientific's Takeover Offer. USA Today (1/26, Iwata) reports, "Medical device maker Guidant on Wednesday accepted Boston Scientific's $27 billion bid, rebuffing a lower offer from Johnson & Johnson and ending a long-running takeover war." USA continues, "The companies have been vying for an edge in the growing multibillion-dollar market for medical and heart devices, and Guidant's pacemakers, defibrillators and stents made it an attractive acquisition target. … The merger, to be completed early this year, will make Boston Scientific the world's No. 2 maker of implantable pacemakers and defibrillators. Boston Scientific also will gain share in the market for heart stent devices, which hold open blood vessels." USA adds, "Most Wall Street analysts and some Guidant investors had urged Guidant to take the pricier Boston Scientific offer, calling it a better long-term investment than J&J's deal. The combined company will have $9 billion in revenue in 2006, Boston Scientific says. … To help close the deal and appease antitrust regulators, Boston Scientific teamed with Abbott Laboratories. Abbott will pay Boston Scientific $6.4 billion in cash to buy Guidant's vascular intervention and endovascular businesses." … Approvals are needed from U.S. and European regulators, plus shareholders for both companies."

The New York Times (1/26, Feder) reports, "For Johnson & Johnson, Tuesday started with a morning conference call with analysts to discuss earnings and ended with William C. Weldon, the company's chief executive, and Robert J. Darretta Jr., the chief financial officer, attending a dinner for several dozen institutional investors at the '21' Club in New York. Throughout the day and evening, the company maintained a rigid silence about the one subject on everyone's mind — whether it would respond to a midnight deadline to counter Boston Scientific's bold $27 billion offer for Guidant." The Times notes that Johnson & Johnson released a statement yesterday "saying the company had 'determined not to increase its last offer for Guidant Corporation, because to do so would not have been in the best interest of its shareholders.' About the only comment was its reminder that Guidant was obliged to pay it a $705 million breakup fee by today. … It was a remarkably quiet conclusion to the biggest and most contentious takeover battle yet in the medical device industry. The outcome leaves Boston Scientific as the apparent winner of Guidant, the No. 2 company in the $10 billion market for defibrillators and other implantable devices that regulate human heartbeats."

BlackBerry Injunction Hearing Set For Feb. 24. The Wall Street Journal (1/26) reports, "BlackBerry maker Research In Motion Ltd. and NTP Inc. will appear in U.S. District Court for the Eastern District of Virginia Feb. 24 for the court to consider a shutdown of U.S. sales and service of the popular wireless email device. In recent court filings, RIM, based in Waterloo, Ontario, argued a BlackBerry shutdown isn't warranted for various reasons, including recent preliminary moves by the U.S. Patent and Trademark Office to reject NTP's wireless email patents. NTP, a Virginia patent holding concern, argues a BlackBerry shutdown is appropriate, since the court has already found RIM infringed on NTP's patents and case law calls for such a shutdown. The court could rule on the injunction as early as Feb. 24 or in the days following, an NTP lawyer said."

NYTimes Says Pixar-Disney Deal Is Chance To Reform Disney's Creative Culture. The New York Times (1/26, 1.19M) editorializes, "A company like" Pixar "— and a figure like Mr. Jobs, notable for his dynamic role at both Apple and Pixar — doesn't let itself be bought for money alone, though the money is certainly enticing enough. This is really an opportunity to infect, and change, the creative culture of Disney, which, back in its founder's day, used to be one of the most creative places around" but whose "animated films have been nothing to shout about in the past decade or so." For Pixar and Apple the deal has "only an upside," and "the same is true for Disney, especially if it keeps shedding the ways of Mr. Eisner's old company and allows itself to become what may turn out to be, in the end, Mr. Jobs's company after all."

ENVIRONMENT:

Three ELF Activists Indicted On Ecoterror Charges In California. Reuters (1/26, Fitzgerald) reports, "A federal grand jury indicted three alleged 'eco-terrorists' on Wednesday on charges of plotting to blow up facilities like dams and cell phone towers. 'These three individuals planned to commit a number of dangerous and destructive acts in our region, all in the name of the Environmental Liberation Front,' U.S. Attorney McGregor

Scott told a news conference in the California state capital." Eric McDavid, Zachary Jenson and Lauren Weiner were "arrested January 13 outside a retail store in Auburn, California, following six months of surveillance of McDavid by federal authorities. … The charges were not related to a separate 65-count indictment handed down on Monday in Washington involving 11 environmental and animal rights activists in the Western United States." Scott "said the trio rented a house east of Sacramento in the foothills where they engaged in bomb-making. At some point, the three were joined by an unnamed woman who was a government informant. 'Because of the exceptional work of the FBI's Joint Terrorism Task Force and the brave efforts of a confidential source they were prevented from carrying out their planned attacks,' the U.S. Attorney said."

EPA Seeks Ban On Chemicals Used In Cookware. USA Today (1/26, Weise) reports, "In a surprise turn Wednesday, the Environmental Protection Agency moved to eliminate the production of a suspected carcinogen used in the making of Teflon and other non-stick and non-stain coatings. The EPA has asked eight manufacturers that use a family of chemicals known as perfluorooctanoic acid, or PFOA, to reduce production 95% by 2010 and to stop using it altogether by 2015. … Environmentalists and consumer groups have long dogged the agency to act. 'The science is still coming in, but the concern is there, so acting now to minimize future releases of PFOA is the right thing to do for our environment and our health'" says Susan Hazen of EPA's Office of Prevention, Pesticides and Toxic Substances." According to the article, "EPA officials are calling for voluntary PFOA cutbacks because 'under the Toxic Substances Control Act, they don't have authority to ban it,' says Richard Wiles of the Environmental Working Group, a public interest group that has long fought to bring public attention to PFOA in the environment." Wiles says that if the chemicals are phased out, it "will be 'the single biggest action the agency has ever taken.'"

The Washington Post (1/26, A1, Eilperin) reports favorable coverage of the EPA for this action. It quotes Ken Cook, president of the Environmental Working Group, who says, "'This is one of those days when the Environmental Protection Agency is at its best. With its announcement today, the EPA is challenging an entire industry to err on the side of precaution and public safety, and invent new ways of doing business. … As harshly as we have singled out DuPont for criticism for its past handling of PFOA pollution, today we want to single out and commend the company and acknowledge its leadership going forward."

DuPont Targeted. USA Today and the Post both note that DuPont was a particular target in the PFOA deal. In the first paragraph of its story, The Washington Post (1/26, A1, Eilperin) says, "Eight U.S. companies, including giant DuPont Co., agreed yesterday to virtually eliminate a harmful chemical used to make Teflon from all consumer products coated with the ubiquitous nonstick material." Both the Post and USA Today note that DuPont recently agreed to a $6.5 million settlement with the EPA over charges that it hid information about the dangers of PFOA.

ABC's World News Tonight (1/25, story 7, 2:50, Vargas) reported, "Today, the government asked companies to virtually eliminate" a chemical used to make Teflon "over the next nine years." Ross: "Today, the Federal government said DuPont had virtually agreed to eliminate any new emissions of the key Teflon chemical at its factories." Susan Hazen EPA: "This is the right thing to do. And we are going to move forward with it." The New York Times (1/26, Janofsky, 1.19M) adds, "DuPont immediately pledged to join the" voluntary program," along with "3M/Dyneon, Arkema, Asahi, Ciba, Clariant, Daikin and Solvay Solexis." The EPA says that "full compliance by the companies and their overseas affiliates would lead to a 95 percent reduction by 2010 in use of the substance, perfluorooctanoic acid, or PFOA, and to their total elimination by 2015."

Video Highlights Problems With Federal Mine Safety Oversight. NBC Nightly News (1/25, story 8, 2:30, Williams) reported, "Those two West Virginia mining disasters have now focused a lot of attention on mine safety in this country." A videotape tape shows "the perils of digging for coal. And the often lax oversight of this nation's mines." NBC (Myers) added, "This is the inside of Coal Creek Mine in southeastern Kentucky. Videotaped by a miner who smuggled a camera into work in June 2004 to document what he said were dangerous conditions." Edwin Pennington "is crushed under this slab of rock 200 feet long." One "safety official who investigated Pennington's death says his tragedy underscores a widespread problem in mines across the country. He says fines are too small to induce companies to fix hazards and the entire system has no teeth." Tony Oppegard, former Mine Safety & Health official: "The company has been going on about its business for the last year and a half without any consequences thus far."

Bush To Push For Reprocessing Of Spent Nuclear Fuel. The Wall Street Journal (1/26, Fialka, 2.11M) reports, "The Bush administration plans to announce a $250 million initiative to reprocess spent nuclear fuel, a first step toward reversing a 1970s policy that rejected reprocessing as too dangerous to pursue." The Administration's "decision to put the money into its fiscal 2007 budget to test new technologies is part of an effort to jump-start the nuclear-power industry at a time when energy prices

are high and concerns about global warming make nuclear power plants more acceptable." The Journal adds, "According to nuclear industry officials and others briefed on the proposal in recent weeks, the program could be announced as early as next week in President Bush's State of the Union address. If the technology works, it could vastly reduce the amount of spent nuclear waste that would have to be buried in underground storage, such as at Nevada's Yucca Mountain, set to open after 2012."

The Washington Post (1/26, A1, Baker, Linzer, 744K) adds the fuel proposal "is part of a broader push by the president for domestic and global nuclear energy. With worldwide energy demands on the rise and U.S. reliance on foreign oil increasing, Bush has held out nuclear power as a solution that will not affect global warming."

Gore Documentary On Global Warming Has Premiere At Sundance Festival. The Washington Post (1/26, A1, Booth, 744K) reports that ex-Vice President Al Gore's documentary on global warming, "An Inconvenient Truth," "had its world premiere at the Sundance Film Festival on Tuesday night before an enthusiastic audience that gave the former vice president and his movie a big standing O. Among the film's lessons: Earth's glaciers are melting, the polar bears are screwed, each year sets new heat records." The Post notes, "The core of the film is a one-man, ever-evolving multimedia slide show that Gore assembled himself. A little-known fact: Since his defeat by George W. Bush in 2000, Gore has traveled the globe with his bar graphs, staging event after event for small, invited audiences. Free of charge. And he's presented one version or another of this slide show, by his own estimation, a thousand times. … In the film, Gore presents the latest evidence to demonstrate how the accumulation of carbon dioxide and other pollutants of the industrial age are increasing temperatures."

FBI/DEA/ATF/USMS:

Mueller Recuses Himself From Trade School Probe. Under the headline "F.B.I. Director Recused From Investigation Of Weld's Former School," The New York Times (1/26, Healy, 1.19M) reports in "Metro Briefing" that "The F.B.I. director will not play a role in the inquiry into Decker College, the Kentucky school once run by William F. Weld, because the director and Mr. Weld, a Republican candidate for governor, are friends and former colleagues, an F.B.I. spokesman said yesterday. … The New York Democratic Party had asked that Mr. Mueller recuse himself, according to a party spokesman. Mr. Weld has not been accused of any wrongdoing involving Decker, which declared bankruptcy last fall amid allegations of fraud."

Under the headline "Weld's Pal Off Inquiry," The New York Post (1/25, Dicker, 624K) reported yesterday, "FBI spokesman Richard Kolko told The Post that while the Decker probe was being handled by the special agent in charge of the Louisville, Ky., field office, Mueller himself is 'regularly briefed on significant investigations and cases.' And while Kolko insisted Mueller 'has not had a role in directing any part of this investigation,' he said, 'since the issue has been raised publicly, and to avoid even the appearance of any conflict, any decisions that would otherwise be made by the director in this matter will, instead, be handled by Deputy Director John Pistole.' Kolko's announcement came a few hours after state Democratic Chairman Herman 'Denny' Farrell joined D'Amato in urging Mueller to step aside. … Farrell said Weld and Mueller were 'good friends' during the 1980s when both served in the U.S. Attorney's office in Boston. He said Mueller had also contributed to Weld's unsuccessful U.S. Senate campaign against incumbent John Kerry of Massachusetts in 1996."

Minnesota Attorney Charged In Internet Pharmacy Scheme. The AP (1/26) reports, "A lawyer has been indicted (in Minneapolis) on federal charges alleging he helped an Internet pharmacy illegally obtain narcotics and helped its founder hide assets." The AP continues, "Daniel Adkins, who was general counsel for Xpress Pharmacy Direct, helped deceive legitimate pharmacies into supplying the narcotics that Xpress hawked over the Internet and by telephone, according to the indictment issued Tuesday." The AP adds, 'Federal authorities say Xpress filled about 72,000 illegal prescriptions for pain killers and other controlled substances, generating sales of about $20 million. Authorities shut down Xpress last May and company founder Christopher Smith, his accountant and a doctor who issued prescriptions were indicted in August. … The indictment alleges that Adkins helped Smith hide assets after they learned about the investigation. It also alleges that Adkins wrote to legitimate pharmacies from which Xpress ordered drugs, assuring them that Xpress was 'both legal and authorized by federal and state statutes.' … Adkins was charged with conspiracy to distribute and dispense controlled substances, wire fraud; unlawful distribution and dispensing of controlled substances and misbranding drugs. If convicted of wire fraud he could face up to 20 years in prison and a $250,000 fine, the U.S. attorney's office said."

Drug Ring's Alleged Second-In-Command Pleads Guilty. The Knoxville (TN) News-Sentinel (1/26, Satterfield) reports, "Admitting crimes that could lock him away for life made Stephen 'Black' Ardis downright scared Wednesday. Ardis, who was captured on secret recordings expressing worries that an undercover agent he dubbed

'Superman' was on his trail, pleaded guilty in U.S. District Court to being second-in-command of a Detroit-to-Knoxville drug running operation. But the 26-year-old drug slinger made it clear before entering his plea that a possible life sentence was a scary proposition he wanted to avoid. … Assistant U.S. Attorney Mike Winck said the massive amount of drugs Ardis conspired to put onto Knoxville's streets guarantees the Detroit man a 20-year prison term. … The drug ring was broken in November after a probe led by U.S. Drug Enforcement Administration Agent Todd Lee and Knoxville Police Department Investigator Bruce Conkey. It was Conkey whom Ardis dubbed 'Superman' in a conversation secretly recorded by the agents during their investigation."

Prosecutor Delays Charges In Washington Bomb Case. The Tri-City (WA) Herald (1/25, Trumbo) reports, "Benton County prosecutors will need several weeks to decide potential charges against a Richland man who says he kept bomb-making material because he is a miner." The Herald continues, "Kevin D. Johnson, 49, was released from jail Friday, three days after Richland police arrested him at his home where they seized gunpowder, nitro-methane and about 20 pounds of ammonium nitrate. They also found six firearms." The Herald adds, "Prosecutor Andy Miller said Tuesday that no charges were filed during the 72-hour hold on Johnson because more investigation is needed. Items taken from the home also have to be analyzed by agents of the federal Bureau of Alcohol, Tobacco and Firearms, he said. … 'To prove the elements of the case, we'd have to get the ATF to test the items,' Miller said. … Richland police Capt. Mike Cobb said an ATF agent told him Tuesday analysis of the items found at Johnson's home would be completed in two to four weeks. … Cobb said the investigation also involves 91 blasting caps that allegedly belonged to Johnson that were found Jan. 15 at a home in Franklin County. Cobb said officers discovered the caps in a closet of a man's home after they investigated a domestic violence complaint."

IMMIGRATION:

Daughter Of Former Chilean Dictator Pinochet May Seek Asylum In US. Reuters (1/26) reports, "The eldest daughter of former Chilean dictator Augusto Pinochet on Wednesday asked the United States to grant her political asylum after she fled tax charges in Chile, Chilean officials said." Reuters continues, "Lucia Pinochet Hiriart, 60, was being moved to an immigration detention center late on Wednesday after spending most of the day at Dulles International Airport near Washington, Chile's Foreign Relations Minister Ignacio Walker told local radio in Santiago. … Earlier, Interior Minister Francisco Vidal said Chile had been told that Pinochet Hiriart had asked for asylum. … 'In the coming two or three days we will have a decision from the United States which, I insist, will be a rejection (of asylum),' Walker said." Reuters adds, "U.S. officials would not confirm that Pinochet Hiriart had requested asylum. … 'Lucia Pinochet is currently in U.S. Customs and Border Protection custody at Dulles International Airport, pending resolution of her immigration status,' said Jarrod Agen, a spokesman for the Department of Homeland Security. … Pinochet Hiriart has been charged with tax fraud related to some $1 million in undeclared taxes and falsification of documents as part of a widening tax evasion and fraud investigation involving the Pinochet family."

TAX:

Jury Finds "Survivor" Winner Hatch Guilty Of Tax Evasion. The AP (1/26, Henry) reports, "Richard Hatch, who won $1 million in the debut season of the reality show 'Survivor,' was found guilty Wednesday of failing to pay taxes on his winnings and taken straight to jail." The AP continues, "Hatch remained calm as the court clerk read the verdict. He waved goodbye to family members, then was handcuffed and taken into custody after U.S. District Judge Ernest Torres said he was a potential flight risk. … The charges carry up to 13 years in prison. Torres said he expected a sentence of between 33 months and 41 months, but said the time could be longer because prosecutors say Hatch committed perjury. Sentencing was scheduled for April 28." The AP adds, "Hatch, 44, was also convicted of evading taxes on $327,000 he earned as co-host of a Boston radio show and $28,000 in rent on property he owned. He was acquitted of seven bank, mail and wire fraud charges related to a charity, Horizon Bound, he planned to open for troubled youth. … Hatch's lawyer, John MacDonald, said he would appeal the verdict. He said Hatch was aware of the possibility of jail time."

Former Washington Man Wanted On Tax Charge Captured In Panama. The Puget Sound (WA) Business Journal (1/26) reports, "The U.S. Department of Justice said Wednesday that former Renton resident David Struckman has been captured in Panama. Struckman had been charged by the Internal Revenue Service for running an operation that promoted tax-avoidance plans." The Journal continues, "Struckman was indicted in 2004 and charged with conspiracy to defraud the United States. He then "disappeared," according to a Justice Department spokeswoman. He was arrested in Panama earlier this month

and deported, the department said, and will be transported to Western Washington." The Journal adds, "The government alleges that Struckman and four others sold 'Global Prosperity' wealth-building products, including videotapes, CDs and seminars, which 'included fraudulent methods of income tax elimination.' .. The seminars cost as much as $37,000 to attend and, according to the government, the group then concealed income earned from the products by using bogus trusts and offshore bank accounts."

CONGRESS-ADMINISTRATION:

Full Senate Begins Debate On Alito Confirmation. CNN's The Situation Room (1/25, Blitzer) reported, "The full Senate debate is under way on Samuel Alito's nomination to the U.S. Supreme Court. A day after the judiciary committee cast the divided vote over Alito, Republicans and Democrats are voicing fierce support and opposition to the President's choice for the high court." Alito "met today with Republicans senators whose majority votes are expected to seal his confirmation despite strong Democratic opposition."

NBC Nightly News (1/25, story 3, 1:00, Williams) reported, "As the full Senate began debating his Supreme Court nomination, Judge Samuel Alito took something of a pre-victory lap on Capitol Hill, thanking Republicans who helped move his nomination to the expected finish line. On the Senate floor, Democrats continued to call him a bad choice, while Republicans praised him." Currently, "Alito has enough support to be confirmed right now."

The AP (1/26, Holland) also says Alito "took a victory lap in the Senate on Wednesday, accepting congratulations from Republican leaders as lawmakers moved toward confirming him in a largely party-line vote." Reuters (1/26) adds Alito "appeared to have the votes for confirmation…as the Senate began a bitter debate."

The Washington Times (1/26, Hurt, 90K) says Republicans "rounded up the 60 votes they need to block any attempt to filibuster his nomination." Meanwhile, Sen. Edward M. Kennedy "called the vote on the nomination 'the vote of a generation.'"

Fox News' Special Report (1/25, Angle) reported, "Though Alito appears to be on track for confirmation and though it appears Democrats aligned against Alito do not have the votes to sustain a filibuster, Virginia's Republican Senator George Allen felt it necessary to issue a warning today." Allen: "My reaction is if they move forward with such a filibuster, my reaction is, 'make my day.' We will enjoy pulling the constitutional trigger to allow Judge Alito a fair up-or-down vote."

ABC's World News Tonight (1/25, story 6, 1:15, Vargas) reported, "Senators were divided along party lines." Sen. Hillary Clinton: "Roe v. Wade is at-risk. The privacy of Americans is at-risk. Environmental safeguards, laws that protect workers from abuse or negligence. Laws, even, that keep machine guns off the streets. All these and many other, are imperiled." Sen. Edward Kennedy: "The record demonstrates that we cannot count on Judge Alito to blow the whistle when the President is out of bounds. He is a long-standing advocate of expanding executive power." Senate Majority Leader Bill Frist: "Judge Alito deserves to become Justice Alito. And those who oppose him are smearing a decent and honorable man and posing an unfair political standard on all judicial nominees."

Bush Meets With Alito's Former Clerks. CNN's The Situation Room (1/25, Blitzer) reported the President met "with about 40 people, Republicans and Democrats, who've clerked for Judge Alito. It is another attempt to drive home the administration's insistence that Alito is qualified and deserves a quick and fair up or down Senate vote."

Novak Says Red State Democrats Who Oppose Alito Regret Vote. Syndicated columnist Robert Novak (1/26) writes that Sens. Kent Conrad and Byron Dorgan of North Dakota, "Bill Nelson of Florida, Tim Johnson of South Dakota, Ken Salazar of Colorado, Mary Landrieu of Louisiana, and Mark Pryor and Blanche Lincoln of Arkansas are red state Democrats who voted to confirm Chief Justice John Roberts. While Roberts is no less conservative than Alito…these Democrats who voted for the chief justice have been under intense pressure from the left to oppose Alito. All such senators may be willing to risk a politically unpopular 'no' vote, partly thanks to disappointing Senate Republican candidate recruitment this year." Novak notes, "The contention that President Bush's nominee is outside the 'mainstream' is the major talking point against Alito, but polls show support for him and his endorsement of spousal abortion notification. That debate's outcome may determine whether senators who vote against Alito will suffer at the polls this year and in the years ahead."

NYTimes Urges Democrats To Filibuster Alito's Nomination. The New York Times (1/26, 1.19M) editorialized that Alito's "elevation will come courtesy of a president whose grandiose vision of his own powers threatens to undermine the nation's basic philosophy of government --- and a Senate that seems eager to cooperate by rolling over and playing dead. It is hard to imagine a moment when it would be more appropriate for senators to fight for a principle. Even a losing battle would draw the public's attention to the import of this nomination." The Times adds, "Senate Democrats, who presented a united front against the nomination of Judge Alito in the Judiciary Committee, seem unwilling to risk the public criticism that

might come with a filibuster -- particularly since there is very little chance it would work. Judge Alito's supporters would almost certainly be able to muster the 60 senators necessary to put the nomination to a final vote. A filibuster is a radical tool. It's easy to see why Democrats are frightened of it. But from our perspective, there are some things far more frightening. One of them is Samuel Alito on the Supreme Court."

Roberts, Alito Appointments Called Bush's Greatest Domestic Successes Since 2003. The Wall Street Journal (1/26, 2.11M) editorializes, "With at least 52 Senators already on record in support, it's clear that -- short of some smear ex machina -- liberal Democrats can't stop Samuel Alito from being confirmed to a seat on the Supreme Court. So it's a good moment to consider what this says about our politics and what it means for the Court as it enters a new era. One conclusion is that the confirmation of both Chief Justice John Roberts and Judge Alito marks the most important domestic success for President Bush since his 2003 tax cuts." The "Alito-Roberts ascendancy also marks a victory for the generation of legal conservatives who earned their stripes in the Reagan Administration. … The Roberts-Alito Court also represents a notable, and greatly satisfying, rebuke for the legal left and its 'borking' strategy."

Bush Resubmits Nominee Previously Blocked By Democrats. The Washington Post (1/26, A3, Babington, 744K) reports the White House "renominated Brett M. Kavanaugh to the US Court of Appeals for the District of Columbia Circuit. President Bush nominated Kavanaugh, the White House staff secretary, in July 2003, but he fell victim to intense battles between Senate Democrats and Republicans over numerous judicial appointments. A May 2005 bipartisan pact averted a showdown over judicial filibusters and enabled some contested nominees to win confirmation. But it left Kavanaugh in limbo." The Senate Judiciary Committee's eight Democrats "complained last year that Kavanaugh took several months to answer their written questions about his qualifications. Other Democrats have noted that Kavanaugh, 40, has limited courtroom experience and helped independent counsel Kenneth W. Starr pursue the Monica S. Lewinsky case during the Clinton presidency."

Abramoff Prosecutor Among Nominees To Federal Bench. The AP (1/26) reports, "President Bush on Wednesday nominated one of the Justice Department's lead prosecutors in the Jack Abramoff corruption probe to a U.S. District Court seat." The AP continues, "Noel Hillman, chief of the department's public integrity section, was nominated for the federal judgeship in New Jersey, where he served in the U.S. Attorney's office under Michael Chertoff, now secretary of Homeland Security." The AP adds, "The White House was poised to nominate Hillman last summer, after New Jersey's two Democratic senators took the opportunity to weigh in on Hillman and other nominees in exchange for lifting their objections to another candidate Bush had nominated in 2003. … Hillman will step down as chief of the public integrity unit next week, but remain in the Justice Department's criminal division until he is confirmed, a department official said. Andrew Lourie, a career prosecutor in Miami, will lead the public corruption-fighting office on a temporary basis, the official said, speaking on condition of anonymity because he is not authorized to discuss personnel matters. … Lourie performed the same role until Hillman took over early in 2003."

Bush Suggests Government Will Not Bail Out GM And Ford. The Wall Street Journal (1/26, Cooper, McKinnon, 2.11M) reports, "President Bush said General Motors Corp. and Ford Motor Co. should develop 'a product that's relevant' rather than look to Washington for help with their heavy pension obligations, and hinted he would take a dim view of a government bailout of the struggling auto makers." In an Oval Office interview, Bush "said that his administration has discussed the development of new fuel technologies with the nation's top two auto makers, which might make them more competitive, but that he has had no talks about the companies' finances." Asked if he had spoken to GM Chairman and Chief Executive Rick Wagoner or Ford Chairman and CEO William Clay Ford Jr., Mr. Bush replied, "Not about their balance sheets. … And I haven't been asked by any automobile manufacturer about a bailout." Asked if the government should take "any pre-emptive action," he said, "I think it's very important for the market to function." Bush "suggested he felt optimistic about the companies' prospects."

WPost Says Detroit, Congress Should Embrace "Competition." In an editorial titled "Managing Detroit," the Washington Post (1/26, A24, 744K) says, "It's not clear whether the GM and Ford restructuring plans will be enough to avert bankruptcy. Their difficulties may take on a more political tone, particularly since the Midwest is a key battleground for presidential campaign strategists." But "Congress needs to keep Motown's troubles in perspective. They are the result of competitive pressures that most parts of the US economy take for granted every day. And it is precisely by embracing competition that the United States has become the world's most powerful economy."

Bush Unlikely To Push Large Initiatives In State Of The Union Speech. The New York Times (1/26, Stevenson, 1.19M) reports, "Having stabilized his political standing after a difficult 2005, President Bush is heading into his State of the Union address on Tuesday intent

primarily on retaining his party's slim majority in Congress this year and completing unfinished business from his existing agenda." Unlike last year, "when he used the occasion to kick off an ambitious and ultimately failed effort to overhaul Social Security, Mr. Bush seems unlikely to reshape the political landscape with his speech on Tuesday, members of both parties said." The Times adds, "Administration officials and other Republicans in Washington said Mr. Bush would focus on several topics, including health care, spending restraint, illegal immigration and the nation's international economic competitiveness, as well as an unapologetic restatement of his national security policy. Much of the speech, they said, will be tied together under a broad theme acknowledging that the United States is going through transitions that involve wrenching dislocation as well as opportunity." His aides "portray Mr. Bush as undaunted by the plague of setbacks last year that loosened his grip on his party and drove down his poll numbers, which although up from their lows last fall remain at anemic levels."

Bush Urged To Tackle Medicare Reform. David Gratzer, a physician and senior fellow at the Manhattan Institute, writes in the Wall Street Journal (1/26, 2.11M), "Bush will cite rising health costs as a major problem for Americans and their businesses, and he will outline steps to strengthen health savings accounts as a remedy." But "he is unlikely to mention Medicare reform -- and that would be a mistake. Indeed, if the president is serious about health reform, he will have to tackle Medicare. And he can start by re-engaging a debate from 1999." Seven years ago, Sen. John Breaux and Rep. Bill Thomas "completed the final report of the National Bipartisan Commission on the Future of Medicare. Considering various reforms, they eventually settled on a proposal modeled after the popular Federal Employees Health Benefits Plan (FEHBP), which covers nine million federal employees and their families. Instead of today's one-size-fits-all Medicare structure, they envisioned a program where seniors choose among competing private plans. Since then, Washington has debated the size and scope of Medicare expansion -- such as the prescription benefit -- but the program itself has yet to be fundamentally rethought." It "needs to be, because faced with Medicare's rising costs over the past four decades, the only real response has been a bipartisan exercise in wage and price controls."

Protestors Sue For Spot During State Of The Union. The Washington Post (1/26, A6, Barker, 744K) reports, "Organizers planning a protest during President Bush's State of the Union address next week say they have been denied a permit to hold the demonstration around the U.S. Capitol Reflecting Pool because that area has been reclassified as part of the security perimeter for the day of the speech. The organizers of the Tuesday protest, called 'World Can't Wait -- Drive Out the Bush Regime,' say the National Park Service and the U.S. Capitol Police initially offered them the Capitol Reflecting Pool as a demonstration site but changed their minds. Demonstrators have been told to confine their gathering to the gravel walkways on the Mall between Third and Fourth streets, farther from the Capitol. The grassy areas are fenced off because they are being resodded." Travis Morales, one of the organizers of the demonstration, "said the group was offered use of the area around the Capitol Reflecting Pool on Jan. 10 and that the site was not then part of any security perimeter. But on Jan. 19, he said, the group was told the security area had been expanded to include the Reflecting Pool. He called the change 'politically motivated,' adding that the Bush administration 'is trying to push us so far away that we can't be seen or heard. … A protest not seen and a protest not heard is not a protest.'" The demonstrators "filed a federal lawsuit yesterday seeking a court order that would enable them to gather at the Capitol Reflecting Pool. U.S. District Judge Ricardo M. Urbina will convene a hearing, possibly today."

Many Liberals Upset Kaine Was Chosen To Respond To Bush.

USA Today (1/26, Lawrence, 2.31M) reports, "Virginia Gov. Timothy Kaine lifted the Democratic Party's spirits last fall when he won in a conservative state and gave his fellow Democrats some ideas about how to replicate his success. The fruits of victory include the honor of being picked to respond to President Bush's State of the Union address Tuesday -- and the wrath of liberal bloggers wondering why Democrats didn't choose somebody else. Anybody else." The selection of Kaine, "a Roman Catholic who opposes gay marriage -- highlighted fault lines within the party. Bloggers on several liberal websites were furious for reasons including Kaine's looks, style and obscurity, his open talk about religion, his moderate positions and his inexperience in foreign affairs. 'What the hell are they thinking?' Arianna Huffington demanded on www.huffingtonpost.com. … Bloggers at dailykos.com, talkleft.com and other liberal sites showered cyberspace with alternatives: new faces — Illinois Sen. Barack Obama, New York Attorney General Eliot Spitzer -- and famous faces -- Al Gore, New York Sen. Hillary Rodham Clinton."

Villaraigosa To Give Spanish-Language Response. The Los Angeles Times (1/26, Chen, 958K) reports, "Congressional Democrats announced today that Los Angeles Mayor Antonio Villaraigosa will deliver the party's Spanish-language response to next week's State of the Union address. … This will be the third consecutive year that Democrats have offered a Spanish language response to Bush's speech. Two years ago, Gov. Bill Richardson of New Mexico delivered the first such response. Last year, it was

jointly given by then Rep. Robert Menendez, now a senator from New Jersey, and Sen. Jeff Bingaman of New Mexico."

CNN's The Situation Room (1/25, Blitzer) added "Villaraigosa's remarks clearly will be aimed at helping Democrats reach out to Hispanic voters right here in the United States."

Effectiveness Of Health Savings Accounts Disputed. The New York Times (1/26, Freudenheim, 1.19M) reports, "Bush has made 'consumer-directed' health savings plans a cornerstone of his policy for addressing runaway medical costs, and he plans to push them again in the State of the Union address next week." But "so far there is little evidence that the approach is helping many consumers come to grips with the high price of health care," even though "the early results do offer some hope. More than two million people have signed up for the plans, which were created as part of Medicare overhaul legislation in 2003 but were not an option for many people until the health insurance sign-up season last fall. While that is a tiny fraction of the 180 million Americans with health insurance, some experts say the numbers show a notably fast adoption rate for a complicated new consumer program. By other measures, though, workers and employers have been slow to embrace health savings plans, which are intended to reduce corporate health care costs while giving individuals more control of their medical spending."

In his Wall Street Journal (1/26, 2.11M), David Wessel criticizes Bush's "cure-all for health care," saying Bush argues for making "health care more like the market for tile and pipes." Adds Wessel, "Set aside the case that only a taxpayer-financed, government-organized solution works. A Republican president and Congress aren't going there, and a lot of Democrats are skeptical, too. … A bigger problem is that too many healthy (for now) Americans go without preventive care, and too many chronically ill Americans don't get care that would avoid costly, painful complications later. HSAs don't help there. And then there's the uncomfortable fact that 80% of health spending in the U.S. each year is spent on 8% of the population. Giving them tax breaks to buy health-insurance policies with $2,000 deductibles won't ensure that money is well spent."

Robert J. Samuelson writes in the Washington Post (1/26, 744K), "Americans want more health care for less money, and when they don't get it, they indict drug companies, insurers, trial lawyers and bureaucrats. Although these familiar scapegoats may not be blameless, the real problem is us. We demand the impossible. The changes we truly need are political. We need to reconnect people with the public consequences of their private acts. We should curb the subsidization of private insurance." Medicare recipients, "especially wealthier ones, should pay more of their bills." But "these changes won't happen because people don't want to see the costs. We don't have the health care system we need, but we do have the one we deserve."

Leavitt Says Government Moving To Solve Prescription Drug Program Problems. The Washington Times (1/26, Fagan, 90K) reports, "Administration officials yesterday told senators the new Medicare prescription-drug program has problems, but they're under control, and states will be reimbursed for covering seniors' prescription costs resulting from the glitches." Senators on the Finance Committee "seemed cautiously optimistic at the assurances, but some said Congress will still probably need to act. 'I think there's no question that the issue of prescription drugs will be back on the [Senate] floor in some form this year,' said Sen. Ron Wyden, Oregon Democrat." Health and Human Services Secretary Michael O. Leavitt said yesterday, "We've identified the problems, we're working on them and the plan gets better every day." He and Medicare chief Mark McClellan "had a private meeting yesterday with committee members to brief them on the situation."

The CBS Evening News (1/25, story 8, 2:00, Schieffer) reported, "It is no secret the new Medicare prescription drug program is not off to a great start. Many elderly have been lost in the bureaucratic maze. Many have found themselves with no coverage at all." CBS (Andrews) added, "According to advocates for senior citizens, in thousands of cases so far, drugs might be covered under Medicare, but patients still need prior authorization before insurance actually covers the drug. The Center for Medicare Advocacy calls that sleight of hand. What's the sleight of hand?" Vicki Gottlich: "I think people were promised that they would be able to get all the drugs that they require, but they weren't told that they might have to go through a little extra." Andrews: "Medicare has ordered insurance plans to solve this saying, 'we expect prior authorization to be resolved at the point of service,' meaning the pharmacy counter. … So now in this transition to this massive new benefit, prior authorization is yet another complication in an already-troubled program."

OLC Urges Caution For Federal Employees On Nonprofit Boards. Government Executive (1/26, Pulliam) reports, "Agencies should be careful about allowing employees to serve on the boards of nonprofit organizations that have an interest in their work, according to a recent opinion published by the Justice Department's Office of Legal Counsel." GE continues, "Federal executives can serve as officers or directors at nonprofit organizations, a 19-page opinion released Jan. 11 stated. But agencies should take into account the appearance of an ethical violation before permitting employees to serve in a group that handles issues

related to their government work. … 'Government employees [have a] . . . duty to "avoid any actions creating the appearance that they are violating the law ... or ethical standards,'" the Justice office's opinion said. … 'If an outside organization in which an employee is a director has been advocating its views directly to the federal government on a matter that the organization has identified as especially significant, there is a significantly heightened risk that the employee ... will at least appear less than independent in his judgments,' the legal counsel stated. 'And that risk ... calls for serious consideration by the employee's agency.' … Federal law requires government employees to recuse themselves from work activities when a nonprofit on which they serve has a financial interest in the matter. But just because nonprofits spend money advocating a position does not necessarily mean they have a financial interest in an agency action, according to the opinion." GE notes, "The case leading to the opinion originated in July 2004 when a senior executive at the Education Department was told by the Office of Government Ethics that election to the Senior Executives Association board of directors would result in a criminal conflict of interest due to his service on his department's Executive Resources Board."

Senate Committee Opens Hearings Into Lobbying Reform. USA Today (1/26, Drinkard, 2.31M) reports that after "weeks of calls for restrictions on how lobbyists influence Congress, lawmakers began Wednesday to grapple with the thorny details of just how to do it." The Senate Homeland Security and Governmental Affairs Committee opened the first congressional hearing on reforms, and "lobbyists argued against proposals to ban privately financed trips for House and Senate members and their aides, saying travel helps them make good policy decisions in an era of globalization." And some senators "rejected calls for more restrictions, saying problems…are rooted in lawmakers' own behavior, the way Congress operates and a failure to enforce rules already on the books." The Washington Post (1/26, A6, Milbank, 744K) reports lawmakers "had no difficulty conceding they had a problem. But there was yawning disconnect between the problem and the proposed remedies. While most everybody agreed that Congress was being subverted by lawmakers' reliance on lobbyists for campaign cash, the proposals getting the most serious consideration yesterday were relatively minor: whether to ban lobbyist-paid lunches or a few million dollars' worth of privately funded congressional trips." Both newspapers quote Sen. Tom Coburn saying, "I don't believe lobbying reform's the problem; I believe Congress is."

However, CNN's The Situation Room (1/25, Koppel) called the hearing "a bipartisan show of support for what Democrat Joe Lieberman called 'doing away' with what they believe is the faulty impression that their votes go to the highest bidder. The high-flying days of Congressional lobbying could be in for a rough landing as Democrats and Republicans alike rushed to put luxury vacations and expensive meals on the Congressional chopping block." The AP (1/25, Abrams) quotes Homeland Security and Governmental Affairs Chairman Susan Collins saying, "The public's trust in Congress is perilously low." The panel's ranking Democrat, Sen. Joseph Lieberman, similarly said, "The status quo stinks and cries out for us to clear the air."

McCain Testifies In Opposition To Earmarks. The Washington Post (1/26, Branigin, 744K) reports Sen. John McCain, appearing as a witness before the panel, "was one of several senators to denounce earmarking, a practice he called 'disgraceful.' He outlined one of several proposals to tighten rules and require greater disclosure of lobbying activities. But he told the committee, 'We're not going to fix this system until we fix the earmarks.'" But "representatives of lobbying organizations urged the committee today not to overreact to what they described as the unscrupulous activities of one corrupt lobbyist," and Minority Whip Richard Durbin said the problem "goes beyond earmarks and that solving it must start with reducing the 'outrageous expense' of political campaigns."

Lewis Offers Steps For Earmarking Reforms. House Appropriations Committee Chairman Jerry Lewis writes in Roll Call (1/26), "The president's budget contains numerous earmarks inserted by nameless, faceless bureaucrats within each government agency. Teach for America, The Points of Light Foundation, and America's Promise are just a few examples of unauthorized, limited-scope initiatives that routinely receive a line-item request in the president's budget. Yet elected representatives know more about local, state or national priorities than the Beltway bureaucracy. It would be a mistake to ignore this expertise when determining how to allocate scarce federal dollars." Lewis calls for "curbing the appetite to spend by sharply reducing the number of earmarks in annual spending bills and making the appropriations process more open and transparent. In order to succeed, the House and Senate must jointly embrace these efforts. Specifically, the leadership of the House Appropriations Committee recommends the following: 1) Sharply limit the number of Member project requests. … 2) Require increased accountability, disclosure and transparency by requiring that Member request letters be made public prior to House consideration of each appropriations bill. … 3) Require that all project requests be submitted in writing to the appropriations subcommittee of jurisdiction via a Member-signed request letter or form. 4) Establish clearly defined criteria for all project requests and require Members to specify how each project meets the criteria. … 5) Increase the proportion of projects that have a

dollar-matching requirement. … 6) Require all Congressionally approved projects to go through a formal executive branch contracting and auditing process. 7) Finally, require that all other committees adopt similar earmarking reforms."

Nelson, Coleman Call For Independent Commission. The Los Angeles Times (1/26, Curtius, 958K) reports Sens. Ben Nelson and Norm Coleman, "convinced that Congress cannot overhaul its rules on ethics and lobbying in the politically charged atmosphere of an election year," called for the creation of an independent commission for the job. But their "proposal faced quick resistance from two senators leading the reform push," Lieberman and McCain, both of whom said they "feared creating an independent commission and that waiting for it to act would slow the momentum for change." McCain said, "I don't want to wait. We've got to act quickly."

House Democratic Leaders Float "Toughest Lobbying Reform Package Yet." Roll Call (1/26, Newmyer) reports House Minority Leader Nancy Pelosi, Minority Whip Steny Hoyer, and Democratic Caucus Chairman James Clyburn "circulated principles" of the "toughest lobbying reform package yet" to Democrats, seeking their support. The measure would "force lawmakers to report when they are sponsoring earmarks, require them to pay fair market value for travel on private jets and create an office of public integrity to oversee these and other new lobbying rules. Details of the plan emerged after a day in which lawmakers on both sides of the Capitol traded barbs, with each party claiming to want a bipartisan solution, but finding no partner across the aisle."

GOP Ends Vestige Of "K Street Project." The Washington Post (1/26, A2, Birnbaum, 744K) reports the GOP has ended a "long practice of routinely summoning lobbyists to the Capitol to try to persuade them to hire their aides and colleagues," a "remnant of the K Street Project once championed by Rep. Tom DeLay." The Senate Republican Conference staff director said Wednesday that a "K-Street-job-vacancies memo -- the heart of Congress's remaining involvement in the effort these days -- will no longer be distributed during high-level meetings hosted by the conference on Capitol Hill between lawmakers and lobbyists."

Hill Staff May Rush To Lobbying Jobs Before Rules Change. Roll Call (1/26, Ackley) writes that while the two parties "might not agree on all things lobbying," they "seem united on doubling the current one-year cooling-off period for newly minted advocates. And that has Congressional staffers, who already had an eye toward employment on K Street, stepping up their job-seeking efforts. Lobbyists, headhunters and Capitol Hill aides speculate that a mini-exodus of staffers from both sides of the aisle may be coming as a result."

ASAE Opposes Proposal To Ban Privately Funded Travel For Lawmakers. The Washington Post (1/26, A23, Sarasohn, 744K) reports in its "Special Interests" column, "The American Society of Association Executives (sometimes referred to as the 'association of associations') is weighing in on plans to overhaul lobbying laws. ASAE, like some other trade groups, is concerned Congress may being acting too fast. ASAE opposes a measure that would ban all privately funded travel for members of Congress because, it believes, the ban would discourage true fact-finding trips and meetings with diverse groups."

DeLay Unrepentant As Ethics Talk Dominates Washington. In his Washington Post (1/26, A25, 744K) column, George Will writes of a visit with Tom DeLay in Richmond, Texas, writing, "Most people, battered as he recently has been, would be curled up on the carpet in a fetal position. But DeLay is as direct and uncomplicated as the tool that supplies his nickname -- 'The Hammer' -- and his faults do not include being a whiner. Furthermore, he is not about to plea-bargain in the court of public opinion. He chafes under prudential reticence: His attorneys tell him not to trumpet the fact that the Justice Department told them he is not a target in the Jack Abramoff investigation. But about other matters, the bantam is belligerent." And in DeLay country, "unlike on the Potomac, the fever for reform is not high. To a visiting columnist who waxes censorious about earmarks for highway projects, DeLay responds with a notable lack of repentance: 'You just drove out on one.'"

Social Security Group Redefines Itself To Push For Lobbying Reform. The Washington Post (1/26, A23, Sarasohn, 744K) reports in its "Special Interests" column, "Fresh off its success in raising a grass-roots wave of public opposition that helped block President Bush's plan to overhaul Social Security, Americans United to Protect Social Security has redefined itself. The name is shorter -- Americans United -- and the mission is broader: public corruption, education, health and energy costs, economic prosperity and such. Yesterday, Americans United unveiled a $1 million advertising campaign urging support for legislation proposed by Democratic lawyers aimed at tightening the restrictions on lobbying." The group "has received initial support from organized labor, including the American Federation of State, County and Municipal Employees. Brad Woodhouse , director of communication, says Americans United hopes to raise $10 million to $20 million from labor, individuals and others."

Blunt, Boehner Make Case For Their Candidacies. Rep. Roy Blunt, a candidate for House Majority Leader, writes in USA Today (1/26, 2.31M), "House members cannot ignore recent scandals that have many questioning the credibility of our system. Republicans will

regain Americans' trust by enacting tough penalties for those who break the law and focusing on our agenda of limited government, personal responsibility and growing the economy by returning money to the Americans who earned it. … Lobbying reforms should include new rules governing travel and disclosure and regulations subjecting shadowy, tax-exempt '527' political groups to the same standards as others who attempt to influence the process. Then the credibility of honest public servants will be not be questioned -- even when some try to paint them with the same brush as those who break the law."

Meanwhile, Rep. John Boehner, a candidate for House Majority Leader writes in USA Today (1/26, 2.31M), "House Republicans need leadership that will help provide a vision and a plan for renewal. We need a leader who will stand up to Democrats when they're wrong, but who has credibility to work with them when it's in the country's best interests.' Boehner adds, "As of now, I am the only candidate who has released a detailed plan that would help House Republicans regain the spirit and energy of 1994, embrace real reform and reclaim the vision responsible for our success."

USA Today Says Blunt, Boehner Not Credible Reformers. An editorial in USA Today (1/26, 2.31M) says, "The former majority leader, Tom DeLay, stepped down after he was indicted in a Texas fundraising case and linked to crooked lobbyist Jack Abramoff. So where is the GOP seeking this fresh face and new start? With two lawmakers -- Roy Blunt of Missouri and John Boehner of Ohio -- who have cozy relations with lobbyists and a penchant for accepting perks from corporate friends." USA adds, "A third candidate for majority leader, John Shadegg of Arizona, is less enmeshed with the lobbying establishment and high-powered fundraising. That's one reason he's given virtually no chance of winning." USA continues, "Both Blunt and Boehner have one point right: Voters are clamoring for change. That requires recognition of what's wrong and the will to do something about it. Lawmakers who've spent their careers accepting perks and raking in special-interest campaign cash don't make for credible reformers."

Cornyn Emerges As Senate GOP's "Self-Appointed Public Relations Man."

Roll Call (1/26, Pierce) reports, "With President Bush and Republicans struggling to regain their standing in public opinion as Senate Democrats hammer away daily at every perceived foible or folly committed by the ruling majority," Sen. John Cornyn "has made it his mission to strike back." Over the past year, Cornyn "has become a self-appointed public relations man for Republicans in Congress and the White House, filling a communications void that has developed in the Senate GOP leadership." Cornyn said, "I saw it as addressing this quick-response need that I don't think we had been set up for before, and really didn't need before the Democrats created their war room. It's not enough to come back later on, a week later, two weeks later, and respond. … A charge unrebutted is a charge believed." Cornyn has taken a key role in judicial nominations and also spearheaded "an aggressive effort among his colleagues in directing staff to send out partisan press releases, opposition research papers and talking points." He is now running for the "low-profile but still influential post of vice chairman of the Senate Republican Conference, which just happens to be the No. 2 'message' position."

First Lady's Approval Rating Is 82% In CNN/USA Today/Gallup Poll.

CNN's The Situation Room (1/25, Crowley) reported, "In the latest CNN/USA Today/Gallup poll, 82 percent of Americans gave thumbs up to the way Laura Bush is handling her job. … Her approval rating is almost 40 points higher than her husband's." CNN added, "Despite that 82 percent approval rating, only 40 percent of Americans say they would like to see Mrs. Bush run for Senate. The truth is, when people see her as outside the world of politics, she is one of his biggest political assets."

Cheney Still A GOP Fundraising Draw.

Roll Call (1/26, Akers) reports in its "Heard on the Hill" column, "Despite a recent spate of bad publicity, Vice President Cheney is still a big draw for GOP fundraising. The vice president is slated to be the headline attraction this evening at a fundraiser for Sen. Mike DeWine (R-Ohio). Anyone can attend for a simple $1,000. But the most generous donors may have a picture snapped with the veep: Going for that 'max out' opportunity before Ohio's primary in May, the DeWine re-election campaign is charging political action committees $5,000 per photo op."

Hillary Clinton Says Bush Disregarding Cities' Needs In Favor Of Tax Cuts.

Reuters (1/25, Whitesides) reported, "Democratic Sen. Hillary Rodham Clinton accused the Bush administration on Wednesday of ignoring the needs of cities in its politically driven zeal for tax cuts and told US mayors 'you are on your own.' Clinton, a potential White House candidate in 2008 who is seeking Senate re-election this year in New York, said that since the September 11 attacks President George W. Bush had reneged on his obligation to states and cities to pay for crucial security and social programs." Clinton said tax "cuts are desirable in the right political and economic climate but 'it is hard to square with the challenges we face at this time of terrorist threat.' At the federal level, 'the sense of urgency that marked the months after the 9/11 attacks has largely given way to politics as usual,' she said."

Clinton Stumbles Over Question On Her Time As Wal-Mart Board Member. The New York Daily News (1/26, McAuliff, 729K) reports that Sen. Clinton "easily pointed at Wal-Mart yesterday as not doing enough about health care but found it a little tougher when asked if she had ever suggested the retailer do more when she was on its board of directors. 'Well, you know, I, that was a long time ago, I have to remember,' she stammered, before pointing to her work on health care while First Lady. She sat on the Wal-Mart board from 1986 to 1992. Her spokesman insisted it's 'a very different company now.'"

Columnist Says Liberals Increasingly Unhappy With Clinton. Columnist Jonah Goldberg writes in the Los Angeles Times (1/26, 958K), "Liberals are sizing up Hillary Clinton for the umpteenth time, and they don't like what they see. … 'I will not support Hillary Clinton for president,' wrote Molly Ivins, the voice of conventional thinking on the left. 'Enough. Enough triangulation, calculation and equivocation. Enough clever straddling, enough not offending anyone.'" Goldberg adds, "The New Republic offers perhaps an even more devastating critique of Clinton for Democratic pragmatists: She can't win. Marisa Katz dismantled the myth that Clinton can appeal to 'red state' voters because she won in upstate New York. Turns out former Vice President Al Gore and Sen. John Kerry each did better in upstate New York than she did. … Meanwhile, a recent Gallup poll showed that 51% of Americans won't even consider voting for Clinton." Goldberg relates that there is "something oddly satisfying in the possibility that Clinton being herself is politically disastrous. And, if she's really just playing one more role according to some classically Clintonian political triangulation, there's something equally satisfying to the prospect that even her fans aren't falling for it anymore."

Obey, Frank To Propose Full Public Financing Of House Contests.

Roll Call (1/26, Kornacki) reports that Rep. David Obey (D-Wis.) "is joining with Rep. Barney Frank (D-Mass.) to propose full public financing of all House elections. They announced Wednesday that they will introduce the plan, which would bar all candidates from fundraising and self-financing in their campaigns, when the House reconvenes next week." Obey's "plan would radically curtail the financial advantage most incumbents now enjoy, even making it difficult for some of them to pay for television ads. And even if Democrats were to unite behind it, the prospect on a vote in the GOP-controlled House is less than remote. … Beyond that, the plan also faces an almost certain constitutional hurdle, in the form of the Supreme Court's 1976 Buckley v. Valeo decision that equated campaign spending with free speech."

Kondracke Says House GOP Group To Unveil "Suburban Agenda" Next Month.

Roll Call Executive Editor Morton M. Kondracke writes in Roll Call (1/26), "A different kind of agenda -- different from the president's State of the Union address and the anticipated Democratic election year document -- is scheduled to be unveiled early next month to House Republicans: 'The Suburban Agenda.' It's the work of a group of 22 GOP Members from across the party's ideological spectrum and led by moderate Rep. Mark Kirk (Ill.), who's also tried to sell it to President Bush's top political adviser, Karl Rove." Kirk said "this agenda is designed to answer the problems faced by a suburban family as it moves through its day." Kondracke notes, "There's clearly strategic political intent behind trying to build the 2006 GOP legislative strategy around the suburbs: More than half of U.S. voters live in the 'burbs, and these places, formerly Republican strongholds, have been trending Democratic in recent years. … The agenda is designed to keep Republicans in power, but many of the items -- electronic health records and anti-gang measures, for sure -- ought to be bipartisan. It wouldn't be surprising if there's a bidding war for the support of the suburbs."

Postal Service Opposes Collins Bill On Mail Rates.

The Washington Post (1/26, B2, Barr, 744K) reports in its "Federal Diary" column, "The U.S. Postal Service headquarters launched a blitz yesterday to block a Senate bill, contending that the legislation, in combination with White House demands, could trigger a 20 percent increase in stamp prices in the near future. The bill's sponsors, Sens. Susan Collins (R-Maine) and Thomas R. Carper (D-Del.), said they were 'outraged that the Postal Service would mislead senators.' In a statement, they said, 'Nothing in the bill would lead to rate increases.' Government agencies rarely risk incurring the wrath of committee chairmen who oversee their operations, as is the case with Collins. As head of the Homeland Security and Governmental Affairs Committee, she has made the overhaul of postal operations one of her priorities. Her bill would create a system of setting mail rates that she believes would give the post office greater pricing flexibility and would prevent it from raising rates each year in excess of inflation as measured by the consumer price index."

Federalist Society Protests Nightline Report On Scalia.

The Washington Times (1/26, Pierce, 90K) reports in its "Inside Politics" column "The Federalist Society yesterday called on ABC to investigate a report by its news show 'Nightline' that suggested Supreme Court Justice Antonin Scalia had done something unethical by participating in a legal seminar sponsored by the group. 'The report grossly misled viewers about a recent trip Supreme Court Justice Antonin Scalia took to teach a 10-hour course on the

Constitution and separation of powers. 'Nightline' suggested that Justice Scalia's trip was a "judicial junket," and even strained to manufacture a link with disgraced lobbyist Jack Abramoff,' Federalist Society President Eugene B. Meyer said in a letter yesterday to ABC News President David Westin. The program, which aired Monday, emphasized that Justice Scalia had missed the September swearing-in of Chief Justice John G. Roberts Jr. because of his commitment to attend the legal seminar at a Colorado resort, suggesting that the jurist spent most of his time playing tennis and engaging in other frivolous pursuits."

High Court Urged To Look To Foreign Opinions In Interpreting Law. Felix G. Rohatyn, the United States ambassador to France from 1997 to 2001, writes in an op-ed in the New York Times (1/26, 1.19M), "Globalization has made it not only 'appropriate or useful' but vital to look at foreign laws" when interpreting our own. "When we require European support on security issues…our job is made more difficult by the intensity of popular opposition in Europe to our policy" on the death penalty. "Contempt for the laws of our allies is a major factor in our increasing isolation in the world," and "that is why is it is deeply troubling that the next member of the Supreme Court will most likely share Justice Scalia and Justice Thomas's" opposition to that view. "Taking the views of 450 million Europeans into account is not a sign of weakness on our part, nor is it a commitment to change our views" but "simply recognition that the laws of our most important allies, our biggest foreign investors, foreign employers, foreign customers and trading partners are worthy of our attention."

OTHER NEWS:

Home Sales Drop Sharply. USA Today (1/26, Knox, 2.31M) reports, "Sales of existing homes fell in December for the third-consecutive month, in a surprisingly sharp drop that signaled the housing market is cooling off faster than expected. Home resales declined 5.7% from November to a seasonally adjusted annual pace of 6.6 million, the slowest since March 2004, the National Association of Realtors said Wednesday. Western states, notably California, suffered the worst, with home sales in the region skidding 11.4% from November and from December 2004." The Wall Street Journal (1/26, Preciphs, 2.11M), however, adds that even if "sales of existing homes fell in December to their lowest level in three months," they "still set a record for the year." The New York Times (1/26, Bajaj, 1.19M) also reports "the housing market registered a fifth consecutive year of increased sales." The data, nonetheless, "appear to suggest that the era of rapidly increasing sales may be coming to a close."

Stocks Down. The New York Times (1/26, 1.19M) reports, "Stocks ended a two-day rally yesterday as a worsening profit outlook for oil companies and homebuilders, two of the market's best performers during the last 12 months, sent prices lower." The Standard & Poor's 500-stock index "fell 2.18 points, or 0.2 percent, to close at 1,264.68, its first drop this week. The Nasdaq composite index lost 4.60 points, or 0.2 percent, to 2,260.65. The Dow Jones industrial average dropped 2.48 points, or less than 0.1 percent, to 10,709.74, helped by a gain in General Motors." The Wall Street Journal (1/26, Patterson, 2.11M) and USA Today (1/26, 2.31M) also report the stock numbers.

Oil Industry Defends Record-High Profits. ABC World News Tonight (1/25, story 4, 2:30, Vargas) reported, "Some breath-taking numbers from the oil industry today. Conoco/Phillips said it made 13.5 $13.5 billion last year, an increase of 66% from the year before. The record-high profits are the result of record-high oil and gas prices people are paying at the pump and to heat their homes. So, the oil industry is feeling the heat. Today, it launched a counterattack." ABC (Stark): "Today the oil industry tried to argue that it's not just the companies themselves who benefit when profits are high. At the gas pump, where prices are once again increasing, news of the huge oil company profits had consumers up in arms." After "all the numbers are in, analysts expect oil industry profits for the fourth quarter to be up at least 46% over a year ago. The industry today was quick to go on the defensive, pointing out its earnings are just slightly above average for all corporations, just over 7 cents for every dollar spent. It also argued that what's good for big oil is good for average Americans." Stark concluded: "So, for oil companies and those who own shares in them, it has been a boom year. But for many consumers, it's a bust." Vargas: "Indeed it is."

Greenspan To Open Consulting Firm. When he leaves the Fed at the end of the month, Greenspan plans to set up a consulting firm, Greenspan Associates, in Washington, DC, the Wall Street Journal (1/26, 2.11M) reports. The Journal adds, "One of his first hires will be Michelle Smith, who the Fed said yesterday will leave her job as director of its office of board members to join Mr. Greenspan's new firm. … In addition, the Fed said David W. Skidmore, Ms. Smith's deputy, would become the board's chief spokesman and Rose Pianalto Cameron will oversee other public information activities.

Greenspan Opposes Banking Loophole. Federal Reserve Chairman Alan Greenspan opposes a regulatory loophole that allows corporations to own banks. The Wall

Street Journal (1/26, Wysocki, 2.11M) says Greenspan's opposition puts him "into the middle of an effort by Wal-Mart Stores Inc. to establish a bank. Mr. Greenspan's salvo, outlined in a 12-page letter to Congress that was reviewed by The Wall Street Journal, is the latest in a controversy over the separation of commerce and banking. Wal-Mart, the Bentonville, Ark., retailer, is trying to obtain a state banking charter in Utah, using precisely the exemption in the banking laws opposed by Mr. Greenspan." The Journal adds that the remarks "could be Mr. Greenspan's last major statement to Congress as Fed chairman."

Investors Were Skeptical When Greenspan Took Over Fed Chair. USA Today (1/26, Hagenbaugh, 2.31M) reports, "Investors jittery about how incoming Federal Reserve chairman Ben Bernanke will pan out can take some solace -- folks weren't sure some guy named Alan Greenspan was up to snuff either. Investors didn't take the news so well on the day in June 1987 when Paul Volcker announced he was leaving the Fed after eight years and Greenspan was named to his position. Bond markets took their worst one-day beating in more than five years, and the dollar fell." USA adds, "In many ways, Bernanke — although widely respected in economic circles — is more of an unknown to the public than Greenspan was in 1987. … But no matter how well they knew Greenspan, people in 1987 were still nervous about him taking over the Fed."

Dow Chemical Loses Appeal On Life-Insurance Policies. The Wall Street Journal (1/26, Matthews) reports, "A federal appeals court ruled Dow Chemical Co. is liable for $22.2 million in back taxes and interest for claiming tax-income losses on thousands of life-insurance policies it took out on its employees. … The ruling is a victory for the Internal Revenue Service, which for the past decade has been cracking down on companies that take out life-insurance policies on their executives and employees, often without their knowledge, in order to reduce their corporate-tax bill." The article says that only Dow Chemical had prevailed against the IRS in these cases, but lost that victory on appeal. The article explains that companies took out these insurance policies "to generate tax deductions with minimal cash outlay. They did this by taking a tax deduction for the interest they paid on loans taken out against the insurance policies, while allowing the policy to build value tax-free."

Ney Announces He Will Seek Reelection. CNN's The Situation Room (1/25, Blitzer) reported, "A leading target in the influence peddling investigation isn't letting the probe keep him from the campaign trail. Congressman Bob Ney announced today that he is running for re-election. The Ohio Republican recently gave up his committee chairmanship. State party officials have urged him to give up a seat as well if he is indicted. Ney denies any wrongdoing."

The AP (1/26, Hammer) notes that in stepping down as chairman of the House Administration Committee earlier this month, Ney "acknowledged that his ties to Abramoff were a distraction from his duties, particularly as Republicans push an ethics reform agenda -- part of which must be implemented by the Administration Committee. But Ney spokesman Brian Walsh said no such distraction has affected Ney's work for his district, where he's known for hands-on constituent service and independence from GOP trade and labor policies."

The New York Times (1/26, Hauser, 1.19M) relates that Ney, in a statement, said "that the campaign this year promises to be a 'vigorous' one 'and I am ready for the fight.' 'I look forward to joining my friends and supporters, including the many state and local officials backing my re-election bid, as we kick off the 2006 campaign this Thursday and Friday,' he said." Ney "is referred to as 'Representative No. 1' in court documents filed in connection with the corruption scandal surrounding" Abramoff. Ney's statement "said he would announce his re-election bid at a campaign rally in Dover tomorrow evening and then travel to the southern part of the district for a second rally in Chillicothe on Friday at noon."

Roll Call (1/26, Whittington) adds, "Chillicothe Mayor Joe Sulzer and Dover Law Director Zack Space are vying in the May 2 Democratic primary for the chance to face Ney, who has held the expansive 18th district seat since 1994."

Ehrlich Says Stem-Cell Funding Decisions Should Be Based On Science. The Washington Post (1/26, B4, Wagner, 744K) reports that Maryland Gov. Robert Ehrlich (R) "is pushing a plan to spend $20 million next year on stem cell research," but "is not committing himself on the question that has stirred the most controversy: whether the money should be used primarily for work on stem cells derived from human embryos or from less controversial adult stem cells." Ehrlich, in an interview, said, "I'm not going to make that decision. … The point here is that the decision should be a function of the science. These are fundamentally science questions, not political questions." Ehrlich "would leave it to a state-founded technology corporation to decide whether to provide grants for work on adult stem cells or work on embryonic stems cells, which many scientists say holds greater promise but some in his party consider tantamount to abortion." Ehrlich, "who has supported stem cell research since his days in Congress," said, "The strong pro-life members know the administration does not share their views on this issue, but we wanted to try to lower the temperature on the politics. … I wanted to try to keep everyone's eye on the ball, and I believe this approach accomplishes that goal."

Republicans Say They Have Bipartisan Support For Stem-Cell Bill Filibuster. The Washington Times (1/26, Ward, 90K) reports that Democratic and GOP Maryland state senators on Wednesday vowed "to stop a bill that would promote the creation of embryos for research. 'If [Senate President Thomas V. Mike] Miller wants to do this extraordinary thing, he will get a filibuster that lasts as long as he wants it to last,' said Senate Minority Whip Andrew P. Harris, Baltimore County Republican. Senate Minority Leader J. Lowell Stoltzfus said he had more than the minimum 19 votes to filibuster. 'We think we have 20,' said Mr. Stoltzfus, an Eastern Shore Republican." The Times notes, "There are 14 Republicans in the 47-member Senate, which means six Democrats have agreed to filibuster. Sen. Paula C. Hollinger, Baltimore County Democrat, is sponsoring the Senate bill in support of embryonic stem-cell research for the second year. … 'I'm sure they will filibuster, and I'm sure we will round up the votes,' she said. Mrs. Hollinger also said she would fight for the bill and against the filibuster for 'as long as it takes.'"

Ford Released From Hospital.

ABC's World News Tonight (1/25, story 9, 0:10, Vargas) reported, "Gerald Ford was released from the hospital today. He spent the last 12 days being treated for pneumonia at the Eisenhower Medical Center near Rancho Mirage, California. His doctors say he is doing well."

NBC Nightly News (1/25, story 7, :45, Williams) added, "At 92, he is the oldest living former president. His spokesperson said he's doing well but it's safe to say doctors will be keeping a close eye on him."

The Los Angeles Times (1/26, Rosenblatt, 958K) reports, "Ford, 92, originally had been scheduled to leave Eisenhower Medical Center in Rancho Mirage on Jan. 19, but doctors kept him for additional treatment."

Professors Say Maryland Wal-Mart Defeat Stems From Government-Employed Voters.

Steve H. Hanke, professor of applied economics at Johns Hopkins University, and Stephen J.K. Walters, professor of economics at Loyola College in Maryland, write in an op-ed in the Wall Street Journal (1/26, 2.11M), "The consequences of" Maryland's "legislature's override of Republican Gov. Robert Ehrlich's veto of their 'Fair Share Health Care Act' on Jan. 12 will be tragic for some of the state's neediest residents." The reason for the override is that legislators "are simply eager for Big Labor's votes and money and therefore subservient to its interests." Estimates show "that as much as a third of the state's economic activity stems from federal employment and purchases," that "sector where revenues appear to arrive automatically and inefficiency never leads to bankruptcy," so "many Marylanders are simply unmindful of the necessities of survival in the private sector." This elects legislators who "often behave as if business is a problem to be solved." However, "legislators should be mindful that companies like Wal-Mart are not the enemy but rather front-line soldiers in a real war on poverty."

Hamas Wins Palestinian Elections; Government Resigns.

The AP (1/26) reports this morning, "The Islamic militant group Hamas said Thursday it won control of the Palestinian parliament and officials from the ruling Fatah Party confirmed the estimate -- though Palestinian election officials delayed the release of preliminary official results." The claim by Hamas leader Ismail Haniyeh "was based on reporting by Hamas activists who observed the counting in the polling stations, the group said. He said Hamas had won about 70 seats, enough for a majority in the 132-seat parliament. … Officials with Fatah also said that Hamas had won about 70 seats, which would give the Islamists a majority in the 132-seat parliament. They spoke on condition of anonymity because counting in some districts was continuing."

Meanwhile, CNN.com (1/26) reports, "In a stunning development ahead of official election results, Palestinian Prime Minister Ahmed Qorie said he and the rest of the Palestinian Authority government will resign in the wake of militant group Hamas' apparent victory in historic elections. The announcement was an acknowledgment that election results showed Hamas had won a majority of seats in the 132-seat Palestinian Legislative Council, supplanting the ruling Fatah party." This announcement came before official election results had been released, CNN.com reported. According to the article, Qorie's office "said it will be up to Hamas to form a new government."

Previously, most reports had referred to exit polls showing a narrow Fatah win. The Wall Street Journal (1/26, Leggett, 2.11M) reports that "according to Beir Zeit University's exit poll, the ruling Fatah party emerged victorious with 46% of the vote and Hamas captured about 40%, making its Reform and Change party the second-most popular among voters. Independent parties accounted for the difference. Final results are expected today." The CBS Evening News (1/25, story 5, 2:00, Schieffer) reported that "exit polls show that a militant group dedicated to Israel's destruction did very well, maybe even well enough to gain a role in the Palestinian government." NBC Nightly News (1/25, story 4, 1:30, Williams) showed Ali Zarbawi, Birzeit University saying, "Hamas will be an active opposition, a very strong opposition, but Fatah is going to lead the government."

USA Today (1/26, Gutman, 2.31M) adds "about 1 million Palestinians voted Wednesday in parliamentary elections that threaten to end the ruling Fatah Party's decade-long monopoly over Palestinian politics." The Washington Post (1/26, A1, Wilson, 744K) headlines its story "Hamas

Makes Strong Showing In Vote," while the Washington Times (1/26, Mitnick, 90K) titles its reprot "Fatah Edges Hamas In Polls." The Christian Science Monitor (1/26, Prusher, Mitnick, 61K) and Los Angeles Times (1/26, King, 958K) run similar reports.

Bush Touts Palestinian Elections But Says He Will Not Deal With Hamas. In its "Washington Wire" column on its web site,, the Wall Street Journal (1/26, 2.11M) reports, "President Bush, in an Oval Office interview, declared that he isn't ready yet to deal with the radical Palestinian Islamist group Hamas no matter how well it does in Wednesday's Palestinian elections. Speaking to The Wall Street Journal as Palestinians were electing a new parliament, Bush lauded the Middle Eastern trend toward democracy that produced Palestinian elections, but he said that Hamas isn't a suitable partner for diplomacy until it renounces its position calling for the destruction of Israel. 'A political party, in order to be viable, is one that professes peace, in my judgment, in order that it will keep the peace,' the president said. 'And so you're getting a sense of how I'm going to deal with Hamas if they end up in positions of responsibility. And the answer is: Not until you renounce your desire to destroy Israel will we deal with you.'"

The Washington Post (1/26, A19, Kessler, 744K) reports "yesterday's better-than-expected electoral showing by a group labeled a terrorist organization by the United States greatly complicates the administration's diplomacy in the region, U.S. officials said yesterday.' Hamas, "which is dedicated to the destruction of Israel, appears to have ridden a wave of popular disgust at the perceived corruption and incompetence of the ruling Fatah Party. Exit polls indicate Fatah will have only a slim edge over Hamas in the Palestinian Legislative Council, giving Hamas a strong claim to a role in the government." The results "suggested the risks inherent in the Bush administration's campaign to bring democracy to the Middle East." Administration spokesmen "officially celebrated the 'historic moment' for the Palestinians while officials privately reeled at the outcome."

All three network news programs briefly noted Bush's pledge the US would not deal with Hamas unless it renounces violence. ABC's World News Tonight (1/25, story 2, 0:20, Woodruff) reported, "The Bush Administration declared the election 'historic' and called this 'a great day for the Palestinian people.' But President Bush made clear the US will not deal with Hamas, no matter how well it did in the election. He told 'The Wall Street Journal' today 'We view Hamas as a terrorist organization. We don't deal with Hamas. … I don't see that changing.'"

The CBS Evening News (1/25, story 6, :30, Schieffer) reported, "Hamas may have won a lot of Palestinian votes, but they got no vote of confidence from President Bush in a 'Wall Street Journal' interview today. The President says he will not deal with Hamas unless the group renounces its call for Israel's destruction."

ABC's World News Tonight (1/25, lead story, 3:10, Woodruff) reported "Israel's new foreign minister holds out little hope." Israeli Foreign Minister Tsipy Livney: "The essence and the reasons of the existence of the Hamas is not because they want to gain some political gains in the conflict. They are talking about demolishing the state of Israel, to erase the state of Israel from earth."

NBC Nightly News (1/25, story 4, 1:30, Williams) in its coverage also noted, "President Bush told 'The Wall Street Journal' today he would not deal with Hamas unless it renounces its call for the destruction of Israel."

The New York Times (1/26, Erlanger, Myre, 1.19M) reports "the acting prime minister of Israel, Ehud Olmert, said his country could not accept a situation in which Hamas would be part of the Palestinian Authority if the group remained armed with unchanged goals."

Carter Hopes Hamas Will Moderate Stance And Renounce Violence. ABC's World News Tonight (1/25, lead story, 3:10, Woodruff) reported, "What no one knows is if Hamas will change, now that it has gained political power. Former President Jimmy Carter came to monitor today's election elections. There are some that believe Hamas will be pragmatic." Former President Carter: "That's my hope. Everybody hopes Hamas will be pragmatic. Because one thing is, if not for their own benefit but maybe for the benefit of the people they represent. Because no doubt if Hamas is not, as you say, pragmatic, then there will be a reduction in foreign assistance."

The CBS Evening News (1/25, story 5, 2:00, Hawkins) reported "Former President Jimmy Carter, who is leading international election monitors here, says bringing Hamas into the system may soften its hard-line positions." Carter: "My hope is and my prayer is that this will be a moderating influence on Hamas, that they'll see the responsibility in the government itself that they will moderate their position, forgo violence and terrorist acts."

Sharon's Absence From Stage Said To Make Peace Process Uncertain. The CBS Evening News (1/25, story 7, 2:00, Schieffer) reported that former Israeli prime minister Ariel Sharon's medical condition "leaves Israel with many unresolved matters, including that wall being built in the West Bank." CBS (Pizzey) added, "The most troublesome and obvious symbol of the unfinished business Ariel Sharon has left behind is the security wall separating Israelis and Palestinians on the West Bank. It wasn't Sharon's idea, but he made it a reality, an unplanned but now integral feature of the so-called road map that is supposed to lead to a peace deal. The problem for those who built on Sharon's legacies is that his plans and policies were like this wall: Only gaps that only he seemed to know how to fill."

Iran Open To Russian Enrichment Of Their Uranium. The Washington Post (1/26, Finn, 744K) reports that Ali Larijani, head of Iran's Supreme National Security Council," said "that his country was open to a compromise proposal from Russia that it enrich uranium for Iran on Russian soil," but added that that "the idea needed fine-tuning in advance of further talks scheduled for the middle of next month." The New York Times (1/26, Myers, 1.19M) adds that Larijani "indicated that no agreement had been reached and that significant details remained to be negotiated" and "warned that Iran would begin enriching uranium on an industrial scale if Iran's nuclear program was referred to the United Nations Security Council." His "remarks made it clear that further discussions on it would not take place until later in February, after the meeting at the atomic energy agency's headquarters in Vienna."

Fox News' Special Report (1/25, Rosen) reported that the head of Iran's national security council, "said in Moscow today Iran now takes a positive view of the so-called Russian proposal, which the Iranians previously rejected. The proposal would have Russia enrich uranium and ship the resulting nuclear fuel to Iran for nonmilitary use."

The AP (1/26, Gutterman) adds that President Bush said "Russia's proposal offered the best chance for resolving the impasse, adding 'it's important for us to exhaust all diplomacy' in dealing with Iran."

The Wall Street Journal/AP (1/26) says "Chief negotiator Ali Larijani also reiterated Iran's threat to renew enrichment activities if it is referred to the United Nations Security Council." The Washington Times (1/26, 90K) runs the same AP story. The Washington Post (1/26, A21, Finn, 744K) runs a similar report under the headline "Iran Says It Is Open To Russian Plan On Nuclear Program," while the New York Times (1/26, Myers, 1.19M) titles its report "Iran Welcomes Russia's Offer To Enrich Uranium Jointly; Details Remain."

Iran's Non-Cooperation Said To Be At Heart Of The Standoff. Knight Ridder (1/26, Landay) reports, "Iran's…obfuscation, conflicting answers and stonewalling on…the enrichment program are at the heart of the crisis over its nuclear program." It is "only by reconstructing the complete history and extent of Iran's nuclear work" that the IAEA can "determine the truth. So far, that's been impossible," and while "Iran has filled some gaps and is promising to fill the rest," IAEA Director General Mohamed ElBaradei said "in a Nov. 18 report to the IAEA board…that 'there still remain issues to be resolved' and Iran's 'full transparency is ... long overdue.'"

Blix Says Bush Administration Overemphasizing Possible Military Action. Fox News' Special Report (1/25, Rosen) reported that "one of the world's best-known weapons inspectors, one who clashed with the Bush Administration before, is criticizing it again now for its approach in the current standoff. Hans Blix, the chief UN weapons inspector in Iraq prior to the war, argued the Administration is overemphasizing the potential for US military interaction in Iran."

Washington Backs Off Linking Iran Vote To India Nuclear Deal. The AFP (1/26) reports, "Washington moved to unlink a landmark US-India civilian nuclear deal with how New Delhi votes on the Iranian nuclear question at a key meeting of the UN atomic watchdog agency." The US Ambassador to India, David Mulford, "had warned Wednesday that a historic deal giving American nuclear technology to India might fall through if New Delhi did not vote against Iran at the February 2-3 meeting of the International Atomic Energy Agency (IAEA)." However, State Department spokesman Sean McCormack said, "we deal with the Indian Government on these two issues as separate issues."

Reuters (1/25) added that "Mulford, told the Press Trust of India news agency that if India decided not to vote against Iran, 'the effect on members of the U.S. Congress with regard to the civil nuclear initiative will be devastating.'" He was also quoted "as saying the deal would 'die,'"

The AP (1/26, Rosenberg) adds, "The State Department in Washington said later that Mulford wasn't speaking for the U.S. government."

Reuters (1/26, Hafezi) also covered this story.

US Envoy Says China's US's Approach To Iran Differ. The New York Times (1/26, Kahn, 1.19M) reports, "China and the United States want to prevent Iran from acquiring nuclear weapons, but their 'approach may differ' on the best tactics to achieve that result, Deputy Secretary of State Robert B. Zoellick said after a round of meetings on the subject in Beijing." He also "called the diplomatic discussions fluid and said there were still differences over what steps should be taken to respond to what Western powers say is a covert program by Iran to build nuclear bombs." This suggests "hat China, despite heavy lobbying, had left some doubts as to whether it is prepared to back a proposal…to get the United Nations Security Council involved in deciding how to handle Iran's nuclear program."

Annan Doesn't Expect IAEA To Be Ready In February To Refer Iran To Security Council. Reuters (1/26, Leopold) reports, "U.N. chief Kofi Annan said on Wednesday he doubted that a U.N. nuclear watchdog would be able to come to a decision by early February on referring Iran to the Security Council over its nuclear programme," adding that "Mohamed ElBaradei, the director-general of the Vienna-based International Atomic Energy Agency, did not expect to have a report on Iran ready until the end of February, for the IAEA's regular board meeting in March."

Iran Accuses British Military Of Aiding Bombers. The Washington Post/Reuters (1/26, A17) reports, "Iran accused the British military on Wednesday of cooperating with bombers who killed eight people in southwest Iran, an allegation Britain described as ludicrous. A little-known group campaigning for independence for Iran's Arab minority asserted responsibility in a Web statement for Tuesday's attacks on a bank and government building in the oil city of Ahvaz." Foreign Minister Manouchehr Mottaki "said that London's involvement was clear and that Tehran would make strong protests." A spokesman in British Prime Minister Tony Blair's office "said Iran's allegation 'deserves to be treated with scorn by the whole international community.'"

UN Peacekeepers To Maintain Monitoring Of Israeli-Lebanese Border. The New York Times/Reuters (1/26) reports, "The members of the United Nations Security Council have agreed that United Nations peacekeepers should keep monitoring the Israeli-Lebanese border for six more months, the current Council president said on Wednesday." Lebanon wanted "a renewal of the mandate of the United Nations' peacekeeping mission for the border area for a year, until Jan. 31, 2007." Yet "the 15 Security Council members instead reached a consensus on an extension until July 31."

Frist Says US, International Community Must "Ramp Up The Pressure" On Syria. In a New York Sun (1/26) op-ed, Senate Majority Leader Bill Frist writes, "A year ago this month, a car bomb killed the former Lebanese prime minister, Rafic Hariri. An ongoing U.N. investigation has implicated the Syrian government in the murder. The Syrian president, Bashar al-Assad, may have played a personal role. Several additional high-profile bombings have occurred in the last several months. Enough is enough: Syria's actions in Lebanon have proven that it has no desire to play by the rules of civilized nations. Now, the United States and its partners need to ramp up the pressure on Damascus. We need to push Syria away from its homegrown brand of Arab fascism and toward democracy, peace, and an authentic end to its interference with Lebanon's affairs. We should start by increasing and expanding our funding for prodemocracy groups in Lebanon and Syria. In the coming Congress, I plan to support legislation that will do just that."

Bush Administration Criticizes Mexico's Plan To Distribute Border Maps. Following an announcement Tuesday by Mexico's National Human Rights Commission that it will print and distribute maps showing immigrants the safest routes to cross the border into Arizona, Mexican President Vicente Fox distanced his government from the group, saying that it was an "autonomous commission." However, the Washington Times (1/26, Kralev, Seper, 90K) reports, "The Bush administration yesterday accused the Mexican government of facilitating illegal entry into the United States after Mexican officials said they would distribute maps of dangerous border areas and posters with safety instructions and other tips. … 'We oppose in the strongest terms the publication of maps to aid those who wish to enter the United States illegally,' said Homeland Security Secretary Michael Chertoff. 'It is a bad idea to encourage migrants to undertake this highly dangerous and ultimately futile effort.'" Meanwhile, "Rafael Laveaga, spokesman for the Mexican Embassy in Washington, said the NHRC is an independent body and receives no government funds."

Hutchison, Border Sheriff Seek Investigation Of Suspected Mexican Military Incursions. The Washington Times (1/26, Seper, 90K) reports Zapata County Sheriff Sigifredo Gonzalez Jr., who heads the Texas Sheriff's Border Coalition, demanded yesterday "that the US and Mexican governments investigate incursions into the United States by heavily armed drug escorts dressed in Mexican military uniforms 'before someone gets killed.'" He "said a growing number of suspected incursions and violence aimed at the area's law-enforcement officers is making the border 'a pretty dangerous place.'" Also yesterday, "Sen. Kay Bailey Hutchison, Texas Republican, said she was 'deeply concerned' about the possible incursions and asked Homeland Security Secretary Michael Chertoff to 'fully investigate this matter and report to Congress the details and confirm whether or not Mexican military officials were involved. … The Mexican government has denied that the men in any of the incidents were soldiers, saying that some drug smugglers dress in military-style uniforms, carry automatic weapons and drive military-style vehicles."

Kyl Says Border Encounters "Undermine Efforts" To Keep Drugs Out Of US. The Los Angeles Times (1/26, Marosi, Lopez, Connell, 958K) reports, "Armed Mexican government personnel made unauthorized incursions into the United States five times in the last three months of 2005, including one incident last month in Southern California, according to confidential Department of Homeland Security records. … The records obtained by The Times provide new details on more than a dozen incursions into the US, including the five most recent ones." Meanwhile, "US Border Patrol Chief David V. Aguilar said "that incursions have declined by more than 50% since 2002. Still, with assault rates against agents at record highs, any incursion is taken 'very seriously.' However, "US Sen. Jon Kyl (R-Ariz.) said in an interview Wednesday that this week's incident in Texas was 'about as serious as it gets' and noted that dozens of reported incursions have occurred in his state. The encounters seriously undermine efforts to stop the flow of drugs coming

across the US border and suggest possible cooperation among Mexican authorities and traffickers, he said."

Mexico Said To Be Helping US Secure Southern Border From Terrorists. Meanwhile, the Christian Science Monitor (1/26, Bowers, 61K) reports, "A top priority of the United States government is to prevent a determined terrorist from crossing the US- Mexico border. It is also becoming a primary mission for Mexico - and the first place it's focusing on is the 375-mile, desolate stretch of land that abuts Arizona. In addition to sharing intelligence and cooperating on investigations with its US counterparts in Arizona, Mexico last year set up three checkpoints along known human-smuggling routes on its side of the border and plans to add two more. Between August, when the checkpoints became operational, and December, Mexican officials stopped 1,277 non-Mexicans (OTMs, for 'other than Mexicans') from crossing into Arizona, according to a Mexican government report obtained by the Monitor. The report shows that most of the OTMs came from Central and South America, but seven are listed as Iraqis." Meanwhile, "the US government is apprehending record numbers of illegal immigrants on the Arizona side of the border."

State Legislators Considering Immigration Legislation. USA Today (1/26, Cauchon, 2.31M) reports, "Frustrated by slow action in Congress, state legislatures are debating whether to increase border enforcement at their own expense, fine employers who use undocumented workers and get local police involved in deporting them." However, "like Congress, legislatures are divided on what to do about the estimated 11 million undocumented immigrants who provide a low-wage workforce in the USA." It "is one of the hottest issues as 37 legislatures convene this month. Last year, states considered 300 immigration laws and approved 40." Meanwhile, "Congress is considering changes to immigration policies — a border fence, a guest worker program — but it's uncertain whether action will be taken this year."

Provision Of Immigration Bill Compared To Nazi Practice. Andrew S. Grove, a member of the board of overseers of the International Rescue Committee, in an op-ed for the Wall Street Journal (1/26, A10, 2.11M) writes that the recently passed "Sensenbrenner-King" immigration bill "scares me because it has the potential of turning neighbor against neighbor -- and of changing our country into a place of fear and mistrust. … The bill contains a provision punishing anyone who 'assists, [or] encourages . . . a person who . . . lacks lawful authority to remain in the United States' to remain here." Grove states, "This could change the nature of our society in a way that I have seen firsthand. As a Jewish child hiding from the Nazis in Hungary, I saw how the persecution of non-Jewish Hungarians who hid their Jewish friends or neighbors cast a wide blanket of fear over everyone. This fear led to mistrust, and mistrust led to hostility, until neighbors turned upon neighbors in order to protect themselves. Is this what we want?"

Mexican Presidential Candidate Seeks To Boost Profile. The New York Times (1/26, McKinley, 1.19M) reports on Mexican presidential candidate Felipe Calderón's efforts to succeed President Vicente Fox. After "a bitter primary fight last year, Mr. Calderón transformed himself from a little-known former energy commissioner into the best hope for the president's right-of-center party. He is running a strong second in most opinion polls to the leftist former mayor of Mexico City, Andrés Manuel López Obrador, and many political strategists say he has a chance to win the election on July 2." Yet, "outside the capital's opinion-makers and party insiders, surveys show that one in five Mexican voters still do not know who Mr. Calderón is, and as the presidential campaign officially kicked off last week, he made his first tour to try to change that."

Musharraf Vows To Construct Natural-Gas Pipeline To Iran.

The Wall Street Journal (1/26, Champion, Kempe, 2.11M) reports, "Pakistani president Pervez Musharraf "said his country would build a planned natural-gas pipeline from Iran without India's participation if talks among the three nations continue to produce no result." His "threat came at a delicate time for Gen. Pervez Musharraf, while he is having to balance domestic public opinion and relations with the U.S., India and Iran." At the World Economic Forum he "said Pakistan had opened bilateral talks with Tehran to build a gas pipeline that would run from Iran." But India has "expressed concern about recent attacks on existing gas and power lines in Baluchistan, the region of South Western Pakistan through which a pipeline from Iran would pass. Gen. Musharraf played down the threat posed by Baluchistan militants, dismissing the conflict as limited to one isolated local tribe." His "tough line on the pipeline talks contrasts with that of his prime minister, Shaukat Aziz, while in New York last week."

OPEC Will Refrain From Cutting Oil Output.

The Wall Street Journal (1/26, Bahree, 2.11M) reports that OPEC "is widely expected to refrain from trimming output levels when its oil ministers meet in Vienna next week, but Iran remains a wild card." The Journal notes, "With the price of oil nearing records recently, an OPEC decision to continue pumping oil at close to capacity should reassure markets of plentiful supply, something Saudi Arabia appears to favor and the U.S. seems to be counting on. In short, there is no economic incentive for OPEC to trim output when market forces have sent billions of extra dollars pouring into the coffers of oil-rich countries anyway." But Iran "could use the OPEC meeting to send a warning to Western Europe and the

U.S., both big oil importers." Meanwhile, "U.S. Energy Secretary Samuel Bodman says he has been in regular contact with oil producers. 'By and large, they seem to be understanding that we have a situation where there needs to be more oil rather than less oil in the world,' Mr. Bodman said this week."

South Korea Ignores US Call For Action On North Korean Financial Activity. The Washington Times (1/26, Salmon, 90K) reports, "A day after the United States urged South Korea to take an active stance against what it contends are North Korea's illicit financial activities, Seoul refused to say whether it would take action and made clear it opposed any attempt at regime change in Pyongyang." South Korean President Roh Moo-hyun said, "When it comes to the North Korean regime, raising issues about it or pressuring it or sometimes wishing for its collapse, on that position of some Americans, we do not agree." The Times notes, "By 'some Americans,' Mr. Roh appeared to be referring to hard-liners in the Bush administration who favor toppling North Korean strongman Kim Jong-il."

US, South Korea Close To Reaching Free Trade Deal. The Washington Post (1/26, D6, Blustein, 744K) reports, "The United States and South Korea are very close to launching negotiations for a free-trade agreement, which would be the most economically significant free-trade pact for Washington since the North American Free Trade Agreement." Yet "both sides have been reluctant to start formal talks until they are reasonably confident that the negotiations would end in agreement. South Korea's farmers are bitterly opposed to opening their country's agricultural markets, and their political clout could scuttle a deal." While "plans to launch the U.S.-Korea talks could still founder, officials and other sources who have spoken recently with negotiators said an announcement is likely to materialize before long. Asked about the prospects, one administration official replied, 'How do you say 'soon' in Korean?'" And "Rob Portman, the U.S. trade representative, heightened the speculation Friday when he told reporters, 'We'll be announcing some additional [free-trade agreement] partners soon. As I think you will notice, they will not be with small economies because I do think we need to move on to some larger economies.'"

"Gas War" Between Russia And Ukraine Leads To European Shortages. The Wall Street Journal (1/26, White, Crawford, 2.11M) reports, "Bickering over natural-gas shipments intensified between Moscow and Kiev has reduced supplies of Russian gas to Europe, led to shortages in several countries and fueled energy-security anxieties across a continent gripped by an arctic cold snap." Few experts "expect a repeat of Russia's New Year's gas cutoff to Ukraine. … But as details of the Jan. 4 deal have emerged, doubts have grown about whether it sets the stable foundation for supplies and exports to Europe that its backers claim." Despite reassurances from both countries, "the two sides yesterday failed to reach agreement on the details of implementing the Jan. 4 compromise, intended to halt what is known as the 'gas war' in the region."

Putin Claims Alleged British Spies Linked To NGOs. The Washington Post (1/26, A16, Finn, 744K) reports, "Russian President Vladimir Putin on Wednesday linked the scandal to foreign financing of nongovernmental organizations in Russia, a connection that grass-roots activists say is tangential and being used to smear their work." Putin said, "The situation is regrettable, as we have seen, when attempts are made to use secret services to work with nongovernmental organizations and when financing is carried out through secret services' channels." The UK government "has refused to comment on the espionage charges, but has denied it was doing anything illegal with nongovernmental organizations." And "Russian authorities have so far presented no evidence that the alleged spy ring recruited human rights activists." Yet the claims have been "seized on by many Russian politicians. The lower house of parliament, by a vote of 401 to 6, passed a resolution Wednesday condemning the involvement of foreign intelligence services with the private groups."

The New York Times (1/26, Myers, 1.19M) notes, "Putin's "remarks intensified a furor" that "could worsen relations with Britain and other countries as Russia presses its assault on European and American financial support of groups that criticize the Kremlin." Putin "said Russia was still considering whether to expel the four diplomats, all mid-ranking secretaries in the British Embassy, indicating for the first time that they had not yet been expelled or withdrawn, though the espionage that was alleged was reported to have been uncovered last fall."

Google Complies With Chinese Censorship. The CBS Evening News (1/25, story 10, 2:00, Schieffer) reported, "Google has launched a new search engine today in China, but in order to do it, it had to agree to restrictions from the communist government." CBS (Gonzales) added, "Just last week, Google stood up to another government, the US government, and refused to turn over personal information the Justice Department wants for its defense of an anti-pornography law." Larry Magid, CBS technology analyst: "The fact that they're making a strong, stand firm with the Justice Department over privacy and then being very loose with the Chinese over censorship, I find a little bit disturbing." Gonzales: "Both decisions actually make good business

sense for Google. The company can't afford to spook American users, and it has to get a foothold in the world's largest market."

GOP Lawmaker To Question Google's Move. The Financial Times (1/26, Kirchgaessner) reports, "Google will be called to task in Washington next month following a controversial decision by the internet search engine to launch a China-based version of its website that will censor results to avoid angering the country's Communist government." Rep. Chris Smith's decision "to call for a February 16 hearing to examine the operating procedures of US internet companies in China, represents the first signs of what could become a serious backlash against Google and other internet companies in Washington that are perceived as capitulating to the Chinese government."

Zoellick Sends Message About Strengthening US Relations With China.

The Washington Post (1/26, A16, Cody, 744K) reports that deputy secretary of state Robert Zoellick's appearance with a Chinese panda "was seen at least in part as a signal to China about where he wants to steer U.S.-Chinese relations. The official New China News Agency received his message 10-4. It immediately transmitted a happy photo of Zoellick and Jing Jing around the country, illustrating the government's view that good U.S.-China relations are essential and, in fact, getting better and better." His "gesture, in another reading, could also be seen as a signal of where he stands in the Washington debate about China. Interpreted that way, becoming a public panda-hugger was an eloquent endorsement of the view that engagement with Beijing is the best path for the United States and that China's emergence as an Asian power does not have to mean conflict in the Pacific." Zoellick's trip "also included specific talks on issues that could be seen as a test of the U.S.-Chinese engagement his panda photo was meant to symbolize. These, he said, included China's stand on the effort to prevent Iran from acquiring nuclear weapons, China's role in diplomacy to persuade North Korea to eliminate its nuclear weapons program and China's currency policies at a time of soaring U.S. trade deficits."

Concerns Raised Chinese Economic Growth May Be Too Rapid. The Washington Post (1/26, D1, Goodman, 744K) reports, "Led by surging exports, China's economy grew by 9.9 percent last year, the government announced Wednesday, underscoring the swiftness by which this once insular communist country has remade itself into a global trading power." But "the news also increased concern that China could be growing too fast, despite measures aimed at cooling the hottest parts of the economy. Aggressive investment has produced too many factories, heightening trade tensions with the United States as China exports surplus wares such as steel, depressing prices globally. Chinese officials worry that unneeded plants could deliver a crippling era of deflation -- falling prices -- which hurts profits and reduces incentives for companies to invest. Such a syndrome kept Japan mired in recession and unemployment for much of the past 16 years."

Report Suggests China Has Fewer AIDS Cases. The New York Times (1/26, Yardley, 1.19M) reports, "China countered the long-held suspicion that it has undercounted the number of people with H.I.V. and AIDS by releasing a new, more extensive estimate on Wednesday that found the opposite: that the country had actually overestimated its number of cases." The new WHO and United Nations AIDS program report "lowered the country's estimated number of H.I.V. and AIDS cases to 650,000 from the official figure of 840,000 released by the government in 2003. Many experts and AIDS workers have long believed that China has at least 1.5 million cases, possibly far more, and some expressed skepticism that the new figure was any more reliable than past estimates."

European Commission Proposes "Nordic-Style" Economic Reforms.

The Wall Street Journal (1/26, Echikson, 2.11M) reports, "The European Commission presented a new plan to reinvigorate Europe's economies, calling for a Nordic-style, seemingly social-democratic approach rather than an Anglo-Saxon free-market model." The report "gave the most praise to northern European countries that are increasing spending on research and development universities and pursuing interventionist jobs policies." It "also called for the creation of a competitive, continent-wide energy program, and support for small and medium-size businesses." It represents Commission President José Manuel Barroso's attempt to recover the initiative after a tough first year in office. Many of his previous plans for jump-starting Europe's economies have faltered."

Sri Lankan Factions To Resume Peace Talks.

The New York Times (1/26, Senanayake, Sengupta, 1.19M) reports, "In a measure of how intractable this country's ethnic conflict is, the warring parties agreed Wednesday to begin talking to each other again, after more than 18 months of deadlock over a site for peace talks and with scores of killings in the meantime." The negotiations "would focus on strengthening an all-but-ineffectual four-year-old cease-fire agreement. They are scheduled to take place in Geneva, starting as early as February." While "modest," the agreement "represents a major breakthrough in the decade-long war."

African Worshipers Mix Islam With Christianity.

The Christian Science Monitor (1/26, McLaughlin, 61K) reports that "worshipers at 'The True

Message of God Mission' say it's entirely natural for Christianity and Islam to coexist, even overlap. They begin their worship by praying at the Jesus alcove and then 'running their deliverance' - sprinting laps around the mosque's mosaic-tiled courtyard, praying to the one God for forgiveness and help. They say it's akin to Israelites circling the walls of Jericho - and Muslims swirling around the Ka'ba shrine in Mecca." The group represents "a window on an ongoing religious ferment in Africa. It's still up for debate whether this group, and others like it, could become models for Muslim-Christian unity worldwide or whether they're uniquely African. But either way, they are 'part of a trend,' says Dana Robert, a Boston University religion professor."

Villagers Flee Nigerian Troops. The New York Times/Reuters (1/26) reports, "Villagers fled Nigeria's lawless delta on Wednesday amid fears of military reprisals after a wave of attacks on foreign oil companies by ethnic Ijaw militiamen." Reuters adds, "The army deployed more troops to major installations, and oil companies tightened security around offices a day after heavily armed men stormed the headquarters of the Italian oil firm Agip, robbing a bank on the premises and killing eight policemen and a civilian."

Annan Denies Arranging Deal For Son's Car. The Los Angeles Times (1/26, Farley, 958K) reports that after his son, Kojo Annan, agreed to reimburse Ghana for the import duties on a car he misidentified as belonging to his father, UN Secretary General Kofi Annan "welcomed news of his son's move. 'It was the right thing to do. … He knew I wanted him to sort it out, clean it up. It was between him, his lawyer and the government." Asked if "he, as secretary-general, secured the tax break for his son, Annan said, 'Absolutely not. It was done behind my back.'"

Former Surfer Volunteers For International Disaster Relief. ABC's World News Tonight (1/25, story 11, 2:20, Wright) reported, "The remarkable story of one American making so much of a difference. He was a laidback, California surfer, until he saw the damage done by the tsunami" ABC (Wright): "If relief organizations had special forces, Matt George would be a Green Beret. He's a one-man trauma ward, in what may be the coldest clinic on earth. A builder doing what he calls extreme home makeovers. And he delivers supplies where no aid workers have gone before."

Pinochet's Daughter Seeks Asylum In US. The Washington Post (1/26, A20, Reel, Constable, 744K) reports, "The oldest daughter of the former Chilean dictator Gen. Augusto Pinochet was detained Wednesday at Dulles International Airport outside Washington, where she requested political asylum, a Chilean official said." Lucia Pinochet "had been served with a subpoena over the weekend in Chile, along with her mother and three siblings. They had been ordered to appear in court on Monday…on tax fraud charges connected to a probe of her father's illegal bank accounts." A DHS spokesman "said she was in U.S. custody at the airport in Virginia 'pending resolution of her immigration status.'" And "Chile's Interior Minister, Francisco Vidal, said U.S. Ambassador Craig Kelly informed his government that Pinochet, sought on an international arrest warrant, had requested asylum. U.S. officials said they could not comment on that issue."

Success Of Bush Allies In War In Iraq Contrasted With Opponents' Downfall. Columnist Mark Steyn in an op-ed in the Wall Street Journal (1/26, 2.11M) writes, "Remember the conventional wisdom of 2004? Back then, you'll recall, it was the many members of George Bush's 'unilateral' coalition who were supposed to be in trouble, not least the three doughty warriors of the Anglosphere -- the president, Tony Blair and John Howard -- who would all be paying a terrible electoral price for lying their way into war in Iraq. The Democrats' position was that Mr. Bush's rinky-dink nickel-&-dime allies didn't count: The president has 'alienated almost everyone,' said Jimmy Carter, 'and now we have just a handful of little tiny countries supposedly helping us in Iraq.' (That would be Britain, Australia, Poland, Japan . . .) Instead of those nobodies, John Kerry pledged that, under his leadership, 'America will rejoin the community of nations' -- by which he meant Jacques Chirac, Gerhard Schröder, the Belgian guy." But now "Bush, Blair, Howard and Koizumi are all re-elected, while Mr. Chirac is the lamest of lame ducks, and his ingrate citizenry have tossed out his big legacy, the European Constitution; Mr. Schröder's government was defeated and he's now shilling for Russia's state-owned Gazprom ('It's all about Gaz!'); and the latest member of the coalition of the unwilling to hit the skids is Canada's Liberal Party, which fell from office on Monday. John Kerry may have wanted to 'rejoin the community of nations.' Instead, 'the community of nations' has joined John Kerry, windsurfing off Nantucket in electric-yellow buttock-hugging Lycra, or whatever he's doing these days."

WSJournal Honors Memory Of Free Market Leader Of Hong Kong. The Wall Street Journal (1/26, 2.11M) editorializes, "Hong Kong's prosperity since World War II is sometimes referred to as a 'miracle.' But miracles require the intervention of a deity, whereas Hong Kong's remarkable economic growth between 1945 and its handover to China in 1997 owes a great deal to the nonintervention of a mortal man, John James Cowperthwaite, who died over the weekend at the age of 90." As Financial Secretary from

1961-1971, Cowperthwaite "was the architect and guardian of the greatest natural experiment in free-market capitalism in the postwar world." The Journal concludes, "Other would-be central planners could learn a lot from what John Cowperthwaite didn't do."

NYTimes Applauds African Union Rejection Of Sudan Leadership. The New York Times (1/26, 1.19M) editorializes, "The African Union did the right thing in rejecting Sudan's bid for the rotating presidency of the organization. Allowing President Omar Hassan al-Bashir of Sudan to become Africa's face to the world would have sent just about every wrong message imaginable." But while "rebuffed for now, Mr. Bashir was promised the group's presidency in 2007, and for now the chair will go to the Congo Republic, hardly a model of human rights. Giving Sudan the African Union presidency next year will be just as unacceptable as it was this year."

THE BIG PICTURE:

Headlines From Today's Front Pages.

Los Angeles Times:
"The Day Disaster Changed Their Lives."
"Hamas Makes Major Inroad In Balloting."
"Villa Shines Through Getty's Clouds."
"Abduction Forces A Grim Look At What A Story Is Worth."
"Reports Cite Incursions On U.S. Border."
"Multiple Risks Of Surgery Drug Seen."
"There Isn't Enough Good Entertainment To Go Around."

USA Today:
"States Weigh Immigration Controls."
"X Games Upstarts Now Embrace The Olympics."
"General Sees Rift In Iraq Enemy."

New York Times:
"Hamas Presses Fatah In Palestinian Vote, Surveys Say."
"Big Test Looms For Prosecutors At Enron Trial."
"New Estimate In China Finds Fewer AIDS Cases."
"Bush, In Speech, Is Seen Avoiding Large Initiatives."
"In Public Schools, The Name Game As A Donor Lure."
"News Analysis: In Case About Google's Secrets, Yours Are Safe."

Washington Post:
"Gay Marriage Ban Advances Toward Va. Referendum."
'Hamas Makes Strong Showing In Vote."
"Nuclear Energy Plan Would Use Spent Fuel."
"Fairfax Police Say Shooting Was Accident."
"Al Gore, Sundance's Leading Man."
"Harmful Teflon Chemical To Be Eliminated By 2015."

Washington Times:
"White House Slams Mexico For Aid Maps."
"Sheriff Demands Probe Of Incursions."
"Fatah Edges Hamas In Polls."
"Bush Reiterates Spy Authority."
"Marriage Amendment Set For Virginia Ballot."
"BB&T Opposes Eminent Domain."
"Toyota Racing Teams Break Through Nextel Cup Barrier."

Detroit Free Press:
"Winter Bust Won't Stop Blast."
"Granholm: Let's Help People Save."
"Audits Find Waste At State Universities."
"DIA Defends Its Right To Van Gogh."

Atlanta Journal-Constitution:
"Voter ID Bill Approved."
"Whose Tax Cut Is It?"
"Fat Lady Warms Up As Opera Gets Closer To Cobb Center Move."
"Palestinian Vote Realigns Power."

Dallas Morning News:
"Drought Taking Its Toll."
"State To Pick Up Medicare Slack."
"Strayhorn Gets Democratic Cash."
"Bush PR Blitz Races To Frame Spying Debate."
"Nuclear Energy Policy Would Reprocess Fuel."
"Study: Internet Fosters Contact."

Houston Chronicle:
"Hamas Party Shows Muscle In Vote."
"Delay In Oil-Spill Notification Probed."
"The Media May Not Be Rock Stars, But This Is Their Big Gig."
"Mexico Police Arrest Woman In 'Old Lady' Serial Killings."
"NASA's Teachable Moments."

Story Lineup From Last Night's Network News:
ABC: Palestinian Election; US Palestinian Election Response; Release Of Iraqi Women; Oil Industry Profits; Bush NSA Defense; Alito Debate; Teflon Dangers; FL Bus Accident; Ford Released; Breast Cancer Treatment; Disaster Relief Volunteer.
CBS: Bush Domestic Spying; Hayden-9/11 Prevention; US Troops Overburdened; Iraq-Prisoner Release; Palestinian Elections; Bush-Palestinian Elections; Sharon Void; Medicare Problems; Ford Release From Hospital; Google-China Censor.
NBC: Bush-Domestic Spying; Katrina Aftermath-White House; Alito Confirmation Hearing; Palestinian Elections; US Troops Overburdened; US Troops Security Advisors; Ford Released From Hospital; Mine Safety; Sandwich Generation; Katrina Coverage.

Story Lineup From This Morning's Radio News Broadcasts:

ABC: Ameriprise-security breach, Identity theft; FL-deadly car accident; WV-Sago mine victim's condition; Palestinian election; Bush-domestic spying; Wall Street.

CBS: Palestinian election; Iraq-female prisoner release; FL-deadly car accident; CA-bank hostage standoff; EPA-teflon chemical; Wall Street.

NPR: Palestinian election; CA-bank hostage standoff; FL-deadly car accident; Senate-Alito; Cuba-US interests section message board; Bush-domestic spying; Iraq-female prisoner release.

WASHINGTON'S SCHEDULE:

Today's Events In Washington.

White House:

PRESIDENT BUSH – No schedule available.

FIRST LADY LAURA BUSH -- Visits Harte Elementary School. New Orleans. Visits St. Bernard Unified School. Chalmette, La. Participates in building a playground. Hancock North Central Elementary School, Kiln, Miss.

VICE PRESIDENT CHENEY -- No schedule available.

US Senate: -- COMMITTEE MEETINGS

10 a.m. ARMED SERVICES _ Full Committee. Closed, members-only briefing on alternatives for tanker recapitalization. Location: Room 222, Russell.

2:30 p.m. SELECT INTELLIGENCE _ Full Committee. Closed, members-only briefing on pending matters. Location: Room 219, Hart.

US House: -- No events scheduled.

Other: ALL DAY

Jan. 22 - 26. TRANSPORTATION MEETING _ The Transportation Research Board holds its 85th annual meeting. Five days of workshops and presentations by and for transportation professionals. Location: Omni Shoreham Hotel, 2500 Calvert St. NW, Washington Hilton & Towers, 1919 Connecticut Ave. NW, Washington Marriott Wardman Park, 2660 Woodley Road NW. Contacts: Russell Houston, 202-334-3252 Notes: Newsroom facilities at all three venues.

Jan. 24 - 26. AGRICULTURAL EMPLOYERS _ The National Council of Agriculture Employers holds its annual meeting. Location: Hamilton Crowne Plaza Hotel, 14th and K Sts. NW. Contacts: n/a, 202-728-0300

Jan. 24 - 26. HEALTH AND HUMAN SERVICES _ The Medicaid Commission holds three days of meetings to discuss longer term recommendations on the future of Medicaid. Location: Holidat Inn-Chevy Chase, 5520 Wisconsin Ave., Chevy Chase, MD. Contacts: Margaret Reiser, 202-205-8255

Jan. 25 - 27. MAYORS _ The U.S. Conference of Mayors holds its 75th Winner Meeting. Highlights: 9 a.m. Plenary session on avian flu and homeland security, with Deputy HHS Secretary Alex Azar, Seattle Mayor Greg Nickels, Baltimore Mayor Martin O'Malley, Denver Mayor John Hickenlooper, Deputy DHS Secretary Michael Jackson, others. 11 a.m. News conference on homeland security and avian flu. 11 a.m. Session on childhood obesity, with William Dietz of CDC, others. 11 a.m. Session on housing for hurricane evacuees, with Rep. Michael Turner, Assistant HUD Secretary Steven Nesmith, others. 11 a.m. Session on energy costs, with Sen. Jack Reed, Steven Crout of the American Gas Association, others. 12:30 p.m. Luncheon, with HUD Secretary Jackson, others. 2:30 p.m. Session on faith-based and community initiatives, with Sen. Sam Brownback, Rep. Danny Davis, others. Location: Capital Hilton, 16th and K Sts. NW. Contacts: Elena Temple, 202-861-6719

Jan. 26 - 27. ENERGY _ The National Council for Science and the Envionrment holds its 6th National Conference on Science, Policy and the Environment: Energy for a Sustainable and Secure Future. Highlights: 9 a.m. Keynote address : Ross Pillari, President, BP America. 10 a.m. Session on opportunities for decision-making that will shape the energy future, with Bob Greco of API, Pennsylvania Enviorinmental Protection Secretary Katie McGinty, former Energy Secretary Hazel O'Leary, others. 5:30 p.m. Presentation of Lifetime Achievement Award to former EPA Administrator Russell Train. Location: Reagan Trade Center. Contacts: David Blockstein, 202-207-0004

9 a.m. LOBBYING REFORM _ American University's CEnter for Congressional and Presidential Studies aqnd the Committee for Economic Development hold a lobbying reform summit. Location: National Press Club. Contacts: Maralee Csellar, 202-885-5952

8:30 a.m. IMMIGRATION LAW _ The American Bar Association Section on Individual Rights hosts a panel discussion on immigration reform, asylum and refugees. Location: National Press Club, 14th and F Sts. NW Contacts: Stephanie Ortbals Tibbs, 202-662-1091 Notes: RSVP requested to 202-662-1030.

9:15 a.m. TAX SIMPLIFICATION _ Sen. Ron Wyden holds a news conference about the need for tax reform to make the tax code simpler. Location: In front of IRS, Pennsylvania Ave. and 10th St. NW. Contacts: Andrew Blotky, 202-224-3789

9:30 a.m. - 11 a.m. HEALTH CARE COSTS _ The Progressive Policy Institute holds a forum to discuss the promise of a local health care reform experiment, The Puget Sound Health Alliance, designed to control costs and reward better care. With David Kendall, PPI; Ron Simms, King County Executive; Janet Corrigan, president, National

Committee for Quality Health Care; Anne Gauthier, senior policy director, Commonwealth Fund's Commission on a High Performance Health System. Location: PPI, Suite 400, 600 Pennsylvania Ave, SE. Contacts: Austin Bonner, 202-547-0001

10 a.m. IDENTITY THEFT _ Treasury Secretary Snow releases ``Identity Theft: Outsmarting the Crooks" DVD. Location: Media Room, main Treasury. Contacts: n/a, 202-622-2920

10 a.m. LOBBYING REFORM _ The American Society of Association Executives holds a news conference on lobbying reform and the value of associations to America. Location: National Press Club. Contacts: Angel Venable, 202-626-2788

10:30 a.m. - 12 p.m. SCHOOL CHOICE _ The Brookings Brown Center on Education Policy holds an education policy forum on school choice in K-12 education. Focusing on ``Getting Choice Right," the final voume from the National Working Commission on Choice in K-12 Education. With Tom Loveless, director, Brown Center on Education Policy; Julian Betts, professor of economics, UC San Diego; Patrick Wolf, principal investigator, School Choice Demonstration Project at Georgetown University; and Laura Hamilton, senior behavioral scientist, RAND Corporation. Location: 1775 Massachusetts Ave., N.W. Contacts: n/a, 202-797-6105

10:45 a.m. DEMOCRATS-MEDICARE RX _ Senators Harry Reid, Ted Kennedy, Jeff Bingaman and Debbie Stabenow joins Concerned Seniors for a press conference to call on the president to take immediate action to fix widespread problems and confusion caused by the Medicare prescription drug bill. Location: Room 406, Dirksen Senate Office Building. Contacts: Jim Manley, 202-224-2939

11 a.m. BUDGET OUTLOOK _ The Congressional Budget Office holds a briefing on the 2006 Budget and Economic Outlook. With acting CBO Director Donald Marron. Location: CBO, 483 Ford House Office Bldg., 2nd and D Sts, S.W. Contacts: Melissa Merson, 202-226-2602 Notes: Congressional press credentials required. Report available at 10 am at www.cbo.gov. Limited copies available at briefing.

11 a.m. REBUILDING NEW ORLEANS _ The Foreign Press Center offers a digital video conference of a New York Press Center on-the-record briefing on rebuilding Cnew Orleans and Lousiana, with Louisiana Economic Development Secretary Michael Olivier, others. Location: Foreign Press Center, National Press Building. Contacts: Sheila Hoban, 202-504-6314 Notes: Foreign media only.

11:15 a.m. ALITO _ Public Advocate of the U.S. group holds an event in support of Samuel Alito's nomination to the Supreme Court, with an ensemble signing ``Alito" as they pass out materials. Location: In front of Dirksen, at 1st St. and Constitution Ave. NE. Contacts: Jesse Binnall, 703-582-7924

12 p.m. ANTI-DUMPING _ The World Bank hosts a briefing on its study finding the use of safeguards, antidumping in Latin America, seen as judicious. The briefing will be chaired by Guillermo Perry, World Bank Chief Economist for the Latin America and Caribbean region. Panelists will include: Hector Marquez, Director, Trade and NAFTA Office, Embassy of Mexico; Brad Ward, partner, Dewey Ballantine LLP; and J. Michael Finger, Retired World Bank Lead Economist. Location: World Bank Headquarters, I Building, 1850 I St. NW, Room I1-200. Contacts: Chris Neal Sr., 202-473-7229

12 p.m. - 2 p.m. UN REFORM-HUMAN RIGHTS _ The United Nations Development Programme holds a roundtable discussion to take stock of UN progress on initiatives for democracy and human rights. With Mark Lagon, deputy assistant secretary, International Organization Affairs, State Department; Magdy Martinez-Soliman, Practice Manager, Democratic-Governance Group, UNDP; Jennifer Windsor, executive director, Freedom House; and others.

12:30 p.m. DEMOCRATS-LOBBYING REFORM _ Senators Lieberman, Feingold, and Obama hold a news conference to call for immediate attention on the Honest Leadership Act, the Democratic proposal to reform congressional lobbying rules. Location: Senate Radi/TV Gallery. Contacts: Jim Manley, 202-224-2939

12:30 p.m. - 1:30 p.m. ECONOMICS-MUTUAL FUNDS _ The National Economics Club hosts a speech by Brian Reid, chief economist, Investment Company Institute, on ``How Well is the Market for Mutual Funds Working?" Location: Chinatown Garden Restaurant, 618 H St, NW. Contacts: n/a, 202-493-8824

1 p.m. DEMOCRATIC LEADERS _ Sen. Dick Durbin and Rep. Nancy Pelosi speak at the National Press Club to give the Democratic pre-buttal fo the State of the Union Address. Location: National Press Club. Contacts: Brendan Daly, 202-226-7616

1 p.m. NORTHERN IRELAND _ The National Press Club holds an Afternoon Newsmaker news conferencde with the leader and deputy leader of the Social Democratic labor party of Northern Ireland discussing the peace process. Location: National Press Club. Contacts: Peter Hickman, 301-530-1210

2 p.m. DEMOCRATS-BUDGET _ Rep. John Spratt and Sen. Kent Conrad hold a news conference on the CBO budget report. Location: House Radio-TV Gallery.

2 p.m. MASSACHUSETTS HEALTH CARE _ The Heritage Foundation holds a discussion with Massachusetts Gov. Mitt Romney on health care reform in his state. Location: Room 2261, Rayburn. Contacts: n/a, 202-675-1761

2:15 p.m. AFGHANISTAN _ U.S. Ambassador to Afghanistan Ronald Neumann holds an on-the-record briefing on the London Conference on Afghanistan next week. Location: Foreign Press Center, National Press Club. Contacts: Doris Robinson, 202-504-6353 Notes: Foreign media only.

3 p.m. BUDGET _ The Center on Budget and Policy Priorities holds a telephone briefing on the new budget and economic forecast by the CBO which will be released Thursday morning. Contacts: Michelle Bazie, 202-408-1080 Notes: Call Contact for details.

THE ATTORNEY GENERAL'S *NEWS BRIEFING*

PREPARED FOR THE OFFICE OF PUBLIC AFFAIRS, U.S. DEPARTMENT OF JUSTICE

TO: THE ATTORNEY GENERAL AND SENIOR STAFF

DATE: MONDAY, JULY 3, 2006 7:45 AM EDT

TODAY'S EDITION

Other News:

Editorial Wrap-Up:

The Big Picture:

Washington's Schedule:

TERRORISM NEWS:

Senators Predict Congress Will Establish Military Commissions For Detainees Soon. The Financial Times (7/3, Alden) reports, "The US Congress looks set to co-operate with President George W. Bush in devising rules for military commissions to try alleged terrorist detainees. This follows last week's historic Supreme Court decision that struck down the president's claim that he could set the rules on his own authority." US lawmakers' reaction to the ruling dominated the Sunday political shows. GOP Sen. Arlen Specter, appearing on CBS's Face the Nation (7/2, Schieffer), said, "The Judiciary Committee had hearings on Guantanamo last June. And I made a trip there, and it's been apparent to us for some time that the Supreme Court was going to impose some restrictions. And we had legislation ready to go. And I think that we should now have hearings in the Judiciary Committee, which we've scheduled for July 11th." M The Washington Times (7/3, Pfeiffer) notes Sen. Carl Levin, Michigan Democrat, "told CBS that his panel will 'have hearings in a couple of weeks.'"

Sen. Lindsey Graham, also a Republican, on Fox News Sunday (7/2, Wallace) said, "I think what we will do this month, I hope, is to get some input from the great legal minds of our time, particularly military lawyers, retired and active duty military judge advocates. … And I would hope Congress would have hearings about what to do in light of this decision and that we will sit down together…in August, write legislation and hopefully vote by September."

The New York Times (7/3, Toner) "both parties were treading carefully in a political and legislative terrain suddenly reconfigured by the Supreme Court. Most leaders on Sunday pledged bipartisan cooperation, but some fault lines were clear." Democratic Sen. Charles E. Schumer "said on 'Meet the Press' on NBC that 'this White House has felt it could just change things unilaterally.' Mr. Schumer added, 'Had they come to Congress a few years ago on this issue, my guess is they would have gotten most of what they wanted.'" But "in light of the court ruling, Mr. Schumer called on Attorney

General Alberto R. Gonzales to create an independent commission to conduct 'a top-to-bottom legal review of all of the administration's ongoing antiterror measures.'" USA Today (7/3) reports "senior Democrats called for a broader review of whether Bush overstepped his war powers," and notes Schumer's comments.

On ABC's This Week (7/2, Stephanopoulos), Democratic Sen. Dianne Feinstein said, "This is the time for the Congress to come together, both political parties, and we can do this, and the President, and work out the parameters of whether it is a special authorized commission, whether it is a military tribunal. But that gives the detainees the rights that the Constitution provides, and this is our strength. It is not our weakness." And Democratic Sen. Jack Reed, on Fox News Sunday (7/2, Wallace), said, "The President declared that he essentially was operating in his own capacity as commander in chief, and I think the court reined him back, and I think it's appropriate. … What it insists is that the President come to the Congress and in a deliberate fashion and a democratic fashion we give him the authority that he needs."

In an analysis piece, the Los Angeles Times (6/3, Schmitt) says the ruling "has apparently presented the Bush administration and its allies in Congress with two choices -- both fraught with risk. They can use the GOP majorities in the House and Senate to put a quick congressional seal of approval on something close to the existing system, but run the risk that it too will be struck down by the high court." Or "they can follow the path suggested by the court and devise a system embracing the procedural and other principles of the U.S. Uniform Code of Military Justice and the Geneva Convention, but risk the possibility that few, if any, of the alleged terrorists will be convicted." And "both choices, as well as attempts to chart a middle course, could set off the kind of protracted, internally divisive debate that the White House and GOP political strategists would not relish with the November elections approaching."

McCain Contends "All Of Us" Would Like To See Guantanamo Shut Down. Sen. John McCain, on ABC's This Week (7/2, Stephanopoulos), said, "All of us and the president has said he'd like to see Guantanamo shut down, but it's not Guantanamo itself, it's the status of these detainees. And I believe that if we use the Supreme Court decision correctly, we will move forward and adjudicate these cases."

Experts Offer Tips On Complying With Court Ruling On Guantanamo Tribunals. Time (7/10, Thornburgh) reports that the Supreme Court's ruling in Hamdan v. Rumsfeld says that if the Bush Administration wants to hold special military tribunals to try terrorism suspects at Guantnamo Bay, "it can't just declare them legal -- it needs to work with the other branches of government to make them so." Time notes that while the ruling was a "rebuke to the Administration's claim that it alone can decide how to defend Americans from terrorism," the High Court did not say "Guantnamo has to be closed. In fact, there are plenty of people who believe it's possible to comply with the court's ruling while protecting American citizens and extracting useful intelligence from detainees." Time lists several ways the Administration can fix Guantanamo, including working with Congress, repatriating the "small fish," who have been determined not to have committed any hostile act against Americans or their allies, processing the habeas corpus cases, living by the Geneva rules and lifting the "veil of secrecy" over the prison.

Bush, GOP Seen As Likely To Utilize Hamdan Decision As Campaign Issue. The Washington Post's Dana Milbank, on The Chris Matthews Show (7/2, Matthews) said, "Bush will be celebrating Hamdan the way the Muslims celebrate Ramadan. … Now he can campaign against the Supreme Court, they can put legislation before the congress that gives him exactly what he wants, force the democrats to vote against them and say 'those guys want to release all the terrorists.' It's going to be the 2002 and 2004 campaign all over again." Later in the program Milbank added, "It's Max Cleland all over again. You need one issue, one sort of wedge, and…this is exactly what the president wants."

The Weekly Standard's Bill Kristol, on Fox News Sunday (7/2, Wallace), said, "This is going to be a great debate for Republicans in Congress for the next few months. … Democrats are either going to have to basically acknowledge that the president has been right all along by authorizing what he wanted, and they're going to have to rebuke the Supreme Court's interpretation of the Geneva Conventions, or the Democrats are going to be in the position of saying that Al Qaida deserves protections like normal prisoners of war or like normal people in the American justice system."

WSJournal Says Case Should Be Election Issue. The Wall Street Journal (7/3) editorializes, "The Court's opinion masks its own power grab by asserting that the executive must defer more to Congress in designing military commissions." But "the Court's own deference to Congress is selective in the extreme, as it simply chose to ignore the clear intent of the Detainee Treatment Act that Congress passed only last December." The Journal adds, "We…certainly hope the Administration presses its case for military commissions to the Congress, including just how much due process protection the Members think al Qaeda detainees really deserve. An election is coming in which the prosecution of the war on terror will again be a major issue. By all means let's debate the proper care and handling of Osama's bodyguard."

GOP Lawmakers Blast Court's Interpretation Of Geneva Convention. The AP (7/3, Yost) reports, "Two Republican senators said Sunday that Congress must rein in

the Supreme Court ruling that international law applies to the Bush administration's conduct in the war on terror." On Fox News Sunday (7/2, Wallace) Sen. Lindsey Graham criticized the "Geneva Convention aspects" of the Hamdan decision, calling them "breathtaking." Graham argued that the "question for this country is should Al Qaida members who do not sign up to the Geneva Convention, who show disdain for it, who butcher our troops, be given the protections of a treaty they're not part of. My opinion -- no. They should be humanely treated, but the Geneva Convention cannot be used in the war on terrorists to give the terrorists an opportunity to basically come at us hard without any restrictions on how we interrogate and prosecute."

Sen. Mitch McConnell, on NBC's Meet The Press (7/2, Mitchell) said, "a very disturbing aspect of the decision was that the court held common Article 3 of the Geneva Conventions applicable to American servicemen. Now this means that American servicemen potentially could be accused of war crimes. I think Congress is going to want to deal with that as well when it enacts these military commissions, and I think we need to do it soon. And so we'll be dealing with that in the coming weeks. … I think we will have to act on this very soon, either in July or in September. Certainly in the next couple of months."

Rep. Peter King, on CNN's Late Edition (7/2, Roberts) noted that "the Geneva Conventions apply to soldiers of established armies, of established governments, not to terrorists who are on the run, who are basically rag-tag operations and do not swear allegiance to a particular country. … Because if we apply the Geneva Convention to them, that means all you ask them is their name, rank and serial number."

Kristol Says Court Committed "Act Of Judicial Imperialism." The Weekly Standard's Bill Kristol, on Fox News Sunday (7/2, Wallace), added, "What the court did find -- let's just be literal about this -- is that Common Article III of the Geneva Conventions applies to Al Qaida. That is a breathtaking finding. It is contrary to every understanding of what that article has meant for the last 50 years. It is a pure act of judicial imperialism. … And I think the Congress is going to have to repudiate the court."

Stevens Opinion Said To Reflect 1946 Ruling Penned By Rutledge. The Washington Post (7/3, A19, Lane) reports in its "Full Court Press" column, "Justice John Paul Stevens wrote last week's Supreme Court opinion striking down President Bush's plan to put suspected terrorists on trial before military commissions. But in a real sense, the opinion's author was Wiley B. Rutledge, the justice for whom Stevens clerked during the court's 1947-1948 term, and for whom he has expressed great admiration in the years since." Rutledge's "most famous dissenting opinion came in 1946, when he wrote that the majority of the court was wrong to deny a petition for habeas corpus by Tomoyuki Yamashita, the Japanese general sentenced to death by a U.S. military commission in the Philippines for atrocities committed by his troops. … It is hard to imagine anyone less popular in the United States than Yamashita. But the man whose case was before the court last week, Osama bin Laden's former aide, Salim Ahmed Hamdan, might qualify. Nevertheless, Stevens defended not Hamdan, but Hamdan's rights."

GOP Intensifies Criticism Of Media Over Anti-Terrorism Program Leaks.

The CBS Evening News (7/2, story 4, 2:20, Mitchell) reported, "A battle between the press and the White House is heating up tonight." CBS (Calvi) added Rep. Peter King has "cosponsored a congressional resolution condemning press reports that revealed a secret government program. The program was designed to monitor millions of bank transactions to try to catch terrorists." President Bush (Wednesday): "There can be no excuse for anyone entrusted with vital intelligence to leak it and no excuse for any newspaper to print it." Calvi: "'The Wall Street Journal,' 'The New York Times' and the 'Los Angeles Times' all reported on the surveillance program on the same day, but it's been 'The New York Times' that's been the focus of criticism, including by the editorial page of the 'Wall Street Journal.'" Bill Keller, Executive Editor, "The New York Times": "The 'Times' is an easy target for conservatives partly because our opinion pages tend to be pretty tough on the Bush Administration." Calvi: "Now, the Administration is considering its options." Rep. King "tells CBS News he'll be asking the Attorney General to investigate how the information was obtained by the 'Times' and file criminal charges against any leakers and reporters who refuse to reveal those sources."

McCain Calls For Prosecution Of Terror Money Tracking Program Leakers. The New York Post (7/3, Orin) reports that Sen. John McCain has ""joined the chorus of critics who say The New York Times was wrong to out a top-secret terror money-tracking program, and he called for prosecuting the leakers." Speaking on ABC's This Week, McCain said, "Tracking the money is always a vital tool, and members of Congress were kept informed and agreed to this program," adding, "So, no, I don't think [the Times] should have published it." The Post adds, "McCain also challenged the Times' claim that it didn't reveal any real secrets, saying, 'If The New York Times thinks the story was inconsequential, the legitimate question is: Why was it on the front page?' Asked if the Times should be prosecuted, McCain replied, 'I think we should go after the leakers first.'"

Document Outlines Bali Bombers' Final Hours.

The New York Times (7/3, Bonner) reports from Indonesia on "the playbook for a suicide bombing, including even a minute-

by-minute choreography of the bombers' final hours. The Indonesian police uncovered the document from the computer of one of the planners of an attack last October in Bali, which killed 20 people when three men walked into separate restaurants and blew themselves up." The document "offers a rare glimpse into the minds of the most cunning terrorist plotters and of the kind of meticulous planning that lies behind their operations. It also shows what even a small, local group with few resources can do, and the difficulty of thwarting their plans." The 34-page document, titled "The Bali Project," was "found on the computer of Azhari Husin, a Malaysian-born engineer educated in Australia and Britain who became a master bomb maker and was one of the most dangerous terrorists in Southeast Asia until he was killed in a shootout with the police last November." The document "was given to The New York Times by a person who requested anonymity because it had not been officially released. It was first reported on by Tempo, an English-language weekly newsmagazine here."

WSJournal Says Islamists Should Not Turn Somalia Into Refuge For Terrorists. An editorial in the Wall Street Journal (7/3) says, "There's no appetite in the US for a large military intervention in Somalia, but that doesn't mean the new regime should think it is immune from outside attention. So here's a suggestion: Send an emissary to the new Islamist government and propose a deal: Hand over the 1998 embassy bombers, refuse safe harbor to al Qaeda operatives, do not invade Somaliland and Puntland. Agree to that, and we will be able to get along. Don't agree, and the US will do what it must to disrupt any terrorist camps or terrorist activity within its borders. … The Somali Islamists need to understand that if they attempt to turn their country into another refuge for terrorists, it will end as badly for them as it did for the Taliban."

HOMELAND RESPONSE:

L.A. Police Chief, Others, To Press Homeland Security For Greater Sharing Of Intelligence. The Los Angeles Times (7/1, Winton, McGreevy) reported, "Los Angeles Police Chief William J. Bratton said Friday that he and other big-city police chiefs will meet this month with top Homeland Security officials amid complaints that the federal agency isn't doing enough to share information with local law enforcement nationwide." Bratton said it is not so much that DHS doesn't "share intelligence," but that "they don't have intelligence." DHS spokesman Russ Knocke described the upcoming meeting as "an opportunity for the secretary to sit down with the chiefs of police for major cities and talk about information sharing." Homeland Security Secretary Michael Chertoff "wants to 'listen to the concerns of the police chiefs and personally work to address the concerns,'" said Knocke.

The AP (7/1) reported that Bratton said, "The good news is: We've seen some significant improvements in intelligence provided over the last year." The AP continued that Knocke "said that last year the federal agency provided more than 1,200 bulletins, notices and other dispatches to local law enforcement agencies." However, he added that DHS is "the first to say there is more work to be done."

WRC-TV Washington, DC (6/30) reported on its website that DC Police Chief Charles Ramsey is among those "complaining about a lack of information sharing during terror threats." Ramsey told NBC4 that he had sent a letter to Secretary Chertoff "and he has agreed to meet sometime in July along with out key staff people, and I'll have some of the police chiefs who are also concerned. Then we'll sit down and talk about it."

WAR NEWS:

Sunni Lawmakers Boycott Iraqi Parliament. The New York Times (7/3, Semple) reports, "The main Sunni Arab political bloc began a boycott of Parliament on Sunday to protest the kidnapping of a Sunni legislator and threatened to withdraw its members from the prime minister's cabinet unless the lawmaker was freed within the next 48 hours." The "walkout" was "the first serious disruption in Iraq's new government and reflected the fragility of the power-sharing arrangement in the face of the relentless sectarian violence overwhelming the nation." The legislator, Tayseer Najah al-Mashhadani, and eight of her guards "were kidnapped by people suspected of being Shiite militiamen on Saturday while driving into Baghdad from her home north of the capital."

The Washington Post (7/3, A15, Partlow) reports, "The decision by the Sunni Accord Front, which holds 44 seats in the 275-member parliament, threatens to pull the legislature apart." Sunni legislators "blamed the abduction on Shiite-led militias aligned with the majority political parties in Iraq. Some accused the Iraqi security forces, who were near the kidnapping site in the Shaab neighborhood, of standing by and allowing Mashhadani's convoy to be captured." The Los Angeles Times (7/3, Roug) also reports the story.

Iraqi Government Publishes "Most Wanted List." The Financial Times (7/3, Negus) reports, "The Iraqi government on Sunday published a "most wanted" list topped by family and former associates of deposed president Saddam Hussein who reportedly finance and direct the insurgency." The list, "planned in parallel with the

government's national reconciliation plan – suggests that the government considers a reconstructed Ba'ath party to be its most dangerous foe."

The AP (7/3, Juhi) notes Saddam's "wife and eldest daughter are among 41 people on the Iraqi government's most wanted list, along with the new leader of al-Qaida in Iraq, a top official announced Sunday." Saddam's wife, Sajida Khairallah Tulfah, "was No. 17, just behind the ousted leader's eldest daughter, Raghad. Sajida is believed to be in Qatar, and Raghad lives in Jordan, where she was given refuge by King Abdullah II."

ABC World News Tonight (7/2, lead story, 2:50, Brown) reported, "Remember the deck of cards the US military put out just after the war? Most of those have since been killed or captured, and the violence continued. The list of 41 names was released by the national security adviser here, who said they're all killers. And will be hunted down, one by one. He said the international police agency, Interpol, has been informed." Mouwafak Al-Rubaie, Iraqi National Security Adviser: "This list shows those who are trying to destroy our country." The CBS Evening News (7/2, story 3, 1:55, Cowan) said it was "the latest step in the government's security crackdown that has failed so far to stem the violence in Iraq."

Violence Continues In Iraq. The CBS Evening News (7/2, story 2, 0:10, Mitchell) reported, "Another bloody day in Iraq. South of Baghdad, four were killed and 22 wounded after a bomb went off. This one day after a car bomb in a Baghdad market killed more than 60."

Further Details Of Alleged Iraq Rape Surface. The Washington Post (7/3, Knickmeyer) reports the version of the alleged rape and murders by US GIs told by a neighbor, Omar Janabi. It gives the victim's age as 15 and contains his account of finding the family's bodies, as well as graphic descriptions of the bodies from death certificates. The Post writes, "The case is at least the fourth American military investigation announced since March of alleged atrocities by U.S. forces in Iraq. The rape allegation makes the Mahmudiyah case potentially incendiary in Iraq. Rape is seen as a crime smearing the honor of the family as well as the victim in conservative communities here."

Senate Intelligence Committee "Statements" Investigation Stalled. In the National Review (7/17), Byron York says the Senate Intelligence Committee "is engaged in a protracted investigation of the public statements of President Bush, Vice President Cheney, top administration officials, lawmakers in the House and Senate, and even officials of previous administrations to determine whether they exaggerated, cherry-picked, misrepresented, or otherwise manipulated intelligence in the run-up to the war." But it is "not going well. In fact, the 'statements investigation' is the main roadblock to completion of what is called 'Phase Two' of the committee's probe of pre-war intelligence." After Democrats "first proposed to investigate only Bush administration officials," Chairman Pat Roberts "pointed out that many members of Congress, as well as many members of the Clinton administration, had also made statements about Iraq's supposed WMD capabilities." But Roberts added when "senators evaluate each statement in light of the intelligence that was available at the time, he proposed, they should do so blindly — that is, not knowing the identity of the speaker, so they would not allow any biases to influence their judgment on the appropriateness or inappropriateness of the statement." It would "not be an exaggeration to say that Democrats — behind the scenes, of course — went bonkers over that suggestion." What had "started as a way to criticize the Bush administration threatened to backfire on Democrats."

Bush Seen As Uninterested In Seeking Democratic Support For Iraq Policy. In the New Republic's TRB column (7/10), Peter Beinart says, "Why doesn't George W. Bush want to win in Iraq? Seriously. The past several weeks have forced him to choose between two big goals: Demonizing Democrats to help the GOP retain control of Congress and fostering a domestic climate that gives the new Iraqi government the best chance to survive. And, again and again, he has chosen door number one." Swallowing the concessions needed from the US to secure the Iraqi government "will require a bipartisan bargain -- the kind of ceasefire required for difficult domestic changes like reforming Social Security or the tax code." But "over the past several weeks, President Bush has done exactly the opposite. Rove and company immediately wielded Zarqawi's death as a partisan club, saying that, if Democrats had their way, he'd still be loose."

Raid Reveals Tensions Between US Forces, Afghan Government. The New York Times (7/3, Gall) reports from Kabul, "A joint military raid by American and Afghan forces on an unobtrusive house here in the capital on March 20 has pointed up the tensions between the American military and the Afghan Defense Ministry over the conduct of counterinsurgency raids, particularly in Kabul, the Afghan defense minister says." The raid "was led by masked American special forces, and included eight members of a unit of the Afghan National Army. The involvement of Afghan soldiers prompted the defense minister, Gen. Abdur Rahim Wardak, who had no advance notice of the raid, to bar Afghan Army personnel from taking part in any raids on houses or compounds."

Two British Soldiers Killed. The Washington Post (7/3, A16, Tran) reports, "An insurgent attack on a British base killed two soldiers and an Afghan interpreter, military officials said Sunday, while at least 20 insurgents were killed in clashes and coalition airstrikes." An AH-64 Apache attack helicopter "crashed Saturday in an accident in southern Afghanistan, killing one crew member, the US military said."

Pakistani Journalist Sees Dire Situation In Afghanistan. Ahmed Rashid, a Pakistani journalist, writes in the Washington Post (7/3, A21), "The current political and military meltdown in Afghanistan was entirely predictable and avoidable. For the past three years Afghans, their president, Hamid Karzai, and foreign experts have been warning that the failure of the United States and the international community to provide sufficient economic, military and reconstruction resources to the fledgling Afghan government would lead to a Taliban resurgence and disillusionment among the Afghan people. That is exactly what has happened." But "there is still a way out of the mess if the international community and the Afghans pull together, rather than being at odds with one another. Karzai set the ball rolling late last month by calling for a joint strategy in a critical meeting with the most important foreign players in Kabul." Rashid adds the UN Security Council "needs to give the UN officials in Kabul the responsibility for coordinating the international response to the crisis and economic and political strategies with the Afghan government."

US Military Faces Shortfall In Special Forces Troops. USA Today (7/3, Brook) reports, "The Army, Navy and Air Force face shortages of elite special operations forces that are playing a leading role in the war against terrorism, military records show." The shortfall of Army special operations, Navy SEALs and Air Force "combat controllers persists as the Pentagon seeks to expand the forces by 15% over the next four years to bolster the anti-terrorism campaign. One reason for the shortage is the intense training. The Navy says only 35 of 166 candidates will qualify as SEALs." USA Today adds, "Retention also is a problem. Some veterans can make $780 a day as civilian security contractors in Iraq, says Rep. Jim Saxton, R-N.J., chairman of a House Armed Services subcommittee that oversees special operations troops. Bonuses as high as $150,000 have helped stanch that loss, he says."

Pentagon Officers Said To Be Resisting Rumsfeld, Cheney On Iran Bombing Plans. In the New Yorker (7/10-17), Seymour Hersh writes that included with the Bush White House's offer to Iran to negotiate over its nuclear program if it suspended its uranium enrichment program included "an unspoken threat: The US Strategic Command, supported by the Air Force, has been drawing up plans, at the President's direction, for a major bombing campaign in Iraq. Inside the Pentagon, senior commanders have increasingly challenged the President's plans, according to active duty and retired officers and officials." Senior officers "have told the Administration that the bombing campaign will probably not succeed in destroying Iran's nuclear program. They have also warned that an attack could lead to serious economic, political, and military consequences for the US." A retired four star general, "who ran a major command, said, 'The system is starting to sense the end of the road, and they don't want to be condemned by history. They want to be able to say, 'We stood up.'" The New Yorker adds the "discord over Iran can, in part, be ascribed to Rumsfeld's testy relationship with the generals. They see him as high-handed and unwilling to accept responsibility for what has gone wrong in Iraq." But Rumsfeld is "not alone in the Administration where Iran is concerned; he is closely allied with Dick Cheney, and," a Pentagon consultant said, "'the President generally defers to the Vice President on all these issues,' such as dealing with the specifics of a bombing campaign if diplomacy fails."

Iran Rejects Western Deadline On Nuclear Proposal. The New York Times (7/3, Fathi) reports, "Iran on Sunday again rejected a deadline to respond to an international proposal to end the standoff over its nuclear program, saying it would respond a month. 'We do not consider such statements as constructive and invite them to wait for our answer until next month,' said Hamidreza Assefi, the Foreign Ministry spokesman, the ISNA news agency reported. The next month in the Iranian calendar begins July 23." Assefi "was responding to a statement made at a meeting of the Group of 8's foreign ministers on Thursday in Russia, during which they demanded Iran make a 'clear and substantive' response to the proposal in a week. P resident Mahmoud Ahmadinejad had previously said Iran would give its answer around Aug. 23."

Iran To Cut Refined Oil Imports, Ration Gasoline. The Washington Times (7/3, Mihailescu) reports, "Iran, which relies on imports for almost half its refined petroleum products, plans to halt those imports and introduce gasoline rationing later this year, the government announced." The decision "appears related to a plan to allow the nation's heavily subsidized gasoline to spike in price in order to reduce the smuggling of fuel to neighboring countries, a practice that aggravates shortages and costs the country billions of dollars every year."

DOJ:

Kennedy Emerges As Swing Vote On High Court. The Christian Science Monitor (7/3, Richey) notes

that with the addition of President Bush's two nominees, Chief Justice John Roberts and Justice Samuel Alito, the supreme Court "has grown more conservative." The Monitor also notes that Justice Anthony Kennedy "will likely decide how far to the right the law moves under the new lineup of justices at the nation's highest court." According to the Monitor, "In years past, Kennedy shared the swing-vote designation with O'Connor. But with her departure he occupies the court's decisive center alone. That puts Kennedy in an even more powerful position than O'Connor, legal analysts say. … Kennedy's power was on full display last week when he joined the court's liberal wing to forcefully strike down President Bush's plan to put terror suspects on trial before military commissions at Guantánamo Bay, Cuba."

Roberts Court Seen As Less Contentious Than Rehnquist's. Time (7/10, Rosen) reports that that Supreme Court's first year under Chief Justice John Roberts "has not been ordinary. As evidenced last week when the court struck down the Bush Administration's use of military tribunals, the Justices are suddenly unafraid to talk to one another in personal terms." By the time the Court adjourned for the summer, "the usual decorous costume drama that is a Supreme Court term had morphed into something much closer -- in vitriol, tension and drama -- to a soap opera." Time notes, however, that despite "the impression left by its rush of final decisions, the Roberts court is, at least so far, less fractured than the court led for 19 years by William Rehnquist. Almost half its decisions this year had no dissents, compared with 38% in Rehnquist's final term, and the tally of 16 cases decided by a 5-to-4 vote is seven fewer than under Rehnquist."

GOP To Focus On Judicial Confirmations. The Washington Times (7/3, Hurt) reports, "In coming weeks, Republicans on Capitol Hill plan for the first major push on judges since Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr. were confirmed to the Supreme Court." In "the nearly six months since Justice Alito was confirmed, only 14 federal judges have been seated." That's "the slowest six-month period since early 2004, according to documents kept by the Department of Justice's Office of Legal Policy." The Times adds, "The plans for renewed emphasis on judges comes after a consortium of conservative leaders expressed deep displeasure with both the White House and Republican leaders on Capitol Hill in recent months over the slowed pace of confirmations." The conservatives wrote "a letter to Senate Majority Leader Bill Frist, Senate Majority Whip Mitch McConnell and other Republican leaders in the body." The "83 signers of the letter…include such conservative icons as Paul Weyrich, Alan Keyes, Richard Viguerie, Abigail Thernstrom, David A. Keene, L. Brent Bozell III and Bill Donohue."

CORPORATE SCANDALS:

Impact Of US Abramoff Probe Into Ex-Guam Governor Remains Unclear. The Guam Pacific Daily News (7/3, Kang) reports, "The fallout over the federal investigation of a possible link between disgraced lobbyist Jack Abramoff and former Democratic Gov. Carl Gutierrez remains unclear. The U.S. Department of Justice on Friday issued a report on the replacement of Frederick Black as the island's U.S. Attorney, in which lobbyist Jack Abramoff told investigators he was helping Gutierrez get rid of Black. Gutierrez on Saturday denied those allegations. Former Guam delegate and Democratic gubernatorial candidate Robert Underwood, in a phone interview from Seattle, said the case warrants further investigation. In particular, he said, inquiries should be made into whether Abramoff received monetary compensation of any kind and where that money might have come from. Gutierrez on Saturday said he nor his administration never paid Abramoff for any lobbying efforts." Underwood "went on to say that if any additional information of a conspiratorial nature is revealed in subsequent investigations, those responsible should be prosecuted. Accountable 'First of all, the voters should hold them accountable and secondly the law should hold them accountable,' he said."

The Guam Pacific Daily News (7/3, Daleno) reports Gutierrez "praised a recently released federal investigation into the removal of former acting U.S. Attorney Fred Black, saying Black's smear of his replacement, Leonardo Rapadas, is a 'prime example of his operations.' Gutierrez yesterday released a written statement responding to the report, accusing Black of blocking local attempts at self-government. During a Saturday interview with the Pacific Daily News, Gutierrez denied statements in the Department of Justice report that lobbyist Jack Abramoff was working on his behalf to get Black removed." Gutierrez "acknowledged meeting with Abramoff during a dinner in the nation's capital, where the topic of Black's nomination came up, but he did not elaborate on what happened after that, saying only that he found it 'interesting' that Abramoff wanted to meet him. A Justice Department Office of Inspector General report, released Friday in Washington, D.C., states that Abramoff told federal investigators he began working on behalf of Gutierrez, who was governor at the time, to lobby for the removal of Black when certain Gutierrez administration officials were under federal investigation."

The Guam Pacific Daily News (7/2, Limtiaco) reports, "Former Democratic Sen. Mark Charfauros yesterday acknowledged that he probably was lobbyist Jack Abramoff's closest friend on Guam, but he disputed a U.S. Department of Justice report released yesterday." Charfauros said he "did

ask his friend Abramoff for help in securing a confirmed U.S. Attorney for Guam, but said he was not working with Gutierrez on the matter and did not send the e-mail stated in the report. 'No way. I'd like to see that e-mail. That didn't happen. I never filed any kind of e-mail, saying that nominations are gonna come out of Carl Gutierrez. Carl Gutierrez had nothing to do with this whole issue,' Charfauros said." The Guam Pacific Daily News (7/2, Daleno, Tamondong) reports Abramoff "has told federal investigators and said in e-mails that he worked on behalf" of Gutierrez to remove Black.

Tenet CEO Faces Challenge Of Moving On After Settlement With DOJ. The Wall Street Journal (7/3, Rundle) reports Trevor Fetter "inherited a financial and legal morass in 2003, when he took the top job at Tenet Healthcare Corp., the big hospital operator. Now, with most of the company's legal woes behind him, Mr. Fetter is turning to his next task: moving on." Tenet last week "agreed to pay the Justice Department $725 million to settle a host of investigations, including allegations that it gamed the Medicare system to generate lucrative payments it didn't deserve." Fetter's "biggest challenge will be to persuade doctors to send more patients to Tenet hospitals, many of which languished as Tenet conserved cash in anticipation of the Justice Department settlement. Today, those hospitals lack the latest CT scanners and other high-tech equipment that doctors crave."

Austin Banker Nearing Victory In S&L Case. The Austin American-Statesman (7/3, Elder) reports, "Austin real estate developer Alfred Hughes was close to giddy when he acquired an El Paso savings and loan in 1988. 'We're sitting on top of the world,' he said after federal regulators approved the purchase. 'We're very comfortable working in a regulated environment.' Less than two years later, regulators shuttered El Paso Federal Savings and Loan. For the past 16 years, Hughes has been trying to collect the $46.5 million he says the government cost him by improperly closing and then liquidating the institution. Among the assets Hughes lost when the thrift closed was his ownership of 4,500 acres of Steiner Ranch in western Travis County, now a development of high-end homes." While the "legal battle may roll on, in a continuing echo of the massive savings and loan crisis of the 1980s and early 1990s, Hughes won a big victory last month. Senior Judge James Merow of the U.S. Court of Federal Claims awarded Hughes the full amount, ruling that a 1989 federal law had unfairly imposed new financial requirements on thrifts."

BP Traders Lost $10 Million, Court Documents Show. Bloomberg (7/3) reports, "The three BP Plc traders accused by regulators of attempting to corner the U.S. propane market lost $10 million when they failed to sell their inventory, court documents show. The traders in February 2004 sought to make more than $20 million by holding most of the propane on a pipeline that ships the heating fuel from a hub in Texas to the U.S. Midwest and Northeast, according to transcripts filed June 28 with the U.S. District Court in Illinois by the Commodity Futures Trading Commission. Instead, they were stuck with much of the fuel as the market plunged on March 1." BP, "which made $2.8 billion trading oil and gas in 2005, and other oil companies are facing increased scrutiny from U.S. regulators and lawmakers as near-record oil prices have boosted gasoline, heating oil and natural gas prices to records in the past year."

Levin, Coleman Want More Oversight Of Energy Markets. The Financial Times (7/3, Grant) reports United Kingdom energy firm BP, "has suspended three Houston-based traders at the centre of an alleged propane price manipulation scheme, as alarm rose in Washington over the need to police energy markets. Senior US senators have warned congress that 'too many trades' are occurring without regulatory oversight." Sen. Carl Levin said, "It's time to put the cop back on the beat in these markets to make sure ordinary Americans aren't ripped off." The Times adds Levin's "call, in a bipartisan report to congress last week by the Senate's Permanent Subcommittee on Investigations, is the clearest sign yet that lawmakers believe the US energy markets are still open to manipulation years after the collapse of Enron exposed the weakness of lightly regulated energy markets." Sens. Levin and Norm Coleman "urged congress to 'eliminate the Enron loophole' by extending the power of the Commodity Futures Trading Commission, the US futures industry regulator, to oversee over-the-counter (OTC) energy markets."

Bermuda Unit Said To Be At Center Of Refco Collapse. The Wall Street Journal (7/3, Mollenkamp, Mcdonald, Mckay) reports on the failure and bankruptcy filing of hedge fund manager Refco, "one of the largest and swiftest failures in recent Wall Street history. Refco, one of the world's largest commodities brokerages, was a global trading hub for corporations, government agencies, individual clients and hedge funds. And yet its spectacular collapse came out of nowhere." There are "thousands of big and small investors trying to recover about $1.8 billion of assets missing from client accounts." The "inside story of Refco's collapse" is now "emerging in federal bankruptcy-court proceedings in lower Manhattan and in related civil and criminal actions. At its center is Refco Capital Markets Ltd. of Hamilton, Bermuda. Court proceedings have uncovered a host of unusual practices by the Bermuda unit that appear to have contributed both to Refco's rapid growth and to its catastrophic fall."

SEC Sues To End German Bond Investment Scheme. USA Today (7/3, Smith) reports Las Vegas investor Jeffrey Weston "has been snapping up Germany Weimar Republic bonds from the 1920s on the premise that $1,000 in IOUs payable in gold then are today worth about $1 billion apiece," persuading "dozens of investors to give him $7.7 million to purchase the antique certificates, which lost much of their value after Adolf Hitler came to power in 1933." Last week, the Securities and Exchange Commission "said Weston had spun a fantastic tale while spending $2 million of investors' money on a house and cars and tucking away $454,000 more in Swiss bank accounts." The SEC "sued to halt Weston's promotions, freeze his funds and recover what authorities say might be only pennies on the dollar. The FBI and Texas authorities also are investigating, court records show."

CRIMINAL LAW:

DOJ Issues New Subpoena For Jefferson Emails. Roll Call (7/3, Bresnahan) reports, "The Justice Department has issued a new subpoena for e-mails from Rep. William Jefferson (D-La.), who is at the center of an ongoing bribery and corruption investigation." The subpoena, "approved by a federal grand jury in Alexandria, Va., was sent last week to James Eagan, Chief Administrative Officer of the House." The Jefferson probe "is being overseen by the US attorney's office in Alexandria." The subpoena "was read into the Congressional Record on Thursday evening, as required under House rules, but did not specify that Jefferson was the target of the request."

Indictment Seen As Wild Card In Ney's Electoral Chances. USA Today (7/3, Lawrence) reports, "There's often a caveat these days when Ohio Republicans talk about re-election prospects for their embattled congressman, Bob Ney. As state Rep. Clyde Evans put it at a recent GOP barbecue, 'Unless he's indicted, I think he'll do very well.'" Ney "hasn't been charged and says he has done nothing wrong. He also says he'll run even if he's indicted. … Some of Ney's past backers, however, say an indictment would change their votes. Some already are considering a switch to Democrat Zack Space, 45, an attorney and hotel developer from Dover."

Government Corruption Cases Persist In Connecticut. The Washington Post (7/3, A3, Fahrenthold) reports the "past few years have revealed so many tales of graft, malfeasance and all-purpose criminality by public servants in Connecticut that it's hard to choose the most brazen." A "tradition of bad behavior by officeholders persists here, despite numerous prosecutions and attempts at reform. If more proof were needed, it has come in the past few weeks, with three new scandals involving current or former big-city mayors." When Gov. John Rowland "resigned, pleaded guilty and was sentenced in March 2005 to a year and a day in jail, 'everybody thought that was going to be the end of it,' said John M. Orman, a professor of politics at Fairfield University in Fairfield, Conn. Instead, he said, the continuing parade of misdeeds has helped the state live up to a new nickname, 'Corrupticut.'" The Post adds the "recent scandals here include the tearful, nationally televised admission on June 20 by Bridgeport Mayor John M. Fabrizi (D) that he had used cocaine while in office." Other cases "include a former mayor and city council member from Middletown -- who pleaded guilty late last month to fraud for embezzling money from his law clients -- and a new charge against Joseph Santopietro, the former mayor of Waterbury."

Missouri Supreme Court Ruling Alters Rules For Sex Offenders. The St. Louis Post-Dispatch (7/2, Franck) reports, "Thousands of offenders would no longer be required to provide information for Missouri's sex offender registry after a ruling Friday by the Missouri Supreme Court, according to the lawyer behind the litigation. While the high court upheld the constitutionality of the state's sex offender registry law, it ruled that the statute should not apply to nearly all of those convicted of crimes prior to 1995, when the law took effect. One key exception is sexually violent predators, who will stay on the list regardless of when their crimes occurred. Just how many of Missouri's more than 11,000 registered sex offenders would be affected by the ruling was unclear Friday. Tim Hull, a spokesman for the Missouri Highway Patrol, which maintains the list, said officials must review the ruling in detail. But Arthur Benson II, the lawyer who brought the case, estimates that thousands would no longer have to be registered as sex offenders. Currently, the registry includes offenses from 1979 to the present. Crimes committed during more than half of those years would not be included in the registry." Benson said the ruling "addresses 'the height of unfairness' in the current law, which requires people to register even for crimes they committed years before the registry law was conceived."

Denver Post Urges Online Safety Precautions For Minors. The Denver Post (7/3) editorializes, "There has been a great deal of concern recently - among lawmakers, in the courts and in the media - about the dangers faced by children on the Internet. Indeed, the statistics about online predators are frightening. Just in the last three years, 7,600 offenders have been caught and arrested for sexual solicitations. According to a U.S. Department of Justice survey, 1 in 5 girls and 1 in 10 boys admitted to being sexually solicited on the Internet. The Internet has proven to be a riveting tool for

children - it provides an incredible opportunity for students to gain a broader view of the world, collect research for school projects, and keep in contact with family and friends. … It doesn't make sense to deal with Internet risks by locking up your children's computer, but it's vital for parents and guardians to monitor their online use. Through awareness, parent-child communication and a few safety precautions, kids and teens can appreciate the benefits of the Internet while dodging most of the dangers."

Irving, Texas, Police May Be Chastised Over Amber Alert. The Dallas Morning News (7/2, Mosier) reports, "The Irving Police Department could face an informal reprimand for issuing an Amber Alert for 2-year-old Elian Majano, who disappeared from a park more than a week ago and is still missing. Evidence of abduction is a requirement for activating the regional alert system, but Police Chief Larry Boyd said there was no such evidence in this case. The task force that runs the local system reviews each alert to determine whether it was warranted. There were 'no signs of abduction, but we couldn't rule it out,' Chief Boyd said."

ABC News Poll Finds 65% Favor Death Penalty For Murder. ABC World News Tonight (7/2, story 6, 0:30, Harris) reported, "Today marks 30 years since the United States Supreme Court ruling that reinstated the death penalty. A new ABC News poll finds that support for capital punishment has fallen over the past decade, but when it comes to the worst crimes, most Americans remain in favor of it: 65% approve of executing people convicted of murder. Since July 2nd, 1976, 1,029 people have been put to death in this country, more than a third of them in Texas."

CIVIL RIGHTS:

Hollywood, Florida, May Seek More Time In Religious Discrimination Lawsuit. The Miami Herald (7/3, Wright) reports Hollywood, Florida, "is expected to ask a federal judge today for more time to settle a religious discrimination lawsuit brought against the city by an Orthodox synagogue. Jury selection is scheduled to start at 9 a.m. before Judge Joan Lenard in U.S. District Court in Miami. The city last week offered a last-minute deal to end the five-year dispute with the Hollywood Community Synagogue Chabad Lubavitch. Now, the congregation wants time to consider the offer. Even if the settlement is accepted, Hollywood leaders may face a fresh round of lawsuits -- this time from neighbors concerned that the deal would allow the synagogue to expand without their input or city approval."

La Tuna Federal Prison Inmates Claim Rights Violations. The El Paso Times (7/3, Roberts) reports, "Inmates held at the various La Tuna federal prison facilities are convinced they have been denied visits, thrown in 'the hole' for minor infractions and denied access to the prison law library because they went public with a lawsuit claiming the federal Bureau of Prisons isn't following its own procedures. Requests for interviews with two of the inmates have been denied twice by La Tuna officials who said it was for the safety of the prisoners. By mail, those inmates have said they want to be interviewed. In that correspondence, they have claimed they are experiencing retaliation for their lawful actions." But La Tuna spokesman Israel Jacquez said, "That's just simply not true. These guys went to the press. That's their right. ... If we believe a staff member is retaliating against an inmate, no matter how frivolous the allegation may be, it is referred to the office of internal affairs."

Texas Redistricting Verdict Could Result In "Ripple Effect." The Washington Times (7/3, Aynesworth) reports last week's Supreme Court ruling "on the constitutionality of the 2003 Tom DeLay-led Texas redistricting coup was a distinct victory for the Republican Party, but it could spawn some interesting fallout." In order to make the 23rd CD compliant "with the Voting Rights Act, some predict that several additional districts will have to be retooled." Rep. Henry Bonilla said, "Anyone who thinks there isn't going to be a ripple effect when countless counties are traded with other congressional districts is not seeing the big picture." The Times ads the "worst that could happen from the Republican viewpoint, several political analysts say, is that Mr. Bonilla might lose the reconstituted 23rd District."

Hitchens Says Congress Should Not "Waste" More Time On Flag Amendment. Christopher Hitchens writes in Wall Street Journal (7/3) that the "so-called 'flag-burning' amendment should never be allowed to waste any more congressional time. … It's easy enough to boast that 'these colors do not run.' However, those who mistake the symbol for the essence are manifesting not a show of spirit for the former but a pathetic lack of confidence in the latter."

WPost Praises McConnell Stance On Flag Burning Amendment. An editorial in the Washington Post (7/3, A20) says the recent Senate debate over a flag burning amendment "managed to bring out some of the worst in politicians of both parties. … If there is a hero in this episode, it is the man who would succeed Mr. Frist as leader, Majority Whip Mitch McConnell (R-Ky.). Mr. McConnell could have put the amendment over the top by abandoning his opposition. To his credit, he didn't, and he was joined by two other Republicans, Sens. Lincoln D. Chafee (R.I.) and Robert F.

Bennett (Utah). As Mr. McConnell explained in a column posted on his Senate Web site, 'No act of speech is so obnoxious that it merits tampering with our First Amendment. Our Constitution, and our country, is stronger than that.'"

ANTITRUST:

US Investigating Kosher Slaughterhouses For Possible Antitrust Violations. The Asbury Park Press/AP (7/3) reports, "The federal government is investigating kosher slaughterhouses and suppliers for possible antitrust practices, according to a lawyer for one of the firms. AgriProcessors Inc., the world's largest kosher slaughterhouse, received a grand jury subpoena requesting documents and was cooperating with the investigation, attorney Nathan Lewin said Friday." It was "not immediately clear exactly how many slaughterhouses and suppliers were involved in the probe. The U.S. Department of Justice did not immediately return a phone call for comment from The Associated Press late Friday."

Second Quarter Merger Activity Was Prolific. The Wall Street Journal (7/3, Berman) reports a "strong first quarter for mergers continued in the second quarter, as deals rolled in from seemingly every sector: Banks, stock exchanges, oil companies, real-estate firms and consumer-products companies. It was one of history's largest and most diverse corporate-buying sprees, with nearly $1 trillion in deals around the world." The "frenetic deal-making produced the third most-active quarter since Thomson Financial began keeping track in 1985. It amounted to more than $916 billion of announced transactions, according to Thomson, up about 35% from about $676 billion a year earlier."

Despite Consolidation, Growth Opportunities Elusive For Commercial Satellite Industry. The Wall Street Journal (7/3, Pasztor) reports that while "consolidation and cost cutting have swept across the commercial-satellite industry," the "surviving operators are finding growth opportunities as elusive as ever." Intelsat Ltd. and PanAmSat Holding Corp. "are set to complete a $3.2 billion merger today, creating a closely held company whose fleet of more than 50 orbiting spacecraft will make it the largest and most diversified global satellite-services operator." But in "an industry with huge capital-investment needs and average annual growth rates hovering around 3% or less, the combined company faces major integration, personnel and marketing challenges to break out of that historical slow-growth pattern."

The Washington Post (7/3, D1, Witte) reports Intelsat Ltd. of Washington will "become the world's largest commercial satellite operator today when it completes its purchase of the firm that had been its toughest domestic competitor." The combined company "will lose money. PanAmSat earned $72.7 million last year, but Intelsat lost far more, about $325 million. Already deep in debt, Intelsat is borrowing heavily to finance the purchase."

FBI/DEA/ATF/USMS:

FBI Agent Came Close To Linking Cole, 9/11 Plots. The New Yorker (7/10-17, Wright) reports on the story Ali Soufan, who, at the time of the attack on the USS Cole in 2000, was "the only FBI agent in the city [New York] who spoke Arabic, and one of only eight in the country." Soufan's language skills, "his relentlessness, and his roots in the Middle East made him invaluable in helping the FBI understand al Qaeda, an organization that few Americans were even aware of before the embassy bombings." During the Cole investigation, an al Qaeda suspect told Soufan "that several months before the Cole attack he and one of the bombers had delivered thirty-six thousand dollars to Khallad, the one-legged al Qaeda lieutenant, in Bangkok. The money," the suspect added, "was meant only to buy Khallad a new prosthesis." But Soufan "was suspicious of this explanation," because "money always flowed toward an operation, not away from it. He wondered if al Qaeda had a bigger plot underway." In November, 2000, "a month after the Cole bombing, Soufan sent the agency the first of several official queries. On Soufan's behalf, the director of the FBI sent a letter to the director of the CIA, formally asking for information about Khallad, and whether there might have been an al Qaeda meeting somewhere in Southeast Asia before the bombing. The agency said that it had nothing." But if the agency "had responded candidly to Soufan's requests, it would have revealed its knowledge of an al Qaeda cell that was already forming inside the US," which eventually became the 9/11 conspiracy.

Post-9/11 Criticism, Private Sector Pay Driving Senior Officials From FBI. Under the headline "An Exodus of Agents," Time (7/10, Bennett, Zagorin) reports in its "Notebook" section, "Office birthday parties must make FBI Director Robert Mueller a little nervous these days." The rumors that Deputy Director John Pistole "was going to bolt for a lucrative job in the private sector" when he turns 50 this month "got so loud that Pistole took it upon himself to assure Mueller that he wasn't leaving," citing, in part, the departure of "so many other senior officials." Time adds, "Years of pummeling by the press and Congress, plus wrenching changes produced by the bureau's shift in focus to antiterrorism, have depressed morale, even in the highest

ranks. That has coincided with lucrative employment offers to agents from firms desperate for experienced security chiefs in the wake of 9/11." Time notes, "Members of the Senate Judiciary Committee have been debating whether the brain drain at the FBI poses a threat to national security," and "Mueller seems to agree. When promoting agents to senior-executive levels, he 'is trying to extract some promise as to how long they are willing to stay,' says Michael Mason, who runs the administrative side of the FBI." Sen. Charles Grassley "suggested to TIME that 'the FBI needs to appeal to the patriotic spirit of its senior managers.' But beyond that, the bureau is offering few tangible perks to make working there more attractive. … Mason, however, is optimistic that the new generation of agents will make the sacrifices necessary for the job."

Blagojevich Says He Acted To Identify, Punish Hiring Misconduct. The AP (7/2, D'Alessio) reported, "Gov. Rod Blagojevich insisted Saturday that misconduct in his administration is limited to isolated events by people who are soon punished, even though his own inspector general found a top Blagojevich aide took part in a 'concerted effort' to subvert the law. 'As you police the system, every so often you're going find some people who violate the rules. The test of leadership is what do you do about it? Do you act and do you pursue it? Do you work with other law enforcement agencies to ferret more of it out?' he said. 'Those are the things we've been doing.'" The AP noted, "Blagojevich acknowledges he has been interviewed by the FBI. Prosecutors have issued subpoenas for hiring records and other information from state agencies, but Blagojevich won't say which agencies."

Former Illinois IG Alleged Hiring Fraud Connected To Blagojevich's Office. The Chicago Tribune (7/2, Long, Chase) reported, "Far-reaching allegations of state hiring abuses detailed by the governor's executive inspector general can be summarized in the report's account of one employee who still works at the Illinois Department of Employment Security. George Rada got his job when the agency violated state hiring practices, then he became a key conduit for Gov. Rod Blagojevich's patronage office to improperly influence hiring at the agency, according to the report obtained by the Tribune." The Tribune noted, "The September 2004 report by then-Inspector General Zaldwaynaka 'Z.' Scott said Rada and an associate, Surami 'Sudi' Garcia, effectively ran the human resources division in the agency instead of the personnel directors they served."

Chicago Tribune Hopes Fitzgerald Will Complete Probe Before Election. The Chicago Tribune (7/2) editorialized, "The FBI and the office of Illinois Atty. Gen. Lisa Madigan have been digging into reports of state hiring abuses since last year. But Friday's disclosure that the feds have 'implicated multiple state agencies and departments' in politically motivated hiring comes as Blagojevich must stand uneasily for re-election." The "voters deserve what they didn't get in 1998 before Ryan was elected governor: a sense of the nature and sweep of a federal investigation. … Our hope…is that to the extent possible, the federal investigation of the Blagojevich administration either culminates or collapses before voters must make their quadrennial choice." Playing on Blagojevich's prior election pledge, the Tribune added, "What Illinois does need is an end to business as usual."

Longtime Scarpa Girlfriend Emerges As Key Witness Against DeVecchio. In a widely-distributed story, the AP (7/3, Hays, McShane) reports Linda Schiro, longtime girlfriend of Colombo family associate Gregory Scarpa Sr., "has emerged as a key witness against an FBI agent accused in what a prosecutor has labeled one of the worst cases of law enforcement corruption in the nation's history." R. Lindley DeVecchio "allegedly fed Schiro's late boyfriend inside information that led to four mob slayings," but DeVecchio lawyers question her credibility, saying that "her story has changed drastically over time." However, "authorities insist that Schiro's initial reluctance to detail the relationship between the agent and the mob capo was motivated by fears for her life. Only recently was she persuaded to tell the truth, they say."

Judge Waiving DeVeccio House Arrest To Watch Holiday Fireworks. The Washington Post (7/2, A2, Whoriskey) reported Lindley DeVecchio "wants to see fireworks this Fourth of July. Trouble is, he has been charged with four counts of second-degree murder related to some mob slayings" and is "under nightly house arrest in Sarasota, Fla. But to the astonishment of prosecutors, a judge last week granted DeVecchio's request that he be allowed to see the Sarasota fireworks 'in light of the defendant's service to the U.S. government.' DeVecchio is a former FBI agent. 'We've been opposed to the whole bail thing from the beginning,' said Jerry Schmetterer, a spokesman for the district attorney's office in Brooklyn, N.Y."

FBI Investigating West Virginia's "Prince Of Pork." ABC World News Tonight (7/2, story 5, 2:45, Harris) reported in its "Your Money" segment that Rep. Alan Mollohan, dubbed the "Prince of Pork," is "very good at bringing home the bacon for his district. So good, in fact, that the FBI is now taking a hard look at whether this Democrat from West Virginia is breaking the law." ABC (Cochran) noted that Mollohan has earmarked "half a billion dollars over the past ten years" for organizations in his district, and "those dollars provided lucrative contracts and high salaries for his supporters. Investigators want to know whether in return those supporters helped Mollohan become a multimillionaire.

… Mollohan says he inadvertently misstated some transactions but insists he did nothing illegal." Mollohan: "I'm proud of the efforts we've undertaken…and if being the 'Prince of Pork'…merits that designation, then I'm proud of that."

Illinois Man Pleads Guilty To Hoax Terror Threat. The Chicago Tribune (7/2) reported, "A man accused in a terrorism hoax pleaded guilty in the case Friday and faces up to 41 months in prison." Gilbert Romero "in June 2005 told the FBI that a terrorist attack was to be carried out against the Chicago headquarters of a U.S. company. The claim came after Romero was detained in Lake County on state charges, according to his plea agreement."

IMMIGRATION:

Sensenbrenner Suggests Voters Would Punish GOP If Senate Bill Enacted. GOP Rep. F. James Sensenbrenner, in a letter to the editor of the Wall Street Journal (7/3), responds to the Journal editorial "The Tancredo Republicans." Writes the congressman, "House Republicans are committed to enacting border security and immigration legislation, but not if it makes the current situation worse. … In November, voters will judge members of Congress based upon whether they lead with an understanding of voters' concerns, as House Republicans are committed to doing, or whether they ignore voters by enacting legislation, such as the Senate amnesty bill, that the public doesn't support."

House GOP Believes Enforcement-Only Immigration Bill Is Political Winner. In the National Review (7/17), Kate O'Beirne says, "Rather than merely blocking action on a Senate bill they refuse to support, a unified House GOP caucus has decided to go on offense in order to wring the maximum political credit from being on the right side of their reading of public opinion." Because House Republicans "fear the appearance of compromising with a Senate bill they are convinced is wildly unpopular, they have -- according to a leadership aide -- no intention of taking part in a conference to hammer out differences between the House and Senate unless 'there is a sea change in either public or Senate opinion.'" Congressional Republicans "who will be facing the voters are firmly convinced that backing border security now will mean job security in November."

LATimes Criticizes Senate Negotiators. The Los Angeles Times (7/3) editorializes, "Last week saw the first narrowing of the chasm between the Senate's recent comprehensive immigration bill and the House of Representatives' punitive enforcement-only package from December. Trouble is, the overtures are all going in the House's direction. … Pro-reform senators are making two classic negotiating mistakes: confusing their opponents' line-in-the-sand intransigence with a negotiating ploy, and elevating the importance of making a deal above its actual content."

Border Arrests Rose In 2006. The Washington Times (7/3, Seper) reports, "US Border Patrol agents have detained 901,428 foreign nationals seeking to sneak into the United States in the past nine months -- more than 3,300 a day -- up from the 890,358 apprehended in the same period last year." Border Patrol spokesman Michael Friel "said the number of apprehensions, monitored since the Oct. 1 start of fiscal 2006, was a 1 percent increase over detention totals in the first nine months of fiscal 2005. H e also said that although arrests had edged up, the number of apprehended non-Mexicans, known as "other than Mexicans" or 'OTMs,' had declined by about 16 percent."

Mexican Program Uses Remittances To Assist College Students. The CBS Evening News (7/2, story 6, 3:35, Mitchell) reported, "Most Mexican immigrants do maintain strong ties with their homeland, sending nearly $20 billion home last year." CBS (Pinkston) added that in Indaparapeo, "many families here depend on money sent by relatives living abroad, but Indaparapeo does something no other community does. In addition to helping individual relatives, the residents of this town and those who have migrated to the US are transforming their entire community, one student at a time." 47 low-income students "are sponsored by an innovative scholarship program funded by Indaparapeans in the United States and operated by residents still living in Mexico." Thanks to "matching funds from the Mexican government, each student receives a monthly stipend of up to 1,500 pesos, about $150, enough to pay for tuition even at some private universities. In exchange, scholarship recipients are required to participate in community service projects such as lending a hand to children with special needs or tutoring high school students in nearby villages. The goal is to connect scholarship recipients more closely to their communities with the hope that they will use their skills in Mexico after graduation."

CONGRESS-ADMINISTRATION:

Bush To Name Connaughton To Lead Maritime Administration. The Washington Times (7/3) reports, "Last week, President Bush announced that he would nominate Sean T. Connaughton to lead the Maritime Administration at the Department of Transportation." Connaughton, a lawyer, "unsuccessfully sought the Republican nomination for lieutenant governor last year, losing in the primary to William T. Bolling. Mr. Bolling went on

to win the seat." Connaughton "has served as a senior transportation associate for the American Petroleum Institute."

Coburn Plan Seeks To Inform Public On Government Spending. The New York Times (7/3, Deparle) reports, "Exasperated by his party's failure to cut government spending, Senator Tom Coburn, Republican of Oklahoma, is seeking cyberhelp." Coburn "wants to create a public database, searchable over the Internet, that would list most government contracts and grants -- exposing hundreds of billions in annual spending to instant desktop view. … While advocating for openness, Mr. Coburn is also placing a philosophical bet that the more the public learns about federal spending, the less it will want." Coburn's plan, "hailed by conservatives, is also sponsored by a Democrat, Senator Barack Obama of Illinois, and applauded by liberal groups that support activist government. The result is a showcase of clashing assumptions and the oddest of coalitions, uniting Phyllis Schlafly, a prominent critic of gay rights, with the National Gay and Lesbian Task Force." The House "unanimously passed a version of the proposal in late June, though in a form that had drawn outside criticism. The House bill creates a database that would omit contracts, which typically go to businesses, but would include about $300 billion in grants, which usually go to nonprofit groups." Liberal "critics see a revival of what they call old partisan efforts to 'de-fund the left,' by reducing grants to liberal groups or adding conditions that limit their activities."

USDA Program Benefits Farmers Even In Good Years. A front page story in the Washington Post (7/3, Morgan, Cohen, Gaul) reports on the loan deficiency payment, a little-known USDA program that was "intended to boost farmers' incomes when prices are low. The farmers do not have to sell at distressed prices to collect the money. They can bank the government payments and sell when prices are higher. Since September, the program has cost taxpayers $4.8 billion. Most of that money -- $3.8 billion -- went to farmers…who sold at higher prices, according to a Washington Post analysis of USDA payment data." According to the Post, "The LDP has become so ingrained in farmland finances that farmers sometimes wish for market prices to drop so they can capture a larger subsidy."

Feingold, Obama Pushing Senate To Adopt Ethics Reforms As Rules Change. Roll Call (7/3, Newmyer) reports, "In a bid to salvage some progress from the fizzling drive to overhaul lobbying and ethics laws, Democratic Sens. Russ Feingold (Wis.) and Barack Obama (Ill.) are pushing their colleagues to adopt as a rules change a slate of reforms from a package the Senate passed months ago." A resolution the pair introduced late last week "would immediately ban gifts, meals and tickets from lobbyists, require pre-approval for privately funded trips and expand revolving-door prohibitions, among other items." While the Senate approved the changes, 90-8, "as part of a broader reform package in March, that bill has stalled awaiting House action." The House "approved its version of the measure in May but has yet to name conferees, and negotiations over the bills have run aground on disagreements about campaign finance and earmark provisions." Roll Call adds, "Obama and Feingold wrote to Senate leaders last week, asking their resolution be adopted as soon as Senators return from the July Fourth recess." Senate Majority Leader Bill Frist's office "did not respond to a request for comment." Senate Minority Leader Harry Reid, "who has sought to portray a GOP 'culture of corruption' as a central theme in his party's midterm messaging, stopped short of a full-throated endorsement of the approach."

Bush's Fitness Seen As Remarkable As He Turns 60. The CBS Evening News (7/2, story 10, 2:40, Mitchell) reported, "The first wave of baby boomers turns 60 this year, and the big day for President Bush comes on Thursday." Ten predecessors "have turned 60 in office, but it's a good bet none was as healthy as number 43." CBS (Axelrod) added, "As the Baby Boomer-in-Chief approaches his birthday this week, he's in top shape, even if he does seem to be dreading the big six-oh just a bit." President Bush (June 7): "I know I'm not supposed to talk about myself, but in a month I'm turning 60. For you youngsters, I want to tell you something, when I was your age, I thought 60 was really old. [laughter] It's all in your mind. It's not that old. Really isn't." Axelrod: Bush's fitness is "a remarkable feat considering that during his five years in office, this President has dealt with 9/11, wars in Afghanistan and Iraq, and a constant threat of terrorism." Bush "doesn't just look healthy. He's got the resting heart rate of an athlete, at 47 to 52 beats per minute. His blood pressure is 110/64. His total cholesterol is 178. His doctors proclaimed him in excellent health and fit for duty, and he actually lost eight pounds last year."

Professor Questions Whether MBA Has Made Bush Better President. Charles R. Kesler, a professor of government at Claremont McKenna College, writes in the Los Angeles Times (7/3), "George W. Bush is the first president with an MBA (from Harvard Business School, no less), but it's not clear that being a master of business administration has made him a better chief executive. The disarray in Iraq, the debacle after Hurricane Katrina -- these aren't exactly the kinds of triumphs that the alumni office likes to boast about." Kesler adds, "It's hard to say what President

Bush absorbed from his management studies. We can only draw inferences, though eventually historians may know more. … Bush's management style is long on decisions and short on explanations. … On ordinary rhetorical occasions, Bush and his text seem hardly acquainted. On great occasions, he tends to overshoot the mark, calling for impossibilities such as an "end to evil." He lacks a rhetorical mean, much less the rhetorical mien that served Ronald Reagan so well."

Bush, McCain Rapprochement Seen As Based On Pragmatic Considerations. The New York Times (7/3, Rutenberg, Nagourney) reports that after "years of competitive and often contentious dealings, President Bush and Senator John McCain of Arizona are building a deepening if impersonal relationship that is serving the political needs of both men." Given their "history of intense rivalry and sometimes personally bitter combat, their newfound partnership is seen by some Republicans as born more of political calculation than personal evolution. Either way, it could prove valuable to Mr. McCain in his efforts to win the Republican presidential nomination in 2008 by sending a signal to Mr. Bush's conservative base and fund-raising network that, at a minimum, the White House will not stand in the Arizonan's way." Aides said "a thaw that began when Mr. McCain campaigned alongside Mr. Bush in the 2004 election has continued through the tougher days of Mr. Bush's second term." But for "all the talk of reconciliation, both sides describe the relationship between arguably the two highest-profile leaders of the Republican Party as almost entirely professional, a little stiff and the product of the pragmatic calculation by two politicians who see potential gain in striking a peace with a powerful rival." Bush "appears to have stronger ties to Mr. McCain than to the other likely presidential candidates." There has been "a steady stream of Bush advisers who have ended up in Mr. McCain's orbit. Most recently, Republicans close to both candidates said that Nicolle Wallace — who just stepped down as Mr. Bush's communications director and has long been close to the president — was likely to serve in some formal or informal role in a McCain campaign. Her husband, Mark D. Wallace, Mr. Bush's deputy campaign manager in 2004 and now an ambassador-level representative to the United Nations, is already lending advice." Wayne L. Berman, a "longtime supporter and fund-raiser for Mr. Bush, has signed on to help Mr. McCain." Karl Rove was "said by associates to have put aside his suspicion and dislike of Mr. McCain." White House press secretary Tony Snow said, "On a series of very tough issues, McCain's been there."

OTHER NEWS:

Emanuel, Dean At Odds Over Party Strategy. Roll Call (7/3, Kornacki) reports, "A letter to Democratic National Committee Chairman Howard Dean from Rep. Rahm Emanuel (Ill.), the head of the Democratic Congressional Campaign Committee, has set off a new round of sniping over party strategy and resources between allies of the two party leaders." Emanuel, who "reportedly stormed out of a May meeting with Dean, penned a letter, dated June 22, to the party chairman demanding $100,000 per targeted district from the DNC to defray the cost of the DCCC's proposed field operation, several individuals who have read the letter said." Attached to the letter was "a sample field plan for a district, itemizing various projected expenses, down to details such as $1,500 for T-shirts. The expense plan was dated June 26, although it was unclear when Dean actually received the missive." Dean "loyalists took the letter as hostile in nature, coming as it did after months of coy suggestions by Emanuel that Dean and the DNC were shirking their financial obligations to the DCCC's election year effort. … On top of that, Dean's backers contend he is not low-balling the DCCC on field operations as Emanuel suggests, and that the $20,000-per-district figure was simply a number being bandied about during negotiations, which were still proceeding when Emanuel wrote the letter."

GOP Sees Chance To Increase House Majority. The Washington Times (7/3, Pfeiffer) reports, "Congressional Republicans say they have a strategic advantage in their effort to increase their House majority, even as national polls show Democrats with a significant lead heading into this year's elections." The National Republican Congressional Committee says that "despite the polling edge for the Democrats, Republicans are targeting conservative districts that went for President Bush in 2004. 'We're competing for red turf held by Democrats,' NRCC spokesman Jonathan Collegio said."

Democrats May Need Only A Few States For "Wave." In his Roll Call column (7/3), Stuart Rothenberg says, "The last major national political wave, in 1994, didn't sweep over all areas of the country with equal force. In some states, Congressional Democrats suffered minimal losses, while in others Democratic House seats fell in bunches." For Democrats "to take the House this year, they may need one or two states to deliver a significant number of wins, not just an isolated victory. Which states give Democrats the best chance to score victories in bunches?" Democratic operatives "have been suggesting that at least a handful of states are ripe for a Democratic wave: New York, Ohio, Pennsylvania, Connecticut and Indiana."

Voters Seen As Needing Solid Reason To Dump Incumbents. Roll Call (7/3, Duran) reports the "surprisingly easy victory that Rep. Chris Cannon (R-Utah) scored over his primary opponent last week has been heralded as a win for President Bush's immigration policy." But wealthy developer John Jacob's "defeat in the Beehive State's 3rd district holds other lessons for both Republicans trying to dislodge incumbents in primaries and Democrats hoping to flip Republican-held seats in November." Just as the "victories of newly elected Rep. Brian Bilbray (R-Calif.) and Reps. Bob Ney (R-Ohio), Bennie Thompson (D-Miss.) and now-ex Rep. Tom DeLay (R-Texas) demonstrated in recent primaries, voters still need a reason to dump incumbents or switch party control of a House seat."

GOP Pressing "Suburban Agenda." In his Roll Call column (7/3), executive editor Morton Kondracke notes Rep. Dave Reichert's effort to persuade GOP colleagues "to back a bill enabling school districts to tap into national criminal databases before they hire employees." The School Safely Acquiring Faculty Excellence Act "passed the House almost unanimously in June — the first legislative success for the GOP's 'Suburban Agenda,' a set of bills designed to appeal to the majority of American voters who live in the suburbs." The agenda "is the brainchild of Rep. Mark Kirk (R-Ill.), one of Congress' most effective moderates, who has sold it to a growing group of conservatives and the House GOP leadership." Kirk said, "Washington may think this is small-bore. It's not the war on terror. But this is an agenda that people care about in their everyday lives — their kids' safety, health care, their ability to send their kids to college." Kondracke adds that besides the "school safety measure, the agenda includes a national '401Kids' savings account for college, a screen to block predators from contacting children at online chat rooms and a bill setting standards for computerizing health records."

Conservative Republicans Now Opposing 527 Reform. The Wall Street Journal (7/3, Cummings) reports that in 2004, "Republicans were organizing against new, loosely regulated political groups that were raising money to attack President Bush." Now, "illustrating how roles often reverse in politics, some of the party's conservative activists are trying to stop legislation that would choke off those groups." The dispute "centers on a House bill that would curtail funding for organizations nicknamed 527s, for the section of the tax code that governs them." But the "rich liberals who spent heavily to oust Mr. Bush" in 2004 "aren't investing in 527s this election cycle, even though the stakes are high, with control of Congress in play." In the 2006 campaign so far, "it is right-leaning 527s that are most active. The Club for Growth, a conservative economic-issue group, is leading the charge to kill the Republican bill that would shut down 527s. The Club for Growth received $8 million in donations during the 2004 cycle; for this cycle, its donations as of May tally $5.1 million." The Club's "allies include social conservatives, gun-rights groups and college Republicans. Their campaign could stall congressional efforts to enact anticorruption legislation -- a response to a spate of ethics scandals -- because the House attached 527 language to its rewrite of lobbying laws."

Mormon, Muslim Presidential Candidates Face Voter Uneasiness. The Los Angeles Times (7/3, Mehren) reports that even as "anti-Semitism and anti-Catholicism are fading as voter taboos," a Los Angeles Times/Bloomberg poll found "uneasiness about some religions persists. Thirty-seven percent of those questioned said they would not vote for a Mormon presidential candidate -- and 54 percent said no to the prospect of a Muslim in the White House." In addition, "21 percent said they could not vote for an evangelical Christian. Only 15 percent replied that they would not vote for a Jewish presidential candidate. Just 10 percent of those polled were unwilling to cast ballots for a Catholic chief executive." The nationwide survey "of 1,321 adults was conducted June 24-27. The poll has a margin of sampling error of plus or minus 3 percentage points, poll director Susan Pinkus said." With "no likely Muslim candidate on the presidential horizon, the poll numbers present the greatest threat to a potential contender from the Church of Jesus Christ of Latter-day Saints (as the Mormon Church is formally known)," Gov. Mitt Romney of Massachusetts. Emory University analyst Merle Black said, "It is something he will have to address. It will be a challenge. It doesn't necessarily kill him as a candidate, but he may have to talk in more detail than he ever has before about his faith."

New Jersey Budget Impasse Could Shutter Casinos, Close Beaches. The CBS Evening News (7/2, story 8, 1:45, Mitchell) reported, "A budget impasse has forced the Garden State to start shutting down its government. The impact may soon be felt by out-of-state visitors like beachgoers and gamblers." CBS (Chen) added that as New Jersey's legislature failed to meet its budget deadline over the weekend, Gov. Jon Corzine shut down nonessential state function and "right away, no more lottery tickets sold, no more drivers license issued either, 45,000 state workers immediately furloughed, road crews suspended, a nice bonus on a holiday weekend, but right after the Fourth of July, state beaches and parks could close and the casinos will as well." Gov. Corzine "wants to increase the sales tax to bring in more revenue. Fellow Democratic lawmakers say that's unnecessary -- the upshot, no deal, and now, no budget."

The AP (7/3, Santi) reports Atlantic City's casinos "were ordered to close Wednesday, the latest casualty of a state government shutdown that entered its second day Sunday after the Legislature failed to adopt a budget by its July 1 deadline." The 12 casinos, "which require state monitoring, have waged a court battle to remain open, and an appeals court was weighing the matter Sunday." Gov. Corzine "said Sunday there was 'no immediate prospect of a budget.' State parks, beaches and historic sites also were expected to shut down Wednesday." If the casinos "shut down, the state would lose an estimated $2 million in tax revenue each day they stayed closed." The budget talks "became heated this year as Corzine, a Democrat, proposed increasing the state sales tax from 6 percent to 7 percent to help overcome a $4.5 billion budget deficit."

Virginia Gay Marriage Ban Spurs Fundraising Boom. The Washington Post (7/3, B2, Jenkins) reports the proposed state constitutional amendment "that would ban same-sex marriage in Virginia has sparked an aggressive fundraising effort, with each side of the debate hoping to secure hundreds of thousands of dollars for their cause." Virginia voters "will decide Nov. 7 whether the state constitution should be amended to define marriage solely as a union between a man and a woman. The amendment also would place a ban in the constitution on civil unions, which already are illegal in Virginia." To "help rally amendment opponents, the Commonwealth Coalition, a Richmond-based group, has set an ambitious goal of raising $3 million, organizers said. They want to fund a barrage of radio and television ads in the fall." Meanwhile, the Family Foundation Action, "which is organizing amendment supporters, has set a best-case-scenario fundraising goal of $900,000, although activists and volunteers said they expected to raise less than that." Both sides "have created Internet fundraising mechanisms and appealed to potential voters through churches and community events across the state. Activists said they plan a direct mailing campaign throughout the summer and fall."

Critics Say Petitions To FDA Delay Approval Of Generic Drugs. Lawmakers are taking a close look at an FDA procedure designed to alert the agency to scientific and safety issues, amid concerns that it may getting subverted by the brand-name drug industry. A front page story in the Washington Post (7/3, A1, Kaufman) reports that leaders in the generic drug industry and some at the FDA "complain that 'citizen petitions' -- requests for agency action that any individual, group or company can file -- are being misused by brand-name drugmakers to stave off generic competition." They say the filing of a petition "triggers another round of time-consuming and often redundant reviews of the generics by the FDA, which can take months or years. In the process, consumers continue to pay millions of dollars more for the brand-name drugs." The Post adds, "Statistics collected by the staff of Sen. Debbie Stabenow (D-Mich.), who has introduced legislation with Sen. Trent Lott (R-Miss.) that would rein in industry-filed citizen petitions, show that 20 of the 21 brand-name petitions settled by the FDA since 2003 were ultimately rejected."

Weather Delays Space Shuttle Launch For Second Day In A Row. For the second day in a row Sunday, the launch of the space shuttle Discovery was postponed due to stormy weather. The AP (7/3, Dunn) reports, "Launch officials said they would try again Tuesday, on the Fourth of July, after giving the work force some rest and a chance to replenish the shuttle's on-board fuel. The weather was expected to improve by Tuesday, although rain was still in the forecast."

ABC World News Tonight (7/2, story 2, 2:15, Stark) reported, "NASA will use the next 48 hours to replenish fuel cells on Discovery in the hopes of having enough energy on board for a third spacewalk. And they'll also need to replenish some of the experiments planned for orbit, including thousands of fruit flies which have a short lifespan. A scrub also means NASA once again has to drain 500,000 gallons of fuel out of the tank. But Tuesday's forecast is better -- a 60% chance of favorable weather."

Astronauts May Have To Perform In-Flight Repairs To Shuttle Tiles. The CBS Evening News (7/2, story 5, 2:25, Cobiella) added, "Since the Columbia disaster when a piece of foam broke away and dealt a fatal blow to the shuttle's wing, astronauts have had to take on the job of in-space repairman. NASA has removed 35 pounds of foam from Discovery's external fuel tank, but it's still far from perfect. … NASA has said that minor damage is unavoidable and putting an astronaut so close to the delicate tiles on the shuttle's wings and underbelly carries its own risk, and all of NASA's in-flight fixes for these fragile tiles are still experimental. So if this Discovery crew were to perform another choreographed repair 230 miles above the Earth, it wouldn't know whether it was a success until they were safely back down."

Academic Bill Of Rights Taking Hold In Many States. The Washington Times (7/3, Richardson) reports that three years after conservative activist David Horowitz began promoting his Academic Bill of Rights in Colorado, the manifesto, which says students should be graded and faculty should be hired without regard to political or religious beliefs, has been introduced in 18 states. Meanwhile, "Students for Academic Freedom, the campus watchdog group founded by Mr. Horowitz, has established chapters on more than 150 campuses. Student governments at a dozen universities have

approved resolutions supporting the Academic Bill of Rights. In April, Princeton University became the first institution of higher learning to pass a version of the Student Bill of Rights by a vote of the entire student body, surprising even Mr. Horowitz, who had no hand in the election." However the Times notes that for all Horowitz's success in raising the issue, "no state has actually approved an academic freedom bill, despite the flurry of hearings and committee votes."

Lawmakers Say Spot On Colbert Show Raised Profiles With Constituents. The Washington Times (7/3, Bellantoni) reports that members of Congress who appear on segment of Comedy Central's "The Colbert Report" known as "Better Know a District" usually "end up looking silly. But several lawmakers said doing the spoof spot…actually has raised their profiles back home, particularly among young folks." GOP Rep. Phil Gingrey "said there was an unexpected byproduct of doing the show -- attention from young constituents and House staffers. Rep. Earl Blumenauer of Oregon had a similar experience when his 3rd District was profiled in May. … But Rep. Barney Frank, Massachusetts Democrat, regrets his appearance and called Mr. Colbert a 'third-rate' comedian." Colbert "so far has targeted 25 members in the 435-member House, splicing and dicing sometimes two-hour-long camera sessions into five-minute clips."

Pelosi Recommends Lawmakers Not Participate In Colbert Spoof. Roll Call (7/3, Akers) reports in its "Heard on the Hill" column that House Minority Leader Nancy Pelosi was asked about the segment during her press conference last Thursday. Pelosi said, "Well, it is humorous; I wouldn't recommend that anyone go on the show. I would think it would be okay to go on if you were live to tape, but don't subject yourself to a comic's edit unless you want to be made a fool of."

House, Senate Clash Over Proposal For Walkway On Capitol's East Front. The Washington Post (7/3, A19, Kamen) reports in its "In the Loop" column that the biggest fight between the House and Senate "may have occurred last week over a House proposal to build a fenced walkway that would run across the now-closed east front of the Capitol -- the area where the long-delayed Capitol Visitor Center is being built. … Senate detractors say this proposal is exceptionally stupid, even for Congress. … The Upper Chamber folks rather uncharitably say the mysterious fence dips to only four feet high so Hastert and House members can walk down the steps and have their pictures taken with constituents." A House aide "said these things are being overblown."

Former DHS Official Says FEMA Director Should Be Allowed To Focus On Disaster Response. Adm. James Loy, former commandant of the US Coast Guard and former deputy secretary of Homeland Security, in an op-ed in the Washington Times (7/3) writes that following "a time-honored pattern," Congress' "impulsive first response" following Hurricane Katrina may be "followed by years of 'perfecting' the original legislation." Loy continues that none of the pending bills that address FEMA's position within DHS "address the central problem: The Homeland Security Act of 2002 diluted the FEMA director's focus on the agency's core mission -- response and recovery -- by requiring him to wear an additional hat as the DHS under-secretary for emergency preparedness and response (later changed to the under-secretary for federal emergency management)." As adjustments are made to the original legislation to fix FEMA, Loy says "we should ensure that the FEMA director can focus all of his time, energy and talent on guiding the agency in responding effectively and efficiently to the American people in the event of a disaster. That is best accomplished by restoring FEMA's independent agency status, offloading the director's responsibilities of being double-hatted as an under secretary and keeping the agency and the director inside DHS with direct access to the secretary during a crisis."

Carter Says FOIA Should Be Amended To Keep Pace With International Standards. Former President Jimmy Carter writes in the Washington Post (7/3, A21), "Our government leaders have become increasingly obsessed with secrecy. Obstructionist policies and deficient practices have ensured that many important public documents and official actions remain hidden from our view." Carter adds, "In the United States, we must seek amendments to FOIA to be more in line with emerging international standards, such as covering all branches of government; providing an oversight body to monitor compliance; including sanctions for failure to adhere to the law; and establishing an appeal mechanism that is easy to access, speedy and affordable. We cannot take freedom of information for granted. Our democracy depends on it."

Thornburgh Says Media Shield Law Must Be Carefully Crafted. Former Attorney General Richard Thornburgh writes in the Wall Street Journal (7/3), "Ever since then-New York Times reporter Judith Miller went to jail for 85 days last year rather than comply with a subpoena for her sources in the Valerie Plame case, the media has been pushing for a federal shield that would grant reporters unprecedented special protection from revealing sources during litigation. The Senate is now taking steps toward

providing such a reporter-source privilege with the Free Flow of Information Act, which is likely to be sent to the floor for a vote over the next few weeks." Thornburgh notes that for the long term, "the bill has troubling implications. In its current form it contains a shield so broad -- and a definition of journalism so vague -- that it upends what up to now has been a reasonable balance between protecting reporters from disclosing sources and preserving the right to the fullest possible access to truth in the courtroom for plaintiffs and defendants." Thornburgh concludes by noting that "given the potential for abuse of that critical role, any media shield must, in the interests of justice, be carefully crafted."

Schwarzenegger's Conservative Former Aide Reverses Support For Term Limits. Rob Stutzman, former deputy chief of staff for communications for Gov. Arnold Schwarzenegger, writes in the Los Angeles Times (7/3), "About 20 years ago, the notion of term limits for officeholders became dogma for the center-right. … Fourteen years have passed since California voters approved legislative term limits, restricting Assembly members to a trio of two-year terms and state senators to two four-year stints. I have always been a loyal conservative supporter of term limits…as a suitably blunt instrument to correct the arrogance of elected officials not mindful enough of those who elected them. … But after 16 years of working in California politics, I've changed my mind. We were wrong. Term limits haven't delivered what we hoped for. They have, in fact, harmed the public interest." It is "high time to admit that term limits haven't worked."

New Republic Says Baucus Should Be Dropped From Finance Panel. The New Republic (7/10) says in its lead editorial that Democratic Rep. Max Baucus uses "his influence as the top Democrat on the Finance Committee to systematically undercut his party and enable George W. Bush's most egregious domestic legislation. So why does his party entrust him with so much responsibility?" Indeed, the Democrats' "only real victory of the last five years -- stuffing the administration on Social Security -- came after Harry Reid cautioned Baucus against freelancing with the White House. Well, we'll do Reid one better and suggest he boot Baucus from the Finance Committee altogether."

Author Says US Is Better At Educating Girls. Author Christina Hoff Somers writes in the Wall Street Journal (7/3) that in a report from Education Sector, a new Washington think tank, policy analyst Sara Mead, "denies that American boys are in trouble academically." Mead "hopes that the nation can have a reasonable 'conversation' about gender issues 'without unfairly undermining the gains girls have made in recent decades.'" Somers adds, "One looks in vain in Ms. Mead's report for any indication that anyone is undermining girls. She seems to think that concern for boys means shortchanging girls. But it does not -- because education is not a zero sum game." Somers adds, "We are strikingly better at educating young women than young men. Boys need our attention. It is difficult to understand why an organization devoted to improving education should regard the current concern for boys as a threat to girls' progress."

Author Says "Boy Crisis" Is "Little More Than A Myth." Author Judith Warner writes in the New York Times (7/3) that the Education Sector study confirms that the "near-ubiquitous belief that our nation's boys are being academically neglected and emotionally persecuted by teachers whose training, style and temperament favor girls" is "little more than a myth." Warner adds, "Talk of the boy crisis is a diversion. It draws attention from the real reasons so many white suburban parents sense that their sons are in trouble. Those reasons aren't academic; they're behavioral and emotional."

Mallaby Calls Concept Of Energy Independence "Pipe Dream." Sebastian Mallaby writes in the Washington Post (7/3, A21), "This month's Group of Eight summit in Russia takes statecraft to a whole new level. Global leaders have 'energy security' on the agenda. But judging by what they say and do, they don't always understand the subject. … As Daniel Yergin has written recently in Foreign Affairs, real energy security requires setting aside the pipe dream of energy independence and embracing interdependence." Mallaby adds, "If the G-8 summit can spread the word about this interdependence, it will do some good. But the nationalistic conception of energy security is worse than useless. By encouraging a competitive scramble for resources that could spiral into conflict, this sort of security talk only creates insecurity."

Herbert Makes Case For Minimum Wage Increase. Bob Herbert writes in the New York Times (7/3), "The federal minimum wage, currently $5.15 an hour, was last raised in 1997. Since then, its purchasing power has deteriorated by 20 percent. Analysts at the Economic Policy Institute and the Center on Budget and Policy Priorities jointly crunched the numbers and determined that, after adjusting for inflation, the value of the minimum wage is at its lowest level since 1955." Herbert adds, "Polls have shown that Americans overwhelmingly favor an increase in the minimum wage. But the low-income workers who would benefit from such an increase are not part of the natural G.O.P. constituency. Thus, the stonewall. … There is no justification

— none — for condemning the nation's lowest-paid workers to this continuing slide into ever deeper economic distress."

Pastor Says Americans Need Formal Day Of Rest. Henry G. Brinton, pastor of Fairfax Presbyterian Church in Virginia, writes in USA Today (7/3) reports, "For all the attention paid this past year to public displays of the Ten Commandments, you'd think people would spend as much energy trying to follow them. When it comes to the Fourth Commandment -- 'Remember the Sabbath Day' -- that's not the case. … The problem with ignoring the Sabbath is that it hurts us as individuals, families and communities." Brinton adds, "We need a formal day of rest. A true Sabbath gives us time to refresh and renew ourselves, regain proper perspective and redirect our lives to what is good and true and worthwhile. … We can learn from men and women in the European Union, who work hard but still enjoy an average of five weeks of paid vacation per year. They often remark that they don't 'live to work,' as we do — instead, they 'work to live.'"

NYTimes Says Congress Should Intervene To Clarify Clean Water Act. The New York Times (7/3) editorializes, "Senator James Inhofe, a conservative Republican from Oklahoma, and Senator Lincoln Chaffee, a liberal Republican from Rhode Island, are at opposite ends of the earth on environmental issues. But both found themselves equally mystified by the recent Supreme Court decision on the Clean Water Act. The decision did nothing to clarify which waters were protected under the act and which were not. Both agreed that only Congress can end the confusion. Both are right. Without Congressional intervention, the certain outcome is endless litigation and a steady decline of the nation's streams and wetlands."

WPost Sees Promise In Ruling On Vermont Campaign Finance Laws. An editorial in the Washington Post (7/3, A20) says the Supreme Court's decision last week striking down Vermont's campaign finance laws "may prove more silver lining than cloud. The Vermont rules never stood much of a chance; they are so strict as to present genuine problems. The important feature of the case is not its specific result but the way the court -- and its two newest justices -- reached that result. On this point, the decision is promising." Despite "an opportunity to declare themselves hostile to campaign finance regulation in general, both signed on -- Justice Alito somewhat equivocally -- to the court's long-standing doctrine that appropriately crafted contribution limits can survive constitutional scrutiny. This is a far more significant development than the fate of Vermont's statute. It suggests that, notwithstanding the turnover in the court's personnel, a revolution in campaign finance law may not be in the offing."

NYTimes Says US Must Improve Science Education. The New York Times (7/3) editorializes that the US must do something about the "horrendous state of science education at both the public school and university levels." The Howard Hughes Medical Institute has "awarded grants to 50 universities aimed at providing richer undergraduate science education as well as mentoring and early research experiences with working scientists. Many of the grants will be used partly to advertise the virtues of scientific study not just at universities but also in high schools and middle schools. These programs send a powerful message at a time when the country needs to be paying attention to remaking science education. Congress, which has been casting for ways to address this problem, would do well to emulate them."

WPost Says Maryland Governor's Race Should Be "Hard-Hitting, Substantive Campaign." An editorial in the Washington Post (7/3, A20) says Maryland Gov. Robert Ehrlich "has spent four years compiling a so-so record. He has diminished a handful of modest victories and sensible policies by displaying a tin ear for political ethics and a pointlessly petulant style of governance that has compounded the partisan venom in Annapolis." Those qualities "may help explain why Mr. Ehrlich… begins his campaign for reelection so far behind his Democratic rival, Baltimore Mayor Martin O'Malley." The Post adds, "Wouldn't it be nice if the campaign looked and sounded like a contest of ideas between two grown-ups, and not a locker-room smack-down. That will be the real test of both candidates -- whether they have the capacity to wage a hard-hitting, substantive, mature campaign that is about Maryland and Marylanders, not just about Bob Ehrlich and Martin O'Malley."

Personnel News. Roll Call (7/3, Ackley) reports in its "K Street Files" column, "**Carolyn Doyle**, a former aide to Sen. Arlen Specter (R-Pa.), has left her position as senior federal affairs representative at the MWW Group. … **Karen Reidy**, most recently with the former MCI, has joined the telecom trade association COMPTEL as its vice president for regulatory affairs. … Cable giant Comcast Corp. has picked up a new lobbyist. **Peter Filon** comes to the company as senior director, federal government affairs, from the House Energy and Commerce Committee, where he has served as minority counsel. PR power-shop Qorvis Communications has signed **Jim McGann** as managing director. … The US Tuna Foundation has a new president. **Anne Forristall** comes to the fishy lobby from MGN Inc., where she advised a

range of clients on legislative strategy. Lisa McGreevey is joining the hedge fund industry's primary trade group, the Managed Funds Association, as executive vice president and chief operating officer. … The public policy and law group at Dickstein Shapiro has added Brian Finch as counsel. … Benjamin McKay has been promoted to senior vice president of federal government relations at the Property Casualty Insurers Association of America. Trading one heavy-hitting Wall Street CEO for another, the Financial Services Roundtable has named Citigroup chief Charles O. Prince to replace newly confirmed Treasury Secretary Henry Paulson as chairman of the group."

The Washington Post (7/3, C1, Kurtz) reports that Jonathan Wald, who was fired as executive producer of the Today show, and Josh Howard, who was forced to resign as executive producer of 60 Minutes II, have "landed at CNBC, where they are helping to retool programming on a business channel that has struggled in the ratings since the dot-com bust six years ago."

EDITORIAL WRAP-UP:

New York Times: *"Crisis Postponed At The U.N."* An editorial in the New York Times (7/3) says the UN "steered clear of a financial shipwreck last week, but it also steered clear of approving urgently needed management reforms. That is a standoff, not a solution. If the less-developed countries blocking those reforms continue to dig in, the United Nations will suffer in diminished public credibility and greater resistance to dues-paying by some of the largest contributor nations, including the United States." The UN "cannot function effectively in the 21st century under budget and management rules that were originally devised for a much smaller organization. Successive embarrassments like the oil-for-food scandal should have made that painfully clear."

"Protecting All Waters." The New York Times (7/3) editorializes, "Senator James Inhofe, a conservative Republican from Oklahoma, and Senator Lincoln Chaffee, a liberal Republican from Rhode Island, are at opposite ends of the earth on environmental issues. But both found themselves equally mystified by the recent Supreme Court decision on the Clean Water Act. The decision did nothing to clarify which waters were protected under the act and which were not. Both agreed that only Congress can end the confusion. Both are right. Without Congressional intervention, the certain outcome is endless litigation and a steady decline of the nation's streams and wetlands."

"How To Educate Young Scientists." The New York Times (7/3) editorializes that the US must do something about the "horrendous state of science education at both the public school and university levels." The Howard Hughes Medical Institute has "awarded grants to 50 universities aimed at providing richer undergraduate science education as well as mentoring and early research experiences with working scientists. Many of the grants will be used partly to advertise the virtues of scientific study not just at universities but also in high schools and middle schools. These programs send a powerful message at a time when the country needs to be paying attention to remaking science education. Congress, which has been casting for ways to address this problem, would do well to emulate them."

Washington Post: *"Campaign Finance Bellwether."* An editorial in the Washington Post (7/3, A20) says the Supreme Court's decision last week striking down Vermont's campaign finance laws "may prove more silver lining than cloud. The Vermont rules never stood much of a chance; they are so strict as to present genuine problems. The important feature of the case is not its specific result but the way the court -- and its two newest justices -- reached that result. On this point, the decision is promising." Despite "an opportunity to declare themselves hostile to campaign finance regulation in general, both signed on -- Justice Alito somewhat equivocally -- to the court's long-standing doctrine that appropriately crafted contribution limits can survive constitutional scrutiny. This is a far more significant development than the fate of Vermont's statute. It suggests that, notwithstanding the turnover in the court's personnel, a revolution in campaign finance law may not be in the offing."

"Flagging Rhetoric." An editorial in the Washington Post (7/3, A20) says the recent Senate debate over a flag burning amendment "managed to bring out some of the worst in politicians of both parties. … If there is a hero in this episode, it is the man who would succeed Mr. Frist as leader, Majority Whip Mitch McConnell (R-Ky.). Mr. McConnell could have put the amendment over the top by abandoning his opposition. To his credit, he didn't, and he was joined by two other Republicans, Sens. Lincoln D. Chafee (R.I.) and Robert F. Bennett (Utah). As Mr. McConnell explained in a column posted on his Senate Web site, 'No act of speech is so obnoxious that it merits tampering with our First Amendment. Our Constitution, and our country, is stronger than that.'"

"Mr. Ehrlich In The Ring." An editorial in the Washington Post (7/3, A20) says Maryland Gov. Robert Ehrlich "has spent four years compiling a so-so record. He has diminished a handful of modest victories and sensible policies by displaying a tin ear for political ethics and a pointlessly petulant style of governance that has compounded the partisan venom in Annapolis." Those qualities "may help explain why Mr. Ehrlich… begins his campaign for reelection so far behind his Democratic rival, Baltimore Mayor Martin O'Malley." The Post adds, "Wouldn't it be nice if the campaign looked and sounded like a contest of ideas

between two grown-ups, and not a locker-room smack-down. That will be the real test of both candidates -- whether they have the capacity to wage a hard-hitting, substantive, mature campaign that is about Maryland and Marylanders, not just about Bob Ehrlich and Martin O'Malley."

Wall Street Journal: *"After Hamdan."* The Wall Street Journal (7/3) editorializes, "The Court's opinion masks its own power grab by asserting that the executive must defer more to Congress in designing military commissions." But "the Court's own deference to Congress is selective in the extreme, as it simply chose to ignore the clear intent of the Detainee Treatment Act that Congress passed only last December." The Journal adds, "We…certainly hope the Administration presses its case for military commissions to the Congress, including just how much due process protection the Members think al Qaeda detainees really deserve. An election is coming in which the prosecution of the war on terror will again be a major issue. By all means let's debate the proper care and handling of Osama's bodyguard."

"A Somali Taliban?" An editorial in the Wall Street Journal (7/3) says, "There's no appetite in the US for a large military intervention in Somalia, but that doesn't mean the new regime should think it is immune from outside attention. So here's a suggestion: Send an emissary to the new Islamist government and propose a deal: Hand over the 1998 embassy bombers, refuse safe harbor to al Qaeda operatives, do not invade Somaliland and Puntland. Agree to that, and we will be able to get along. Don't agree, and the US will do what it must to disrupt any terrorist camps or terrorist activity within its borders. … The Somali Islamists need to understand that if they attempt to turn their country into another refuge for terrorists, it will end as badly for them as it did for the Taliban."

Los Angeles Times: *"House Of (Immigration) Blues."* The Los Angeles Times (7/3) editorializes, "Last week saw the first narrowing of the chasm between the Senate's recent comprehensive immigration bill and the House of Representatives' punitive enforcement-only package from December. Trouble is, the overtures are all going in the House's direction. … Pro-reform senators are making two classic negotiating mistakes: confusing their opponents' line-in-the-sand intransigence with a negotiating ploy, and elevating the importance of making a deal above its actual content."

"United On Clean L.A. Ports."

"Taming The Tamil Tigers." The Los Angeles Times (7/3) editorializes, "Since April, Sri Lanka has experienced rising violence between the government and the Tamil Tigers rebel group, effectively gutting a 4-year-old cease-fire. But amid the carnage, leaders of both sides have been making unexpected conciliatory gestures, spurring hope that with the help of international monitors, full-scale war can be avoided. … A peaceful Sri Lanka is very much in India's interest; war could bring a stream of refugees and instability to India, particularly in the state of Tamil Nadu. India should start to take a more active role, while the EU must work for a return to the bargaining table. It isn't too late to head off a full-scale war."

THE BIG PICTURE:

Headlines From Today's Front Pages.

Los Angeles Times:
"Confusion Grips Mexico Election."
"Happy? Let's Sum It Up."
"Congress Faces Dilemma On Terror Trials."
"In First Year, L.A.'s Mayor Finds His Inner Pragmatist."
"With The Right Spin, Any Film Can Be No. 1."
"Iraqis Go To Great Lengths To Get Away."

USA Today:
"How Americans See Americans."
"U.S. Elite Forces Face Shortfall."
"Some Spots Too Dry For Fireworks."

New York Times:
"Israel Steps Up Gaza Raids In Bid To Free Soldier."
"Internet Calling Pressures Bells To Lower Prices."
"A Terror Strike, Choreographed On A Computer."
"A New Partnership Binds Old Republican Rivals."
"Once Again, The Boss Is In At The New York Office."
"Marijuana Fight Envelops Wharf In San Francisco."

Washington Post:
"Record Crowds Flock To Vote Across Mexico."
"Growers Reap Benefits Even In Good Years."
"Episcopal Protest Of Top Bishop Increases."
"Petitions To FDA Delay Generic Drugs, Critics Say."
"Mongolians Meld Old, New In Making Arlington Home."

Washington Times:
"Mexico Election Too Close To Call."
"Senators Promise Gitmo Statute."
"Academic Manifesto Takes Root."
"Iran Plans To Cut Gas Imports, Subsidies."
"A Penny Saved Is A Penny Spurned."
"Illegal Students Face Expulsion From France."
"Representatives Relish Being Made A Mockery."

Detroit Free Press:
"Zetsche Steps Out Front At DCX."
"Schools Ties Bonuses To Test Scores."
"Kalamazoo Is Drug-Testing Hub For Pfizer."

Atlanta Journal-Constitution:
"Fulton Jail Is Slow To Let Go."
"'Always Remember.'"
"Austin Pleads Guilty To 'Mistake.'"
"Turner Studios In Midtown Undo Shoestring Image."

Houston Chronicle:
"Too Close To Call In Mexico."
"Troubling Figures Put Focus On Sunnyside."

Story Lineup From Last Night's Network News:
ABC: Iraq's Most Wanted; Shuttle Launch Scrubbed; Israel-Gaza Offensive; Mexico-Presidential Election; FBI-West Virginia Congressman; Death Penalty Anniversary; Alzheimer's-Art Therapy; National Anthem-Singing Project.
CBS: Israel-Gaza Offensive; Iraq Violence; Iraq's Most Wanted; Conservatives-Press Concerns; Discovery-Repair Concerns; Mexican Scholarship Program; World Cup; New Jersey-Government Shutdown; Weekend Box Office; Bush's 60th Birthday.
NBC: Preempted By Golf.

Story Lineup From This Morning's Radio News Broadcasts:
ABC: Space Shuttle Launch Delayed; Mexico-Election; Israel-Kidnapped Soldier; IN-Car Accident.
NPR: Mexico-Election; Israel-Kidnapped Soldier; UN-Human Rights Reforms; Space Shuttle Launch Delayed; IN-Car Accident; Iraq-Most Wanted List; World Cup; Foreign Stock Markets.

WASHINGTON'S SCHEDULE:

Today's Events In Washington.

White House:

PRESIDENT BUSH — Signs H.R. 5403, the Safe and Timely Interstate Placement of Foster Children Act of 2006. Roosevelt Room, The White House. Photo Release.

VICE PRESIDENT CHENEY — No public schedule.

US Senate: No scheduled events.

US House: No scheduled events.

Other: ELECTIONS-LATINOS _ 9:30 a.m. The Latino Policy Coalition and Lake Research Partners hold a teleconference to release the results of a national survey of Latino voters and discuss the midterm elections. With Jim Gonzalez, chair, Latino Policy Coalition; Celinda Lake, president, Lake Research Partners; and Dr. Fernando Guerra, director, Leavey Center for the Study of Los Angeles. Contacts: Michael Bustamante, 916-425-0839. Notes: Dial-in: 1-866-216-6835. Passcode: 116692.

NY TIMES-PROTEST _ 12 p.m. The D.C. Chapter of FreeRepublic.com and Accuracy in Media hold a demonstration to call for the prosecution of New York Times publisher Arthur Sulzberger, Jr., Executive Editor Bill Keller and reporters James Risen and Eric Lichtblau for "giving aid and comfort to al Qaeda by publishing stories exposing national security intelligence programs." Location: In front of 1627 "Eye" St. NW.

GRANNY PEACE BRIGADE _ 2 p.m. The Granny Peace Brigade, 18 grandmothers protesting the war in Iraq, hold a rally and march to mark the end of their journey from New York City. Highlights: 2 p.m. Marchers will be joined by war protester Cindy Sheehan, at Dupont Circle. Sheehan will escort the marchers down Massachusetts Avenue to the Gandhi statue at Massachusetts Ave. and Q Sts, NW, in front of the Indian Embassy. Location: Gandhi Statue, corner of Q St NW and Massachusetts.

AAAS

ADVANCING SCIENCE, SERVING SOCIETY

21 September 2005

Neil Gorsuch
U.S. Department of Justice
Office of Associate Attorney General
950 Pennsylvania Ave., NW, #5706
Washington, DC 20530

Dear Mr. Gorsuch: Neil

Thank you for participating in the orientation program for the 2005-06 AAAS Science & Technology Policy Fellows. We appreciate you making time to lend your perspectives and expertise to the group. Your unique viewpoints contributed significantly to the content of the program.

The orientation plays a critical role in preparing the Fellows for their year of service in legislative and executive branch offices. The opportunity for dialog and exchange of ideas and resources is extremely valuable to build the Fellows' knowledge and capacity to interact successfully at the science-policy interface.

We are grateful for your input to support the AAAS Science & Technology Policy Fellowships.

Best regards,

Cynthia

Cynthia R. Robinson
Director
AAAS Science & Technology Policy Fellowships

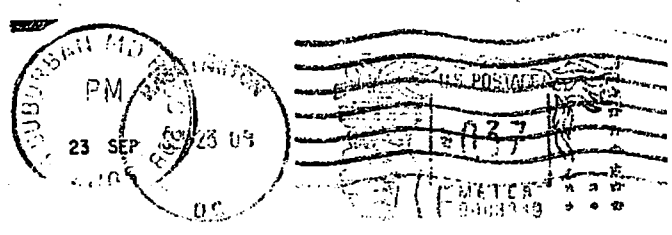
Neil,
Many thanks for doing this. The topic is important and the session was excellent. I was very pleased.
Mike Jacobs

Directorate for Science and Policy Programs
Science and Technology Policy Fellowship Programs

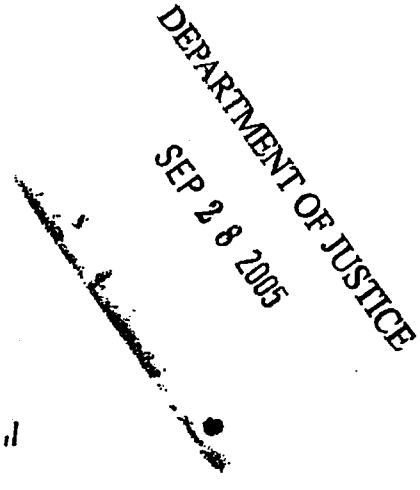
American Association for the Advancement of Science
1200 New York Avenue, NW, Washington, DC 20005 USA
Tel: 202 326 6700 Fax: 202 289 4950
E-mail: fellowships@aaas.org

AAAS
ADVANCING SCIENCE, SERVING SOCIETY

Directorate for Science and Policy Programs
1200 New York Avenue, NW
Washington, DC 20005 USA



Neil Gorsuch
U.S. Department of Justice
Office of Associate Attorney General
950 Pennsylvania Ave., NW, #5706
Washington, DC 20530



 9/14 2:

AAAS
ADVANCING SCIENCE, SERVING SOCIETY

August 31, 2005

Mr. Neil Gorsuch
U.S. Department of Justice
Office of Associate Attorney General
950 Pennsylvania Ave., NW, #5706
Washington, DC 20530

Dear Mr. Gorsuch:

I am delighted to learn from JoAnn Bordeaux, that you have agreed to speak at the orientation for the 2005-06 class of AAAS Science & Technology Policy Fellows. Your session is scheduled for Wednesday, September 14, 2005, where you will be joined on the dais by the Honorable Susan Braden of the U.S. Court of Federal Claims. We are requesting that each of you give a 20-minute presentation that highlights the challenges faced by the legal system (in your case, from the perspective of the Justice Department) in dealing with cases that are marked by increasing technical complexity. This would then be followed by open discussion and questions from the audience. The entire session would run from 2:30-3:30 p.m. Enclosed is a preliminary agenda for the full orientation program. Additional information is available on our website, at www.fellowships.aaas.org.

The Fellowship Program was initiated in 1973, and since then more than 1,600 early to mid-career scientists and engineers have been competitively selected from across the United States to spend a year in Washington, D.C., working in Congress and federal agencies on issues relating to science, technology, and policy while learning about the federal policymaking process. The fellowship experience is a stepping stone to leadership positions, whether the Fellows remain in government, return to academia, or pursue careers in the non-profit or private sectors.

Although a highly sophisticated group, the new AAAS Fellows have varying degrees of familiarity with the policy process when they arrive in Washington. The orientation plays a critical role in their preparation for the fellowship year. Previous orientations have featured a wide range of speakers, including Members of Congress Sherwood Boehlert, Jeff Bingaman, Rush Holt, and John D. Rockefeller IV; journalists Cory Dean of *The New York Times*, Joe Palca of NPR, and Rick Weiss of *The Washington Post*; Nobel Peace Prize Laureate and former President of Costa Rica, Oscar Arias; Valdas Adamkus, President of Lithuania; the Ambassadors of Bulgaria, Switzerland and Sweden; and Bruce Alberts, immediate past President of the National Academy of Sciences.

Directorate for Science and Policy Programs

American Association for the Advancement of Science
1200 New York Avenue, NW, Washington, DC 20005 USA
Tel: 202 326 6600 Fax: 202 289 4950
www.aaas.org/spp

We will be hosting a luncheon with Rep. Ros-Lehtinen just prior to your session, at the Columbus Club at Union Station. We plan to convene your session there as well. We would pleased, if your schedule permits, for you to join the Fellows and other guests at the luncheon. Please let me know if you are able to attend. For both the luncheon and sessions to follow, we expect the audience to number around 150 people, including new and former Fellows and AAAS staff.

We are honored to have you join us as a AAAS orientation speaker along with some of the other distinguished individuals we have invited to participate, including Secretary of State Condolezza Rice, Brazilian Ambassador to the U.S. Roberto Abdenur, and Scientific Advisor to President Bush, Dr. John Marburger.

In the weeks ahead, you will be contacted by Chris McPhaul, Associate Director of the Fellowship Program, to answer your questions and to provide the necessary logistical information associated with organizing the session. In the interim, should you have any questions, I can be reached by phone at 202.326.6793 and via email at mfrankel@aaas.org.

Sincerely,

Mark S. Frankel

Mark S. Frankel, Ph.D.
Director, AAAS Scientific Freedom,
Responsibility and Law Program

PRELIMINARY

AAAS SCIENCE & TECHNOLOGY POLICY FELLOWSHIP PROGRAMS
2005-06 ORIENTATION SUMMARY

TUESDAY, SEPTEMBER 6, 2005

5:00 p.m.	Briefing about the AAAS Fellows' Health Plan

WEDNESDAY, SEPTEMBER 7, 2005

8:30 a.m.	Coffee
9:00 a.m.	Welcome *Alan Leshner, CEO, AAAS* *Al Teich, Director, Science & Policy Programs, AAAS*
9:15 a.m.	Overview of the Fellowship Orientation Program *Cynthia Robinson, Director, Science & Technology Policy Fellowships, AAAS*
9:40 a.m.	Expectations for Your Fellowship Year *Steve Nelson, Associate Director, Science & Policy Programs, AAAS*
10:00 a.m.	Introductions: AAAS Fellowship Program Staff Introductions: 2005-06 AAAS Science and Technology Policy Fellows and Jefferson Science Fellows
11:00 a.m.	Break
11:30 a.m.	Introductions: continued
1:00 p.m.	Get-Acquainted Lunch
2:30 p.m.	How to Operate in a Bureaucracy with Intelligence and Integrity *Jonathan Margolis, Director, Office of Regional Policy Coordination and Initiatives, U.S. Department of State*
3:30 p.m.	Coffee Break
4:00 p.m.	Breakout Sessions with Former and Renewal Fellows
5:30 p.m.	Welcome Reception

THURSDAY, SEPTEMBER 8, 2005

8:00 a.m.	Coffee
8:30 a.m.	The American Experiment in Government *Mark Talisman, Independent Consultant and Analyst on Government Affairs*
10:00 a.m.	Break
10:30 a.m.	Policy Analysis 101 *Eugene Bardach, Professor of Public Policy, University of California, Berkeley* *Karlyn Bowman, Resident Fellow, American Enterprise Institute*
12:00 p.m.	Lunch, AAAS
1:30 p.m.	Workshop: Analyzing a Policy Case Study
3:30 p.m.	Break
4:00 p.m.	Where Does Science Fit in Public Policy? *Paul Gilman, Director, Oak Ridge Center for Advanced Studies* *Al Teich, Director, Science and Policy Programs, AAAS*

FRIDAY, SEPTEMBER 9, 2005

8:30 a.m.	Security Check-In at the Eisenhower Executive Office Building
9:00 a.m.	The Presidency *Allan Lichtman, Professor of History, The American University*
10:30 a.m.	Break
11:00 a.m.	The White House Office of Science and Technology Policy *Shana Dale, Deputy Director for Homeland and National Security, White House Office of Science and Technology Policy* *Richard Russell, Associate Director for Technology, White House Office of Science and Technology Policy*

12:00 p.m.	Leave for AAAS
12:30 p.m.	Lunch
2:15 p.m.	The Nature of the Federal Bureaucracy: Its Structure, Function and Culture *Mark Rom, Associate Professor of Government and Public Policy, Georgetown University*
3:15 p.m.	Contrasting Cultures of Science and Policy-Making: What They Mean for Your Fellowship Year *Steve Nelson, AAAS*
4:15 p.m.	Ice Cream Social

SATURDAY, SEPTEMBER 10, 2005

12:00 p.m.	Fellows Picnic

MONDAY, SEPTEMBER 12, 2005

8:15 a.m.	Security Check-In at the State Department
9:00 a.m.	Science & Diplomacy at the U.S. Department of State *Anthony F. Rock, Acting Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs*
10:15 a.m.	Break
10:45 a.m.	Globalization *Clyde Prestowitz, President, Economic Strategy Institute*
11:45 a.m.	Travel to National Press Club for lunch
12:15 p.m.	Lunch – Sustainable Development *Warren Evans, Director, Environment Department, Environmentally and Socially Sustainable Development, The World Bank*
2:45 p.m.	Science & Security *Gerald Epstein, Senior Fellow for Science and Security, Center for Strategic & International Studies*
3:45 p.m.	U.S. Foreign Policy *William J. Dobson, Managing Editor,* Foreign Policy

TUESDAY, SEPTEMBER 13, 2005

8:00 a.m.	Coffee
8:30 a.m.	Introduction to Federal Budget Procedure: Or, Why You'll Never Understand the Policy Process Unless You Understand the Budget *Kei Koizumi, Director, Research & Development Budget and Policy Program, AAAS*
10:00 a.m.	Break
10:30 a.m.	An Interactive Workshop: Writing an Appropriations Bill *Kei Koizumi*
12:30 p.m.	Travel to Four Points Sheraton for Lunch
1:00 p.m.	Lunch – National Economic Policy *Alice Rivlin, Senior Fellow, Brookings Institute*
3:00 p.m.	Return to AAAS
4:00 p.m.	Barnard Lecture *Andrew Revkin, Reporter, the New York Times*
5:00 p.m.	Reception

WEDNESDAY, SEPTEMBER 14, 2005

8:30 a.m.	Coffee, Library of Congress
9:00 a.m.	Perspectives on the Congress *Walter Oleszek, Senior Specialist in Government and Finance, Congressional Research Service*
10:15 a.m.	The Legislative Process *Michael Koempel, Senior Specialist in American National Government, Congressional Research Service*
11:30 a.m.	Leave for Group Photo

12:00 p.m. Group Photo by the Capitol Reflecting Pool
12:30 p.m. Lunch with Member of Congress (Columbus Club, Union Station)
Rep. Ileana Ros-Lehtinen (R-Florida)
2:30 p.m. The Judicial Process (Columbus Club, Union Station)
The Honorable Susan Braden, U.S. Court of Federal Claims
Neil Gorsuch, Principal Deputy Associate Attorney General, U.S. Department of Justice
Moderator, Mark Frankel, Program Director, Scientific Freedom, Responsibility, and Law Program, AAAS
3:30 p.m. *Concurrent Sessions:* Ethical and Legal Requirements in Congress, AAAS
Kenyen Brown, Counsel, Senate Select Committee on Ethics
John Sassaman, House Committee on Standards of Official Conduct
Ethical and Legal Requirements in Executive Branch Agencies
Gregg Burgess, Assoc. General Counsel, Office of Government Ethics
Holli Beckerman Jaffe, Director, Ethics Office, NIH
5:30 p.m. Former Fellows Reception, AAAS

THURSDAY, SEPTEMBER 15, 2005 (*breakout day; concurrent sessions*)

Legislative Track
(to be planned by CRS)
8:30 a.m. Check in at CRS
8:45 a.m. Coffee/muffins
9:00 a.m.
9:15 a.m.
10:45 a.m.
11:00 a.m.
12:15 p.m.
1:30 p.m.
4:15 p.m.
5:00 p.m. Leave for reception
5:30 p.m. Reception for Congressional Fellows

International Track
8:30 a.m. Coffee/muffins
9:00 a.m. The Interagency Process
David Conover, DoE
Beverly Simmons, USDA
Andrew Weber, DoD
10:15 a.m. Break
10:30 a.m. The International S&T Community in Washington
Alice Abreu, OAS
Kamal Dwivedi, Embassy of India
Mary Kavanagh, European Commission
12:00 p.m. Lunch
1:00 p.m. Non-Governmental Organizations
Julee Allen, Save the Children
Oliver Langrand, CI
Joe Stork, HRW
2:15 p.m. International Law
Richard J. Wilson, AU
3:30 p.m. Break
3:45 p.m. Public-Private Partnerships
Lori Brutten
5:15 p.m. Leave for Cap City
5:30 p.m. Reception for all Fellows

Executive Branch Track
8:30 a.m. Coffee/muffins
9:00 a.m. Relations Between the Executive and Legislative Branches of Government
Sue Quantius, U.S. House Appropriations Committee
Marc Smolonsky, NIH
10:00 a.m. Break
10:15 a.m. Coordination of Domestic Science among Federal, State & Local Agencies
Kevin Clark, NYC Office of Emergency Management
Segaran Pillai, DHS
11:45 a.m. Lunch
1:15 p.m. Science Fellows in Agencies Filled with Scientists
Michael Slimak, EPA
Joanne Tornow, NSF
2:15 p.m. Break
2:30 p.m. Improving Accountability for Federal Support of R&D
Sarah Horrigan, OMB
William Valdez, DoE
3:30 p.m. Break
3:45 p.m. Federal Advisory Committees
Lexi Shultz, UCS
Robert Flaak, GSA
5:00 p.m. Leave for Cap City
5:30 p.m. Reception for All Fellows

FRIDAY, SEPTEMBER 16, 2005

8:00a.m.	Check-in at the National Academies
8:30 a.m.	Overview of the National Academies *E. William Colglazier, Executive Officer, National Academies* *James Jensen, Director, Office of Congressional and Government Affairs, NRC*
9:30 a.m.	Break
10:00 a.m.	Science and the Media *Sharon Begley, The Wall Street Journal (invited)* *David Malakoff, NPR* *Rick Weiss, The Washington Post* *Curt Suplee, NSF, moderator*
Noon	Lunch: BBQ at AAAS
1:30 p.m.	Lobbying in Washington *Gary Andres, Vice Chairman of Public Policy and Research, Dutko Worldwide (Invited)* *David Stonner, Head of Congressional Affairs Section, Office of Legislative and Public Affairs, National Science Foundation* *Patricia Bartlett, Director of Federal Relations, Georgia Institute of Technology (Invited)* *Moderator: Tom Williams, President, The Williams Group*
3:30 p.m.	What a AAAS Fellowship Can Do for You: Perspectives from a Former Fellow *Norine Noonan, Dean, School of Science and Mathematics, College of Charleston*

MONDAY, SEPTEMBER 19, 2005

Congressional Fellows

9:00 a.m.	Perspectives on the 109th Congress
10:30 a.m.	Break
10:45 a.m.	How a Congressional Office Works/Preparing for Placement
12:15 p.m.	Leave for Placement Office
12:45 p.m.	Meet at Placement Office

State Department Diplomacy Fellows

8:30 a.m. State Department will provide agenda

EPA Environmental Fellows

9:00 a.m. EPA will provide agenda

NIH Fellows

9:00 a.m. NIH will provide agenda

All Other Fellows

Report to assigned offices

Neil.
CAR departs 9th
St. at 12:10

3:30 pickup
from Union Station
Aloma

AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE

SCIENCE & TECHNOLOGY POLICY FELLOWSHIP PROGRAMS
2005–06 ORIENTATION

CHALLENGES FACED BY THE JUDICIARY IN DEALING WITH CASELOADS MARKED BY INCREASING TECHNICAL COMPLEXITY

JUDGE SUSAN G. BRADEN
UNITED STATES COURT OF FEDERAL CLAIMS

Susan G. Braden

JUDGE

UNITED STATES COURT OF FEDERAL CLAIMS
717 MADISON PLACE, N.W.
WASHINGTON, D.C. 20005

Judge Braden was appointed to the bench of the United States Court of Federal Claims on July 14, 2003, by President George W. Bush, after being confirmed by unanimous consent of the United States Senate. She was sworn into office by Senator Jeff Sessions, Chairman of the Senate Subcommittee on Administrative Oversight & the Courts. Her investiture was conducted on October 24, 2003 by Justice Sandra Day O'Connor and Justice Ruth Bader Ginsburg.

On October 22, 2004, Judge Braden was inducted as a Senior Fellow of the ABA's Administrative Law and Regulatory Section by Justice O'Connor at a ceremony held at the Supreme Court. Judge Braden also was recently named to the Editorial Board of the American Intellectual Property Law Association.

Judge Braden received a B.A. degree (1970) and J.D. degree (1973) from Case Western Reserve University in Cleveland, Ohio. She also attended post graduate courses at the Harvard Law School in the summer of 1978.

Prior to joining the bench, Judge Braden litigated complex federal and administrative law cases in private practice in trial and appellate courts. In particular, her work in the intellectual property area received favorable notice in the *Wall Street Journal*, *New York Times*, *National Law Journal*, *Journal of the American Bar Association*, and *Interfaces on Trial*: *Intellectual Property and Interoperability In*

The Global Software Industry. In 1996, Judge Braden was honored by the Computer Law Association for winning multiple decisions in the Eastern District of New York, the Eastern District of Texas, the Second Circuit, and a certified question to the Supreme Court of Texas in *Computer Assocs. Int'l, Inc.* v. *Altai, Inc.*, a landmark case that changed the application of copyright law to computer software. In 1998, she also won a companion case brought in France before the Cour de Appel de Paris.

In addition, Judge Braden has been lead counsel in a number of cutting edge cases. In 1995, she was lead counsel in a constitutional and state income tax case that challenged the industrial incentive law of the State of Alabama and received favorable mention in the *Wall Street Journal, Business Week*, and *State Income Tax Alert*, where it was described as "the case to watch." In 1991, she was lead counsel in a case noted in the *Wall Street Journal* where the federal district court awarded her client indemnification of environmental liabilities required to be assumed under an antitrust divestiture. In 1990, she was appointed by the Governor of the State of Alabama as a Special Assistant Attorney General to handle an antitrust divestiture required by the Federal Trade Commission.

In private practice, Judge Braden also represented a wide variety of client interests before almost every major department and federal agency, testified before the United States Congress on a variety of matters, and was a principal advocate of the Emergency Oil and Steel Loan Guarantee Act of 1999, which established a $1 billion federal loan guarantee program to assist bankrupt and troubled steel mills and small oil companies.

Prior to entering private practice, Judge Braden served as Senior Counsel to the Chairman of the Federal Trade Commission and his predecessor, who was Acting Chairman and a Commissioner (1980-1985). In both positions she was responsible for advising on antitrust and consumer enforcement actions and handling congressional relations. From 1973-1980, Judge Braden was a Senior Trial Attorney in the Antitrust Division of the Department of Justice. She joined the Department under its Honor Law Program and initially was assigned to the Cleveland Regional Office, where she assisted in the trial of the first antitrust felony case and served as lead counsel in numerous criminal bid rigging cases and major merger investigations. In 1978, she was assigned to the newly formed Energy Section as lead counsel in a proceeding that conditioned the nuclear licenses of several electric utilities, bringing Texas into the national power grid. From 1978–1980, Judge Braden also represented

the Department of Justice at OECD meetings in Paris, London, and Dusseldorf. During her tenure in government, Judge Braden received numerous Superior and Outstanding Performance Merit awards and in 1984, she received the Federal Bar Association's Distinguished Service Award.

Judge Braden is admitted to the Bars of the United States Supreme Court, the United States Court of Appeals for the Federal Circuit, the United States Court of Appeals for the District of Columbia Circuit, the United States Court of Appeals for the Second Circuit, the District of Columbia, and the Supreme Court of Ohio.

Judge Braden is married to Thomas M. Susman, a partner in the law firm of Ropes and Gray. Their daughter is a graduate of Yale University. Judge Braden is an avid gardener and passionate supporter of the Washington Opera and Shakespeare Theatre.

Westlaw.

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(Cite as: 58 Fed.Cl. 270)

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Motions, Pleadings and Filings

United States Court of Federal Claims.
Margaret **ALTHEN**, Petitioner,
v.
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent.
No. 00-170V.

Sept. 30, 2003.

Claimant filed suit under National Childhood Vaccine Act alleging that she suffered optic neuritis and acute-disseminated encephalomyelitis (ADEM) as direct result of tetanus toxoid (TT) vaccination. The Court of Federal Claims, Golkiewicz, Chief Special Master, 2003 WL 21439669, denied claim, and claimant appealed. The Court of Federal Claims, Braden, J., held that claimant established entitlement to relief under Vaccine Act.

Reversed and vacated.

West Headnotes

[1] Federal Courts ⚿1116.1
170Bk1116.1 Most Cited Cases

[1] Health ⚿389
198Hk389 Most Cited Cases
In order to establish prima facie case for compensation and other relief under Vaccine Injury Compensation Program for injury allegedly caused by vaccine not listed in Vaccine Injury Table, claimant must proffer at least some evidence as to each element of claim, but also sufficient evidence to persuade special master or court by preponderance or "greater weight" of evidence that each fact asserted is more probable than not. Public Health Service Act, § 2111(c)(1)(C)(ii), as amended, 42 U.S.C.A. § 300aa-11(c)(1)(C)(ii).

[2] Health ⚿389
198Hk389 Most Cited Cases
If claimant seeking relief under National Childhood Vaccine Act for injuries allegedly caused by non-listed vaccine is able to establish legal causation or causation in fact, then burden of proof shifts to government to establish that factor unrelated to vaccine was actual cause of claimant's illness or injury. Public Health Service Act, § 2113(a)(1)(B), as amended, 42 U.S.C.A. § 300aa-13(a)(1)(B).

[3] Federal Courts ⚿1116.1
170Bk1116.1 Most Cited Cases

[3] Health ⚿389
198Hk389 Most Cited Cases
If question of law arises regarding interpretation or implementation of National Childhood Vaccine Act, that is matter for courts, not special masters. Public Health Service Act, § 2113(b)(1), as amended, 42 U.S.C.A. § 300aa-13(b)(1).

[4] Health ⚿389
198Hk389 Most Cited Cases
Special master appointed pursuant to National Childhood Vaccine Act is adjudicative fact finder charged with applying existing legal precedent to decide particular case based on record before him or her; special master ultimately is not maker nor interpreter of law. Public Health Service Act, § 2113, as amended, 42 U.S.C.A. § 300aa-13.

[5] Health ⚿389
198Hk389 Most Cited Cases
National Childhood Vaccine Act does not preclude causation in fact from being established by claimant in absence of peer reviewed literature. Public Health Service Act, § 2113, as amended, 42 U.S.C.A. § 300aa-13.

[6] Health ⇦389
198Hk389 Most Cited Cases
To establish causation in fact element of prima facie case under National Childhood Vaccine Act, claimant must present evidence of strong temporal relationship and either reliable medical opinion or scientific theory explaining logical sequence of cause and effect. Public Health Service Act, § 2113, as amended, 42 U.S.C.A. § 300aa-13.

[7] Health ⇦389
198Hk389 Most Cited Cases
Mere suggestion in peer-reviewed literature that vaccine is only related in some sense to injury falls far short of reliability required by preponderance standard to establish prima facie case under National Childhood Vaccine Act in individual case. Public Health Service Act, § 2113, as amended, 42 U.S.C.A. § 300aa-13.

[8] Health ⇦389
198Hk389 Most Cited Cases
Once claimant under National Childhood Vaccine Act establishes strong temporal relationship between receiving vaccine and first symptoms of illness, logical sequence of cause and effect, supported by reliable medical opinion or scientific theory, also must be proffered to explain causal link. Public Health Service Act, § 2113, as amended, 42 U.S.C.A. § 300aa-13.

[9] Health ⇦389
198Hk389 Most Cited Cases
Claimant who suffered optic neuritis and acute-disseminated encephalomyelitis (ADEM) after she received tetanus toxoid (TT) vaccination was entitled to relief under National Childhood Vaccine Act, where claimant was generally in good health before she received vaccine, optic neuritis occurred within medically appropriate time period, claimant evidenced some form of continuing and worsening demyelinating disease within 18 days of vaccine until time of trial, expert presented reliable medical opinion linking claimant's medical records and progressing illness to established medical theory of "degeneracy" and "epitope spreading" to establish causation, and there was no evidence that claimant's injuries were caused by some other factor. Public Health Service Act, § 2111(c)(1)(C)(ii), 2113(a)(1)(A), as amended, 42 U.S.C.A. §§ 300aa-11(c)(1)(C)(ii), 300aa-13(a)(1)(A).

*272 Ronald C. Homer, Boston, Massachusetts, for petitioner.

Gregory W. Fortsch, Washington, D.C., for respondent, United States Department of Justice.

MEMORANDUM OPINION

BRADEN, Judge.

On June 3, 2003, the Chief Special Master of the Office of Special Masters of the United States Court of Federal Claims ("Chief Special Master") issued an Entitlement Decision in this case, which he described as raising "difficult and involved medical and causation issues" under the National Childhood Vaccine Act of 1986, 42 U.S.C. § 300aa-1 to -34 (2000) ("Vaccine Act"). *See Althen v. Sec'y Dep't of Health and Human Servs.*, 2003 WL 21439669, at *9 (Fed.Cl. Spec. Mstr. June 3, 2003) ("*Althen*"). The Chief Special Master denied petitioner's claim for compensation and other relief. The court has issued this opinion on an expedited basis to facilitate any appellate review the respondent ("government") may wish to pursue, since the court has determined that the petitioner met the statutory burden to establish causation in fact by a preponderance of the evidence and therefore, as a matter of law, is entitled under the Vaccine Act to compensation, reasonable attorneys fees, and other costs.

RELEVANT FACTS AND PROCEDURAL BACKGROUND [FN1]

FN1. The relevant facts recited herein are summarized from detailed factual findings found in *Althen,* at *1-*4. Citations to record evidence are noted within parentheses. (TR) refers to the transcript of a June 14, 2002 hearing of the parties' experts. (P.Ex.) refers to petitioner's exhibits. (D.Ex.) refers to government's exhibits.

Petitioner is a college graduate and was a Public Health Administrator for the City of Hartford. (P.Ex.18 at 146). She is married; her daughter is now 22 years old. (P.Ex. at 147). On March 28, 1997, a tetanus toxoid' [FN2] vaccination and a hepatitis A vaccination were administered to petitioner. *See Althen,* at *1 (P.Ex. 1 at 1). Prior to that time, petitioner enjoyed good health, although she had Duane's syndrome, [FN3] which affected her ability to look to her left without experiencing double vision. (P.Ex. 8 at 1). In addition, petitioner "had a history of hypothyroidism [FN4] probably on an autoimmune basis," [FN5] for which she takes a prescription synthetic thyroid drug. (P.Ex. 21 at 1).

FN2. Tetanus toxoid vaccine is a modified toxin of the bacteria *Clostridium tetani* and does not have viral components. *See* ADVERSE EVENTS ASSOCIATED WITH CHILDHOOD VACCINES: EVIDENCE BEARING ON CAUSALITY, Institute of Medicine 67-68 (1994) ("1994 IOM REPORT").

FN3. Duane's syndrome "is a hereditary congenital syndrome in which the affected eye shows limitation or absence of abduction, restriction of abduction ... narrowing the palebral fissure on adduction and widening on adduction, and deficient convergence. It is transmitted as an autosomal dominant trait. Called also *retraction syndrome*[.]" DORLAND'S MEDICAL DICTIONARY 1754 (29th Edition 2000) ("DORLAND'S").

FN4. Hypothyroidism is the "[d]iminished production of thyroid hormone, leading to clinical manifestations of thyroid insufficiency, including low metabolic rate, tendency to weight gain, somnolence and sometimes myxedema [accumulation of excess watery fluid under the skin]." STEDMAN'S MEDICAL DICTIONARY 866 (27th Edition 2000) ("STEDMAN'S").

FN5. An autoimmune disease is "any disorder in which loss of function or destruction of normal tissue arises from humoral or cellular immune responses to the body's own tissue constituents[.]" STEDMAN'S at 510.

On April 15, 1997, petitioner sought medical treatment for blurred vision, which progressed in four days to a complete loss of sight in her right eye. *Id.* (P.Ex. 2 at 3; P.Ex. 20 at 23; P.Ex. 21 at 1). Petitioner also complained of a "steady" "posterior headache," "discomfort along the right side of her nose," "pain with eye movements," "sharp discomfort along her right temple" ***273** when bending over, and "queasiness." *Id.* (P.Ex. 1 at 107). Initially, petitioner was diagnosed by Dr. Lesser, an ophthalmologist, as having "probable right optic neuritis." [FN6] *Id.* (P.Ex. 3 at 88; P.Ex. 4 at 122; TR. 13).

FN6. Optic neuritis is an "inflammation of the optic nerve, ... classified either as *intravascular,* affecting the part of the nerve within the eyeball ... or *retrobulbar,* affecting the portion behind the eyeball." DORLAND'S at 1207; *see also* 1994 IOM REPORT at 83, ("Optic neuritis ... [is a] focal demyelinating lesion [ ] that can occur in isolation or as components of diffuse demyelinating diseases such as ADEM and multiple sclerosis.").

An April 21, 1997 brain MRI confirmed optic neuritis in petitioner's right eye, but revealed no "evidence of multiple sclerosis [FN7] or demyelinating disease." [FN8] *Id.* (P.Ex. 1 at 111). Nevertheless, Dr. Lesser advised petitioner that she had a 2 to 5 percent risk of developing MS within five years. (P.Ex. 3 at 88). On April 27, 1997, petitioner experienced "sudden loss of vision" over a two day period. *Id.* (P.Ex. 3 at 38). A few weeks later, petitioner complained of sight loss in her right eye, accompanied by "tingling along the ulnar side right hand" and numbness in that hand. *Id.* at *2. (P.Ex. 1 at 107). On May 23, 1997, petitioner was examined by Dr. Silvers, a neurologist, who reported "significant right optic neuritis." (P.Ex. 1 at 106). Dr. Silvers advised petitioner that in light

of the most recent MRI, her risk of developing MS was "low ... however, this risk is still real." (P.Ex. 1 at 106).

> FN7. Multiple sclerosis is "a disease in which there are foci of demyelination of various sizes throughout the white matter of the central nervous system ('CNS'), sometimes extending into the gray matter. Typically, the symptoms of lesions of the white matter are weakness, incoordination, paresthesia, speech disturbances, and visual complaints. The course of the disease is usually prolonged, so that the term *multiple* also refers to remissions and relapses that occur over a period of many years. The etiology [cause or origin] is unknown." DORLAND'S at 1611.

> FN8. Demyelinating disease is an "extensive idiopathic [of a cause unknown] loss of myelin sheaths [protein sheaths that cover nerve fibers] in the brain." STEDMAN'S at 588. Demyelinating disease "has long been known to follow viral and some bacterial infections and the administration of live attenuated and inactivated antiviral vaccines." 1994 IOM REPORT at 83.

On June 4, 1997, petitioner was admitted to Hartford Hospital with fever, confusion, and neck stiffness. TR. 14 (P.Ex. 1 at 98; P.Ex. 21 at 1); *see also Althen,* at *2. On June 6, 1997, petitioner received an EEG that revealed a "focal component in the patient's right temporal region raising the possibility of an infectious process or inflammatory process at that site." *Id.* (P.Ex. 1 at 100). Petitioner's MRI also indicated "a subtle area of increased signal in the right parietal region, possibly reflecting underlying encephalitis." *Althen,* at *2 (TR 58-62). After an exhaustive battery of tests, petitioner was discharged to the hospital's acute rehabilitation unit on June 16, 1997, with a primary diagnosis of: "Encephalitis [FN9] of unknown type." *Id.* (P.Ex. 1 at 87, 99). MRI brain scans taken on June 5, 1997 and June 6, 1997 showed "A vague suggestion of some enlargement of the anterior temporal region on the left, and minimal loss of white matter/gray matter differentiation. However, this is not definitive and one cannot clearly evaluate the possibility of edema." (P.Ex. 18 at 109). On June 21, 1997, petitioner again was discharged, this time with a diagnosis of "questionable acute disseminated encephalomyelitis, right optic neuritis, congenital Duane's syndrome, [and] urinary tract infection." *Id.* (P.Ex. 1 at 87).

> FN9. Encephalopathy is defined in the Vaccine Act "Qualifications and aids to interpretation" as "any significant acquired abnormality of, or injury to, or impairment of function of the brain. Among the frequent manifestations of encephalopathy are focal and diffuse neurological signs, increased intracranial pressure or changes lasting at least six hours in level of consciousness, with or without convulsions. The neurological signs and symptoms of encephalopathy may be temporary with complete recovery, or may result in various degrees of permanent impairment." 42 U.S.C. § 300aa-14(b)(3)(A). Encephalitis refers to an "encephalopathy caused by an inflammatory response in the brain. This is usually manifested with systemic constitutional symptoms, particularly fever and pleocytosis of the cerebrospinal fluid. However, the terms *encephalopathy* and *encephalitis* have been used imprecisely and even interchangeably in the literature." 1994 IOM REPORT at 337.

On July 2, 1997, petitioner once again was admitted to Hartford Hospital, this time because of "increasing dizziness" and "gait instability." *Id.* (P.Ex. 1 at 90-91; P.Ex. 4 at *274 72; P.Ex. 21 at 1). In addition, an examination revealed petitioner was almost completely blind in her right eye. (P.Ex. 27 at 59). On this occasion, a MRI brain scan showed "multiple areas of white matter abnormality," noting the possibility of "encephalitis or ADEM [FN10] or even an acute demyelinating process." *Id.* (P.Ex. 4 at 24; P.Ex. 21 at 1). Based

on petitioner's symptoms a month earlier, the resident physician concluded that: "The possibilities of encephalitis or ADEM or even an acute demyelinating process are in consideration." (P.Ex.27 at 35). Another of petitioner's hospital physicians concurred that her "presentation was not felt to be typical for multiple sclerosis [but he was concerned about] another autoimmune demyelinating diastasis." *Id.* (P.Ex. 1 at 91). He also was uncertain whether petitioner's condition was "due to acute disseminated encephalomyelitis or a form fruste of Behcet's disease." [FN11] *Id.* (P.Ex. 1 at 90-91). Another Hartford Hospital doctor reported a differential diagnoses [FN12] of ADEM, multiple sclerosis, or vasculitis. [FN13] *Id.* (P.Ex. 18 at 322). On July 8, 1997, petitioner again was discharged. *Id.* (P.Ex. 1 at 90-91).

FN10. ADEM is an abbreviation for "acute disseminated encephalomyelitis," which like multiple sclerosis is a demyelinating disease affecting the nerve fibers in the nervous system, which is "characterized by perivascular lymphocyte and mononuclear clear cell infiltration and demyelination ... It is believed to be a manifestation of an autoimmune attack on the myelin of the central nervous system. Clinical manifestations include fever, headache, vomiting, and drowsiness progressing to lethargy and coma; tremor, seizures, and paralysis may also occur." DORLAND'S at 589. ADEM also is "characterized by acute depression of consciousness and multifocal neurologic findings occurring within days to weeks (5 days to 6 weeks) following an inciting event. It is characterized pathologically by diffuse foci of perivenular inflammation and demyelination most prominent in the white matter of the brain and spinal cord." 1994 IOM REPORT at 83 (citation omitted).

FN11. Behcet's disease is "characterized by simultaneously or successively occurring recurrent attacks of genital and oral ulcerations ... often with arthritis; a phase of generalized disorder, occurring more in men than women, with variable manifestations, including dermatitis, erythema nodosum, thrombophlebitis, and cerebral involvement." STEDMAN'S at 1748.

FN12. A differential diagnosis is "the determination of which of two or more diseases with similar symptoms is the one from which the patient is suffering, by a systematic comparison and contrasting of the clinical findings." STEDMAN'S at 492.

FN13. Vasculitis is an "inflammation of the blood or lymph vessels of the central nervous system." DORLAND'S at 1934.

From April 1997 to May 1998, petitioner had a total of seven MRI brain scans. (P.Ex. 4 at 72). "[B]y 7/97 [punctate lesions] had blossomed into a right temporal parietal lesion followed thereafter by development of lesions disseminated through the central nervous system[.]" (P.Ex. 4 at 72). On May 28, 1998, a lab test indicated that petitioner's myelin basic protein levels were "indicative of an acute demylinating episode, such as occurs with multiple sclerosis." (P.Ex. 18 at 560). By June 4, 1998, petitioner's attending physician concluded that she had developed ADEM, although "the findings are unusual and atypical." (P.Ex. 3 at 78). On July 27, 1998 and again on January 7, 1999, petitioner experienced optic neuritis in her left eye. *Id.* at *3 (P.Ex. 4 at 72; P.Ex. 21 at 2).

At the request of Dr. Lesser and Dr. Silvers, Dr. Vollmer, Director of the Neuroimmunology Program at Yale University, examined petitioner on April 27, 1999. He concluded that neurosarcoid or isolated angiitis [FN14] was " the most likely diagnosis," although multiple sclerosis "remains in the differential diagnosis." *Id.* (P.Ex. 8 at 4). On May 15, 1999, another MRI brain scan "reveal[ed] some small abnormalities scattered throughout the white matter, suggestive of vasculitis or sarcoid or parainfectious disease." *Id.* (P.Ex. 4 at 23). Dr. Vollmer observed this "pattern [was] not typical of multiple sclerosis," but concluded that "[g]iven the

lack of confirmatory evidence for multiple sclerosis, and the lack of evidence of recent progression, I am unable to make a definitive diagnosis at this time. Nevertheless I do not see evidence of multiple sclerosis, but remain concerned that there may be some other inflammatory disease." *Id.* (P.Ex. 4 at 23; P.Ex. 8 at 6).

> FN14. Angiitis is "isolated vasculitis [inflammation of the blood or lymph vessels] of the central nervous system." DORLAND'S at 81.

***275** On June 10, 1999, Dr. Silvers noted in petitioner's medical record that, "[W]hile primary CNS vasculitis is a thought, I would think that the absence of a significant headache, the initial episode of a febrile encephalomyelitis and the MRI's [sic] would support a demyelinating illness." *Id.* (P.Ex. 1 at 37-38); *see also* P.Ex. 1 at 21 (Vaccine Adverse Event Reporting System, dated December 22, 1999, stating petitioner's reaction to the March 28, 1997 tetanus toxoid vaccine was adverse and that she was diagnosed as having "Acute Disseminated Encephalomyelitis").

On March 31, 2000, petitioner filed the information required to initiate an action under the Vaccine Act.

Following a May 4, 2000 examination, Dr. Silvers concluded that petitioner had a primary diagnosis of "Probable multiphasic ADEM." (P.Ex. 1 at 11). On August 6, 2000, petitioner experienced a brain seizure and again was admitted to Hartford Hospital. *Id.* at *4 (P.Ex. 18 at 93). A brain *biopsy was performed that "showed clear* evidence of inflammation in the central nervous system." TR. 14. (emphasis added). Petitioner was diagnosed with "vasculitis with secondary tissue destruction and demyelination consistent with primary angiitis." *Id.* (P.Ex. 25 at 46). On August 17, 2000, a Hartford Hospital Department of Radiology Report noted that petitioner's symptoms were "consistent with an acute demylinating process which includes MS or a previously suspected diagnosis of encephalitis." (P. Ex 25 at 133).

And, a Radiology Report, dated December 2, 2000, reported "[C]linical Indication: Multiple Sclerosis," but also noted "very minimal progression of Multiple Sclerosis changes in the left parietal lobe." *Id.* (P.Ex. 26 at 137). On December 11, 2000, Dr. Vollmer summarized petitioner's condition as a:

> relapsing neurologic syndrome that began with an acute illness in 1997, associated with fever and altered mental status. However, she has continued to have relapses since that time with loss of vision which comes on very quickly and also a left hemiparesis that evolved over a matter of a few days. This was associated with a seizure like episode. A biopsy suggested CNS vasculitis, but also show some demyelination and macrophasias, suggesting possibly an acute demyelinating lesion. Unfortunately, the patient's history and MRI is not specific and does not eliminate the possibility that she has CNS vasculitis despite this.

(P.Ex. 23 at 2).

EXPERT PROCEEDINGS BEFORE THE CHIEF SPECIAL MASTER

On June 14, 2002, the Chief Special Master presided over a hearing of the parties' experts.

F. Petitioner's Expert-Dr. Derek R. Smith, M.D.

The Chief Special Master found that petitioner's expert, Dr. Derek R. Smith, M.D., was "knowledgeable about his area of expertise and the facts of this case; he testified cogently and credibly." *Althen,* at *4 n. 6.

Dr. Smith is a board-certified neurologist, with a sub-speciality in multiple sclerosis and neuroimmunology. *Id.* He is currently a Clinical Instructor at the Harvard Medical School and also an Associate Professor of Neurology at Brigham Women's Hospital in Boston. *Id.* Dr. Smith has published writings regarding multiple sclerosis and neurologic injuries. *Id.* Dr. Smith exclusively treats patients with multiple sclerosis (approximately 100-150 persons per month), providing first and second opinions and long-term treatment. *Id.* (TR 4-6). In addition, Dr. Smith is engaged in conducting clinical trials for future treatment of

multiple sclerosis and has an interest in immune mechanisms in multiple sclerosis, clinical trials in multiple sclerosis, and immune deviation concerning therapeutic modalities. *Id.* He also has been engaged in research "looking at T cell [FN15] function in patients with MS and trying ***276** to identify differences as compared to normal controls in terms of the way that ... T cells are ... either functioning or interacting with the rest of the immune system." *Id.* (TR 7).

> FN15. A "T cell" is one that "initiates immune responses against specific agents ... The function of T cells ... is to start both unspecific immune responses, activate cells that are not specific, but would provide an inflammatory environment that is conductive of eliminating [a] foreign agent, and also, stimulate the activation, maturation of so-call D lymphocytes, which make antibodies." (TR 82).

Dr. Smith testified that he is "highly confident that, in the right individuals, a tetanus toxoid vaccination can cause central nervous system demyelination." *Althen,* at *4. (TR 35). Dr. Smith's July 10, 2001 written opinion noted that petitioner "had a history of hypothyroidism probably on an autoimmune basis." (P.Ex. 21 at 1). In addition, he testified that the tetanus toxoid vaccine administered to petitioner in March 1997 "probably" played a role in petitioner's illness. "There was no preceding viral infection. There was *no other explanation* for why she could have had a sudden onset of profound immune responses in the central nervous system." (TR 13, 37) (emphasis added). Dr. Smith also testified that the tetanus toxoid vaccine more probably than not substantially contributed to petitioner's optic neuritis and subsequent demyelinating disorder that progressed from March 28, 1997 to the present. (TR 12-14; P.Ex. 21 at 1-2).

The medical theory on which Dr. Smith based his expert opinion is known as the theory of "degeneracy," resulting from growing knowledge about "molecular mimicry." [FN16] *Id.* Dr. Smith explained to the Chief Special Master that "the reason one gives vaccinations is in order to create memory cells, T cells, B cells that will respond to the pathogen that is being vaccinated against in the future." *Id.* (TR. 11-13, 35, 39). The body's T cells, however, can "degenerate" and mistakenly respond to non-specific or non-native antigens, such as CNS myelin antigens, rather than the vaccine's antigen. *Id.* (TR 27-31). This mistake can then trigger an inflammatory response, which ultimately manifests itself as a demyelinating disease through "epitope spreading," [FN17] resulting in a chronic condition, such as that developed by petitioner. *Id.* at *5 (TR 33-34, 37). Dr. Smith reported that the degeneracy of T cells is "a widely recognized principle in medicine, accepted in the field of neuroimmunology and supported by the [medical] literature." *Id.* (TR 30, 32). Dr. Smith acknowledged, however, that the 1994 IOM REPORT concluded that there was insufficient evidence at that time to accept or reject a causal relationship between tetanus toxoid vaccine and demyelinating disease, but he believed that developments in laboratory and clinical work since 1994 may supplant the epidemiologic literature, on which the 1994 IOM REPORT's conclusions were based. (TR 44). [FN18]

> FN16. Molecular mimicry is a "phenomenon wherein, two separate peptides or proteins are not identical, but because of the structure or their component of amino acids, in terms of ... the way they may look to the immune system, they appear to be identical[.]" (TR 21).
>
> FN17. An "epitope" is the "simplest form of an antigenic determinant, on a complex antigenic molecule, which can combine with antibody or T cell receptor." STEDMAN'S at 610. "Epitope spreading" is a "process that was described in the experimental model for MS and has been repeated many times; whereby, an immune response that is initially very restricted to a few different types of T cells with a few different T cell receptors over time, because of continuing inflammation, can become more widespread and involve

more different T cells, more different antigens." (TR 33).

FN18. *See, e.g.,* S. Schwartz et al., "Acute disseminated encephalomyelitis; a follow-up study of 40 adult patients," *Neurology,* May 22, 2001, at 1 ("many patients initially diagnosed with ADEM develop clinically definite MS upon long-term follow up") (P.Ex. 40 at 1, 4); *see also* G. Schwartz et al., "Acute midbrain syndrome as an adverse reaction to tetanus immunization," 15 *Intensive Care Medicine* 53 (1988) ("The occurrence of nearly identical episodes was remarkable, as well as the relatively rapid return to normal consciousness and neurological status after deep coma."); G.K. Schlenska, "Unusual Neurological Complications Following Tetanus Toxoid Administration," 215 *J. Neurology* 299 (1977) ("Neurological complications [after tetanus shots] occurred extremely rarely ... it is less well known that tetanus toxoid may contain traces of antibody producing protein, which is responsible for these complications.").

Dr. Smith also testified that the onset of petitioner's initial inflammatory condition, optic neuritis, occurred within a medically accepted time period. *Id.* at *6 (TR 38). In addition, in his judgment, whether petitioners's condition is diagnosed as relapsing *277 ADEM, MS, or CNS vasculitis "is not a big issue" as "the underlying inflammatory process is undoubtedly the same in each instance." *Id.* (TR 15; P.Ex. 21 at 2). Finally, Dr. Smith testified that he could ascertain no alternative causes to the tetanus toxoid vaccine in petitioner's medical history that would explain the onset of her demyelinating illness or its chronic nature. *Id.* (TR 13-14, 38, 55-57, 62).

G. The Government's Experts

1. Dr. Arthur P. Safran, M.D.

The Chief Special Master found the testimony of one of the government's experts, Dr. Arthur P. Safran, M..D., "credible, [although] it did not add significantly to the resolution of the issues before the court." *Althen,* at *6 n. 12. Dr. Safran is board-certified in both internal medicine and neurology. *Id.* Currently, he serves as an Associate Clinical Professor at Boston University School of Medicine, an Instructor at Tufts University School of Medicine, and a Lecturer at Harvard Medical School. *Id.* The topic of his academic instruction is neurology. *Id.* Dr. Safran also serves as an Attending Neurologist and Associate Physician at various Boston hospitals. *Id.* Dr. Safran's clinical practice includes patients with various neurological disorders of the peripheral and CNS, primarily multiple sclerosis patients. *Id.* (TR 132). In addition, Dr. Safran has published journals and other reference materials on multiple sclerosis. *Id.*

Dr. Safran rejected a causal relationship between petitioner's tetanus toxoid vaccine and her subsequent illness, which he concluded is "an undiagnosed disease of the nervous system, with manifestations suggesting differential diagnosis lies between multiple sclerosis and vasculitis of the central nervous system, favoring the later." (R. Ex. A at 1; TR 134-35, 138-39, 145, 160- 63). Dr. Safran concluded that petitioner's illness was more likely "vasculitis or angiitis of the central nervous system," based on: an April 1997 onset of optic neuritis, which he characterized as a "vasculitis illness;" a 2000 brain biopsy indicating "some evidence of demyelination, as well as vasculitis;" petitioner's past physician treatment history; a family history of aneurysms, which are "associated with vasculitis;" and the fact that the onset of petitioner's illness fell within a medically acceptable time period for immune mediated illness. *Id.* at *6. (TR at 134-35, 157-59, 160-62). Dr. Safran admitted, however, that when he rendered his expert opinion on petitioner's diagnosis, he overlooked P.Ex. 35, indicating that petitioner's physician had prescribed AVONEXTM, a drug used to treat MS, in 2002. (TR 155).

He further testified that he was unaware of medical reports, medical literature, or epidemiology that linked tetanus toxoid either to CNS disorders or a

neurological condition that manifested itself two weeks after vaccination as optic neuritis and then progressed into vasculitis or multiple sclerosis. *Id.* at *7 (R. Ex. A at 2; TR 137-38, 147, 151). Therefore, he concluded that a causal connection between petitioner receiving the tetanus toxoid vaccine and her illness was "remote." *Id.* (TR 159).

Dr. Safran also criticized Dr. Smith's reliance on the relationship between tetanus toxoid and Guillain-Barre Syndrome, [FN19] discussed in the 1994 IOM REPORT, to support a theory that a similar causal relationship could exist between the tetanus toxoid vaccine and CNS disorders. *Id.* (TR 136- 37; 156). Dr. Safran's reason for discounting this possibility was the "cells [involved in tetanus toxoid and CNS disorders] are different, and the epidemiology is not shown." *Id.*

> FN19. Guillian-Barre Syndrome ("GBS") is "an acute, immune-mediated disorder of peripheral nerves, spinal roots, and cranial nerves, commonly presenting as a rapidly progressing, areflexive, relatively symmetric ascending weakness of the limb, truncal, respiratory, pharyngeal, and facial musculature, with variable sensory and autonomic dysfunction; typically reaches its nadir in 2-3 weeks, followed initially by a plateau period of similar duration, and then subsequently by a gradual but complete recovery in the majority of cases." STEDMAN'S at 1755.

2. Dr. Roland M.G. Martin, M.D.

The Chief Special Master found the testimony of the government's second expert witness, Dr. Roland M.G. Martin, M.D., to be "cogent" and "credible" and that he demonstrated "significant knowledge about his ***278** medical field and its application to the general causation issue in this case." *Id.* at *7 n. 15.

Dr. Martin is board-certified in neurology and electrophysiology and currently is the Acting Chief of the Cellular Immunology Section of the Neuroimmunology Branch at the Department of Health and Human Service's National Institute of Health ("NIH"), which is involved in "T cell immunology and its relation to neuro-immunological disorders[,] particularly MS." *Id.* (TR at 65-67). In addition, Dr. Martin is currently an Adjunct Professor of Neurology at the University of Maryland's Baltimore Medical School and an Adjunct Professor at Howard University in neurology, immunology, and genetics. *Id.* Dr. Martin also sees private patients with MS, ADEM, and vasculitis, has served on scientific advisory committees, and published and/or reviewed journal articles concerning multiple sclerosis and other neurological disorders. *Id.*

Dr. Martin testified that he is unaware of published data that suggests the tetanus toxoid vaccine can trigger CNS T cells or cause a demyelinating disease of the CNS. *Id.* at *7 (TR 69, 84-92, 126). "[Research] does not exclude the theoretical possibility [that tetanus toxoid can trigger CNS]. But it does not support [that possibility]." (TR 70). Dr. Martin was aware that the 1994 IOM REPORT acknowledged a link between tetanus toxoid and peripheral nervous system autoimmune disease, such as GBS, but he felt the level of occurrence was low. *Id.* at *8 (TR 78-81).

Dr. Martin, however, agreed with the theory of the evolution of molecular mimicry since it was now accepted that "T cells are able to recognize a wide variety of antigen." *Id.* at *7 (TR 71). Based on data from NIH and other laboratories, however, Dr. Martin believed that molecular mimicry "by itself is in all likelihood not sufficient to initiate an autoimmune disease. These may only occur in individuals with a particularly susceptible genetic background, and in addition strong unspecific factors that stimulate the immune system such as a viral infection." (D. Ex. C at 1-2). Dr. Martin, however, acknowledged that "The susceptibility for autoimmune disease is ... relatively high. For example, the major HLA [FN20] idea that is associated with MS is found in about 25 percent of the population. If you take MS patients, about 50 to 60 percent have this one HLA. So, many, many people have the genetic background, but only one in a thousand develops MS. [T]hings need to ...

happen to overrun what naturally protects from these diseases." (TR 114). Since Dr. Martin did not review petitioner's medical records, however, he was unaware of petitioner's history of hypothyroidism, which Dr. Smith concluded was "probably on an autoimmune basis." (P.Ex. 21 at 1). Dr. Martin also agreed with Dr. Smith that a chronic inflammatory disease could be caused and maintained by "epitope spreading." *Id.* at *8 (TR 107-108).

> FN20. HLA is an "Abbreviation for human leukocyte antigens[.]" S TEDMAN'S at 825.

Dr. Martin did not dispute that petitioner has a CNS disorder and that the optic neuritis occurred within a medically appropriate time for immune mediated responses. *Id.* at *7 n. 16. (TR 68, 69, 77, 119-20). Unlike Dr. Smith, however, he saw no link between petitioner's optic neuritis and her later symptoms. *Id.* Dr. Martin concluded that petitioner's symptoms were "not compatible with MS or a demyelinating disease," but with either a viral or bacterial meningitis. *Id.*

THE *STEVENS* "ANALYTICAL FRAMEWORK"

The Chief Special Master was the author of a 2001 decision, *Stevens v. Sec'y Dep't of Health and Human Servs.*, 2001 WL 387418 (Fed.Cl.Spec.Mstr. Mar. 30, 2001) ("*Stevens*"), wherein he fashioned and applied what he characterized as "*the* appropriate analytical framework for evaluating off-Table, so called causation in fact claims." *Stevens,* at *6 (emphasis added). According to the Chief Special Master, this "framework" addresses the "difficulties special masters encounter when weighing evidence against the general principles of causation." *Stevens,* at *23.

The *Stevens* "analytical framework" has five elements:

*279 1) "Proof of medical *plausibility,*" which is established by "proffering a *theory* of biologic mechanism by which a *component* of the vaccine can cause the type of injury suffered." *Stevens,* at *23 (emphasis added);

2) "Proof of conformation of medical *plausibility* from the medical community *and* literature." *Id.* at *23-24 (emphasis added);

3) "Proof of an injury recognized by the medical *plausibility* evidence and literature." *Id.* at *25. (emphasis added);

4) "Proof of a medically acceptable temporal relationship between the vaccination and the onset of the alleged injury." *Id.;* and

5) "Proof of the elimination of other causes." *Id.* at *26.

See also April 19, 2001 Chief Special Master Order (advising the other special masters that the *Stevens* analysis will be followed by the Chief Special Master in a number of "subsequent cases," including *Althen*).

THE CHIEF SPECIAL MASTER'S APPLICATION OF THE STEVENS "ANALYTICAL FRAMEWORK" IN THIS CASE

The Chief Special Master in this case found that the "proof of medical plausibility" element of the *Stevens "analytical framework"* was satisfied by petitioner's expert opinion that T cells that come into contact with the tetanus antigen or peptide can "mistakenly respond to a variety of non-specific or non-native antigens such as central nervous system self-antigens ... trigger [ing] CNS disorders[.]" *Althen,* at *9. (TR 28-31). The Chief Special Master also was persuaded that petitioner satisfied this element because the 1994 IOM REPORT stated that: ("[I]t *is biologically plausible* that ... sequence similarities of proteins in the vaccine to host proteins, such as those of myelin ... *might evoke a response to a self-antigen, so-called molecular mimicry.*"). *Althen,* at *11 (quoting 1994 IOM REPORT at 48, 84) (emphasis added).

The Chief Special Master, however, found that petitioner did not satisfy *Stevens'* second element, medical *plausibility* evidence and literature, *i.e.,* "confirmation from the relevant medical community that it is seeing, reporting (in peer-reviewed literature), and discussing a 'suspected or potential' association between *the tetanus toxoid* vaccine and [the alleged injuries.]" *Althen,* at *14. Without such "objective confirmation that the vaccine

administered is potentially associated with the injury alleged, petitioner's causal claims are mere speculation and thus insufficient." *Id.* at *12.

On July 2, 2003, petitioner filed a timely motion for review of the Entitlement Decision. Petitioner seeks review on two bases. First, petitioner asserts that "the use of the *Stevens'* 'Prongs' is an abuse of discretion and not in accordance with the law." *See* Pet. Mem. In Support of Motion For Review at 10. Alternatively, assuming that the *Stevens'* "analytical framework" is lawful, petitioner argues that all five of the *Stevens'* "Prongs" were satisfied in fact. Therefore, petitioner argues that the decision of the Chief Special Master, holding only the first of the "Prongs" was satisfied, was arbitrary and capricious. *Id.* at 17-18.

On August 4, 2003, the government responded, agreeing with petitioner that the "*Stevens* standard" is contrary to law. *See* Response to Pet. Motion for Review at 8-11. Assuming *arguendo* that the " *Stevens* standard" is lawful, however, the government contended that petitioner's suggestion that a more relaxed causation standard should be applied has been "waived, has no merit, and is based on a non-precedential decision." *Id.* at *7-8. Instead, the government argues that the court should affirm the Chief Special Master's decision because the petitioner failed to demonstrate that the tetanus toxoid vaccination caused her injuries. *Id.* at *3-8.

STANDARD OF REVIEW

Congress requires the judges of this court to analyze conclusions of law made by a special master under the Vaccine Act *de novo,* under a "not in accordance with law" standard. *See* 42 U.S.C. § 300aa-12(e)(2)(B). "The 'not in accordance with the law' aspect of the standard of review is ... involved ... [where there is] dispute over statutory construction ***280** or other legal issues." *Hines v. Sec'y Dep't of Health and Human Servs.,* 940 F.2d 1518, 1527 (Fed.Cir.1991); *see also Saunders v. Sec'y Dep't of Health and Human Servs.,* 25 F.3d 1031, 1033 (Fed.Cir.1994) (quoting *Munn v. Sec'y Dep't of Health and Human Servs.,* 970 F.2d 863, 870 n. 10 (Fed.Cir.1992)).

Factual findings of a special master, however, should not be set aside unless they are found to be "arbitrary and capricious" or a special master has abused his or her discretion in determining such findings. *See* 42 U.S.C. § 300aa-12(e)(2)(B). The United States Court of Appeals for the Federal Circuit ("Federal Circuit"), recognizing that "no uniform definition of this standard has emerged," has instructed the court that the decision of a special master may be found to be "arbitrary and capricious" only if he or she:

> relied on factors which Congress has not intended [the special masters] to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence ... or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Hines, 940 F.2d at 1527 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)) (discussing a similar standard of review for agency rulemaking under the Administrative Procedure Act). Discretionary rulings are reviewed under an "abuse of discretion standard." *Munn,* 970 F.2d at 870 n. 10.

THE ELEMENTS AND BURDEN OF PROOF IN VACCINE ACT CASES

The Vaccine Act provides that a petitioner may qualify to receive compensation and other relief under the Vaccine Injury Compensation Program ("Program") if injury can be established either by causation in law or causation in fact. Causation in law is established if one of the vaccines, listed in the Vaccine Injury Table at 42 U.S.C. § 300aa-14(a) ("Table"), was administered to a petitioner and the "first symptom or manifestation of onset or of the significant aggravation of such injuries, disabilities, illnesses, conditions, and deaths" of specific adverse medical conditions associated with the use of each vaccine and listed in the Table occurred within a time period specified in the Table. *See* 42 U.S.C. § 300aa-14(a); 42 C.F.R. § 100.3(a). The Table is to be read and interpreted by reference to "Qualifications and aids to interpretation," that define the key terms used in the Table. *See* 42 U.S.C. § 300aa-14(b); 42 C.F.R. § 100.3(b).

[1] Congress also decided to afford a petitioner the opportunity to receive relief under the Program even if the time period for the first symptom or manifestation of a specified injury is not satisfied. *See* 42 U.S.C. § 300aa-11(c)(1)(C)(ii); § 300aa-13. Under these circumstances, however, a petitioner must establish causation in fact under a traditional tort analysis, *i.e.*, first, by establishing a *prima facie* case offering evidence of sufficient facts to establish each element of the claim and then, by meeting a burden of proof as to each element of the claim under a "preponderance of the evidence" standard. Thus, a non-Table Vaccine Act petitioner must proffer at least some evidence as to each element of the claim, but also sufficient evidence to persuade the special master or court by a preponderance or "greater weight" of evidence that each fact asserted is more probable than not.

In interpreting the Vaccine Act, the Federal Circuit has explained that a petitioner must proffer evidence that meets a "preponderance of evidence" burden of proof in non-Table causation in fact cases: "a proximate temporal association alone does not suffice to show a causal link between the vaccination and the injury. To prove causation in fact, petitioners must proffer a medical theory that explains the causal connection between the vaccination and illness manifested. Causation in fact requires proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury. A reputable medical or scientific explanation must support this logical sequence of cause and effect." *Grant v. Sec'y Dep't of Health & Human Servs.*, 956 F.2d 1144, 1148 (Fed.Cir.1992) (citation omitted); ***281***Bunting v. Sec'y Dep't of Health and Human Servs.*, 931 F.2d 867, 873 (Fed.Cir.1991) ("petitioner's burden is not to show a generalized 'cause and effect relationship' with listed illnesses, but only to show causation in the particular case[.] [Otherwise,] a different and greater burden [would be placed] on petitioners than was enacted by Congress."). Subsequently, the Federal Circuit has clarified that *Grant* requires satisfaction of two separate elements to make out a *prima facie* case in a non-Table case: petitioner must prove, "by a preponderance of the evidence, that the vaccine was not only a but-for cause of the injury but also a substantial factor in bringing about the injury." *Shyface v. Sec'y Dep't of Health and Human Servs.*, 165 F.3d 1344, 1352 (Fed.Cir.1999) (adopting RESTATEMENT (SECOND) OF TORTS 431 (1977) standard for determining the "legal cause" of the harm). Thus, evidence of a similarity to a Table injury, Table time periods, or the elimination of other potential causes of injury all have been held to be insufficient to establish causation in fact as a matter of law in non-Table cases. *See Grant*, 956 F.2d at 1148.

[2] If petitioner is able to establish legal causation or causation in fact, then the burden of proof shifts to the government under 42 U.S.C. § 300aa-13(a)(1)(B) to establish that a factor unrelated to the vaccine was the actual cause of the petitioner's illness or injury. *See Jay v. Sec'y Dep't of Health and Human Servs.*, 998 F.2d 979, 984 (Fed.Cir.1993); *see also Strother v. Sec'y Dep't of Health and Human Servs.*, 21 Cl.Ct. 365, 374 (1990) (Rader, J.).

DISCUSSION

Neither the United States Court of Federal Claims nor the United States Court of Appeals for the Federal Circuit has had an occasion to review the *Stevens* decision. Nevertheless, the Chief Special Master advises that "The only issue the court must resolve [on review of the instant case] is whether petitioner satisfied the standard established in *Stevens*." *Althen*, at *9. The court disagrees. The *Stevens'* causation in fact "analytical framework" does not bind the court. The Chief Special Master's adoption and utilization of that "framework" in deciding the instant case, however, is ripe for the court's *de novo* review.

A. The Chief Special Master's Utilization of the *Stevens* "Analytical Framework" to Decide the Instant Case Was Contrary to Law.

The limited duties of a special master are defined in the Vaccine Act with clarity and specificity:

> **(d) Special masters**
> (2) The special masters *shall recommend rules* to the Claims Court...

> (3)(A) A special master to whom a petition has been assigned *shall issue* a decision ...*[that] shall* --
> (i) *include findings of fact and conclusions of law,* and
> (ii) be issued as expeditiously as practicable....

42 U.S.C. § 300aa-12(d) (emphasis added).

In addition, the Act requires that special masters:

> shall consider, in addition to all other relevant medical and scientific evidence *contained in the record*-
> (A) any diagnosis, conclusion, medical judgment ... which is *contained in the record* regarding the nature, causation, and aggravation of the petitioner's illness, disability, injury, condition, or death, and
> (B) the results of any diagnostic or evaluative test which are *contained in the record* and the summaries and conclusions.

42 U.S.C. § 300aa-13(b)(1) (emphasis added); Rule 3(b), VACCINE RULES OF THE UNITED STATES COURT OF FEDERAL CLAIMS.

[3] The purview of the special masters, therefore, was limited by Congress to making case-by-case determinations based solely on evidence "contained in the record." 42 U.S.C. § 300aa-13(b)(1). In direct contravention of the language of the Vaccine Act, however, the Chief Special Master proclaims that the special masters now "*must move beyond case-by-case decision-making toward instruction* -what types of evidence are persuasive, how much evidence is necessary, what causal relationships are pure speculation, which relationships are proven to ensure ***282** that similarly-situated petitioners are treated alike and thus fairly." *Althen,* at *16 (emphasis added). Not a word in the Vaccine Act, however, authorizes the Chief Special Master to impose any particular "analytical framework" in a causation in fact case; nor is the Chief Special Master charged with determining "the" framework. If a question of law arises regarding the interpretation or implementation of the Vaccine Act, that is a matter for the courts, not the special masters. *See Knudsen v. Sec'y Dep't of Health and Human Servs.,* 35 F.3d 543, 549 (Fed.Cir.1994) ("The *sole* issues for the special master are, based on the record evidence as a whole and the totality of the case, whether it has been shown by a preponderance of the evidence that a vaccine caused the ... injury or that the ... injury is a table injury, and whether it has not been shown by a preponderance of the evidence that a factor unrelated to the vaccine caused the ... injury. *See* 42 U.S.C. § 300aa-13(a)(1), (b)(1).") (emphasis added); *Hodges v. Sec'y Dept. of Health and Human Servs.,* 9 F.3d 958, 961 (Fed.Cir.1993) ("Congress assigned to a group of specialists, the Special Masters ... the unenviable job of sorting through these painful cases and, based upon their accumulated expertise in the field, *judging the merits of the individual claims.*") (emphasis added). That the parties in *Stevens* invited the Chief Special Master to opine on such a framework does not change this analysis.

[4] Of course, a special master properly may propose an "analytical framework" in *dicta. See, e.g., Wagner v. Sec'y of Health and Human Servs.,* 1997 WL 617035, at *9 ("[M]y own thoughts on this legal issue constitute pure dicta, not essential to my task [.]") A special master's views also may be of general public interest and make a valuable contribution to the academic and scholarly commentary about the Vaccine Act and its administration. A special master, however, is an adjudicative fact finder charged with applying *existing* legal precedent to decide a particular case based on the record before him or her; a special master ultimately is not the maker nor the interpreter of the law. [FN21] *See, e.g., La Buy v. Howes Leather Co.,* 352 U.S. 249, 256, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957) ("The use of master is 'to aid judges in the performance of specific judicial duties'... and not to displace the court.") (citation omitted); *In re Bituminous Coal Operators' Ass'n, Inc.,* 949 F.2d 1165, 1166 (D.C.Cir.1991) (Ginsburg, J.) (requiring a district judge "to reserve ... and not delegate to the special master, the *core [judicial] function* of making dispositive rulings, including ... conclusions of law on issues of liability.") (emphasis added). Although the constitutional issues implicit in *La Buy* and explicitly raised in *Bituminous Coal Operators'* are not at issue here because of the court's Article I

status and the fact that petitioner voluntarily initiated proceedings under the Vaccine Act, the concern that special masters confine their role to one of *assisting* the court, rather than usurping its authority and proper role to determine dispositive issues of law, is no less relevant in this case.

> FN21. *See, e.g.,* Brazil, Wayne D., *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication,* 53 U. CHI. L. REV. 394, 396 (Spring 1986) (observing "even [special] masters with clearly limited mandates seem pressured or tempted to gravitate into larger spheres. With broader duties, masters might contribute more, but they also may invade the proper preserve of the judiciary[.]")

B. The Application of the *Stevens* "Analytical Framework" In This Case Contravenes the Vaccine Act and Supreme Court and Federal Circuit Precedent.

The court's analysis of the *Stevens* "analytical framework" begins with an examination of whether the language of the Vaccine Act is clear. If so, "that is the end of the matter." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). In determining the clarity of the statute, the court "relies on a commonsense consideration of the words[.]" *See Shalala v. Whitecotton,* 514 U.S. 268, 277, 115 S.Ct. 1477, 131 L.Ed.2d 374(1995) (O'Connor, J., concurring opinion). Only if the statute is "silent or ambiguous" is any further inquiry required. *See Chevron,* 467 U.S. at 843, 104 S.Ct. 2778. In *Stevens,* however, the Chief Special Master erroneously observed: "Unfortunately, Congress ***283** imparted little guidance as to what proof would be necessary to show causation." *Stevens,* at *7. To the contrary, the language of 42 U.S.C. § 300aa-13(a)(1) could not be more clear: Congress specified that the petitioner must prove causation in fact by a "preponderance of the evidence" as to each factor set forth in 42 U.S.C. § 300aa-11(c)(1). In the instant case, the Chief Special Master, perhaps recognizing the flawed premise of *Stevens,* now has re-characterized it as a proposed "analytical framework" consisting of a "five-prong analysis as a *means* of meeting the preponderance of evidence standard[.]" *Althen,* at *12 n. 29 (emphasis added). The *Stevens* "analytical framework," however, is much more than a "means." *Id.* In fact and in operation, three of the five *Stevens* elements either significantly change the statutory burden of proof or directly contravene the language of the Vaccine Act and therefore are erroneous as a matter of law. *See Althen,* at *15 ("*Stevens* attempts to guide the experts by defining 'preponderance [.]' ") As discussed *infra,* the Supreme Court already has defined "preponderance," and the Federal Circuit has provided ample guidance as to how to weigh evidence in Vaccine Act cases.

1. The "Medical Plausibility" Element

The Supreme Court has defined a preponderance of the evidence to require "the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he or she] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.' " *Concrete Pipe and Prod. of California, Inc. v. Constr. Laborers Pension Trust for Southern California,* 508 U.S. 602, 622, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993) (quoting *In re Winship,* 397 U.S. 358, 371-372, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring)). "[J]udges often express [preponderance of evidence] mathematically by saying the plaintiff must establish the facts necessary to her [or his] case by a probability greater than 0.5 or greater than 50%. That is to say the facts claimed by the plaintiff must be more likely than not to exist." DOBBS, DAN B., THE LAW OF T ORTS 360 (2000) ("DOBBS").

In the context of Vaccine Act cases, the Federal Circuit has summarized this evidentiary burden as follows: "The claimant must prove by a preponderance of the evidence that the vaccine, and not some other agent, was the actual cause of the injury." *Munn,* 970 F.2d. at 865. A preponderance of evidence, however, does not require proof of scientific certainty. *Bunting,* 931 F.2d at 873 ("The standard of proof required by the Act is simple

preponderance of evidence; not scientific certainty."). *Steven's* "medical plausibility" element, however, changes and lowers the petitioner's burden of proof from the preponderance of the evidence standard required by 42 U.S.C. § 300aa-11(c)(1). To be "plausible" a fact need only be "*superficially* fair, reasonable, or valuable." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 890 (10th ed.2001) (emphasis added). Therefore, by definition, a medical "plausibility" does not achieve the level of reliability expected in a medical record or medical opinion. *See* 42 U.S.C. § 300aa-13(a)(1) (specifically prohibiting a special master or the court from making "a finding based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion"); RULE 8(C), VACCINE RULES OF THE UNITED STATES COURT OF FEDERAL CLAIMS (Appendix J to the RCFC) ("The special master will consider all *relevant, reliable* evidence, governed by principles of fundamental fairness to both parties.") (emphasis added); *Daubert v. Merrell Dow Pharm., Inc.* 509 U.S. 579, 590, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) ("[T]he requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability.") Indeed, even the Chief Special Master acknowledged the inherent vagueness attendant to using a "plausibility" standard: "Plausibility is different things to different people. [The 1994 IOM REPORT had] to explain how they were using plausibility because they used it several different ways throughout the report. It's ... difficult to get a grasp on." (TR 142-43). And Dr. Martin, one of the government's experts, observed: "Plausible ... is a very vague term. It's a hypothetical possibility." (TR 111).

This is more than an exercise in semantics. The Vaccine Act, as most legislation, was the *284 product of considerable compromise. As part of that compromise, the vaccine manufacturers acceded to those interests that wanted to allow petitioners who did not have Table injuries the opportunity to receive compensation under the Vaccine Act. The *quid pro quo* was that the manufacturers wanted to be able to rely on the fact that a non-Table petition would be required to meet a traditional tort causation in fact standard, which was and is settled as a matter of law. *See, e.g.,* DOBBS at 360 ("A lesser standard of persuasion than preponderance of evidence [in tort cases] is almost unheard of."). *Stevens'* "medical plausibility" element, however, unlawfully changes the standard of proof that Congress determined was appropriate and, therefore, disturbs settled expectations that reflect "not only the weight of the public and private interest affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Santosky v. Kramer,* 455 U.S. 745, 754-55, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (quoting *Vitek v. Jones,* 445 U.S. 480, 491, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980)) (holding that the "minimum requirements [of procedural due process] being a matter of federal law... are not diminished by the fact that the State may have specified its own procedures[.]"). Therefore, the Chief Special Master's findings regarding "medical plausibility" are contrary to law and should be reversed and vacated.

2. The "Confirmation of Medical Plausibility From the Medical Community and Literature" Element

[5] *Stevens'* second element requires "confirmation of *medical plausibility* from the medical community *and* literature." *Stevens,* at *23 (emphasis added). The Chief Special Master explains that this "Prong" requires petitioner to "establish that peer-reviewed literature is reporting that the vaccine is *related in some sense* to the injury alleged." *Stevens,* at * 24 (emphasis in original deleted in part). As a threshold matter, the Vaccine Act does not preclude causation in fact from being established by a petitioner in the absence of peer reviewed literature. Accordingly, this element changes and increases a petitioner's burden of proof. Moreover, this "Prong" is not faithful to *Daubert,* which does not require that an expert's theory be supported by scientific literature; instead, scientific literature is only one of several factors to be considered by the court in determining the reliability of an expert's opinion. *See Daubert,* 509 U.S. at 594, 113 S.Ct. 2786 ("The fact of publication (or lack thereof) in a

peer-reviewed journal thus will be relevant, *though not dispositive,* consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.") (emphasis added).

[6][7] Accordingly, the Federal Circuit in Vaccine Act cases requires evidence of a strong temporal relationship *and either* reliable medical opinion *or* scientific theory explaining a logical sequence of cause and effect to establish causation in fact. *See Grant,* 956 F.2d at 1148 ("Causation in fact requires proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury. A reputable medical *or* scientific explanation must support this logical sequence of cause and effect.") (emphasis added); H.R.Rep. No. 99-908, pt. 1, at 15 (1986) ("evidence in the form of scientific studies *or* expert medical testimony is necessary to demonstrate causation[.]") (emphasis added). In addition, the mere suggestion in peer-reviewed literature that a vaccine is only " *related in some sense*" to the injury falls far short of the reliability required by a "preponderance" standard in an individual case. *See Stevens,* at *24 (emphasis added). At the same time, the lack of such literature, as a matter of law, does not preclude a petitioner from meeting a preponderance standard, based on the totality of evidence in a particular case. Therefore, the Chief Special Master's findings regarding "Prong" two of the *Stevens* "analytical framework" are contrary to law and should be reversed and vacated.

The Chief Special Master found that petitioner in the instant case did not satisfy the burden of proof regarding the second *Stevens* "Prong" and ended his analysis without any discussion about the three additional ***285** "Prongs" of the "framework." [FN22] Therefore, no further review is required here, other than to note that "Prong" three suffers from the same deficiencies as elements one and two of the "analytical framework," because it requires proof of an injury based on the plausibility standard set out in "Prongs" one and two.

> FN22. Although the Chief Special Master's Entitlement Decision states that petitioner was denied relief based on the "totality of the evidence," *Althen,* at *1, this representation is belied by the fact that the Chief Special Master's Entitlement Decision ended its analysis with petitioner's failure to satisfy "Prong Two." *See Althen,* at *14 ("[T]he court simply cannot make the unsubstantiated evidentiary leap, that according to the medical community or peer-reviewed literature, there is a suspected or potential association between the *tetanus toxoid vaccine* and [the alleged injuries].").

C. The Petitioner Carried the Statutory Burden of Proving Causation in Fact.

The Federal Circuit held in *Jay* that petitioner was entitled to "judgment as a matter of law" if the petitioner carried its statutory burden of proving causation under 42 U.S.C. § 300aa-11(c)(1)(C)(ii) and 42 U.S.C. § 300aa-13(a)(1)(A). *See Jay,* 998 F.2d at 984. The undisputed facts in *Jay* on which the Federal Circuit relied in reversing the decision of the United States Court of Federal Claims and awarding petitioner relief in that case include that: "an otherwise healthy child received a DPT shot; the DPT shot caused fever, directly or indirectly limpness, and intermittent inconsolable extended screaming; the child missed his normal nightly feeding; the child died within 18 hours of the shot; the autopsy was inconclusive; and a medical expert testified, uncontradicted, that the DPT shot caused the death, the medical theory being that an encephalopathy occurred." *Jay,* 998 F.2d at 983. The record in this case shares many similarities.

In the instant case, petitioner's medical records evidence that she was generally in good health before she received a tetanus toxoid vaccine on March 28, 1997. (P.Ex. 20 at 1). Both of the government's experts agreed that the initial symptom of petitioner's illness, *i.e.,* optic neuritis, occurred within a medically appropriate time period. [FN23] Optic neuritis is widely recognized as a symptom of "diffuse demyelinating diseases such as ADEM and multiple sclerosis." 1994 IOM REPORT at 83; *see also id.* Glossary Exhibit C at

340 ("Optic Neuritis represents a central demyelinating disease of the optic nerve anterior to the optic chiasm. It can occur as a solitary unexplained monophasic disease or it may be an early sign of multiple sclerosis."). [FN24] In addition, the petitioner established a logical sequence of cause and effect, in that within 18 days after receiving a tetanus toxoid vaccine and until the trial, petitioner evidenced some form of continuing and worsening demyelinating disease, which is "characterized pathologically by diffuse foci of perivenular inflammation[.]" 1994 IOM REPORT at 83. This record is replete with incident after incident of worsening inflammatory disease during this period. *See infra* at 3-6.

FN23. Dr. Martin testified: "Something in the range between seven (days) and four weeks would be an appropriate temporal relationship for an autoimmune response." (TR 119). Dr. Safran concurred that the temporal relationship here is appropriate. (TR 159).

FN24. Optic neuritis is not a "vasculitis" illness, as Dr. Safran, one the government's experts testified. *See Althen,* at *6.

[8] The law in the Federal Circuit is well established that once a petitioner establishes a strong temporal relationship between receiving the vaccine and first symptoms of illness, a logical sequence of cause and effect, supported by a reliable medical opinion *or* scientific theory, also must be proffered to explain the causal link. *See Grant,* 956 F.2d at 1148. Petitioner's expert presented a reliable medical opinion linking petitioner's medical records and progressing illness to the established medical theory of "degeneracy" and "epitope spreading" to establish causation. Both "degeneracy" and "epitope spreading" were known to and not disputed by Dr. Martin, one of the government's expert witnesses. [FN25] Moreover, Dr. Martin's ***286** theory of "degeneracy" and "epitope spreading" appears to be supported by a pathology report, dated September 1, 2000, indicating that:

FN25. Dr. Martin testified, "I do not agree with the conclusions [of Dr. Smith that it is likely or probable that tetanus toxoid triggered petitioner's disability], but it is correct that *degeneracy* ... moves T lymphocytes ... [which] can respond to one antigen ... and are able to recognize large numbers, probably in the range of 10 to the six[th] of one million different antigens by one T cell receptor. Among these many antigens that stem from, a pattern as this *cannot be excluded as a theoretically possibility* ...." (TR 83) "*I agree with the theoretical possibility* [that tetanus toxoid caused petitioner's demeylinating illness], but I ... currently do not have the evidence supporting it.". (TR 122) (emphasis added).

> The deep cortex shows increasing abnormalities in relation to marked tissue destruction with secondary demyelination .... The tissue destruction appears to be due to inflammation involving the small and medium size blood vessels, many of which are surrounded and infiltrated by lympho-plasmaytic infiltrates extending into the adjacent tissue.... IP studies, however, show a marked predominance of T cells and insufficient atypia of B cells to sustain a diagnosis of lymphoma.... Absent any demonstrable cause of the vascular inflammation and absent systemic vasculitis, this case falls into the category of primary angiitis of the central nervous system.... Clinically and pathologically, this is an unusual presentation and evolution of cerebral vasculitis, and no agreement was reached on the nature of the disease [but] [m]orphologically, the features are those of a primary vasculitis of the brain.

(P.Ex. 26 at 126).

[9] Finally there is no evidence in this record that petitioner's injuries were caused by some factor other than the tetanus toxoid vaccine. There is also no evidence of a virus or other explanation for petitioner's onset and deteriorating condition other than the tetanus toxoid vaccine, which is made from a bacterial agent. (TR 57). Notably, Dr. Vollmer

early on identified an infection as a potential cause of petitioner's illness. (P.Ex. 4 at 23) ("small abnormalities scattered throughout the white matter, suggestive of vasculitis or sarcoid or parainfectious disease"). Neither Dr. Vollmer nor the government's experts, knew or seemed to appreciate that petitioner's hypothyroid condition likely was autoimmune disorder that would have made her T cells more sensitive to the effects of the vaccine and the potential for both degeneracy and epitode spreading. Nor did the Chief Special Master. As the Federal Circuit observed in *Jay,* "The special master losing sight of the forest for the trees, ignored entirely the fact of [a child's] death. [Petitioner's expert physician] did not assume that an encephalopathy occurred. Rather, he testified that an encephalopathy occurred based on [the child's] *entire history*[.]" *Jay,* 998 F.2d at 983 (emphasis added). Based on petitioner's entire medical history and the record in this case, the court believes that the petitioner satisfied the statutory requirements for recovery.

Petitioner proffered reliable medical records, a reputable medical opinion, a logical sequence of cause and effect, and a medical theory causally connecting the vaccination to the onset and development of her demyelinating illness. In other words, petitioner established that but for the vaccine, it is more likely than not (greater than 50%) that she would not have incurred optic neuritis and subsequent symptoms of demyelinating illness. Moreover, petitioner has established that it is more likely than not (greater than 50%) that the vaccine was a substantial factor in causing her demyelinating illness. Therefore, the Chief Special Master erred as a matter of law because the petitioner met the statutory burden to establish causation in fact under 42 U.S.C. § 300aa-11(c)(1)(C)(ii) and 42 U.S.C. § 300aa-13(a)(1)(A), albeit that causation was not established to a medical certainty. *See Knudsen,* 35 F.3d at 548-49 ("The determination of causation in fact under the Vaccine Act involves ascertaining whether a sequence of cause and effect is 'logical' and legally probable, not medically or scientifically certain."); *Bunting,* 931 F.2d at 873 ("The standard of proof required by the Act is simple preponderance of the evidence, not *scientific certainty.*") (emphasis added). Petitioner, therefore, is entitled to relief under the Vaccine Act.

***287 CONCLUSION**

For the foregoing reasons, Petitioner's Motion for Review is **GRANTED**, the June 3, 2003 Entitlement Decision of the Chief Special Master is hereby **REVERSED** and **VACATED**, and the case is remanded to the Chief Special Master for an award of compensation to the petitioner, reasonable attorneys fees, and other costs. The Clerk of the Court shall enter judgment accordingly.

IT IS SO ORDERED.

58 Fed.Cl. 270, 62 Fed. R. Evid. Serv. 1386, Prod.Liab.Rep. (CCH) P 16,763

Motions, Pleadings and Filings (Back to top)

- 1:00VV00170 (Docket)
  (Mar. 31, 2000)

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In the United States Court of Federal Claims

No. 00-238C
Filed December 10, 2003

NORTH STAR STEEL CO.,	*
Plaintiff,	*
v.	*
THE UNITED STATES,	*
Defendant.	*

ORDER REGARDING POST-OPINION BRIEFS AND SETTING PRE-TRIAL STATUS CONFERENCE

A. Effect Of May 11, 1996 Federal Energy Regulating Commission Order On Jurisdiction

The court's November 26, 2003 Memorandum Opinion recognized that Federal Energy Regulatory Commission ("FERC") Order No. 888 required the "functional unbundling" of wholesale generation, transmission, and ancillary services, including regulating service. *See* 61 Fed. Reg. 21540 (May 10, 1996). On May 11, 1999, FERC approved, in final, the Western Area Power Administration's ("WAPA") unbundled rate for regulating service. The court has examined this filing and is of the opinion that the service offered would not have met North Star's technical requirements and, for this reason, that action by FERC did not affect the court's jurisdiction with respect to the dispute in this case. Nevertheless, the court would like the parties specifically to address this and the following issues in post-opinion briefs not to exceed 20 pages, which should be filed simultaneously on February 17, 2004.

B. Court Appointed Expert

Assuming the court continues to be satisfied as to its jurisdiction, the court has given some thought to how this case should proceed. The court's November 26, 2003 Memorandum Opinion held that the Consolidated Contract was sufficiently definite to meet the requirements of the United States Court of Appeals for the Federal Circuit with respect to contract formation. The court, however, did not determine whether or when that contract may have been breached. In order to

make that determination, the court would need to know whether and when either party ended good faith negotiations regarding an "appropriate cost-based methodology" for the "In-Kind Energy" payment to be utilized as of July 1, 1998, *i.e.*, one year after the Kingman, Arizona mill became operational. In order to make that determination, however, the court would need to know what "appropriate cost-based methodology" or "methodologies" would be "reasonable" under the circumstances. In that regard, the opinion of independent industry experts proffered by the parties, pursuant to Fed. R. Ev. 702, would appear to be the most efficient way of adducing such evidence.

In light of the highly technical nature of such evidence, however, the court is of the opinion that the interest of justice would be well served by the appointment of a technical expert for the court, pursuant to Fed. R. Ev. 706. *See, e.g., Computer Assocs.* v. *Altai, Inc.*, 982 F.2d 693, 712-14 (2nd Cir. 1992) (J. Walker, Chief Judge) (affirming use of court expert appointed pursuant to Fed. R. Ev. 706 who "submitted a comprehensive written report that analyzed various aspects of the computer programs at issue and evaluated the parties' expert evidence . . . [because that] opinion was instrumental in dismantling the intricacies of computer science so that the court could formulate and apply an appropriate rule of law. While [that] report and testimony undoubtedly shed valuable light on the subject matter of the litigation, [the trial judge] remained, in the final analysis, the trier of fact."); *see also Techsearch, L.L.C.* v. *Intel Corp.*, 286 F.3d 1360, 1378-81 (Fed. Cir. 2002) (affirming district court's appointment of technical advisor not subject to the requirements of Fed. R. Ev. 706, but suggesting appropriate guidelines for safeguarding the judicial process from undue influence and to ensure that the advisor's duties were clearly defined and limited); Associate Justice Stephen Breyer, "Economic Reasoning & Judicial Review," The American Enterprise Institute (Dec. 5, 2003) http://www.c-span.org/ Video Archives.

Therefore, the parties each should submit the names of three suggested court experts in their post-opinion briefs, together with an appendix providing the curriculum vitae of such proposed experts. The parties may provide a proposed court expert with a copy of Fed. R. Ev. 706, the court's November 26, 2003 Memorandum Opinion, and this Order, but should not engage in any substantive discussion about the case or issues.

C. New Issue Regarding Plaintiff's Standing

On December 9, 2003, the court was advised that plaintiff no longer owns the Kingman, Arizona mill. Therefore, plaintiff should address whether it continues to have standing to pursue this action and seek monetary relief in this court. In addition, on or before February 17, 2004 plaintiff should proffer the asset and purchase agreement regarding the sale of the Kingman, Arizona mill or other appropriate documentation evidencing that the breach of contract claim at issue in this case has been specifically reserved by plaintiff.

D. Amicus Of The Federal Trade Commission

WAPA has monopoly power over its transmission lines and therefore must conduct its business-related activities in a manner that does not impose excessive rents on customers. As a matter of law, the "reasonableness" of an "appropriate cost-based methodology" or "methodologies"

for "In-Kind Energy" payment necessarily entails that such a methodology complies with antitrust laws. This court does not have jurisdiction to ascertain whether an antitrust violation may have occurred or to provide a remedy for any such a violation, nevertheless, it would ill serve the parties and the public interest if the court were to ascertain there was a breach of the Consolidated Contract and make a determination as to the "reasonableness" of an "appropriate cost-based methodology" or "methodologies" that offended antitrust principles. Therefore, the court would like the views of the parties as to the court's potential interest in inviting the Federal Trade Commission to review the parties' final expert reports and the final report of the court's expert and provide an amicus.

E. Pre-Trial Status Conference

The court also hereby sets a telephone pre-trial status and scheduling conference for Friday, February 19, 2004 at 10:30 a.m., EST, to discuss: setting a date for the parties' final expert reports; defining the scope of the court's expert's duties and establishing procedures suggested in *Techsearch*; other pre-trial matters; and to set a date for trial.

IT IS SO ORDERED.

Susan G. Braden
Judge

United States Court of Federal Claims
717 MADISON PLACE, N.W.
WASHINGTON, D.C. 20005

CHAMBERS OF
JUDGE SUSAN G. BRADEN
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September 2, 2004

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RE: *North Star Steel Company* v. *United States*, Case No. 00-238

Gentlemen:

On December 10, 2003, the court issued an order indicating that because of the *sui generis* nature of what is a reasonable "appropriate cost-based methodology" or "methodologies," the advice of a technical expert in utility rate-making would advance an appropriate resolution in this case.

Thereafter the court and counsel for parties worked together to define the scope of the court-appointed expert's assignment, *i.e.*, to provide the court and parties with a written report that:

1. Identifies all of the cost-based elements that the Federal Energy Regulatory Commission would allow in calculating WAPA's revenue requirement for the regulation service for which North Star was assessed the "In-Kind Energy Payment."

2. Provides a statement and references to support why each of the cost-based elements listed in response to Item 1 is reasonable.

3. Calculates, using practices employed by the Federal Energy Regulatory Commission, within a zone of reasonableness, for each of the following periods, the amount that North Star should have been assessed for the regulation service for which North Star was assessed the "In-Kind Energy Payment."

    a. July 1, 1998 through July 31, 1999;
    b. August 1, 1999 through September 30, 2000; and
    c. October 1, 2000 through March 17, 2003 (or the last date services were provided).

4. Calculates, for each period identified in Item 3, the difference between the amount(s) that North Star should have paid and the amount North Star did pay for regulation services.

Next, the court contacted the American Association for the Advancement of Science's Directorate for Science and Policy Programs–Court Appointed Scientific Expert ("CASE") to identify an appropriate panel of experts from which the court and parties could select an expert. CASE recommended three potential experts with appropriate credentials. Of the three, plaintiff's counsel objected to two of the proposed experts. The Government had no objections to any of the candidates.

Since Dr. Barkovich was acceptable to both parties, the court would like to proceed with her retention. The court anticipates that Dr. Barkovich's report would be provided only to counsel for the parties by October 18, 2004 and that she will be available for deposition(s) during the period October 18–November 4, 2004. Following deposition(s), she will be permitted to amend and/or supplement her report, which will be filed as direct testimony with the court and counsel for the parties on November 8, 2004. The court anticipates that Dr. Barkovich would be available for cross-examination at a date to be determined at trial during the week of November 15-19, 2004.

Pursuant to Fed. R. Evid. 706(b), "the compensation [of a court-appointed expert] shall be paid by the parties in such proportion and at such time as the court directs, and charged in like manner as other costs." *See generally* Joe S. Cecil and Thomas E. Willging, "Court-Appointed Experts," *Reference Manual on Scientific Evidence*, 558-60 (1st ed. 1994); *see also id* at 559 ("The court may allocate the fees among the parties as it finds appropriate both as an interim measure and in the final award."). The court has been advised by CASE that Dr. Barkovich's rate is $300 per hour and that she has estimated that the preparation of her initial report will entail approximately 100

hours. In addition, the court anticipates deposition preparation and time in deposition would be approximately 25 hours and preparation and time at the trial to be an additional 25 hours, excluding travel time. Therefore, the court estimates Dr. Barkovich's expert fees should approximate $45,000 plus reasonable travel, copying, telephone, and related expenses.

Since the parties' expert reports have been completed, the court would like formally to retain Dr. Barkovich's services on or before September 13, 2004 by the issuance of an order. At that time, the parties would be expected each to forward Dr. Barkovich a $10,000 retainer check. Dr. Barkovich will be required to maintain a detailed time log and expense record to be provided to the court and counsel for the parties for review on or before December 1, 2004, after which time the court will issue a second order regarding payment of the balance due.

Therefore, on or before September 13, 2004, the court would appreciate formal notice of your agreement to share equally Dr. Barkovich's fees and expenses.

If you require any additional information, please feel free to contact Ms. Elizabeth Clements who will be the new law clerk assigned to this case as of September 7, 2004.

Sincerely yours,

Susan G. Braden
Judge

Enclosures
cc: Ms. Deborah Runkle, CASE Project Manager

In the United States Court of Federal Claims

No. 00-238C
Filed September 29, 2004

****

NORTH STAR STEEL CO.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

****

ORDER

On December 10, 2003, the court issued an order indicating that the advice of a technical expert in utility rate-making would advance an appropriate resolution in this case. Thereafter, the American Association for the Advancement of Science's Directorate for Science and Policy Programs–Court Appointed Scientific Experts ("CASE") was contacted by the court and later provided the court with a list of three suggested experts. Of the three experts, Dr. Barbara Barkovich was acceptable to both parties.

With the attached consent of the parties, the court hereby orders the parties' retention of Dr. Barbara Barkovich for the limited purpose of serving as a factual and technical expert to the court, pursuant to Fed. R. Evid. 706. Dr. Barkovich will prepare a written report that:

1. Identifies all of the cost-based elements that the Federal Energy Regulatory Commission would allow in calculating WAPA's revenue requirement for the regulation service for which North Star was assessed the "In-Kind Energy Payment."

2. Provides a statement and references to support why each of the cost-based elements listed in response to Item 1 is reasonable.

3. Calculates, using practices employed by the Federal Energy Regulatory Commission, within a zone of reasonableness, for each of the following periods, the amount that North Star should have been assessed for the regulation service for which

North Star was assessed the "In-Kind Energy Payment."

a. July 1, 1998 through July 31, 1999;
b. August 1, 1999 through September 30, 2000; and
c. October 1, 2000 through March 17, 2003 (or the last date services were provided).

4. Calculates, for each period identified in Item 3, the difference between the amount(s) that North Star should have paid and the amount North Star did pay for regulation services.

In connection with this assignment, counsel for plaintiff promptly will provide Dr. Barkovich with a copy of the Second Amended Complaint; Answer to Second Amended Complaint; the Court's November 26, 2003 decision; a copy of its expert report, together with a list of other suggested discovery (documents and deposition testimony) that Dr. Barkovich may elect to review. Simultaneously, counsel for the Government will provide Dr. Barkovich with a copy of its expert report, together with a list of suggested discovery (documents and deposition testimony) that Dr. Barkovich may elect to review. Any correspondence to Dr. Barkovich by counsel for the parties will be copied to all parties and the court. Likewise, any correspondence from Dr. Barkovich to counsel for the parties will be copied to all parties and the court. All such communications should be in writing.

Dr. Barkovich's report will be provided to the parties by October 18, 2004. Dr. Barkovich will be available for deposition during the period October 18, 2004 through November 4, 2004. Following deposition(s), Dr. Barkovich will be permitted to amend and/or supplement her report, which will be filed as direct testimony with the court and counsel for the parties on November 8, 2004. The court anticipates that Dr. Barkovich would be available for cross-examination at a date to be determined at trial during the week of November 15-19, 2004.

Both parties have agreed to share equally in Dr. Barkovich's fees and expenses. The parties are ordered to immediately issue a retainer check in the amount of $10,000 to Dr. Barkovich. Dr. Barkovich will be required to maintain a detailed time log and expense record to be provided to the court and counsel for the parties for review on or before December 1, 2004. The court will issue a second order regarding payment of the balance due after receipt of Dr. Barkovich's time log and expense record.

SUSAN G. BRADEN
Judge

Economic Reasoning and Judicial Review

Stephen Breyer
Associate Justice, Supreme Court of the United States

AEI-Brookings Joint Center 2003 Distinguished Lecture
Presented at the American Enterprise Institute
December 4, 2003

AEI-Brookings Joint Center for Regulatory Studies
WASHINGTON, D.C.

Economic Reasoning and Judicial Review

Stephen Breyer

Thank you for the AEI-Brookings Award and the invitation to give this lecture. I am proud to receive the award for personal, as well as professional, reasons. AEI and Brookings first gave this award to Fred Kahn, my intellectual/regulatory hero, and last year to my judicial colleague, Richard Posner. Brookings launched my scholarly career by publishing my first book, *Energy Regulation by the Federal Power Commission*, written in 1972 with Paul MacAvoy—not a best seller. (It did recommend rationalizing the nation's electricity transmission grid!) And I learned the nuts and bolts of regulation in part by attending AEI meetings and Brookings seminars in the 1970s.

There I heard economists frequently complain that classic transport regulation meant not low prices but high prices, not consumer benefit but consumer harm. And I saw those economists—Alfred Kahn, Jim Miller, George Eads, Richard Caves, William Capron, Charles Schultz, Michael Levine, and others—begin the process of regulatory reform. They provided the intellectual support necessary to bring about airline and trucking deregulation. They helped to free the policy debate from ideological assumptions that favored widespread use of "command and control" regulatory systems, focusing that debate instead upon questions of where, whether, and how regulation might best serve the public. Their work, grounded in economics and oriented toward practical policy improvement, led to change for the better. In part because Brookings and AEI have consistently encouraged work of this sort over the years, to speak of public policy informed by economics is now commonplace.

My lecture this evening will focus upon law and economics. Such questions may not stir the soul. Edmund Burke long ago pointed out that "the age of chivalry is dead; that of sophists and calculators" (perhaps he meant lawyers ~~and economists~~ experts) "is upon us; and the glory of Europe is extinguished forever." But in this less glorious age, it is nonetheless important to the welfare of the public that law reflect a proper blend of economic and administrative considerations.

I shall not discuss the now-fashionable, highly theoretical study of whether or how economics has had virtually global influence upon the law. Rather, I shall consider the older, unfashionable practical problem of bringing economic reasoning to bear in legal fields that undoubtedly call for it, for example, antitrust law, intellectual property law, and economic regulation. In these areas of law, I side with those who favor greater judicial use of economic reasoning. Economics will not necessarily determine the outcome of such cases, but if courts and agencies get the economics right, at the least they may more intelligently consider the role of non-economic ingredients of sound public policy.

I recognize that I have not always been successful in persuading my judicial colleagues to this point of view. And that sad circumstance brings me to the question I shall address: Are there general reasons, related to law and to legal institutions, that have tended to inhibit the use of economics as an influence upon the law—at least in the Supreme Court? I think there are, and I shall discuss cases that illustrate some of them—not in order to vindicate my own point of view in those cases, but because a discussion of those individual instances may help us better understand the role of economic reasoning in shaping the law. I shall first list the relevant factors, and I shall then discuss particular cases that illustrate three of them.

I

There are seven general reasons why it may be difficult to persuade other Justices in economically oriented cases. Four have to do with the unique mechanics of the Supreme Court—the way in which we carry out our work. Because they only tangentially concern economic reasoning, my discussion of these four reasons will be brief. They create an institutional backdrop against which I shall consider three other more policy-oriented, less idiosyncratic factors.

First, unlike many European high courts, we do not divide decision-making authority among ourselves. We do not ask one Justice to specialize in respect to a particular case or to prepare a report on a case for use by the others. We do not try to develop different areas of expertise over time. We are generalists. We recognize that some of our members may have developed greater knowledge of a particular field, but we also recognize that such knowledge can bring with it a perspective that, as generalists, we might find skewed. Thus, any deference we may show to our other colleagues' expert knowledge is limited. We each participate fully in each judicial decision. We believe we are appointed to exercise our own judgment. And each of us takes full responsibility for his or her decision in each case. All this means that one Justice's expertise in a particular field, while not totally irrelevant, will rarely prove determinative.

Second, time is limited. At the Supreme Court, we consider about 7,500 petitions for review each year. We grant about eighty, each of which raises a legal question that different lower courts have answered differently. The difficulty of the case, the size of the petition docket, and the need to decide create pressure to move on. And that pressure militates against Justices, once having reached a decision, changing their minds. We are not obstinate, but we recognize that, were we to change our minds too often, the work of the Supreme Court would not get done.

Until a dissenting view in a highly technical case—involving, say, complex economic analysis—is reduced to a draft in writing, however, its persuasive power may be limited. It takes time to produce that writing. By the time the dissent circulates, a majority may have reached a contrary conclusion. And, because of the

time pressures I mentioned, that consensus can prove resistant to change.

Third, we try to limit our separate writings—dissents or concurrences—to matters we consider important in principle. We know that a single opinion provides clearer instruction to bench and bar and, normally, helps avoid confusing the law. We know that no opinion is perfect and that we must search for agreement, even where we do not fully agree. Consequently, we may join an opinion containing secondary statements with which we do not fully agree. But just when is a matter important enough to provoke written disagreement? I suspect that a Justice who is expert in a technical area is more likely than a non-expert to find a secondary statement important enough to provoke a written disagreement. And that fact may account for some of my written disagreement in technical, economically-oriented cases.

Fourth, cases in which law involves economics are often ones in which the law instructs courts to defer to other governmental decision-makers. They may, for example, arise where agencies have created economically-based public policy. And courts must decide not whether that policy is wise, but whether it is so wrong as to be "arbitrary," "capricious," or an "abuse of discretion." It is particularly difficult to show that an agency decision, or a congressional decision, is *that* wrong. And courts are consequently tempted not to engage in economic reasoning themselves or examine the agency's economic reasoning that closely, but simply to approve an agency's efforts to take account of economics as reasonable ones.

These reasons, as I said, create an institutional backdrop for three others that I wish to discuss in greater detail. These three are speculative, but they help explain more directly why economic reasoning has not played a greater role in the Court's decision-making. The first has to do with the law's need for administrable rules and for related certainty. The second concerns the use of experts in appellate courts. The third involves the law's distrust of novelty—a fact that often requires new approaches slowly to win acceptance in other institutions before a court will introduce them into the law. Three cases, in which I filed separate opinions, will help explain why I find, and why I believe you may find, these last-mentioned reasons worth thinking about.

II

The first case, *Whitman v. American Trucking Associations,*[1] involved the Clean Air Act. The relevant statutory language instructed the Environmental Protection Agency (EPA) to set ambient air standards "the attainment and maintenance of which . . . are requisite to protect the public health" with "an adequate margin of safety."[2] The Court held that this language does not permit the EPA to consider economic costs. First, the language says nothing about costs. Second, in other, similar parts of the statute the language does mention economic costs. Third, absence of the language here, along with its presence there, means that here Congress intended to leave economic costs out. Fourth, the Court reached a similar conclusion in other similar cases, where it said that Congress did not want the EPA to consider economic costs unless there is a "clear . . . textual commitment" to such consideration. Fifth, there is no such "clear commitment" here.

I wrote separately to set forth different reasons for reaching a similar conclusion.[3] From a purely linguistic perspective, I thought the EPA might find that a standard that imposes huge costs but secures little, if any, added safety is not a standard that is "requisite to the public health" with "an adequate margin of safety." But I nonetheless thought that the statute's legislative history made clear that Congress intended to force industry to create new, cheaper, more effective pollution control technologies. Congress also thought that any agency effort to weigh costs along with benefits would ordinarily prove too time-consuming. Thus, I agreed with the majority that the statute ordinarily forbids taking account of economic costs. Nothing in this particular case justified departing from that presumption.

The point of my writing, however, was to say that the statute did not necessarily forbid all consideration of costs in *less usual*

cases. Its language, read in light of the history, is sufficiently flexible to permit the EPA to take account of costs, for example, where necessary to avoid counterproductive results. A world filled with standards "requisite to the public health" is not a world without risk. The safest possible football pads and helmets do not prevent every injury; and a degree of risk that seems unreasonably dangerous in the context of safe drinking water may nonetheless fall well within any football-injury "margin of safety." Hence, the EPA must have authority to decide, within limits, what counts as "adequately safe," or what counts as "requisite to the public health." It must have authority to decide related matters, such as whether an antipollution standard poses greater health risks than it eliminates: For example, in setting ozone standards, the EPA can account for countervailing health benefits such as a reduction in the number of skin cancers. And, if so, the EPA must have similar authority to determine whether, because of unusually high costs and unusually small benefits, a proposed standard will prove counterproductive—at least in unusual cases. I thought that, in respect to consideration of costs, the statute does not mean "never." And probably because of my earlier work in the field of regulation, I thought it important to say so.

Now you can see the real difference of opinion in this case. If the majority means "never," its interpretation risks counterproductive results—results that Congress could not have intended. But my own view, "sometimes," immediately invites the question, "Well, just when?" The argument has less to do with the value of considering economic costs in pollution cases than it has to do with the value of bright-line rules in the law.

Economic reasoning is often difficult to reconcile with bright-line rules. Economics often concerns gradations, with consequences that flow from a little more or a little less. But the law, at least in a final appeals court, often seeks to create clear distinctions of kind. Antitrust law reveals this kind of tension. A per se rule against price-fixing, for example, does not embody a judgment that price-fixing could never prove economically justified. Rather, the rule reflects a judgment that economic justifications for price-fixing are so few,

arise so infrequently, and are so difficult to prove, while the enforcement advantages of a clear rule are so great, that a more complex, more economically sophisticated, legal rule is not worth the effort. Indeed, the difficulty the courts may have in applying a more sophisticated rule may create mistakes that outweigh the benefits of that rule.

Could a per se Clean Air Act rule against consideration of costs prove similarly justified? I thought not. Such a rule would sometimes bring about seriously counterproductive results. I believe that the statute's language and purposes permit a more open-ended interpretation. In these circumstances, the use of such words as "ordinarily" and "unusual" would have to provide sufficient administrative guidance.

I am less interested in the merits of the particular conclusion, however, than I am in pointing out how the difference between my view and that of the majority in this case raises larger legal issues: How often is a bright line justified? When will more open, less definite interpretations of statute prove workable? To what extent will a statute's language, including its statutory context, provide a definitive answer to a difficult interpretive question? These are the questions that judges must answer in a case like this one.

In trying to answer them, I try to assess what a reasonable legislator would want in light of the statute's basic purposes. The degree of "brightness," "absoluteness," or scope of a legal rule set forth in an opinion should itself reflect a judicial weighing of relevant considerations—of legal costs and benefits, if you like. And Congress, I believe, would rarely intend a bright-line legal interpretation that would bring about seriously counterproductive results.

Making such judgments is easier said than done. In general, I tend to disfavor absolute legal lines. Life is normally too complex for absolute rules. Moreover, a more open, less definite approach to interpretation is likely to prove more compatible with the law's incorporation of knowledge drawn from other disciplines, particularly disciplines that themselves reason by way of "a little more, a little less," such as economics.

III

The second case, *Verizon Communications v. FCC*,[4] involved rate-setting. The Telecommunications Act of 1996, seeking to bring about competition in local telephone service, requires incumbent local firms (typically regulated monopolies) to make "elements" of their local systems available on request to new entrants at "rates . . . based on . . . cost."[5] The act gives the Federal Communications Commission the power to make rules governing those rates. And the FCC has written rules that require especially low rates—rates that approximate what it would cost a hypothetical, perfectly efficient firm to supply that element in the future, assuming that the hypothetical firm were to build a new, perfectly efficient communications network from scratch. (Fred Kahn refers to this set of rules as "Total Element Long-Run Incremental Cost—Blank Slate," or "TELRIC-BS," for short.) If, for example, a local telephone monopolist owns twisted copper wires running from a switching center into each home, and if those wires cost, say, $3 million per year to keep up, a new entrant can share that element, i.e., the wires, by paying prices that reflect not the $3 million needed to keep up the wires, but, rather, the costs of current best-technology methods of accessing the home, say, wireless costs of just thirty cents.

The legal question before our Court was whether the FCC's system was rationally related to the statute's purpose, namely encouraging new competition. By a vote of seven to one, the Court concluded that the system was rational, hence lawful. I confess that I was the one. I dissented because I believe that the pricing rules conflict with the statute's pro-competitive objective.

The firms that challenged the FCC's systems argued approximately as follows: First, the act's specific objective is to substitute competition for regulation in local telephone markets where that transformation is economically feasible.

Second, to help achieve this objective, the act allows new entrants access to certain elements of the incumbent's system—in particular those elements that would be too expensive, and wastefully inefficient, for the new entrant to duplicate. Just as access to a railroad bridge across a river could spare a new railroad the need wastefully to duplicate the bridge, so access to a pair of twisted copper wires running from street to home could spare a new firm the need wastefully to duplicate those wires. The important point is that the sharing of facilities by two or more firms is *not* itself competition; but sometimes sharing of bottleneck facilities will help bring about competition in the unshared, remaining parts of the service. It is this latter form of competition that the act seeks to promote.

Third, pricing rules consequently must seek to encourage the sharing of facilities when sharing will open a bottleneck, but not otherwise. That is, sharing should only be encouraged when it is far less expensive, economically speaking, to share than it is to build new, duplicative facilities elsewhere. Otherwise, efficient investment and innovation would be deterred.

Fourth, pricing rules such as the FCC's that are based upon hypothetical, most-efficient-firm costs, rather than rules that are based upon costs an incumbent firm will actually incur, will not encourage the right kind of sharing nor bring about the right kind of competition. Under the FCC rules actual costs will not affect prices. Hence, the rules would encourage new firms to lease the incumbent's old, less efficient facilities rather than themselves build new, more efficient facilities, even if new investment is economically far more efficient.

In my example, the copper wires should *not* be shared because it is far more efficient to build new, thirty-cent wireless connections than to pay the $3 million needed to keep up the existing copper wires. Yet the FCC rules would lead new firms to lease the existing wires, not build new wireless systems, for they would pay no more for the old leases than for the new construction. Indeed, the FCC rules would encourage new firms to lease an incumbent's entire system, producing universal sharing instead of universal competition. By insisting that a new entrant receive the immediate advantage of an incumbent's cost-saving innovations, they would discourage innovation and investment. And for reasons I will not go into here, I

believe I can show that—if the numbers are more realistic—an incumbent would lack the economic incentives necessary to encourage its investment in innovation in the first place. In essence, by creating a "sharing" price for each element in an existing system that equals or is lower than the price associated with the creation of any new independent facility, the rules tend toward a system in which regulatory price setting would *supplant*, not *promote*, competition.

In my own view, these arguments are basically correct.[6] The statute, I believe, foresees a regulatory approach something like that used in Europe. A regulator, seeking competition in voice, data, text, picture, entertainment, or other new communications service, has authority to insist that an incumbent make available to a new entrant access to existing bottleneck facilities, say the house-to-switching-center copper wires owned by the incumbent. The regulator will encourage negotiation among the parties, with an eye toward speedy resolution of any related pricing dispute. But, if necessary, the regulator will itself set prices low enough to prevent the incumbent from blocking entry, but high enough to encourage the new firm to consider other entry methods where feasible—prices the regulator might determine through "yardstick" comparisons with other systems. I concluded that the FCC rules lack a rational connection with the statute's pro-competitive purposes.

Now let me return to my basic question. What is it about the law that makes this position so difficult to accept? The last few minutes may make the answer to this question obvious. The subject matter is just too technical, requiring too much expertise for lay judges to feel confident in overturning the contrary decision reached by an expert administrative body.

Remember that the legal standard governing the case delegates considerable decision-making authority to the FCC, the agency whose rules are under review. Those challenging the rules must show not that they are unwise, but that they are close to irrational. Remember, too, that in our Court, the difficult, complex, technical subject matter means that oral discussion of the subject will prove difficult; a dissent will take considerable time to write; and, by the time it is written, changing minds may prove

particularly difficult. Now ask yourself how you could expect anyone who has not, through chance, had considerable experience with communications regulation (or related forms of economic regulation) to understand what I have been talking about these last few minutes? How could anyone expect a non-technical panel of judges to do anything but accept the agency's decision as rational where the subject matter is so complex? How could a judge lacking a technical background (even if filled with doubt) do anything but hesitate to affix the label "irrational" and overturn an expert agency's judgment in such a case—particularly when the question is so close that a judge with that experience must also hesitate to do so?

Now you see the problem. Judges have long recognized the difficulty of reviewing the substance of highly technical agency decision-making. *Verizon*, in my view, illustrates the difficulty of maintaining some form of judicial review in highly technical subject matter areas—such as telecommunications and information technology—that implicate sophisticated economic reasoning.

Should we then abandon judicial review in highly technical cases or apply it in a perfunctory matter? I do not think so. The law rightly forbids agencies, in the name of technical expertise, to wrest themselves free of control by others; our own legal traditions obligate judges to see that agency decisions fall within the bounds of reason; and agency decisions in highly technical areas are important, and of ever-increasing importance, as technology becomes an ever-more important part of the life of the average citizen.

Nor do I believe we can solve the problem by turning to judges who are specialists. Review by generalist judges brings a certain lay common sense to technical decisions and a necessary degree of coherence to the law.

So, what can be done? Perhaps courts could make better use of experts in such cases. Our Court received expert views in *Verizon* primarily in the form of arguments contained in legal briefs written by the parties' lawyers. Those briefs were well-written, beautifully translating technical matters into language

that judges can understand. Yet judges know that the authors of those briefs are interested individuals actively seeking to persuade them. They were not written by disinterested experts seeking first and foremost to enlighten the Court.

Suppose it were easier for courts to retain their own experts in such matters, perhaps experts suggested by the parties, who would retain the right to supplement the views of any such experts with expert views of their own. Might such a system increase the courts' ability to determine, for example, the outer bounds of what is reasonable in technical subject matter areas? I do not say that the Supreme Court should retain its own experts, even in highly complex technical cases. But the lower courts, not just trial courts but also appellate courts, might do so on occasion in a range of cases involving scientific and other technical subject matter.

Britain has recently begun to move in this direction, at least in respect to trials.[7] Under the revised British Civil Procedure Rules, a trial court can appoint a single expert when parties wish to submit expert evidence on the same issue.[8] Evaluative reports from the Lord Chancellor's Department have praised the increased use of single joint experts as creating a less adversarial culture and reducing both time and cost.[9] Britain based its experiments on practices that are fairly common in civil-law countries, where a judge will select an expert from lists provided by scientific or technical institutions or maintained by the courts themselves. In France, for example, the courts maintain a "regional" and a "national" list of experts who meet certain criteria. The court appoints the expert (often, though not exclusively, from these lists) and sets the issues to be investigated. Upon completion of the assignment, the expert is required to file a written report with the court.[10]

I read with interest a recent French case, *La Ligue Contre Le Racisme Et L'Antisemitisme v. Yahoo!, Inc.*,[11] in which a French court prohibited Yahoo.com from providing French internet users access to a service selling Nazi memorabilia, as well as to other pro-Nazi websites. A key question concerned the practical ability of Yahoo to segregate search requests from users in France from those in other countries. In response, the judge commissioned a report

from a panel of experts, while permitting Yahoo to criticize or object to portions of that report. The result was speed and agreement—not about the result, but about many of the technical facts that underlay it.

I cannot say whether the French system, the British system, or some other system, used at the trial court level or adapted for use at the appellate court level, would solve our American problems. But *Verizon* may offer an example of such a problem—a problem of providing courts with a better understanding of technical matters. Since I believe that technical subject matters—biology, communications, computers—will become ever more relevant to the law, I think this kind of problem is of growing importance. And foreign experience suggests that better judicial use of technical expertise may prove possible. My lonely position in *Verizon* may stand for this kind of need.

IV

The third case, *Eldred v. Ashcroft*, concerns a statute that extends the copyright term by twenty years for both future and existing copyrights.[12] For some works it extends the term from fifty years to seventy years after the author's death; for others, from seventy-five years to ninety-five years. The question was whether the Constitution's copyright clause granted Congress the power to enact this extension. That clause says that Congress shall have the power to "promote the progress of science," i.e., learning and knowledge, "by securing for limited times to authors . . . the exclusive right to their respective writings."[13] The Court held that this language covers the extension.

I dissented because I thought that the statute extending the term for twenty years fell outside the scope of the clause.[14] It seemed to me that the extension amounted to an unjustified effort to create not a limited, but a virtually perpetual, copyright term. As I understand the clause, it requires copyright statutes to serve certain public, not private, ends, namely to "promote the progress" of knowledge and learning by providing incentives for

authors to create works and by removing the related restrictions on a work's dissemination after a "limited" time.

It is easy to see how the twenty-year extension would serve private ends. It would transfer billions of dollars of income from consumers of existing works, e.g., readers or moviegoers, to the heirs of the long-dead producers of those works (or connected corporations). But from the public's standpoint, it would bring about considerable harm: it would unnecessarily block dissemination of works that, with a shorter term, would sooner fall into the public domain. The extension would, for example, require those who wish to use century-old, often commercially valueless, works to find, and to obtain permission from, difficult-to-locate current holders of those copyrights.

Consider the teachers who wish their students to see albums of Depression-era photographs, to read the recorded words of those who actually lived under slavery, or to contrast, say, Gary Cooper's heroic portrayal of Sergeant York with filmed reality from the battlefield of Verdun. Consider the historian, writer, artist, database operator, film preservationist, researchers of all kinds, who wish to make the past accessible for their own use or for that of others. Requiring them to obtain a copyright holder's permission for an additional twenty years—starting seventy-five years after the work was created—would often fatally impede their efforts.

I could find no justification for the extension that might offset this harm. No one could reasonably conclude that copyright's traditional justification—providing an incentive to create—could apply to this extension. Past works, say, Mickey Mouse films, by definition need no incentive, for they already exist. And any added incentive to create works in the future is insignificant.

To understand why that is so requires reference to undisputed data that interested groups submitted to the Court; and it requires reference to the economic analysis that other groups provided (including Nobel Prize–winning economists). They made clear that no potential author could reasonably believe he or she has more than a tiny chance of writing a classic that will survive long enough for a copyright extension (of twenty years, beginning seventy-five years in the future) to matter. Indeed, fewer than 2 percent of all copyrighted works retain any commercial value after seventy-five years. And any remaining monetary incentive is diminished radically by the fact that the relevant royalties will not arrive until seventy-five years or more into the future, when not the author, but distant heirs or shareholders in a successor corporation, will receive them. A 1 percent likelihood of earning $100 annually for twenty years, starting seventy-five years into the future, is worth less than seven cents today. What potential Shakespeare, Wharton, or Hemingway would be moved by such a sum? Regardless, that added present value does not significantly differ from the present value added by a perpetual copyright. Indeed, the twenty-year extension results in a copyright term that produces more than 98 percent of the value of perpetual protection.

Neither could I find other copyright-related justifications for the extension. It did not produce significant international uniformity. It had no other significant copyright-related international commercial effect. It did benefit several publishers, shareholders, and various entertainment companies, including Walt Disney and AOL Time Warner (the current holder of the copyright on the "Happy Birthday to You" melody, first published in 1893 and copyrighted after litigation in 1935). But this kind of private commercial benefit, in my view, falls outside the copyright clause. My conclusion was that the copyright extension was unconstitutional.

For present purposes, I want to focus, not upon the substance of my copyright conclusion, but upon the fact that seven of my colleagues disagreed with it and with the empirical and logical arguments that supported it. Why were my arguments so unconvincing?

Of course the subject matter was technical, specialized, and complex, it took time to write the dissent, and the law obliges the courts to defer heavily to the judgment of Congress in this area. But I believe that a different factor is also at work, and that factor is more interesting. It consists of the novelty of the approach I

accepted, an approach that depends heavily upon an economic-type weighing of costs and benefits. The approach is not completely novel. It finds support in the literature and in prior case law. But, in its heavy reliance upon economic and commercial factors, it departs in form, if not in substance, from most previous copyright opinions.

The law is a conservative institution. Courts must protect those who have relied upon prior law and prior approaches. Thus, courts ordinarily will rightly hesitate to adopt a new approach to an important body of law—at least until the relevant publics, acting through other institutions, themselves seem to have found the new approach acceptable. Here those publics and other institutions include Congress, the copyright bar, publishers, authors, schools, libraries, research institutions, and many others beside. A critical mass within those publics has not embraced the approach that my dissenting opinion reflects—at least not yet.

I do not mean to say that courts, in applying or developing copyright law or any other branch of law, directly follow public opinion. But I do mean to point out that the shaping of law in America is a highly democratic process. New law is less often decreed from on-high by a court or a legislature than it "bubbles up" from below. Often the lawmaking process resembles a kind of conversation among many interested groups, including experts, specialists, commercial enterprises, labor unions, various interest groups, and ordinary citizens. That conversation takes place in journals, at seminars, in newspapers, at hearings, and in court proceedings. The decision of one institution is taken as a datum by another. It may be embodied in administrative rules, statutes, even constitutional interpretations, but none of these is permanent; all are subject to change or gradual evolution.

Michael Oakeshott, in describing liberal education, better explained what I have in mind. "The pursuit of learning," he said,

> is not a race in which the competitors jockey for the best place, it is not even an argument or a symposium; it is a conversation. . . . [E]ach study appear[s] as a voice whose tone is neither tyrannous nor plangent, but humble and conversable. . . . Its integration is not superimposed but springs from the quality of the voices which speak, and its value lies in the relics it leaves behind in the mind of those who participate.[15]

Similarly, the development of legal methods and analysis is a collaborative, evolving process. The law is continuously renewed. To steal a philosophical boating metaphor, we renew it plank by plank while it floats upon the sea.

So viewed, a dissent continues to play a role in an ongoing policy debate. Even though it is not the law, others may find its arguments or approaches persuasive; they may adapt or adopt them for use in different forums; and if there is sufficiently widespread acceptance, even judicial approaches may change. So seen, a dissent will be judged in terms of its persuasive force, which, despite the majority to the contrary, is not irretrievably lost. With this larger process in mind, I can hope that my lonely dissents invoking economic reasoning will not be so lonely in the future.

V

I have used three dissenting opinions to illustrate three features of the law, features relevant to its use of economic policy. The first concerns the law's need to interpret statutes with what I might call an open-textured approach—an approach that finds greater value in the consideration of underlying human purposes than in the proliferation of strict legal categories. Bright-line rules, while sometimes useful, are not always a preferred alternative, particularly when such a rule brings with it results that, in terms of a statute's basic purpose, prove counterproductive.

The second concerns the need to introduce economic reasoning in technical areas into the courts through the use of experts,

rather than by sending judges to economic seminars, along with the need for those experts to understand the role that administrative considerations, such as the need for rules, play in the law.

The third concerns the need, given the law's reluctance to rely upon novel approaches, for institutions outside the judiciary to debate and to adopt economic methods for the courts to model.

These considerations suggest that those interested in helping the law to reflect sound economic policy must understand the need for legal decisions and legal rules that are administrable. But they cannot take administrability itself as if it were an immutable factor automatically explaining whatever decision a court makes. The shape of a legal rule, the extent to which it ought to be "bright-line," is itself open to thought and analysis. And those who are intellectually comfortable with concepts of equilibrium, who see virtues in considering a little more, a little less, might well have something to contribute to that debate. Brookings/AEI will, I hope, remain involved in legal decision-making and will not take legal decisions as a given, immune from analysis.

My point is that participation in the judicial process by those with basic economic or regulatory policymaking expertise can help. The more aware you are and the more you are willing to undertake informed criticism of judicial decision-making, the better. Whether serving as experts in individual cases, or more generally as informed court-watchers and critics, you have the ability to help encourage and make more accessible to lawyers and judges the tools of analysis.

That kind of participation is consistent with my own view of the legal process—that it is too important to be left simply to the legal specialists, to the lawyers, or even to the judges.

Notes

1. 531 U.S. 457 (2001).
2. 42 U.S.C. § 7409(b)(1).
3. 531 U.S. at 490–96 (Breyer, J., concurring).
4. 535 U.S. 467 (2002).
5. 47 U.S.C. § 252(d)(1).
6. 535 U.S. at 539–63 (Breyer, J., dissenting).
7. See Lord Woolf, *Final Report: Access to Justice*, ch.13 (July 26, 1996).
8. UK Department for Constitutional Affairs, Civil Procedure Rules 35.7, 35.8 (2003).
9. See The Lord Chancellor's Department, Civil Justice Reform Evaluation, *Emerging Findings: An Early Evaluation of the Civil Justice Reforms* (March 2001); The Lord Chancellor's Department, Civil Justice Reform Evaluation, *Further Findings: A Continuing Evaluation of the Civil Justice Reforms* (August 2002).
10. See, e.g., M. Neil Browne et al., "The Perspectival Nature of Expert Testimony in the United States, England, Korea, and France," *Connecticut Journal of International Law* 18 (2002): 55, 96–100.
11. High Court of Paris, May 22, 2000, Interim Court Order No. 00105308 (cited in *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 169 F. Supp. 2d 1181 [N.D. Cal. 2001]).
12. 123 S. Ct. 769 (2003).
13. U.S. Constitution, art. 1, sec. 8, cl. 8.
14. 123 S. Ct. at 801–814 (Breyer, J., dissenting).
15. Michael Oakeshott, *The Voice of Liberal Learning* (New Haven: Yale University Press, 1989), 109–110.

66 Fed.Cl. 400
(Cite as: 66 Fed.Cl. 400)

H
66 Fed.Cl. 400
Briefs and Other Related Documents

United States Court of Federal Claims.
HONEYWELL INTERNATIONAL, INC., and **Honeywell** Intellectual Properties, Inc., Plaintiffs,
v.
The UNITED STATES, Defendant,
andLockheed Martin Corp., Defendant-Intervenor.
No. 02-1909C.

June 14, 2005.

Background: Holder of patent on display system for night vision goggles and exclusive licensee of the patent brought suit against the United States, alleging violation of the Invention Secrecy Act, a taking of the patent and related patent application in violation of the Fifth Amendment, and unlicensed use of the patent by the government in violation of statute. Contractor which manufactured military aircraft which allegedly infringed patent intervened.

Holdings: The Court of Federal Claims , Braden, J., held that:

(1) preamble language in claims would be construed to mean a system comprised of optical filters that can be used in combination with an aid, with light amplifying, passive, and night vision qualities, and a display of colors that includes a source of light perceptible by the night vision aid;

(2) term "local color display" would be construed to mean a device that may be used together or in combination with optical filters and shows or exhibits at least one color perceptible to an observer or observers utilizing a night vision aid; and

(3) term "notch filter" would be construed to mean an optical filter that has the capacity both to pass and substantially block light and may be a single-notch filter or a multi-notch filter.

So ordered.

West Headnotes

[1] **Patents 291 ⇦161**
291k161 Most Cited Cases
A federal trial judge examines patent claim terms and phrases through the viewing glass of a person skilled in the art.

[2] **Patents 291 ⇦159**
291k159 Most Cited Cases
A federal trial judge in a patent infringement case must determine, as a threshold matter, whether there is ambiguity in any claim term requiring construction and, if so, to consider intrinsic evidence.

[3] **Patents 291 ⇦167(1)**
291k167(1) Most Cited Cases
If a patent's claim language is ambiguous, the specification, including the inventors' statutorily-required written description of the invention, is the primary source for determining claim meaning.

[4] **Patents 291 ⇦159**
291k159 Most Cited Cases
If analysis of intrinsic evidence resolves ambiguity about the meaning of a patent claim, as a matter of law, it is improper for a federal trial judge to cite to "extrinsic evidence", i.e., evidence outside of the patent record, including expert and inventor testimony, dictionaries, learned treatises, and articles.

[5] **Patents 291 ⇦159**
291k159 Most Cited Cases

Patents 291 ⇦161

291k161 Most Cited Cases
In construing a patent claim, extrinsic evidence may be considered to determine how one of ordinary skill in the relevant art would interpret the claim language.

[6] **Patents 291 ⇐161**
291k161 Most Cited Cases
Depending on the clarity of a patent claim and specification, prior issued patents may be considered in construing a patent claim, as they may provide a source of relevant evidence to determine how a term or phrase has been used or understood by one skilled in the art, whether or not the prior art was referenced in the specification or the prosecution history.

[7] **Patents 291 ⇐159**
291k159 Most Cited Cases
Treatises and technical articles, particularly those of note, wide circulation, or likely to be utilized as standard desk reference material by an ordinary person skilled in the art at the time of the patent's issuance may be consulted in the discretion of the court in construing a patent.

[8] **Patents 291 ⇐159**
291k159 Most Cited Cases

Patents 291 ⇐167(1)
291k167(1) Most Cited Cases

Patents 291 ⇐168(2.1)
291k168(2.1) Most Cited Cases
In construing a patent, expert testimony may be considered, but only insofar as it aids the trial court to understand the claim language, the specification, or the prosecution history; it cannot be considered for the purpose of varying or contradicting the claims.

[9] **Patents 291 ⇐159**
291k159 Most Cited Cases
Post-issuance testimony by a patent's inventor as subjective opinion about the meaning of patent claim terms is entitled to little or no weight in construing the terms.

[10] **Patents 291 ⇐157(2)**
291k157(2) Most Cited Cases
Federal trial court should construe patent claims to preserve the patent's validity only where all other tools of claim construction are exhausted.

[11] **Patents 291 ⇐165(4)**
291k165(4) Most Cited Cases
Whether a patent claim preamble is treated as a limitation is determined on the facts of each case in light of the claim as a whole and the invention described in the patent.

[12] **Patents 291 ⇐165(4)**
291k165(4) Most Cited Cases
Where patent claim language derives an antecedent basis from the claim preamble, it may be considered as a necessary component of the claimed invention.

[13] **Patents 291 ⇐176**
291k176 Most Cited Cases
Preamble language in patent claims pertaining to display system for night vision goggles, "a display system for use in association with a light amplifying passive night vision aid and a local color display, including a local source of light, comprising" would be construed to mean a system comprised of optical filters that can be used in combination with an aid, with light amplifying, passive, and night vision qualities, and a display of colors that includes a source of light perceptible by the night vision aid.

[14] **Patents 291 ⇐176**
291k176 Most Cited Cases
Term "local color display" in claims for patent of display system for night vision goggles would be construed to mean a device that may be used together or in combination with optical filters and shows or exhibits at least one color perceptible to an observer or observers utilizing a night vision aid.

[15] **Patents 291 ⇐176**
291k176 Most Cited Cases
Term "local source of light" contained in preambles to claims of patent for display system for night vision goggles would be construed to mean an essential element of the local color display that must be perceptible to an observer or observers with a night vision aid.

[16] **Patents 291 ⚿176**
291k176 Most Cited Cases
Phrase "filters light from the local color display" in claim of patent for display system of night vision goggles would be construed to mean that the starting point for light occurs at the filters.

[17] **Patents 291 ⚿176**
291k176 Most Cited Cases
Term "notch filter" in claim of patent for display system for night vision goggles would be construed to mean an optical filter that has the capacity both to pass and substantially block light and may be a single-notch filter or a multi-notch filter.

[18] **Patents 291 ⚿176**
291k176 Most Cited Cases
Term "color bands" claim of patent for display system for night vision goggles would be construed to include the range of wavelengths, within which the colors blue, red, and green are visible to the human eye.

[19] **Patents 291 ⚿176**
291k176 Most Cited Cases
Term "red color band" in claims of patent for display system for night vision goggles would be construed as a range of color in the range of 620 nanometers to 780 nanometers.

[20] **Patents 291 ⚿176**
291k176 Most Cited Cases
With regard to phrase "substantially blocks" in patent claims for display system for night vision goggles describing filters which substantially block light, verb "blocks" would be construed as preventing light from a color display from reaching the night vision aid and "substantially" to mean in a sufficient amount to enable the night vision aid to function.

[21] **Patents 291 ⚿176**
291k176 Most Cited Cases
Term "blue color band" in claims of patent for display system for night vision goggles would be construed as a range of color from 455 nanometers to 492 nanometers.

[22] **Patents 291 ⚿176**
291k176 Most Cited Cases
Term "green color band" in claims of patent for display system for night vision goggles would be construed as a range of color from 492 nanometers to 577 nanometers.

Patents 291 ⚿328(2)
291k328(2) Most Cited Cases
6,467,914. Construed.

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MEMORANDUM OPINION AND ORDER CONSTRUING CERTAIN CLAIMS OF UNITED STATES PATENT NO. 6,467,914

BRADEN, Judge.
In the decade following the United States Supreme Court's unanimous affirmance of the landmark *en banc* decision in *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 978-79 (Fed.Cir.1995) ("*Markman I*"), *aff'd*, 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996) ("*Markman II* "), the United States Court of Appeals for the Federal Circuit has devoted a great deal of effort to provide federal trial courts with a workable analytical framework to construe the meaning of a patent's claims that is faithful to 35 U.S.C. § 112 and affords the court an opportunity to consider relevant, but reliable, evidence, in a wide range of diverse and increasingly complex applications of mechanical, electrical, chemical, computer, pharmaceutical, bio, and nano technology.

From the court's reading of controlling appellate precedent, intrinsic evidence has been endorsed as

most relevant and reliable to establish the metes and bounds of the property right conveyed by the privilege of the patent grant. Extrinsic evidence has been determined to be useful to identify the *403 academic and industry credentials of "one skilled in the art," akin to the "reasonable man" in the tradition of tort law. If the court must resort to extrinsic evidence to avoid determining that a claim is indefinite, only the most probative and reliable of such evidence should be considered-and, with caution.

In this case, the court determined that it was unnecessary to consider extrinsic evidence to construe the language of the patent claims at issue, in most instances. *See Renishaw PLC v. Marposs Societa' per Azioni,* 158 F.3d 1243, 1250 (Fed.Cir.1998) (internal citations omitted) ("The construction that stays true to the claim language and most naturally aligns with the patent's description of the invention will be, in the end, the correct construction."). In only one claim, where extrinsic evidence was considered, the court was able to construe the disputed term by referring to prior art and was not dependent on technical treatises, technical dictionaries, nor the parties' experts.

In light of the multitude of issues addressed herein, an outline of this Memorandum Opinion and glossary of selected acronyms follow:

OUTLINE

b. The Government's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

c. Intervenor Lockheed Martin's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

d. Specific Precedent Governing Construction Of A Patent's Preamble.
e. The Court's Construction Of "A Display System For Use In Association With A Light Amplifying Passive Night Vision Aid And A Local Color Display, Including A Local Source Of Light, Comprising" In This Case.

2. "Local" And "Color Display."

a. Honeywell's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

b. The Government's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

c. Intervenor Lockheed Martin's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

d. The Court's Construction Of "Local Color Display" In This Case.

i. In The Preambles To Claim 1 And Claim 2.
ii. In Claim 1(a).
iii. In Claim 2(a).

3. "Local" And "Source of Light."

a. Honeywell's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.

iii. Post-Claim Construction Hearing Briefs.

b. The Government's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Brief.

c. Intervenor Lockheed Martin's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Brief.

d. The Court's Construction Of "Local Source Of Light" In This Case.

4. "Optical Filter" And "Filter."
5. "Filters" And "Filtering."
6. "Filters Light From The Local Color Display."

a. Honeywell's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

b. The Government's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Briefs.

c. Intervenor Lockheed Martin's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

d. The Court's Construction Of "Filters Light From The Local Color Display " In This Case.

7. "Notch Filter."

a. Honeywell's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Briefs.

b. The Government's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

c. Intervenor Lockheed Martin's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

d. The Court's Construction Of "Notch Filter" In This Case.

8. "Passes."
9. "Color Band[s]."

a. Honeywell's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.

b. The Government's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

c. Intervenor Lockheed Martin's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

d. The Court's Construction Of "Color Bands" In This Case.

10. "Predetermined Color Bands."

11. "Red Color Band."

a. Honeywell's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

b. The Government's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

ii. At The Claim Construction Hearing.

c. Intervenor Lockheed Martin's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

d. The Court's Construction Of "Red Color Band" In Thi s Case.

12. "Predetermined Red Color Band."
13. "Substantially Blocks."

a. Honeywell's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

b. The Government's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

c. Intervenor Lockheed Martin's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

d. The Court's Construction Of "Substantially Blocks" In This Case.

14. "First," "Second," "Third," "Fourth," And "Filter."

15. "Blue Color Band."

a. Honeywell's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

b. The Government's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

c. Intervenor Lockheed Martin's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

d. The Court's Construction Of "Blue Color Band" In This Case.

16. "Green Color Band."

a. Honeywell's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

b. The Government's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

c. Intervenor Lockheed Martin's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.
ii. At The Claim Construction Hearing.
iii. Post-Claim Construction Hearing Briefs.

d. The Court's Construction Of "Green Color Band" In This Case.

17. "Narrowband Of The Red Color Band."

IV. CONCLUSION.

***406 * * * * * ***

GLOSSARY OF SELECTED ACRONYMS

AGC	Automatic Gain Control
ANVIS	Aviators' Night Vision Imaging System
CIE	Commission International l'Eclairage or International Commission on Illumination
CRT	Cathode Ray Tube

IEEE	Institute of Electrical and Electronics Engineers, Inc.
IPL	Instrument Panel Lighting
JEDEC	Joint Engineering Display and Electronic Committee
LCD	Liquid Crystal Display
MCP	Microchannel Plate
nm	Nanometer
NVG	Night Vision Goggles
NVIS	Night Vision Imaging System
RGB	Red Green Blue
SED	Spectral Energy Distribution
	Wavelength or the distance between successive peaks of an electromagnetic wave.
nu,	Frequency or the number of complete cycles of electromagnetic radiation completed each second.

* * * * * *

I. THE RELEVANT TECHNOLOGY.

In 1973, a second-generation of Night Vision Goggles ("NVG") was developed by the United States Army to provide helicopter pilots with a brighter view at night of underlying terrain to allow them to fly at low levels. *See* January 24, 2005 Technology/Industry Primer ("Jt.Primer") at 3; FN1 *see also* November 22, 2004 Direct Testimony and Expert Report of Dr. Harry Lee Task ("PMX35") ¶ 8 at 4. NVGs, however, were very sensitive to cockpit lighting, warning lights, displays, and particularly to light of longer wavelengths in the visible spectrum and infrared radiation. *See* Jt. Primer at 6-8; *see also* PMX 35 ¶ 9 at 4. In particular, ***407** NVGs' sensitivity to red light created numerous problems that were known prior to the October 10, 1985 filing of the patent at issue in this case, including the fact that nearby light sources in a cockpit could overwhelm the sensor elements and interrupt NVG functioning or amplify reflections from the cockpit lights, causing the pilot to see confusing images. *Id.*

FN1. Although counsel for all parties collaborated in preparing the January 24, 2005 Technology/Industry Primer, the parties agree that it is not evidence nor a stipulation as to fact or law. *See* Jt. Primer at 2. The court has obtained permission to reproduce the graphics that are copyrighted by HowStuffWorks.com.

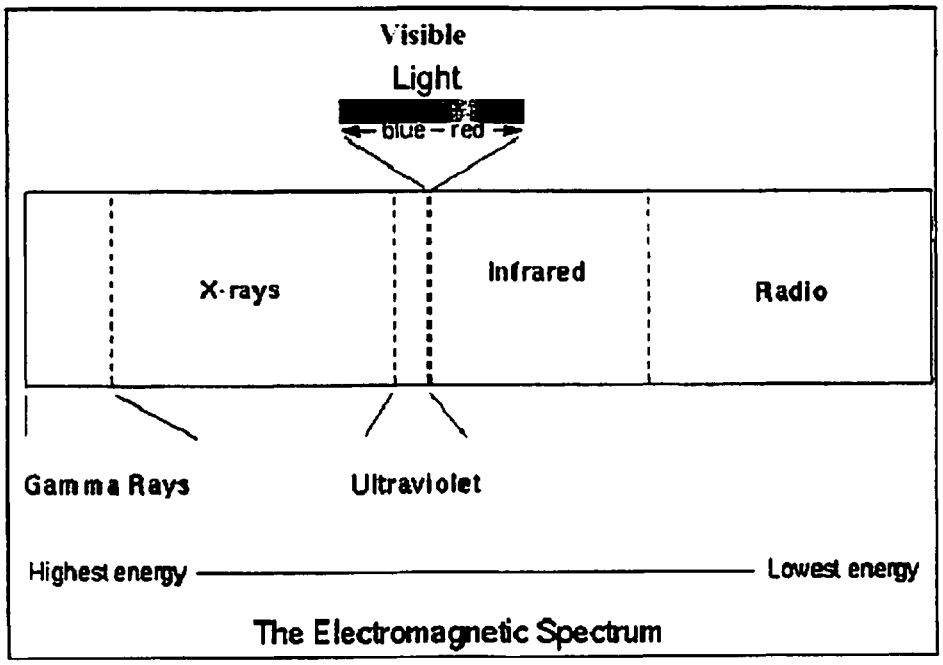
Many techniques were developed by the military and private companies to try to solve the incompatibility between the NVG and aircraft lighting and cockpit displays. *See* PMX 35 ¶¶ 8-12 at 4-6. In the 1980's, the United States Army began to utilize an Aviation Night Vision Imaging System ("ANVIS") goggles with a third-generation image intensifying tube that was much more sensitive to light, *i.e.,* ranging from approximately 450 nanometers ("nm") to 930 nm, instead of 400 nm to 700 nm. *See* Jt. Primer at 3; *see also* PMX 35 ¶¶ 9-13 at 4-7. As a result, the visible range below 580 nm could be used for cockpit lighting and display since light in that range, in large part, was invisible to NVGs and allowed the pilot to see outside the aircraft. *See* PMX 35 ¶ 13 at 6-7.

A. Night Vision Aids.

1. The Electromagnetic Spectrum.

The electromagnetic spectrum ("spectrum")

describes the range of electromagnetic waves that transports energy, both in electric and magnetic fields. *See* Jt. Primer at 3. Energy from cosmic rays have the shortest wavelengths; electrical oscillations have the longest wavelengths. *Id.* " Visible spectrum" or light is the portion of the spectrum located between the ultraviolet light region and the infrared region, as depicted below:



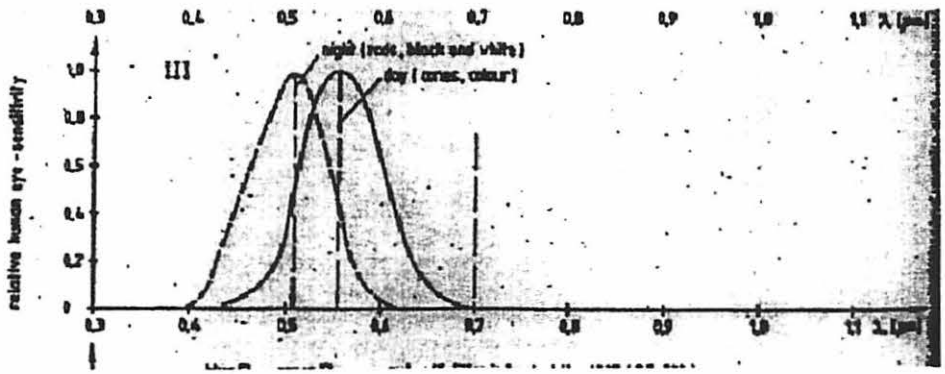
Id. at 4.

Light is characterized by wavelength and frequency. *Id.* Wavelength, referred to by the symbol lambda, , is the distance between successive peaks of an electromagnetic wave. *Id.* Frequency referred to by the symbol nu, , is the number of complete cycles of electromagnetic radiation completed each second. *Id.* Wavelength and frequency are inversely related, *i.e.*, light with a higher frequency has a shorter wavelength; light with a shorter frequency has a longer wavelength. *Id.* at 4-5. Wavelength times frequency equals the speed of light. *Id.* at 5. Light and infrared radiation customarily are described in terms of wavelength. *Id.*

***408 2. Night Vision Goggles.**

NVGs are sensitive to visible light and infrared radiation regions of the electromagnetic spectrum. *Id.* at 5. An unaided human eye only can see light within the visible region of the electromagnetic spectrum, which has a narrow range, as shown above. *Id.* The human eye adapts to different lighting environments and has two distinct sensitivity curves, as illustrated below:

DAY AND NIGHT SENSITIVITY OF THE HUMAN EYE

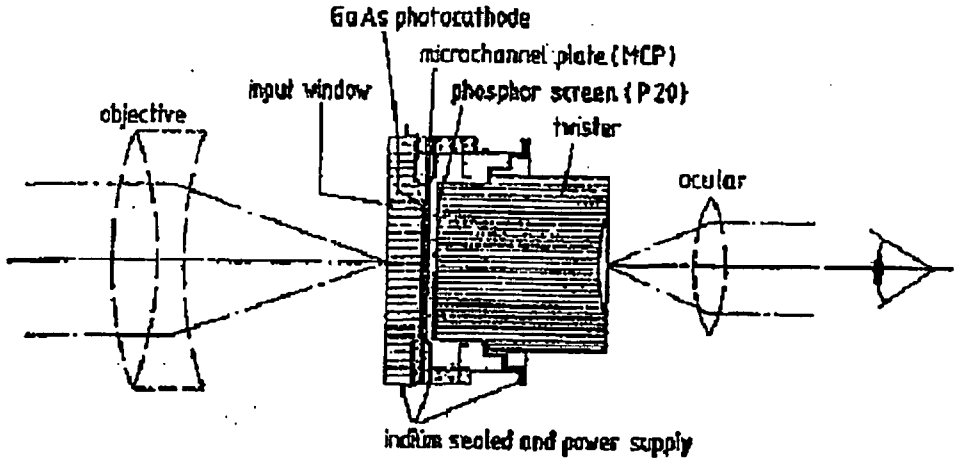


Id. at 6.

The peak sensitivity of the human eye drifts toward shorter wavelengths of light in extreme darkness, known as scotopic vision, which is rarely used in human activities. *Id.* at 6. Colors are seen by day vision, known as photopic vision. *Id.* Radiant energy, originating from the sun during the day and the stars or moon at night, is the electromagnetic energy that the human eye detects. *Id.* At night, there is less visible light present than during the day, so the human eye has extreme difficulty detecting the radiant energy that remains. *Id.*

Night vision aids enable the user, generally a pilot, to see objects at night by amplifying the very low levels of radiant energy from the visible and infrared spectrum. *Id.* Some night vision aids are capable of amplifying the radiant energy reflected from an object at night in overcast conditions. *Id.*

NVGs utilize a "two-step energy conversion process " to enable the user to observe very low levels of light and infrared radiation and convert the latter into visible light: first, by converting photons into electrons and amplifying the electrons; and second, by converting the amplified electrons back into photons, in visible light for the user. *Id.* at 7-8. A schematic of a typical night vision aid is reproduced below:



*409 *Id.* at 7.

Low-level radiation first enters the NVG at an objective lens that focuses low levels of light and infrared radiation onto an input window of an intensifier tube. *Id.* The intensifier tube consists of a photocathode and a microchannel plate ("MCP") that amplifies light and infrared radiation. *Id.* The photocathode converts photons into electrons. *Id.* Electrons are then emitted from the cathode and received at the input surface of the MCP, generally constructed of a honeycomb-like plate of many hollow tubes fused together. *Id.* Each electron passing through the tube frees other electrons, creating tens of thousands of electrons that exit the tube for each one that entered the tube. *See* Jt. Primer at 7-8.

Exiting electrons strike a phosphor screen that acts as the reverse of the photocathode and converts the electrons back into photons of visible light at a higher intensity than the input photons. *Id.* at 8. If an observer uses an ocular lens, the light emitted appears as a green image. *Id.* This energy is increased by a factor of 10,000 to 20,000 at maximum sensitivity and is known as "gain" or " image intensification" of the NVGs. *Id.* Although NVGs amplify low level light and infrared radiation by a factor of 10,000 to 20,000, they also amplify normal level and bright lights, such as streetlights or cockpit lights, by the same factor, which can damage the NVGs. *Id.* To prevent this problem, ANVIS goggles were developed that have a feature known as "automatic gain control" to govern image intensification within the MCP. *Id.* This reduction of intensification, however, affects the ANVIS goggles' entire field, thereby preventing the user from seeing dimly illuminated objects when normal level and bright lights are introduced. ANVIS goggles also are sensitive to light from about 540 nm to 910 nm. *See* Jt. Primer at 8. To address this issue, ANVIS goggles utilize a "minus blue" filter that reduces the sensitivity of the goggles to the longer wavelengths. *Id.*

B. Cockpit Displays.

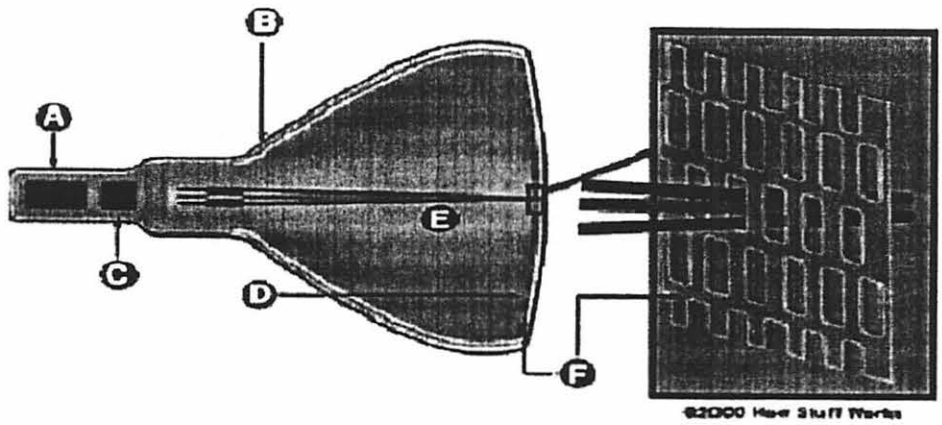
Aircraft use a variety of displays in the cockpit, such as cathode ray tubes ("CRTs") and liquid crystal displays ("LCDs"). *Id.* at 9. Both, however, can generate or reflect light that interferes with the operation of the NVG. *Id.* at 9-11.

1. Cathode Ray Tubes.

CRTs are "picture tube for television" technology used in a broad range of commercial and military applications, including aircraft displays. *Id.* at 9.

CRTs operate by receiving an input that is processed by generating electron beams that strike a screen coated with one or more layers of phosphor, wherein each layer can generate one or more colors in a color display. *Id.* When an electron beam strikes a particular phosphor, a phosphor dot on the screen is excited to emit light of a certain color. *Id.* at 10. Full color CRTs typically have three phosphors that correspond to the three most common primary colors of the display: red, green and blue. *Id.* There are different sets of primary colors, each of which can produce many more colors in the visible spectrum. *Id.* Prior to the advent of flat screen technologies, every computer monitor and television used a CRT, similar to that shown below:

***410**



SCHEMATIC OF A CATHODE RAY TUBE

Id. at 9.

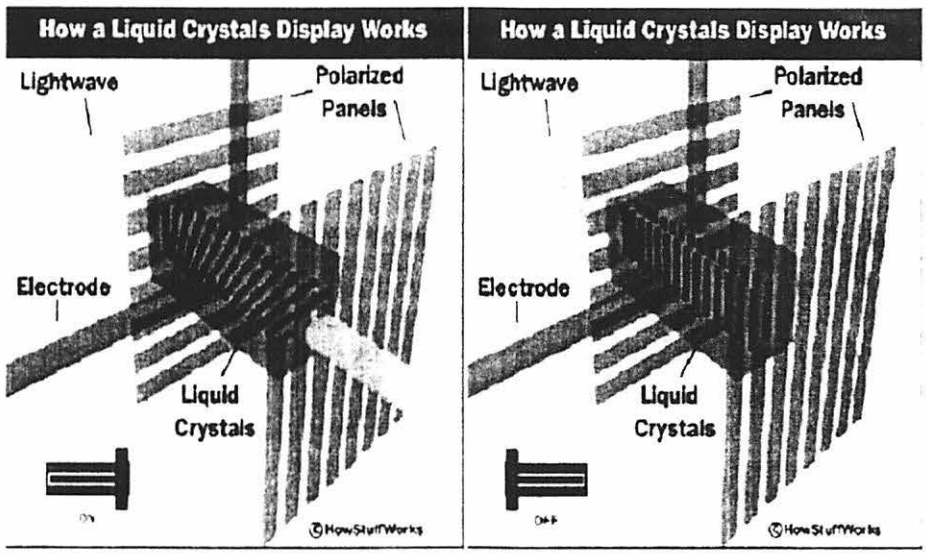
2. Liquid Crystal Displays.

LCDs are used in many commercial applications, including aircraft cockpit displays. *Id.* In transmissive LCDs, light is generated at the back of the display using a fluorescent tube, known as an LCD backlight. *Id.* This tube has a phosphor coating on the inside that emits light when excited by mercury vapor, which produces color, as determined by the chemical characteristics of the phosphors. *Id.* Color is then passed through an array of liquid crystal picture elements or pixels. *Id.* Each liquid crystal pixel also acts as a "shutter"

that either passes or blocks the light to varying degrees. *Id.* at 10-11. A LCD is comprised of two polarizing filters and a cavity containing a liquid crystal compound. *Id.* at 10. When electricity is not applied to a pixel, the backlight is polarized by the first polarizer and is placed to permit light to pass through the second polarizer. *Id.* In a color LCD, each pixel has three subpixels that correspond to the three primary colors of the display. *Id.* at 11. When electricity is applied, the two polarizers act together to block the backlight, as shown below:

*411

SCHEMATIC OF A LIQUID CRYSTAL DISPLAY



Id.

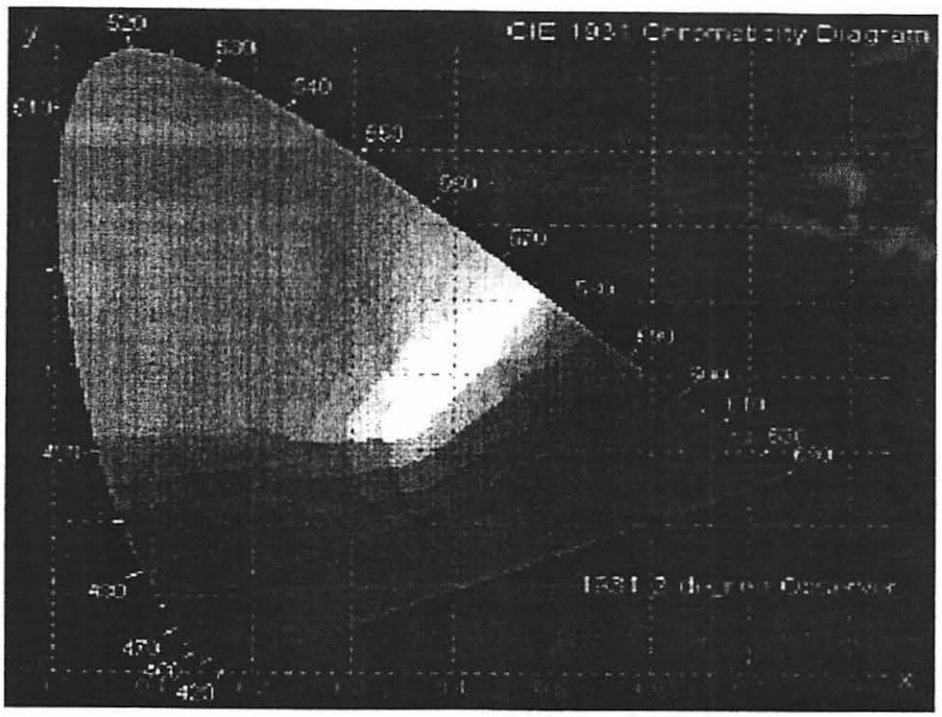
3. Color.

Color is a psychological response to different wavelengths of light based on the human perception. *Id.* at 12. How color is perceived depends upon the amount of energy light has at each wavelength. *Id.* Spectral energy distribution (" SED") shows the relative intensity of light at each wavelength. *Id.* The SED, however, is not useful for identifying specific colors. *Id.* In 1931, the Commission International l'Eclairage or International Commission on Illumination ("CIE") developed a system for identifying specific colors

by measuring the chromaticity of light. The CIE system, which uses the diagram reproduced below, is well known and widely accepted. *Id.*

***412**

1931 C.I.E. CHROMATICITY DIAGRAM



Id. at 13.

All existing colors can be represented by a single point on the CIE Diagram, as plotted on chromaticity coordinates (x,y). *Id.* The upside down u-shaped perimeter of the diagram represents the 100% saturated, or pure spectral colors. *Id.* Colors, however, desaturate or become more and more pastel toward the center, until they are white. *Id.* Every color can be correlated to a dominant wavelength or complimentary dominant wavelength. *Id.*

C. Characteristics And Types Of Optical Filters.

Optical filters are devices that selectively pass or block electromagnetic radiation. *Id.* at 14. Whether radiation is passed or blocked is based upon a transmissive spectrum that shows wavelengths that have high transmittance (passing) and low transmittance (blocking). *Id.* Typically, filters derive their names by the way the transmittance graph looks. *Id.* For example, filters

that pass shorter wavelengths and block longer wavelengths are called "low pass filters." *Id.* Filters that pass longer wavelengths and block shorter wavelengths are "high pass filters." *Id.*

A combination of optical filters will create a filter with properties that are cumulative, *i.e.,* the combination of a "highpass filter" that passes light above 500 nm and a "lowpass filter" that passes light below 600 nm will result in light being emitted in the 500-600 nm range. *Id.* The transmittance values of filters are multiplied, wavelength by wavelength, to calculate the cumulative effect. *Id.*

D. The '914 Patent.

The '914 patent FN2 describes the technical problem in 1985 of having "a night vision aid, such as ANVIS goggles, be operable in a cockpit or similar environment in which a full color display is illuminated." '914 patent, col. 2, ll. 2-5.

> FN2. The '914 patent appears in the record as PMX 1 or DMX 1.

The '914 patent consists of three claims. Claims 1 and 2 are independent claims and ***413** Claim 3 is dependent upon Claim 2. *See* '914 patent, col. 5, l. 30-col. 6, l. 31.

Claim 1 describes:

> A display system for use in association with a light amplifying passive night vision aid and a local color display including a local source of light, comprising:
> (a) a first optical filter that filters light from the local color display, wherein said first optical filter is a notch filter that passes light comprising predetermined color bands including a predetermined red color band and that substantially blocks light associated with color bands other than said predetermined color bands; and
> (b) a second optical filter that filters light at the night vision aid, wherein said second optical filter substantially blocks light of at least said predetermined red color band.

'914 patent, col. 5, l. 30-col. 6, l. 11.

Claim 2 describes:

> A display system for use in association with a light amplifying passive night vision aid and a local color display including a local source of light having blue, red, and green color bands, comprising:
> (a) a plurality of filters at the local color display including (1) a first filter for filtering the blue color band of the local source of light; (2) a second filter for filtering the green color band of the local source of light; and (3) a third filter for filtering the red color band of the local source of light and passing a narrowband of the red color band; and
> (b) a fourth filter which filters light at the night vision aid, said fourth filter cooperating with said plurality of filters to substantially block at least said narrowband of the red color band from being admitted to the night vision aid.

'914 patent, col. 6, ll. 12-28.

Claim 3 describes:

> The display system of claim 2 wherein said narrowband of the red color band is substantially five to twenty nanometers wide.

'914 patent, col. 6, ll. 29-31.

II. FACTUAL AND PROCEDURAL BACKGROUND. FN3

> FN3. The relevant facts and procedural background recited herein largely were derived from: the United States Patent No. 6,467,914 (" '914 patent") , granted on October 22, 2002 and issued from United States Patent Application Serial No. 06/786,269 (" '269 application"), originally filed on October 10, 1985, the prosecution history thereof, and prior art; Plaintiffs' December 18, 2002 Complaint (" Compl."); the United States ("Gov't" or " Government"); May 23, 2003 Motion To Issue Notice to Third-Party Lockheed Martin Corp. ("Lockheed Martin"); the Government's June 16, 2003 Answer ("

Gov't First Answer"); Defendant-Intervenor's September 3, 2003 Motion to Intervene ("Int.Motion"); Plaintiffs' September 9, 2003 Response thereto ("Pl. Reply to Int. Motion"); Defendant-Intervenor's September 17, 2003 Answer ("Int.Answer"); Plaintiffs' December 23, 2004 Opening Claim Construction Brief ("12/23/04 Honeywell Brief"); Defendants' January 14, 2005 Claim Construction Brief ("1/14/05 Def. Joint Brief"); Plaintiffs' January 21, 2005 Reply Claim Construction Brief ("1/21/05 Honeywell Brief"); Plaintiffs' April 1, 2005 Opening Post-Hearing Brief Regarding Claim Construction ("4/1/05 Honeywell Brief"); the Government's April 1, 2005 Post-Hearing Claim Construction Brief ("4/1/05 Gov't Brief"); Defendant-Intervenor's April 1, 2005 Post-*Markman* Brief ("4/1/05 Int. Brief"); Plaintiffs' Post-Hearing Reply Brief Regarding Claim Construction ("4/15/05 Honeywell Brief"); Government's Post-Hearing Claim Construction Reply Brief ("4/15/05 Gov't Brief"); Defendant-Intervenor's April 15, 2005 Reply to Honeywell's Opening Post-Hearing Brief Regarding Claim Construction ("4/15/05 Int. Brief"); April 15, 2005 Joint Stipulation ("Jt.Stip."); Plaintiffs' May 13, 2005 Amended Complaint ("Am.Compl."); the Government's May 31, 2005 Answer (" Gov't Answer to Am. Compl."); and Defendant-Intervenor's May 31, 2005 Answer ("Int. Answer to Am. Compl.").

Honeywell Intellectual Properties, Inc. is the owner of the '269 patent application and '914 patent and Honeywell International, Inc. (hereinafter collectively, "Honeywell") is the exclusive licensee of the '269 patent application and '914 patent. The issuance of the patent, however, was withheld because of a Secrecy Order, issued on April 2, 1986.

On December 18, 2002, Honeywell filed a Complaint in the United States Court of Federal Claims asserting essentially three claims against the Government allegedly for violating: (1) the Invention Secrecy Act of 1951, 35 U.S.C. §§ 181 -88, as a result of the Government's issuance of an April 2, 1986 Secrecy Order concerning Honeywell's '914 ***414** patent and related '269 application; FN4 (2) the Fifth Amendment to the United States Constitution, as a result of the Government's taking of Honeywell's '914 patent and related '269 application; and (3) 28 U.S.C. § 1498(a) , as a result of the unlicensed, or otherwise unlawful, use of the '914 patent by or on behalf of the Government. *See* Compl. at ¶¶ 53-75. The case was assigned to the Honorable Emily C. Hewitt.

FN4. Initially, Honeywell asserted that the Government infringed U.S. Patent Application Serial No. 06/786,268 (" '268 application") and U.S. Patent No. 6,142,637 (" '637 patent"). Honeywell, however, relinquished claims in the '268 application and '637 patent. *See* 12/23/04 Honeywell Brief at 1, n.1; *see also* 5/13/05 Honeywell Motion.

On May 23, 2003, the Government filed a Motion to Issue a Notice to Third Party Lockheed Martin, pursuant to 41 U.S.C. § 114(b) and RCFC 14(b). On June 5, 2003, the court granted the Government's Motion. On June 16, 2003, the Government filed a First Answer.

* * * * * *

On August 15, 2003, this case was assigned to the undersigned judge. On September 3, 2003, Lockheed Martin filed an Unopposed Motion to Intervene, insofar as Honeywell alleged that the C-130J Hercules aircraft, which is manufactured by Lockheed Martin, incorporated technology claimed in the '914 patent. *See* Int. Motion at 1. On September 9, 2003, Honeywell filed a Response to Lockheed Martin's Motion to Intervene. On September 12, 2003, both Lockheed Martin and the Government filed a Reply to Honeywell's Response. On September 17, 2003, the court issued a revised Order granting Lockheed Martin's Motion to Intervene with respect to only Counts III and IV of the Complaint. On September 17, 2003, the court

entered an Order setting discovery and pretrial deadlines agreed to by the parties. On that date, Lockheed Martin also filed an Answer in response to the December 18, 2002 Complaint.

On February 10, 2004, the Government filed an Unopposed Motion for Entry of a Stipulated Protective Order. On February 20, 2004, the court granted the Unopposed Motion and entered a Stipulated Protective Order. On April 30, 2004, the court entered an Order setting the date of a claim construction hearing for December 6-10, 2004, which subsequently was rescheduled to November 29, 2004-December 3, 2004 by a May 14, 2004 Order. On July 9, 2004, the court also issued an Order granting Honeywell's Unopposed Motion for Extension of Time of Certain Discovery Deadlines. On July 16, 2004, the court convened a telephone status conference to discuss discovery matters and questions concerning the claim construction hearing. At the invitation of the court, on July 23, 2004 and July 29, 2004, Lockheed Martin and Honeywell forwarded the court letters expressing suggestions about that hearing. On July 23 and 30, 2004, and August 5 and 17, 2004, the court convened additional telephone status conferences to discuss pending discovery matters. On August 25, 2004, the court vacated the September 17, 2003 and May 14, 2004 Orders and established a revised Scheduling Order setting a new date for the claim construction hearing for January 27, 2005, later re-set for January 31, 2005. In addition, on August 25, 2004, the court issued a Claim Construction Procedures Order proposed by the parties. On August 26, 2004, the court convened another telephone status conference to discuss discovery matters. On August 27, 2004, Lockheed Martin filed a Motion to Compel Honeywell's responses to Interrogatories 3 and 4. On August 30, 2004, Lockheed Martin filed a Motion to Compel Honeywell's response to Interrogatory 17.

On September 13 and 23, 2004, the court convened additional telephone status conferences to discuss discovery matters. On October 4, 2004, Lockheed Martin filed a Motion to Compel Honeywell to respond to requests for admission. On October 5, 2004, the court convened a telephone status conference with the parties. On October 6, 2004, the court issued an Amended Claim Construction Procedures Order and an Amended Scheduling Order setting another telephone status conference with the parties for October 12, 2004.

On October 15, 2004, Honeywell filed an Infringement Claim Chart. On October 18, 2004, Honeywell requested entry of a First ***415** Amended Protective Order and opposed Lockheed Martin's requests for admission. On October 27, 2004, Lockheed Martin filed a Reply. At the November 1, 2004 telephone status conference, the court was advised that the dispute regarding requests for admission had been resolved to the satisfaction of the parties. Accordingly, on November 2, 2004, the court entered an Order to that effect.

On November 10, 2004, defendants filed a Joint Response Chart that asserted Claims 1, 2, and 3 of the '914 patent were invalid, due to:

> (1) the existence of documentary and nondocumentary evidence that rendered Honeywell's claims obvious; (2) the insufficiency of the description of the invention to show Honeywell's possession of it; (3) a failure by Honeywell to disclose the best mode for practicing the claimed invention; (4) Honeywell's derivation of the invention from others; (5) the introduction of impermissible new matter to the '914 patent in Honeywell's June 24, 2002 amendment; (6) the misjoinder of inventorship, which led to the granting of the '914 patent (the Government did not join in this defense); (7) the violation of Honeywell's duty to disclose to the second patent examiner the existence of prior art that was material to the PTO granting the '914 patent (the Government did not join in this defense).

On November 15, 2004, Honeywell submitted a Proposed Claim Construction Statement that set forth: (1) Honeywell's proposed claim constructions, including any special or uncommon meanings of words or phrases used in the '914 patent ; (2) references from the specification that support, describe, or explain each of the claim elements and/or Honeywell's proposed construction; (3)

material in the prosecution history that describes or explains each of the elements of the claim; and (4) extrinsic evidence, where necessary.

On November 16, 2004, the court entered a First Amended Protective Order reflecting the changes negotiated by the parties. On November 16, 2004, defendants filed a Motion to Amend the Defendants' Joint Response Chart. On November 22, 2004, defendants filed a Joint Proposed Claim Construction Statement, together with a November 22, 2004 Expert Report of Dr. Harry Lee Task.

On December 3, 2004, the court entered an Order setting a status conference on December 17, 2004 and amending the due date for the Joint Claim Construction Statement to December 14, 2004. On December 16, 2004, the court entered an Order granting Lockheed Martin's Motion to Amend Defendants' November 8, 2004 Joint Response Chart. Following the December 17, 2004 status conference, the court entered a Second Amended Protective Order. On December 21, 2004, the parties filed a Joint Claim Construction Statement.

On December 23, 2004, Honeywell filed an Opening Claim Construction Brief seeking the court's construction of certain claims in the '914 patent, together with a four volume appendix-Exhibits 1-39 (PA1-PA514). On January 14, 2005, the Government and Lockheed Martin filed Defendants' Claim Construction Brief, together with five volumes of Exhibits 1-35 (DE1-DE1036). FN5 On January *416 21, 2005, Honeywell filed a Reply Claim Construction Brief, together with a Supplemental Appendix Ex. 40-49 (PA515-558). On January 27, 2005, the parties filed a Supplement to the Joint Claim Construction agreeing to the construction of the following terms: "optical filter" and "filter," when used as nouns; "filter" and " filtering," when used as verbs; and "passes," when used as a verb.

> FN5. On January 12, 2005, without requesting leave, the Government and Lockheed Martin filed a joint brief prior to the claim construction hearing that clearly was produced and authored in large part by Lockheed Martin's counsel. *See* 1/14/05 Def. Joint Brief; *see also* TR at 10-16. On January 26, 2005, the court issued a Memorandum Opinion and Order addressing jurisdictional and procedural issues raised by this unilateral action:
>
> The public interest in having transparent judicial proceedings is particularly ill-served where a private party is in fact conducting and funding the Government's defense of a patent infringement case without the Government's public recognition and specific authorization of such. Therefore, if the Government, in fact, has decided to allow Lockheed Martin to "assume and undertake the conduct and control" of this case, [pursuant to Contract No. F33657-00-C0018 page one and an unidentified one page attachment, *see* May 23, 2003 Motion for Notice to Third-Party, pursuant to RCFC(b) (Exhibit 2 at 2(i)(3))], then the Government should advise the court and parties .... On the other hand, if the Government, in fact, intends to continue to defend this case, the court expects each party to proceed independently, representing the best interests of each party's respective clients.
>
> *Honeywell Int'l, Inc. v. United States,* 65 Fed.Cl. 809, 810-11, 2005 WL 1415441 at *2 (Fed.Cl. Jan. 26, 2005, amended and reissued on June 14, 2005) (Memorandum Opinion and Order).
>
> Thereafter, the Government reaffirmed that it would conduct a separate defense, particularly since "Lockheed's interest in the infringement issue are not co-extensive [with the Government]." TR at 5.

The court held a claim construction hearing from January 31, 2005-February 3, 2005 ("TR 1-1138"). FN6 In addition to argument of the parties, the court considered the reports of the parties' experts as direct testimony and heard cross examination and re-direct.

> FN6. The following Honeywell exhibits

were admitted into evidence: PMX 1-57, 100-105, 110-112. The following Government and Lockheed Martin exhibits were admitted into evidence: DMX 1-38, DX 50-56.

The court has determined that Honeywell's expert, Lawrence E. Tannas, Jr., and his testimony, met the qualifications of Fed.R.Evid. 702 -03. *See* PMX 34 (Nov. 15, 2004 Initial Expert Report of Lawrence E. Tannas, Jr.); PMX 36 (Dec. 1, 2004 Rebuttal Expert Report); PMX 37 (Dec. 7, 2004 Supplement to Expert Reports); *see also* TR at 772-958; 1128-1135. Mr. Tannas has a B.S. and M.S. degree in Engineering from the University of California. *See* PMX 37 at Ex. 1. Mr. Tannas has had more than 25 years of "hands-on" experience with avionic cockpit displays, including research and development, manufacturing, testing, and human factor analysis. *See* PMX 34¶ 1 at 2. In addition, Mr. Tannas worked for Honeywell in the early 1960's during which time he invented the backup reentry guidance display for the Apollo Reentry Vehicle, which was used in the Apollo 13 mission. *Id.* ¶ 3 at 2. Subsequently, Mr. Tannas was employed at Martin Marietta Corp. where he developed a cockpit for the SV5 Manned Space Vehicle. *Id.* Prior to starting his own firm in 1999, Mr. Tannas also was employed by Rockwell International where he developed the engineering prototype of a liquid crystal display for the world's first full-scale LCD production. *Id.* Mr. Tannas currently is President of Tannas Electronics, an entity involved in consulting, lecturing, and research. *Id.* ¶ 5 at 3. In addition, he is President of Tannas Electronic Displays, Inc., which is involved in research, development, and licensing of intellectual property for preparing LCDs for avionics. *Id.*

Mr. Tannas has served as a consultant or lecturer for Fortune 500 companies, several universities, and federal agencies, including the Federal Aviation Administration, National Aeronautics and Space Administration, United States Air Force, United States Navy, National Science Foundation, Defense Advanced Research Projects Agency, and the Central Intelligence Agency. *Id.* ¶ 2 at 2. Mr. Tannas also is an inventor or co-inventor of eight patents issued by the USPTO. *Id.* ¶ 3. He has authored or co-authored numerous publications, including serving as author/editor of *Flat-Panel Displays and CRTs* (Van Nostrand Reinhold Co., 1985) and *Flat-Panel Display Technologies, Japan, Russia, Ukraine, and Belarus* (Noyes Publications, 1995). *Id.* ¶ 4. In addition, Mr. Tannas has been a coordinator and lecturer on flat-panel displays, human factor analysis, and advance cockpit displays at University of California at Los Angeles and other universities. *Id.* ¶ 4 at 2-3.

Mr. Tannas was retained by Honeywell to provide an opinion as to the meaning of the following words or phrases in the '914 patent : "color display," *id.* ¶ 12 at 5; "source of light," *id.* ¶ 13; "local" with "color display," *id.* ¶ 14; "local" with "source of light," *id.* ¶ 14 at 5-6; "optical filter," *id.* ¶ 15 at 6; "notch filter," *id.* ¶ 16; "color band," *id.* ¶ 17 at 6-7; "predetermined color band," *id.* ¶ 18 at 7; "substantially blocks," *id.* ¶ 19; "filter," *id.* ¶ 20; "narrow band of the red color band," *id.* ¶ 21 at 7-8.

In addition to testifying about proposed construction of the above-referenced terms, Mr. Tannas advised the court that he intended to testify about the "background of the patented ['914] invention, including providing ***417** relevant information concerning the technologies and industry to which the ['914] patent relates, the prior art, and the problems solved by the invention." *Id.* ¶ 22 at 8.

The court also has determined that the Government's expert, Dr. Harry Lee Task met the qualifications of Fed.R.Evid. 702 -03. *See* PMX 35 (Nov. 22, 2004 Expert Report of Harry Lee Task, Ph.D.); *see also* TR at 968-1127. Dr. Task has had more than 27 years of "hands-on" experience with research and development in helmet mounted displays, display image quality, vision assessment in space, night vision goggles, night vision goggle compatible lighting, and vision through aircraft transparencies. *See* PMX 35 ¶ 3 at 2. Dr. Task has a B.S. degree in Physics from Ohio University, a M.S. in Physics from Purdue University, a M.S. and Ph.D. in Optical Sciences from the University of Arizona Optical Sciences

Center, and a M.S. in Management of Technology from the Massachusetts Institute of Technology Sloan School of Management. *Id.* ¶ 2 at 1-2.

In 1971, Dr. Task was hired by the United States Air Force Aerospace Medical Research Laboratory ("AMRL") as an optical physicist to work on helmet mounted displays and display image quality. *Id.* ¶ 3 at 2. In 1989, Dr. Task became the Chief Scientist for AMRL and served in that capacity until 1991. *Id.* In 1997, Dr. Task became the Senior Scientist for Human Systems Interface for the United States Air Force Research Laboratory, a position equivalent to a one-star General. *Id.* In June 2001, Dr. Task retired from the United States Air Force, but has continued technical work as a consultant. Since his retirement in June 2001, Dr. Task has been an independent consultant and President and Treasurer for Opto-Metrix, Inc., a Subchapter "S" corporation that makes and sells optical protractors. *Id.* ¶ 1 at 1.

Dr. Task also is the inventor or co-inventor of approximately 45 patents issued by the USPTO, author or co-author of over 100 technical-research publications, a member of relevant professional associations, including the Society for Information Display, and a Fellow of the American Society for Testing and Materials. *See* PMX 35 ¶ 4 at 2-3. He has been retained as an expert in vision and visibility in approximately a dozen cases involving vehicle accidents at night or dusk, however, none concerned NVGs or NVG compatible lighting. *Id.* ¶ 5 at 3.

Dr. Task was retained to provide an opinion as to the meaning of the following words or phrases in the '914 patent : "display system," *id.* ¶ 15 at 8; " local" with respect only to "passive night vision aid, " *id.* at ¶¶ 17-18 at 8; "display," *id.* ¶¶ 19-20 at 4-5; "color display," *id.* ¶ 21 at 9; "local source of light," *id.* ¶¶ 22-23 at 9; "notch filter," *id.* ¶¶ 24-25 at 9; "narrowband," *id.* ¶ 26 at 10; "color band," *id.* ¶¶ 27-29 at 10-11; "red color band," *id.* ¶¶ 30-31 at 11-12; "predetermined red color band," *id.* ¶¶ 32-34 at 12; "blue color band," *id.* ¶ 35 at 13; "green color band," *id.* ¶ 36 at 13; and "substantially blocks," *id.* ¶¶ 37-42 at 13-15.

In addition, Dr. Task testified about the background associated with the technical areas of the '914 patent , including the United States Army's 1973 adoption of a second-generation NVG and designation of the AN/PVS-5A as an "interim" pilot's aid for helicopter flying at night. *See* PMX 35 ¶ 8 at 4. Dr. Task admitted that NVGs were limited because of their incompatibility with aircraft lighting and displays. *Id.* Dr. Task explained that the problem was too much light in the cockpit, to which the NVGs were "sensitive." *Id.* ¶ 9 at 4. In addition, pilots trying to look outside the helicopter would see only reflections of the inside of the cockpit, as opposed to the view outside the helicopter. *Id.* On a more technical basis, the wavelengths that the NVGs were sensitive to (and amplified) included the entire visible spectrum (*i.e.,* 400-700 nm) and a small portion of the near infrared wavelengths, *i.e.,* 700-900 nm. *Id.* ¶ 9 at 4.

Dr. Task advised the court that most cockpit lighting and displays utilize incandescent light bulbs that emit a considerable amount of infrared energy compared to energy to which the human eye is sensitive. *Id.* ¶ 10 at 5. This created an issue since most incandescent lights in the cockpit emitted far more "bad" light than "good" light, to which the eye is sensitive. *Id.* Even when the NVGs were sensitive, "the filters typically did their ***418** job with respect to producing the desired color, but they also passed the invisible-to-the-eye infrared light that was incompatible with the NVG operation." *Id.* Therefore, in order to create a display with phosphors compatible with NVGs, longer wavelength side bands needed to be blocked by a filter. *Id.* ¶ 11 at 5-6. To accomplish making a display with a phosphor compatible with NVGs several techniques were developed, including: placing filters over displays to block objectionable infrared and red wavelengths, but pass blue and green wavelengths; incandescent lights in the cockpit were turned off and the instrument panel utilized sources of light that did not emit objectionable light; and a filter passing only shorter wavelengths were put over white phosphor displays to block those wavelengths. *Id.* ¶ 12 at 6. The United States Army also developed an Aviation Night Vision Imaging System ("ANVIS") night vision goggles in the early 1980s that used an image

intensified tube that was sensitive in the 450-930 nm range, rather than a full visible spectrum. *Id.* ¶ 13 at 6. When a "long pass" filter was used on the lens in front of the NVG to reduce the sensitivity of the ANVIS to shorter visible wavelengths, the NVG became sensitive to wavelengths of 580-930 nm. *Id.* ¶ 13 at 7. As a result, the visible range of below approximately 530 nm was used for cockpit lighting and display since light in this range was invisible to the NVGs allowing visibility outside the cockpit. *Id.* ¶ 14 at 7. Figure 1, the preferred embodiment of the '914 patent, teaches a significant overlap between the wavelengths (including yellow, orange, and red wavelength bands) sensitive to the human eye and the ANVIS, *i.e.,* approximately 580-700 nm. *Id.* This was the state of the NVG technology in 1985, at the time the '914 patent was filed. *Id.* ¶ 15 at 7 (quoting '914 patent specification describing the problem in 1985 that the '914 patent addressed) ("It is ... desired that a night vision aid such as ANVIS goggles be operable while a full color display is illuminated. It is therefore desired to prevent light which originates at the full color display from overwhelming the night vision aid.").

Following the claim construction hearing, on February 28, 2005 and March 3, 2005, the court convened telephone status conferences, pursuant to which the court issued a March 11, 2005 Scheduling Order regarding post-hearing briefs and discovery deadlines regarding the August 1-12, 2005 trial.

On March 30, 2005, Lockheed Martin filed a Motion to Supplement the Record with three contracts between Lockheed Martin and the Government to support Lockheed Martin's intervention as a matter of right.

On April 1, 2005, Honeywell filed an Opening Post-Hearing Brief Regarding Claim Construction; the Government filed a Post-Hearing Claim Construction Brief; and Lockheed Martin filed a Post-*Markman* Hearing Brief. On April 7, 2005, the court granted Lockheed Martin's March 30, 2005 Motion to Supplement the Record.

On April 15, 2005, Honeywell filed a Post-Hearing Reply Brief Regarding Claim Construction; the Government filed a Post-Hearing Claim Construction Reply Brief; and Lockheed Martin filed a Reply to Honeywell's Opening Post-Hearing Brief Regarding Claim Construction. In addition, on April 15, 2005, the parties filed a Stipulation agreeing to the meaning of six of the contested claims, which are set forth herein.

On April 20, 2005, Honeywell filed a Motion for Leave to Supplement the Record Regarding Claim Construction of the term "red color band" ("4/20/05 Honeywell Brief"), together with an April 18, 2004 Declaration of Mark Koehn, Esquire and April 19, 2004 Declaration of Lawrence E. Tannas, Jr. and Exhibits 1-13 (PE1-155). FN7 Honeywell's Motion requested that the record include the *Draft Standard for Color Active Matrix Liquid Crystal Displays* in U.S. Military Aircraft, WL-TR-93-1177, Darrel Hopper June ***419** 1994 (Koehn Ex. 1) and Dr. Hopper's deposition testimony related thereto. On May 4, 2005, the Government filed a Brief in Response to Honeywell's Motion to Supplement, together with three volumes of supporting Exhibits ("Gov't Supp. Resp."). The Government did not object to Honeywell's request to supplement the record, but requested counter-designations.

> FN7. On February 25, 2005, Honeywell filed a Motion to file a corrected version of the December 23, 2004 Opening Claim Construction Brief. On March 14, 2005, Defendants opposed Honeywell's request to file a corrected brief. On March 17, 2005, Honeywell filed a reply together with Exhibits A-G. On March 24, 2005, the court entered an Order denying Honeywell's February 25, 2005 Motion, but granted Honeywell leave to discuss any corrections in the post-hearing brief to be filed on April 1, 2005.

On May 4, 2005, Honeywell also filed a letter to bring the recent decision of the United States Court of Appeals for the Federal Circuit in *Gillette Co. v. Energizer Holdings, Inc.,* 405 F.3d 1367 (Fed.Cir.2005) to the attention of the court. On May 5, 2005, Honeywell filed a Supplement to the October 15, 2004 Claim Chart ("5/5/05 Honeywell

Supp. to Claim Chart") to amend: Section II of the Claim Chart to clarify that "Honeywell no longer asserts that LED displays are a type of display that infringes the '914 patent when used by the Government" (5/5/05 Honeywell Supp. to Claim Chart at 1, ¶ 2.); Section II of the Claim Chart to clarify that "Honeywell no longer asserts that the Cockpit Engineer Display (CED) made by Smiths Industries for B-52H, the Warning Annunciator Panel (WAP) made by Litton Systems/Northrop Grumman for the C-17A, or the Engine/Caution Panel made by Litton Systems for the C-17A are covered by the '914 patent when used by the Government in connection with NVIS" (*Id.* at 2, ¶ 3.); and Section III of the Claim Chart to remove " the statement at page 9 referencing 'Attachment B: claim chart showing how, on information and belief, '914 claim 1 reads on full color, NVIS compatible, Light-Emitting Diode (LED) displays, when used with NVIS" ' (*Id.* at ¶ 4.). Honeywell appears to have withdrawn Attachment B to the Claim Chart. *Id.* On May 6, 2005, the Government filed a Motion for Leave to File the Declaration of Dr. Darrel G. Hopper ("5/5/05 Hooper Decl.").

On May 6, 2005, Honeywell filed a Reply in support of the April 20, 2005 Unopposed Motion to Supplement the Record Regarding Claim Construction. On May 9, 2005, the court granted the Government's May 6, 2005 Unopposed Motion to File an Original Declaration of Dr. Darrel Hopper.

On May 13, 2005, the court granted Honeywell's May 13, 2005 Unopposed Amended Complaint dismissing Counts I, II, III, and IV as they relate to U.S. Patent No. 6,142,637.

On May 13, 2005, Honeywell filed a Motion to Preclude the Government "from making offensive use of certain documents belatedly produced in violation of the Court's [First Amended Protective Order and Second Amended Protective Order]," together with the May 11, 2005 Affidavit of Mark Koehn and Exhibits 1-19 (PE1-PE159). On May 25, 2005, the Government filed a Brief in Opposition. On May 26, 2005, the court denied Honeywell's May 13, 2005 Motion to Preclude. On May 31, 2005, Honeywell filed a Motion for Reconsideration.

On May 31, 2005, both the Government and Lockheed Martin filed an Answer to Honeywell's Amended Complaint.

III. DISCUSSION.

A. Jurisdiction.

The United States Court of Federal Claims has jurisdiction to adjudicate claims that allege "an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same ... [seeking] recovery of ... reasonable and entire compensation for such use and manufacture." 28 U.S.C. § 1498(a).

The United States Court of Federal Claims also has jurisdiction to adjudicate claims under the Invention Secrecy Act. *See* 35 U.S.C. § 181. FN8

> FN8. The Invention Secrecy Act provides that "[w]henever publication or disclosure by the publication of an application or by the grant of a patent on an invention in which the Government has a property interest might, in the opinion of the head of the interested Government agency, be detrimental to the national security, the Commissioner of Patents upon being so notified shall order that the invention be kept secret and shall withhold the publication of the application or the grant of a patent therefor under the conditions set forth hereinafter. Whenever the publication or disclosure of an invention by the publication of an application or by the granting of a patent, in which the Government does not have a property interest, might, in the opinion of the Commissioner of Patents, be detrimental to the national security, he shall make the application for patent in which such

> invention is disclosed available for inspection to ... the Secretary of Defense, and the chief officer of any other department or agency of the Government designated by the President as a defense agency of the United States.... If, in the opinion of ... the Secretary of a Defense Department, or the chief officer of another department or agency so designated, the publication or disclosure of the invention by the publication of an application or by the granting of a patent therefor would be detrimental to the national security, ... the Secretary of a Defense Department, or such other chief officer shall notify the Commissioner of Patents and the Commissioner of Patents shall order that the invention be kept secret and shall withhold the publication of the application or the grant of a patent for such period as the national interest requires, and notify the applicant thereof." 35 U.S.C. § 181.
> An applicant may seek damages caused by the issuance of a Secrecy Order. *See* 35 U.S.C. § 183 ("An applicant ... whose patent is withheld as herein provided, shall have the right ... to apply to the head of any department or agency who caused the order to be issued for compensation for the damage caused by the order of secrecy and/or for the use of the invention by the Government, resulting from his disclosure."). If full settlement of the matter is not achieved "the head of the department or agency may award and pay to such applicant ... a sum not exceeding 75 per centum of the sum which the head of the department or agency considers just compensation for the damage and/or use." *Id.*

***420** The Complaint and Amended Complaint in this action properly invoke the court's jurisdiction under both of these federal statutes that authorize the award of monetary damages.

B. Standing.

1. Plaintiff.

Lower federal courts have been advised to "decide standing questions at the outset of a case. That order of decision (first jurisdiction then the merits) helps better to restrict the use of the federal courts to those adversarial disputes that Article III defines as the federal judiciary's business." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 111, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (Breyer, J. concurring). The party invoking federal jurisdiction, has the burden of proof and persuasion to satisfy the constitutional requirements of Article III standing. *See FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 231, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (holding that the burden is on the party seeking to exercise jurisdiction by clearly alleging facts sufficient to establish jurisdiction).

Section 281 of Title 35 of the United States Code provides that "[a] patentee shall have remedy by civil action for infringement of his patent." 35 U.S.C. § 281; *see also* 35 U.S.C. § 100(d) ("The word 'patentee' includes not only the patentee to whom the patent was issued but also the successors in title to the patentee."); *Prima Tek II, L.L.C. v. A-Roo Co.,* 222 F.3d 1372, 1376-77 (Fed.Cir.2000) ("Standing to sue for patent infringement derives from the Patent Act, ... 35 U.S.C. § 281."); *Paradise Creations, Inc. v. UV Sales, Inc.,* 315 F.3d 1304, 1308 (Fed.Cir.2003) (emphasis in original) (" This court has determined that in order to assert standing for patent infringement, the plaintiff must demonstrate that it held enforceable title to the patent *at the inception of the lawsuit.*"). The standard set forth by the United States Supreme Court over a century ago fully retains its vitality. *See Waterman v. Mackenzie,* 138 U.S. 252, 260, 11 S.Ct. 334, 34 L.Ed. 923 (1891) (citations omitted) (" There can be no doubt that he is 'the party interested, either as patentee, assignee, or grantee,' and as such entitled to maintain an action at law to recover damages for an infringement; and it cannot have been the intention of congress that a suit in equity against an infringer to obtain an injunction and an account of profits, in which the court is authorized to award damages, when necessary to fully compensate the plaintiff, and has the same

power to treble the damages as in an action at law, should not be brought by the same person.").

Plaintiffs properly have alleged that, at the inception of the lawsuit and at the filing of the Amended Complaint on May 31, 2005, Honeywell Intellectual Properties Inc. was the owner of the '269 patent application and '914 patent and Honeywell International Inc. was an exclusive licensee of the '269 patent application and '914 patent.

***421 2. Intervenor.**

The United States Court of Federal Claims "may summon any and all persons with legal capacity to be sued to appear as a party ... in any suit ... of any nature whatsoever pending in said court to assert and defend their interests [.]" 41 U.S.C. § 114(b); *see also* RCFC 14(b) ("The court, ... may notify any person with legal capacity to sue and be sued and who is alleged to have an interest in the subject matter of any pending action."); *see also* RCFC 24(a) ("Upon timely application anyone shall be permitted to intervene in an action ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."); RCFC 24(b) (" Upon timely application anyone may be permitted to intervene in an action: ... (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.").

The Complaint alleged that aircraft manufactured by Lockheed Martin for the Government incorporate technology disclosed and claimed in the '269 patent application and '914 patent. *See* Compl. ¶¶ 53-60, Ex. B; *see also* Am. Compl. ¶ ¶ 24-28, Ex. B. Lockheed Martin initially filed a Motion to Intervene and the court subsequently granted Lockheed Martin's Motion. Following the court's January 26, 2005 Memorandum Opinion and Order, Lockheed Martin supplemented the record with three contracts that Lockheed Martin entered into with the Government, "all contain[ing] warranties that each aircraft provided by Lockheed Martin under the contracts 'shall be free of rightful claim of infringement of any United States Patent.' " *See* 3/30/05 Lockheed Martin Motion to Supplement the Record at 2 (citing Ex. 1 (Contract No. F33657-95-C-2055) at 14 (C-130J System Commercial Warranty), Part A(e), p. 42 of 165; Ex. 2 (Contract No. F33657-00-C-0018), Attachment 1 at 14 (C-130J System Commercial Warranty), Part A, e., p. 50 of 65; Ex. 3 (Contract No. 33657-03-C-2014), Attachment 1 at 13 (C-130J System Commercial Warranty), b(5), p. 34 of 48). The remedy for a breach of these warranties by Lockheed Martin would be " 'reimbursement of the Government by [Lockheed Martin] of the amount of the Government's loss, cost or damage ... arising out of such patent infringement.' " *See* 3/30/05 Lockheed Martin Motion to Supplement the Record at 3 and n.2. These contracts evidence that the disposition of this action may impair Lockheed Martin's interests, unless it enjoys all the rights of a party, including the right to appeal. Therefore, the court has determined that Lockheed Martin has standing to intervene in this case pursuant to RCFC 24(a).

C. Controlling Appellate Precedent Concerning Construction Of Patent Claims.

The United States Supreme Court's unanimous affirmance of the *en banc* decision of the United States Court of Appeals for the Federal Circuit in *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 978 (Fed.Cir.1995) ("*Markman I*"), *aff'd* 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996) ("*Markman II*"), settled that the meaning and scope of a patent's claims are issues of law to be determined by a federal trial judge. *Id.* A strong undercurrent, if not undertow, concerned the competence of a jury to understand, must less construe, technical terms of art and functional elements of a patent's claims. *See Markman II,* 517 U.S. at 384, 116 S.Ct. 1384 ("We ... consider both the relative interpretive skills of judges and juries

and the statutory policies that ought to be furthered by the allocation."); *see also id.* at 388-89, 116 S.Ct. 1384 (quoting *Parker v. Hulme,* 18 F. Cas. 1138, 1140 (E.D.Pa.1849) ("The judge, from ... training and discipline, is more likely to give a proper interpretation to such instruments than a jury; and ... is, therefore, more likely to be right, in performing such a duty, than a jury can be expected to be.")).

*422 In *Markman I,* the United States Court of Appeals for the Federal Circuit specified three sources relevant to construe a patent's claim: claim language; the specification; and prosecution history. *See Markman I,* 52 F.3d at 979 (quoting *Unique Concepts, Inc. v. Brown,* 939 F.2d 1558, 1561 (Fed.Cir.1991)) (" 'To ascertain the meaning of claims, we consider three sources: The claims, the specification, and the prosecution history.' "). It is important to recognize, however, that in *Markman II* the United States Supreme Court did not constrain a federal trial court from adjudicating the terms of a claim by excluding any relevant and reliable evidence, including that of experts. *See Markman II,* 517 U.S. at 390, 116 S.Ct. 1384 ("The decisionmaker vested with the task of construing the patent is in the better position to ascertain whether an expert's proposed definition fully comports with the specification and claims and so will preserve the patent's internal coherence."). Instead, that decision was entrusted to the considered judgment of the federal trial judge to determine, but following the precedent of the United States Court of Appeals for the Federal Circuit that was established to bring uniformity and doctrinal stability to the decisions of the federal judiciary on all matters concerning patent law. *Id.* ("It was just for the sake of such desirable uniformity that Congress created the Court of Appeals for the Federal Circuit as an exclusive appellate court for patent cases, H.R.Rep. No. 97-312, pp. 20-23 (1981), observing that increased uniformity would 'strengthen the United States patent system in such a way as to foster technological growth and industrial innovation.' *Id.* at 20.").

1. A Federal Trial Judge Must First Attempt To Construe Ambiguous Claim Terms Utilizing Intrinsic Evidence.

a. Claim Language.

[1] [2] A federal trial judge examines claim terms and phrases "through the viewing glass of a person skilled in the art." *See Brookhill-Wilk 1, LLC v. Intuitive Surgical, Inc.,* 334 F.3d 1294, 1298 (Fed.Cir.2003); *see also Hockerson-Halberstadt, Inc. v. Avia Group Int'l, Inc.,* 222 F.3d 951, 955 (Fed.Cir.2000) ("Claim language must be given ordinary and accustomed meaning, as understood by one of ordinary skill in the art," at the time of the patent application.). In doing so, a federal trial judge in a patent infringement case must determine, as a threshold matter, whether there is ambiguity in any claim term requiring construction and, if so, to consider intrinsic evidence. *See Vitronics Corp. v. Conceptronic, Inc.,* 90 F.3d 1576, 1582 (Fed.Cir.1996). First, a federal trial judge must " look to the words of the claims themselves, both asserted and nonasserted, to define the scope of the patented invention." *Id.* Second, "it is always necessary to review the specification to determine whether the inventor has used any terms in a manner inconsistent with their ordinary meaning. The specification acts as a dictionary when it expressly defines terms ... or by implication." *Id.* Third, a federal trial judge may "consider the prosecution history of the patent, if in evidence." *Id.* The United States Court of Appeals for the Federal Circuit has decided that intrinsic evidence is the " most significant source of the legally operative meaning of disputed claim language." *Id.; see also Phonometrics, Inc. v. Northern Telecom Inc.,* 133 F.3d 1459, 1464 (Fed.Cir.1998) ("Proper construction requires an examination of claim language, the written description, and, if introduced, the prosecution history.").

b. Specification Explanation And Definition.

The United States Court of Appeals for the Federal Circuit recently reaffirmed that the specification is often the best tool to ascertain the "technological and temporal context" of claims. *See Nazomi Communications, Inc. v. Arm Holdings, PLC,* 403

F.3d 1364, 1368 (Fed.Cir.2005) (citing *Metabolite Labs., Inc. v. Lab. Corp. of Am. Holdings,* 370 F.3d 1354, 1360 (Fed.Cir.2004)) ("In most cases, the best source for discerning ... [usage in context as understood by one skilled in the art at the time of the invention] is the patent specification wherein the patent applicant describes the invention.").

[3] If a patent's claim language is ambiguous, the specification "including the inventors'***423** statutorily-required written description of the invention is the primary source for determining claim meaning." *Astrazeneca AB v. Mutual Pharm. Co., Inc.,* 384 F.3d 1333, 1336 (Fed.Cir.2004); *see also id.* at 1337 (quoting *Autogiro Co. of Am. v. United States,* 181 Ct.Cl. 55, 384 F.2d 391, 397-98 (1967)) (" 'Most courts have simply stated that the specification is to be used to explain the claims'; ... the patent is an integrated document, with the claims 'pointing out and distinctly claiming,' 35 U.S.C. § 112, the invention described in the rest of the specification and the goal of claim construction is to determine what an ordinary artisan would deem the invention claimed by the patent, taking the claims together with the rest of the specification."). Of course, the utility of the specification depends on whether the "written description of the invention [is] ... clear and complete enough to enable those of ordinary skill in the art to make and use it." *Vitronics,* 90 F.3d at 1582.

The United States Court of Appeals for the Federal Circuit has held many times that " 'a patentee can act as his own lexicographer to specifically define terms of a claim contrary to their ordinary meaning[;]' the written description in such a case must clearly redefine a claim term 'so as to put a reasonable competitor or one reasonably skilled in the art on notice that the patentee intended to so redefine that claim term.' " *Elekta Instrument S.A. v. O.U.R. Scientific Int'l, Inc.,* 214 F.3d 1302, 1307 (Fed.Cir.2000) (quoting *Process Control Corp. v. HydReclaim Corp.,* 190 F.3d 1350, 1357 (Fed.Cir.1999)); *see also Georgia-Pacific Corp. v. United States Gypsum Co.,* 195 F.3d 1322, 1332 (Fed.Cir.1999) (citations omitted) (advising that the "specification of the patent in suit is the best guide to the meaning of a disputed term ... [and if] intrinsic evidence is unambiguous, it is improper for the court to rely on extrinsic evidence to contradict the meaning of the claims."); *ATD Corp. v. Lydall, Inc.,* 159 F.3d 534, 540 (Fed.Cir.1998) (citation omitted) ("When 'the specification explains and defines a term used in the claims, without ambiguity or incompleteness, there is no need to search further for the meaning of the term' ... [unless] such definition is challenged [then] it is often appropriate ... to receive evidence of the meaning and usage of terms of art from persons experienced in the field of the invention."); *Vitronics,* 90 F.3d at 1582 (holding that, in ascertaining the scope of the patent, deference should be afforded claims, as defined by their "customary meaning," with the caveat that the law affords patentees the right to serve as a "lexicographer," if a special or unique definition is clearly stated in the specifications or prosecution history.). Federal trial judges also have been well advised not to construe a claim to exclude the preferred and only embodiment disclosed in a specification: "such an interpretation is rarely, if ever, correct[.]" *Vitronics,* 90 F.3d at 1583.

In *Chemcast Corp. v. Arco Industries Corp.,* 913 F.2d 923, 926-27 (Fed.Cir.1990), the United States Court of Appeals for the Federal Circuit also discussed the distinction between "enablement" and "best mode" requirements. FN9 The specification discloses an invention "in such a manner as will enable one skilled in the art to make and utilize it." *Id.* at 926. The purpose of the "best mode," however, is to restrain inventors from applying for patents and concealing from the public preferred embodiments of their inventions. *Id.* at 927.

> FN9. The governing statute provides that the specification "shall set forth the best mode contemplated by the inventor of carrying out his invention." 35 U.S.C. § 112. Section 112 also requires disclosure of specific instrumentalities or techniques that are the best way of carrying out the invention. *Id.*

c. Prosecution History.

Federal trial judges also have been instructed that

prosecution history is relevant to claim construction "because it may contain contemporaneous exchanges between the patent applicant and the [USPTO] about what the claim means." *Vitronics,* 90 F.3d at 1584. Prosecution history, however, can trump the importance of the specification in certain circumstances. For example, in *Graham v. John Deere Co. of Kansas City,* 383 U.S. 1, 86 S.Ct. 684, 15 L.Ed.2d 545 (1966), the United States Supreme Court held that if claims were narrowed to obtain issuance over ***424** prior art during prosecution, they may not later be interpreted by the specifications to cover what was disclaimed before the U.S. Patent Office. *Id.* at 33, 86 S.Ct. 684; *see also Schriber-Schroth Co. v. Cleveland Trust Co.,* 311 U.S. 211, 220-21, 61 S.Ct. 235, 85 L.Ed. 132 (1940) ("When ... the patentee originally claimed the subject matter alleged to infringe but then narrowed the claim in response to a rejection, he may not argue that the surrendered territory compromised unforeseen subject matter that should be deemed equivalent to the literal claims of the issued patent."). In sum, prosecution history may preclude "a patentee from regaining through litigation, coverage of subject matter relinquished during prosecution of the application of the patent." *Wang Labs. v. Mitsubishi Electronics America, Inc.,* 103 F.3d 1571, 1577-78 (Fed.Cir.1997), *cert denied,* 522 U.S. 818, 118 S.Ct. 69, 139 L.Ed.2d 30 (1997).

2. Only In Limited Circumstances May A Federal Trial Judge Construe Claim Terms Utilizing Extrinsic Evidence.

[4] If analysis of intrinsic evidence resolves ambiguity about the meaning of the patent claim, as a matter of law, it is improper for a federal trial judge to cite to extrinsic evidence, *i.e.,* evidence outside of the patent record, including expert and inventor testimony, dictionaries, learned treatises, and articles. *See Vitronics,* 90 F.3d at 1584 (allowing extrinsic evidence "to help the court come to the proper understanding of the claims [,]" but not to contradict intrinsic evidence or vary the scope of the claims). That instruction was clarified in *Key Pharm. v. Hercon Lab. Corp.,* 161 F.3d 709 (Fed.Cir.1998):

> This court has made strong cautionary statements on the proper *use* of extrinsic evidence, which might be misread by some members of the bar as restricting a trial court's ability to *hear* such evidence. We intend no such thing. To the contrary, trial courts generally can hear expert testimony for background and education on the technology implicated by the presented claim construction issues, and trial courts have broad discretion in this regard.
>
> Furthermore, a trial court is quite correct in hearing and relying on expert testimony on an ultimate claim construction question in cases in which the intrinsic evidence (*i.e.,* the patent and its file history-the "patent record") does not answer the question.
>
> What is disapproved of is an attempt to use extrinsic evidence to arrive at a claim construction that is clearly at odds with the claim construction mandated by the claims themselves, the written description, and the prosecution history, in other words, with the written record of the patent.

Id. at 716 (citations omitted); *see also Elekta Instrument,* 214 F.3d at 1307 (quoting *Gentry Gallery, Inc. v. Berkline Corp.,* 134 F.3d 1473, 1476 (Fed.Cir.1998)) ("[A] court should rely upon ' the claim language, the written description portion of the specification, the prosecution history, and if necessary to aid the court's understanding of the patent, extrinsic evidence.' "); *Zodiac Pool Care, Inc. v. Hoffinger Indus., Inc.,* 206 F.3d 1408, 1414 (Fed.Cir.2000) (affirming a federal trial court's claim construction and cautioning that "both intrinsic and extrinsic evidence [may be considered, however, a federal trial court should] turn[ ] to extrinsic evidence only when the intrinsic evidence is insufficient to establish the clear meaning of the asserted claim."); *Trilogy Communications, Inc. v. Times Fiber Communications, Inc.,* 109 F.3d 739, 744 (Fed.Cir.1997) ("When, as here, the district court has concluded that the patent specification and the prosecution history adequately elucidate the proper meaning of the claims, expert testimony is not necessary and certainly not crucial.").

[5] Extrinsic evidence, however, may be particularly useful to determine how one of ordinary skill in the relevant art would interpret the claim

language. *See Brookhill-Wilk 1, LLC,* 334 F.3d at 1298. For example, a federal trial judge should be able to consider extrinsic evidence to learn whether a common term has a special meaning in the relevant field. *See Microsoft Corp. v. Multi-Tech Sys., Inc.,* 357 F.3d 1340, 1347 (Fed.Cir.2004) (*en banc*) (quoting ***425***Invitrogen Corp. v. Biocrest Mfg., L.P.,* 327 F.3d 1364, 1367 (Fed.Cir.2003)) (" Claim language generally carries the ordinary meaning of the words in their normal usage in the field of invention.").

a. Prior Art.

[6] Depending on the clarity of a patent claim and specification, prior issued patents may provide a source of relevant evidence to determine how a term or phrase has been used or understood by one skilled in the art. That is true whether or not the prior art was referenced in the specification or the prosecution history. *See Arthur A. Collins, Inc. v. Northern Telecom, Ltd.,* 216 F.3d 1042, 1044-45 (Fed.Cir.2000) ("When prior art that sheds light on the meaning of a term is cited by the patentee, it can have particular value as a guide to the proper construction of the term, because it may indicate not only the meaning of the term to persons skilled in the art, but also that the patentee intended to adopt that meaning."); see also *Vitronics,* 90 F.3d at 1583. Within the hierarchy of extrinsic evidence, prior art is a more reliable source of evidence as to the meaning of words or phrases in a patent claim than expert testimony. *Id.*

b. Technical Treatises And Technical Articles.

[7] As with prior art, treatises and technical articles, particularly those of note, wide circulation, or likely to be utilized as standard desk reference material by an ordinary person skilled in the art at the time of the patent's issuance may be consulted in the discretion of the court. *See Dow Chemical Co. v. Sumitomo Chem. Co.,* 257 F.3d 1364, 1372 (Fed.Cir.2001) ("[Technical treatises, which are extrinsic evidence, hold a 'special place' and may sometimes be considered along with the intrinsic evidence when determining the ordinary meaning of claim terms."); *see also Vitronics,* 90 F.3d at 1584 n. 6 ("Although technical treatises and dictionaries fall within the category of extrinsic evidence, as they do not form a part of an integrated patent document, they are worthy of special note. Judges are free to consult such resources at any time in order to better understand the underlying technology and may also rely on dictionary definitions when construing claim terms, so long as the dictionary definition does not contradict any definition found in or ascertained by a reading of the patent documents.").

c. Expert Testimony.

[8] The United States Court of Appeals for the Federal Circuit has instructed federal trial judges that expert testimony may be helpful in aiding an understanding of the patent, but not for the purpose of varying or contradicting the claims. *See Markman I,* 52 F.3d at 981. The United States Court of Appeals for the Federal Circuit, however, has cautioned that expert testimony may be considered, but only insofar as it aids the trial court to understand the claim language, the specification, or the prosecution history. *See Vitronics,* 90 F.3d at 1584 ("Indeed, where the patent documents are unambiguous, expert testimony regarding the meaning of a claim is entitled to no weight."); *see also CAE Screenplates Inc. v. Heinrich Fiedler GmbH & Co. KG,* 224 F.3d 1308, 1318 (Fed.Cir.2000) (holding that when "the intrinsic evidence is unambiguous, it is improper for a [federal trial] court to rely on extrinsic evidence such as expert testimony when construing disputed claim limitations."); *but see Pitney Bowes, Inc. v. Hewlett-Packard Co.,* 182 F.3d 1298, 1308 (Fed.Cir.1999) ("*Vitronics* does not prohibit courts from examining extrinsic evidence, even when the patent document is itself clear."); *see also id.* (emphasizing that *Vitronics* "does not set forth any rules regarding the admissibility of expert testimony into evidence.... [and] there are no prohibitions ... on courts hearing evidence from experts. Rather, *Vitronics* merely warned courts not to *rely* on extrinsic evidence in claim construction to contradict the meaning of claims discernible from thoughtful examination of the claims, the written

description, and the prosecution history-the intrinsic evidence."); *Key Pharm.*, 161 F.3d at 716 ("[T]rial courts generally can hear expert testimony for background and education on the technology implicated by the presented claim construction issues, and trial courts have broad discretion in this regard.").

***426** Federal trial courts also have been advised that "it is entirely appropriate, perhaps even preferable, for a court to consult trustworthy extrinsic evidence to ensure that the claim construction it is tending to from the patent file is not inconsistent with clearly expressed, plainly apposite, and widely held understandings in the pertinent technical field." *Pitney Bowes*, 182 F.3d at 1309. In that case, Circuit Judge Rader wrote " Additional Views," joined by Circuit Judge Plager, to emphasize that *Vitronics* provides "good counsel when it urges trial judges to focus on the patent document-notably the claims themselves-to ascertain the scope of patent coverage." *Id.* at 1314.

Federal trial judges, however, may turn to expert testimony to: "(1) supply a proper technological context to understand the claims (words often have meaning only in context), (2) explain the meaning of claim terms as understood by one of skill in the art (the ultimate standard for claim meaning), and (3) help the trial court understand the patent process itself (complex prosecution histories-not to mention specifications-are not familiar to most trial courts."). *Id.* (citations omitted); *see also Elkay Mfg. Co. v. Ebco Mfg. Co.*, 192 F.3d 973, 976-77 (Fed.Cir.1999) *cert. denied*, 529 U.S. 1066 (2000) (reversing a federal trial court and stating that a court "may receive extrinsic evidence to educate itself about the invention and the relevant technology, but the court may not use extrinsic evidence to arrive at a claim construction that is clearly at odds with the construction mandated by the intrinsic evidence.").

d. Scientific Or Industry Specific Dictionaries.

Although many post-*Markman II* decisions have attempted to clarify the permissible use of dictionaries to define words in a claim, the United States Court of Appeals for the Federal Circuit's initial guidance in *Markman I* remains sound: "The district court's claim construction, enlightened by such extrinsic evidence as may be helpful, is still based upon the patent and prosecution history." *Markman I*, 52 F.3d at 981; *see also Toro Co. v. White Consol. Indus., Inc.*, 199 F.3d 1295, 1299 (Fed.Cir.1999) ("[The trial court should] not rely solely on a dictionary of general linguistic usage, but would understand the claims in light of the specification and the prior art, guided by the prosecution history and experience in the technologic field.").

e. Inventor Testimony.

[9] The United States Court of Appeals for the Federal Circuit appropriately has viewed post-issuance testimony by a patent's inventor as subjective opinion about the meaning of claim terms that is entitled to little or no weight. *See, e.g., Bell & Howell Document Mgmt. Prods. Co. v. Altek Sys.*, 132 F.3d 701, 706 (Fed.Cir.1997) ("The testimony of an inventor often is a self-serving, after-the-fact attempt to state what should have been part of his or her patent application."); *Engel Indus., Inc. v. Lockformer Co.*, 96 F.3d 1398, 1405 (Fed.Cir.1996) ("[The inventor's] subjective intent is of little or no probative weight in determining the scope of the claims, except as documented in the prosecution history.").

3. A Federal Trial Court Should Construe Claims To Preserve A Patent's Validity Only Where All Other Tools Of Claim Construction Are Exhausted.

[10] Where ambiguity remains after reviewing intrinsic evidence in construing patent claims, two doctrines have been employed to preserve the patent's validity. The United States Court of Appeals for the Federal Circuit has advised federal trial judges that claims should be construed to preserve a patent's validity, however, this presumption is applicable only "where the proposed claim construction is 'practicable,' ... based on sound claim construction principles, and does not revise or ignore the explicit language of the claims."

Generation II Orthotics Inc. v. Med. Tech. Inc., 263 F.3d 1356, 1365 (Fed.Cir.2001); *see also Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 914 (Fed.Cir.2004) (holding that "unless the court concludes, after applying all the available tools of claim construction that the claim is still ambiguous, the axiom regarding the construction to preserve the validity of the claim does not apply"). Likewise, the United ***427** States Court of Appeals for the Federal Circuit has emphasized that the doctrine of claim differentiation is to be reserved only for those cases where neither intrinsic nor extrinsic evidence leads to a definite definition. *See Hormone Research Foundation, Inc. v. Genentech, Inc.*, 904 F.2d 1558, 1567 n. 15 (Fed.Cir.1990) ("[The doctrine of claim differentiation] although well established in our cases cannot overshadow the express and contrary intentions of the patent draftsman.").

4. The Import Of *Phillips v. AWH Corp.*, 376 F.3d 1382 (Fed.Cir.2004).

To the displeasure of the court, none of the parties initially recognized, much less discussed, the pending *en banc* consideration of *Phillips v. AWH Corp.*, 363 F.3d 1207, *reh'g en banc granted, j. vacated,* 376 F.3d 1382 (Fed.Cir.2004) ("*Phillips*") in their pre-claim construction briefs. *See Honeywell Int'l, Inc. v. United States*, 65 Fed.Cl. 809, 810-11, 2005 WL 1415441 (Jan. 26, 2005, amended and reissued June 14, 2005) (Memorandum Opinion and Order); *see also* TR at 8-13. In *Phillips*, the United States Court of Appeals for the Federal Circuit, sitting *en banc*, requested briefing and argument concerning seven core claim construction issues:

> 1. Is the public notice function of patent claims better served by referencing primarily to technical and general purpose dictionaries and similar sources to interpret a claim term or by looking primarily to the patentee's use of the term in the specification? If both sources are to be consulted, in what order?
> 2. If dictionaries should serve as the primary source for claim interpretation, should the specification limit the full scope of claim language (as defined by the dictionaries) only when the patentee has acted as his own lexicographer or when the specification reflects a clear disclaimer of claim scope? If so, what language in the specification will satisfy those conditions? What use should be made of general as opposed to technical dictionaries? How does the concept of ordinary meaning apply if there are multiple dictionary definitions of the same term? If the dictionary provides multiple potentially applicable definitions for a term, is it appropriate to look to the specification to determine what definition or definitions should apply?
> 3. If the primary source for claim construction should be the specification, what use should made of dictionaries? Should the range of the ordinary meaning of claim language be limited to the scope of the invention disclosed in the specification, for example, when only a single embodiment is disclosed and no other indications of breadth are disclosed?
> 4. Instead of viewing the claim construction methodologies in the majority and dissent of the now-vacated panel decision as alternative, conflicting approaches, should the two approaches be treated as complementary methodologies such that there is a dual restriction on claim scope, and a patentee must satisfy both limiting methodologies in order to establish the claim coverage it seeks?
> 5. When, if ever, should claim language be narrowly construed for the sole purpose of avoiding invalidity under, *e.g.*, 35 U.S.C. §§ 102 , 103 , and 112?
> 6. What role should prosecution history and expert testimony by one of ordinary skill in the art play in determining the meaning of the disputed claim terms?
> 7. Consistent with the Supreme Court's decision in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996), and our *en banc* decision in *Cybor Corp. v. FAS Technologies, Inc.*, 138 F.3d 1448 (Fed.Cir.1998), is it appropriate for this court to accord any deference to any aspect of trial court claim construction rulings? If so, on what aspects, in what circumstances, and to what extent?

Phillips, 376 F.3d at 1383.

In post-claim construction hearing briefs, however, the parties rationalized their oversight by advising the court that the resolution of *Phillips* would not affect the claim construction in this case because the '914 claims are not dependent upon dictionary definition, but rather can be resolved by the claim language or description of the '914 ***428** invention, as set forth in the specification and embodiments therein. *See* 4/1/05 Honeywell Brief at 9-10; *see also* 4/1/05 Gov't Brief at 12.

The Government's proposed construction of the term "red color band" in this case primarily relied on a dictionary definition. *See* 1/14/05 Def. Joint Brief at 30-33; 4/1/05 Gov't Brief at 37; 4/15 Gov't Brief at 21. In *Phillips,* however, the Government wherein argued that "[p]rimary reliance on dictionaries that are not part of the patent's public record subordinates the patentee's own explanation of his invention in favor of a dictionary definition never at issue during the patent prosecution before the USPTO." 9/20/04 Brief for the United States as *Amicus Curiae* at 9, *Phillips v. AWH Corp.* The Government explained to the court that its proposed construction of the "red color band" was misstated and taken out of context by the court in light of the Government's adherence to an "approach approved by the [United States Court of Appeals for the] Federal Circuit in cases such as *Key Pharmaceuticals v. Hercon Laboratories Corp.,* 161 F.3d 709 (Fed.Cir.1998)." *See* 4/15/05 Gov't Brief at 3. The Government also was quick to point out that Honeywell equally was culpable of relying on extrinsic evidence in its proposed construction of the terms: "display system," *see* 12/23/04 Honeywell Brief at 9-11 (citing *e.g.,* Webster's; Ieee Dictionary; Dr. Task, TR at 31-32, 35; Mr. Tannas, TR at 34, 129); "optical filter," *see also id.* at 15-19 (citing, *e.g.,* APPLIED OPTICS; Mcgraw Hill; Mr. Tannas Initial Report (PMX 34 at ¶ 15); Mr. Tannas, TR at 168-71, 279-80, 351-52; Dr. Task, TR at 19, 31-32, 244-45, 247, 249-56); and " color band," *see also id.* at 24-26 (citing *e.g.,* Webster's; Mcgraw Hill; Mr. Tannas Initial Report (PMX 34 at ¶ 17); Mr. Tannas, TR at 183; Dr. Task's Initial Report (PMX 35 ¶ ¶ 27-28); Dr. Task, TR at 58, 63-65, 70-71, 127-29).

Since the infringement and potential damage claims in this case are scheduled for trial on August 1, 2005, the court has decided to issue this claim construction Memorandum Opinion, reserving the right to amend these constructions prior to the issuance of a Final Judgment, in light of any subsequent appellate precedent, including *Phillips,* and any further evidence that may be adduced at trial.

D. Construction Of Certain Claims Of United States Patent No. 6,467,914.

At a January 31, 2005-February 4, 2005 claim construction hearing, initially the parties requested that seventeen claims of the '914 patent be construed by the court. On April 14, 2005, the parties filed a Joint Stipulation to evidence their agreement of the meaning of six claims. Therefore, the court now is required only to construe the eleven claims that remain in dispute.

For each claim term or phrase at issue, the court has set forth the parties' arguments before, during, and after the claim construction hearing to highlight those occasions where there was a shift, which sometimes was subtle and at other times stark. The court also has made liberal use of the transcript of the claim construction hearing to highlight the areas of the court's inquiry and representations made by counsel therein and to underscore the court's disposition of each word or phrase of a claim that was construed.

As a predicate to the following patent claim construction, the court has determined that one of ordinary skill in the art in 1985 would be knowledgeable about night vision compatible aids, compatible instrument and panel lighting, and manufacturing displays for military cockpits.

1. "Display System."

Preamble language common to both Claim 1 and Claim 2 of the '914 patent states that the invention is: "*A display system* for use in association with a light amplifying passive night vision aid and a local color display including a local source of light[.]"

See '914 patent, col. 5, ll. 31-33, col. 6, ll. 11-13 (emphasis added).

The parties have proposed the following competing constructions of "display system" and other claim language for the court's consideration:

Honeywell's Proposed Construction	**Defendants' Proposed Construction**
Display system for use in association with a light amplifying passive night vision aid and a local color display including a local source of light: No further construction is necessary. To the extent preamble needs to be construed at all, it should be construed as follows: complex unity subject to a common plan or serving a common purpose that combines a light amplifying passive night vision aid and a local color display including a local source of light.	**"Display System for Use in Association With"** means two or more filters, which are used in combination with a night vision aid, such as night vision goggles, and a local color display, to make the color display compatible with the night vision aid. For use in association with: in combination with.

***429** *See* Honeywell *Markman* Slide 35; Gov't *Markman* Slide 002 (bold added by parties).

a. Honeywell's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

Honeywell's pre-hearing brief informed the court that no further construction of the language of the preambles common to both Claim 1 and Claim 2 was necessary. *See* 12/23/04 Honeywell Brief at 8. In the alternative, if the court decided to construe " display system," Honeywell urged the court to consider the entire preamble, not just the first seven words. *Id.* In addition, Honeywell proffered that either a traditional or specialized dictionary definition supported the "ordinary meaning" of " *system* as a complex unity formed of often diverse parts," which in this case includes, "a light amplifying passive night vision *aid* and a local color display including a local source of light." *Id.* (emphasis added). Honeywell cautioned, however, that the "fact that the *display system* is recited as being *for use in association with ... a local color display* does not require that the display system be distinct from the local color display." *Id.* at 16 (emphasis added).

Next, Honeywell turned to the specification and figures therein to support the proposition that the " filter(s) may be *either* in front of the local color display or *within* the display." *Id.* at 10 (emphasis added); *see also id.* at 10-11 (*comparing* '914 patent , figure 1 showing filter 23 in front of 17, the local color display, *with* '914 patent, figure 3 showing filters 61, 62, and 63 within 37, the local color display).

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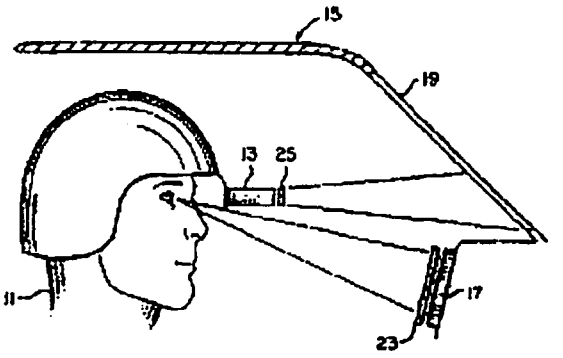

FIG. 1

'914 patent, figure 1, sheet 1 of 2.

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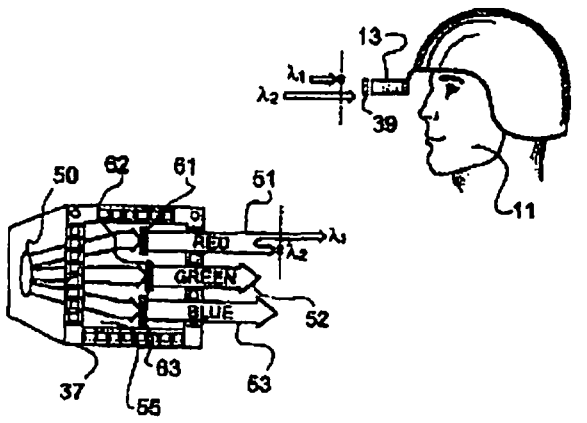
FIG. 3



'914 patent, figure 3, sheet 2 of 2.

At the claim construction hearing, initially Honeywell requested the court construe only the words "display system." TR at 126 ("I think perhaps on reflection the two terms, the two words that should be construed are 'display system.' "). After further inquiry by the court, Honeywell decided to request construction of "display system," as well as the remainder of the preamble language common to both Claims 1 and 2:

> THE COURT: So you're arguing that the words that now-you want to argue just about the words " display system" and not the rest?
> *431 HONEYWELL'S COUNSEL: We are arguing ... in our position on the whole preamble, the word-we're going to *take display system first,* and then *address how* it's implicated *in the balance of the preamble*[.]

TR at 128 (emphasis added). Thereafter, Honeywell argued that "display system" means "the entire combination ... [rather than being] confined to the two components[.]" TR at 129. In that regard, Honeywell argued "[t]hat display has to be a local color display or the local source of light, and it's got to have a night vision aid." TR at 152.

iii. Post-Claim Construction Hearing Briefs.

During post-hearing briefing, Honeywell argued that "display system" should be construed in accord with the ordinary meaning of "a system that *includes* a display or display functionality." 4/1/05 Honeywell Brief at 12 (emphasis added) and n.2 (citing Ieee Dictionary; PMX 28 at 264, 915; Lockheed PPT at 70-72); *see also* DMX 36 at D000087 (citing prosecution history where examiner construed "display system" to refer to a system having a "plurality of CRT's"); PMX 44 at 5:35 (Miller, '562 patent) ("display system" refers to "a system that includes a color CRT display and a contrast enhancement filter."). At this juncture, however, Honeywell appeared no longer to be arguing that a "display system" included both a night vision aid and a local color display, but only a "display or display functionality." *Compare* 12/23/04 Honeywell Brief at 8-9 *with* 4/1/05 Honeywell Brief at 12.

b. The Government's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

The Government's pre-hearing brief represented that the preamble language "establishes that this display system is comprised of two or more filters and not [the night vision goggles] and the local color display." 1/14/05 Def. Joint Brief at 8-9 (citing Ex. 1 '914 patent, col. 5, ll. 31-33 and col. 6, ll. 11-14). The Government also asserted that the '914 patent specification supported its construction, because the "Background of the Invention" section of the specification provided that: "[t]he invention relates to electronic passive night vision aids *and* to a system for operating such night vision aids *in conjunction with* a local display such as a cockpit display." *Id.* at 9-10 (emphasis added) referring to '914 patent, col. 1, ll. 19-21. In addition, the " Summary of the Invention" section of the specification provided that: "*In accordance with* the present invention, an ANVIS aid, such as an ANVIS goggles set, is provided with an optical filter. A second optical filter blocking light in an opposite sense from the first optical filter is placed over displays, which may otherwise present light that would interfere with the ANVIS." '914 patent, col. 2, ll. 11-15 (emphasis added).

The Government further advised the court that the prosecution history established that the original '914 patent described an invention with "full color display which uses separate primary color light sources is made compatible with an ambient night vision (ANVIS) aid." Ex. 7 '914 Wrapper D0005. During prosecution, however, Honeywell distinguished the '914 patent invention from prior art representing that: "In order to enable highly-sensitive night vision (ANVIS) goggles to be operated in an environment having full color displays, it is necessary to provide a technique to protect the ANVIS goggles .... *The present invention accomplishes that by filtering* the display light with optical filters *and by providing an additional optical filter* at the night vision aid." Ex. No. 7 '914 Wrapper D000109 (emphasis added).

ii. At The Claim Construction Hearing.

At the claim construction hearing, the Government stated that it was seeking construction of more than " display system," but rather the phrase "display system for use in association with[.]" TR at 165.

> GOVERNMENT'S COUNSEL: [T]he display system is clearly the noun .... I think the "for use in association with" defines a separate clause that is a description ***432** of the intended use of the display system and nothing more.
>
> THE COURT: Well, what do you do with the " including" phrase?
>
> GOVERNMENT'S COUNSEL: Well, we believe that the "including" phrase, including a local source of light refers explicitly to the local color display. So the local color display includes a local source of light [.] ... The specification makes very clear that the "including" phrase refers to the local color display, and not to the display system[.] ... Let's go to the specification.... It states that, and it uses the phrase "system." " The invention relates to an electronic passive night vision aids and to a system for operating such night vision aids in conjunction with a local display, such as a cockpit display ['914 patent, col. 1, ll. 19-21]." ... the system is something that brings them together[.]

TR at 169-172.

iii. Post-Claim Construction Hearing Briefs.

During post-hearing briefing, the Government conceded that "display system" means "two or more filters," but that the "proper construction of 'for use in association with' ... shows that the display system, comprising two or more filters, is intended to be used in combination with a night vision aid and a local color display, but that these elements are not *part* of the claimed invention." 4/1/05 Gov't Brief at 13 (emphasis in original). The Government emphasized that the '914 patent specification referred to "system" only once and in a way that supported the Government's construction, *i.e.*, the "Technical Field" portion of " Background of the Invention" stated: "This invention relates to electronic passive night vision aids and to a *system* for operating such night vision aids in conjunction with a local display such as a cockpit display." DMX 1 ('914 patent, col. 1, ll. 19-21). Accordingly, the Government concluded that this phrase must mean that filters are the only required elements of the invention and that a night vision aid and a local color display are independent devices that operate in conjunction with the display system. *See* 4/1/05 Gov't Brief at 15-16. The Government also urged that during the '914 patent prosecution history, in response to the Examiner's rejection for obviousness in light of USPTO No. 3,517,122 (Maass), Honeywell represented that the '914 patent filters were for a different purpose than generating RBG color signals, *i.e.*, Honeywell filters "provide a technique to protect the ANVIS goggles from the relatively high intensity light produced by the local cockpit displays. The present ['914 patent] invention accomplishes that by filtering the display light with optical filters." 4/1/05 Gov't Brief at 16 (citing DMX 7 at DE-328).

c. Intervenor Lockheed Martin's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

Lockheed Martin's construction of "display system" was the same as that of the Government. *See* 1/14/05 Def. Joint Brief at 8-14.

ii. At The Claim Construction Hearing.

The court considered the following colloquy at the claim construction hearing relevant to the court's decision to construe the entire preamble language common to Claim 1 and Claim 2.

> LOCKHEED MARTIN'S COUNSEL: And it's one of the reasons you can't turn to a dictionary definition and say let's take the dictionary definition of system, or let's take the dictionary definition of system as modified by display. You really have to look to a definition of system as modified by display, and is modified by the phrase "for use in association with" a night vision goggle and a local color display, including a local source of light, and that's the only way you can

come to a definition, and it's one of the reasons why you can't rely on a dictionary here.
TR at 183.

* * * * * *

LOCKHEED MARTIN'S COUNSEL: [Honeywell's counsel] in his initial brief indicated that the preamble did not need to be construed because it simply discussed the purpose, if you will, of the invention. I *433 believe he has moved away from the arguments from what I heard today, would indicate that he understands that the preamble does need to be construed[.]
TR at 184.

* * * * * *

LOCKHEED MARTIN'S COUNSEL: Your Honor, we were discussing the preamble, and you can see from the prosecution history-... the preamble was considered to be a limitation on the claim by Honeywell. Because it's a limitation, it needs to be construed.... [W]e have an extract from the prosecution history where we deal with this issue of indefiniteness that we talked about before.... [T]he words "in association with" to be "in combination with."

THE COURT: Well, this was the patent examiner who felt it was indefinite.

LOCKHEED MARTIN'S COUNSEL: Yes, this is the patent examiner finding that it was .... [I]ndefiniteness is one of the first things you look for when you're looking at patent issue, and here they found indefiniteness, and a change was made in the preamble to indicate that the-basically changed it so the preamble read "in combination with a night vision goggle and a local display, a display system comprising."
TR at 186-87.

* * * * * *

LOCKHEED MARTIN'S COUNSEL: Also, Honeywell tried to argue around the Patent Office's prior art rejections, and successfully did it by claiming that its display system that was described in the body of the claim was distinct from prior art systems. That's the type of thing that brings the preamble into play as a claim limitation.
TR at 188.

* * * * * *

LOCKHEED MARTIN'S COUNSEL: [T]he night vision aid and the local color display were essential limitations because, as the patent acknowledges, the claimed novelty of the invention is the combination of filters which make up the display system, with the night vision goggle, and the local color display, and the only reference to night vision goggles and local color display is found in the preamble. The preamble also needs to be-... construed because the preamble is necessary to give life, meaning, and vitality to the claims.
TR at 189.

* * * * * *

LOCKHEED MARTIN'S COUNSEL: So turning to the specification, there are two pieces of the specification that are relevant to the definition of the display system, and both of those are consistent with the definition that-... in the specification that needs to be considered when looking at the definition of display system, and it is the statement in the specification that you find under the heading "Background of the Invention," which states: "This invention relates to electronic passive night vision aids and to a system for operating such night vision aids in conjunction with a local display such as a cockpit display." My point in quoting this is that this statement support[s] the interpretation that we have been discussing and it shows that there are three parts to this invention: night vision aids, a system for operating those aids, and local displays. So it is a night vision aid and a system that operates those night vision aids in conjunction with a local display such as a cockpit display.... [T]he summary of the invention in the 914 patent, and it provides that, and I quote: "In accordance with the present invention, an ANVIS aid such as an ANVIS goggle set is provided with an optical filter. A second optical filter blocking light in an opposite sense from the first optical filter is placed over the displays which may otherwise present light that would interfere with the ANVIS." So again what we see here is we see a reference to the ANVIS aid in the night vision goggles, a local display, and the filters, each of them forming their own separate

functions.
TR at 196-99.

* * * * * *

THE COURT: I'm not sure I read that that way in 44, because it says the present invention basically includes the goggles *434 that have a filter, and then there is a second optical filter blocking light in the opposite direction. I don't read it the way you do. What am I missing?
LOCKHEED MARTIN'S COUNSEL: Well, it says you have with the present invention an ANVIS, such as goggles.
THE COURT: Got it.
LOCKHEED MARTIN'S COUNSEL: Which is provided with an optical filter.
THE COURT: Got it.
LOCKHEED MARTIN'S COUNSEL: Which [are] going to be part of the system.
TR at 198-99.

* * * * * *

LOCKHEED MARTIN'S COUNSEL: I am attempting to show that the display system is in fact separate from the local color display, and the night vision goggles, I have a couple more slides along those lines that I would like to show the Court. The first is slide No. 58, and in this slide Honeywell is arguing in response to an action from the Patent Office that its claimed display system was distinct from prior art display systems that were cited when the Patent Office rejected its complaints.
THE COURT: Remind me what year this was that the PTO had this rejection....
GOVERNMENT'S COUNSEL: It's September 9, 1986, and I know we were referring to-I believe Lockheed is also referring to Bates Nos. D000108 to 109, I believe.
THE COURT: Okay. Now, I have on my chronology, see I just did my own little thing, November 13, 1989, I said PTO issued a notice of allowability, and they did that after this episode-
GOVERNMENT'S COUNSEL: Right, right.
THE COURT: -in response. Okay.
GOVERNMENT'S COUNSEL: That would be right.

* * * * * *

LOCKHEED MARTIN'S COUNSEL: So in order to show that their claimed display system was distinct from prior art display systems they argued to the Patent Office. It says, "In order to enable highly sensitive night vision ANVIS goggles to be operated in an environment having full color displays, it is necessary to provide a technique to protect the ANVIS goggles from relatively high intensity light produced by the local cockpit displays." And it goes on and states, "The present invention accomplishes that by filtering the display light with optical filters and providing an additional optical night vision aid. The filter for the night vision aid is adapted to block light from the preferred range of frequencies, thereby effectively blocking out light from the display." So again what this tells us is there is a display, the display is generating light, and their invention says let us filter that light so that we can keep offending light from reaching the night vision goggles. If we turn to slide 59, and here we have-again this is from Exhibit 7, the 914 file history, and the Bates number here is D000110. Honeywell makes another statement to the Patent Office which shows that its display system is operationally separate from the local color display. Here it says, "It is respectfully submitted that the prior art neither shows nor suggests that a multiple monochromatic tube color display be provided with separate filters in order to provide enhanced filtration of multi-color displays." So again what they are saying is is that their invention is to provide this enhanced filtration. This is the filtration that would filter out the offending light from reaching the night vision goggles.
THE COURT: I would read that that their enhancement would be the multiple monochromatic tube color display, which includes-no, no, no-which is provided together with, okay, separate displays, and it's different than what you said.
LOCKHEED MARTIN'S COUNSEL: Well, I would say I was reading it. "Respectfully submit that the prior art neither shows nor suggests that a multiple monochromatic tube color display be provided with separate filters."
THE COURT: What I am saying back to you is

what they are saying is that the prior art didn't talk about-

*435 LOCKHEED MARTIN'S COUNSEL: That's correct.

THE COURT: -multiple monochromatic tube color display, but we are now. We meaning-

LOCKHEED MARTIN'S COUNSEL: I think if we read this whole thing in context, what I have done is extract something here, we see the whole contact saying-

THE COURT: Right.

LOCKHEED MARTIN'S COUNSEL: -that they were dealing with a piece of prior art that had multiple monochromatic displays, and in those monochromatic displays the displays were providing different colors, different primary colors that could be combined, and Honeywell tried to distinguish the prior art by saying, wait a minute, we're not just providing multiple monochromatic displays, we are providing a special filter, separate filters, and those separate filters are to give enhanced filtration of multi-color displays in order to achieve the night vision compatibility goal of the invention.

THE COURT: Let me go back and ask something that may be intuitive to you but not necessarily to me. Was the prior art basically tubes that they put filters on, but tubes that did something else, project the real color?

LOCKHEED MARTIN'S COUNSEL: That's correct.

THE COURT: Okay.

LOCKHEED MARTIN'S COUNSEL: What the prior art was you had a prior art display which consisted of three monochromatic tubes, each generating a primary color, red, blue, and green.

THE COURT: Okay.

LOCKHEED MARTIN'S COUNSEL: And through the electronic signals that went into those tubes you can manipulate the intensity of the color.

THE COURT: And that was the way they wanted to address the issue of the redness?

LOCKHEED MARTIN'S COUNSEL: Right, and those three tubes together could give you a full color display....

TR at 208-13.

iii. Post-Claim Construction Hearing Briefs.

After the claim construction hearing, Lockheed Martin advised the court that one of ordinary skill in the art would construe the preamble phrase "display system for use in association with" to mean "two or more filters which are used in combination with a night vision aid, such as night vision goggles ('NVG '), and a local color display, to make the color display compatible with the night vision aid." 4/1/05 Int. Brief at 10. Lockheed Martin maintained that Honeywell "claimed only a filtering system that would render a full color display compatible with NVG." *Id.* Stated another way, Lockheed Martin contended that Honeywell claimed only: "A (a display system) for use in association with B (a night vision aid) and C (a local color display), comprising: D (a first optical filter or a plurality of filters) and E (a second optical filter or a fourth optical filter)." *Id.* Honeywell did not claim: "A, comprising: B, C, D, and E." *Id.; see also* 4/15/05 Int. Brief at 3-8.

In the court's judgment, Lockheed Martin's post claim construction hearing brief best described the dispute over the term "display system." Lockheed Martin argued that Honeywell's construction asserted that "display system consists of the entire cockpit." 4/1/05 Int. Brief at 10. Stated differently, the filters in Honeywell's display system "may make the local color display [not only] compatible with the NVG, [but also] producing red, green, and blue color bands generated by the three light sources that combine to make a full color image." *Id.* Lockheed Martin argued that "nothing in the claims, the specification[,] or the file history indicate that Honeywell's display system performed any role in the production of the color emitted by the display." *Id.* at 11.

d. Specific Precedent Governing Construction Of A Patent's Preamble.

[11] The United States Court of Appeals for the Federal Circuit has instructed federal *436 trial courts that whether a preamble is treated as a limitation is determined "on the facts of each case in light of the claim as a whole and the invention

described in the patent." *Storage Tech. Corp. v. Cisco Sys., Inc.*, 329 F.3d 823, 831 (Fed.Cir.2003); *see also Corning Glass Works v. Sumitomo Elec. U.S.A., Inc.* 868 F.2d 1251, 1257 (Fed.Cir.1989) (reviewing the "entirety of the patent [is necessary] to gain an understanding of what the inventors actually invented and intended to encompass by the claim."); *Bell Communications Research, Inc. v. Vitalink Communications Corp.*, 55 F.3d 615, 620 (Fed.Cir.1995) (A claim preamble has the "import that the claim as a whole suggests for it. In other words, when the claim drafter chooses to use *both* the preamble and the body to define the subject matter of the claimed invention, the invention so defined, and not some other, is the one the patent protects.").

Where the written description "consistently uses" specific terms to refer to the "invention as a whole, .. . [the] preamble of each claim serves as a convenient label [or descriptive name] for the invention as a whole." *Storage Tech.*, 329 F.3d at 831 (citing *IMS Tech., Inc. v. Haas Automation, Inc.*, 206 F.3d 1422, 1434 (Fed.Cir.2000)) (merely giving a descriptive name to the claimed invention does not limit the scope of the claim). Where the preamble "defines a structurally complete invention in the claim body and uses the preamble only to state a purpose or intended use for the invention," it is not limiting. *See Rowe v. Dror*, 112 F.3d 473, 478 (Fed.Cir.1997). On the other hand, where there is no "meaningful distinction to be drawn between the claim preamble and the rest of the claim, for only together do they comprise the 'claim. ' ... [T]he preamble ... is said to constitute or explain a claim limitation." *Pitney Bowes*, 182 F.3d at 1305.

[12] In addition, where claim language derives an antecedent basis from the preamble, it may be considered as a necessary component of the claimed invention. *See Catalina Mktg. Int'l, Inc. v. Coolsavings.com, Inc.*, 289 F.3d 801, 808 (Fed.Cir.2002) (quoting *Pitney Bowes*, 182 F.3d at 1305) ("In general, a preamble limits the invention if it recites essential structure or steps, or if it is ' necessary to give life, meaning and vitality' to the claim.").

e. The Court's Construction Of "A Display System For Use In Association With A Light Amplifying Passive Night Vision Aid And A Local Color Display, Including A Local Source Of Light, Comprising" In This Case.

[13] In this case, the court has decided to construe all of the operative preamble language common to both Claim 1 and Claim 2 of the '914 patent, *i.e.*, "A display system for use in association with a light amplifying passive night vision aid and a local color display including a local source of light," as necessary to understanding the '914 patent and therefore as a limitation thereof. *See Eaton Corp. v. Rockwell Int'l Corp.*, 323 F.3d 1332, 1339 (Fed.Cir.2003) ("When limitations in the body of the claim rely upon and derive antecedent basis from the preamble, then the preamble may act as a necessary component of the claimed invention.").

The court begins with "system" in the aforementioned phrase modified by the adjective " display" to describe the general purpose or function of the system. The prepositional phrase "for use in connection with," applies to two other nouns that are objects of this phrase, *i.e.*, "aid" and "display." "Light amplifying," "passive" and "night vision" are adjectives modifying "aid." Likewise, "local" and "color" are adjectives modifying "display," when it is used as a noun. The placement of the terms "night vision aid" and "local color display" in the prepositional phrase prior to the verb " comprising" advised one of ordinary skill in the art that the claimed system may include or be used together or in combination with a "night vision aid" and a "local color display." *See* '914 patent, col. 5, ll. 22-28.

From the use of the verb "comprising," the court also construed the preamble language common to both Claims 1 and 2 as "presumptively open-ended," *i.e.*, encompassing display systems that include a first optical filter, as described, and a second optical filter, as described. *See* ***437***Gillette Co. v. Energizer Holdings, Inc.*, 405 F.3d 1367, 1371-72 (Fed.Cir.2005) (Where a claim uses the "word ' comprising' transitioning from the preamble to the body [it] signals that the entire claim is presumptively open-ended.... Because the patentee

invoked this open-ended treatment ... the scope of [the] claim ... encompasses all [display systems] satisfying the elements set forth in [each] claim."); *see also Crystal Semiconductor Corp. v. TriTech Microelectronics Int'l, Inc.*, 246 F.3d 1336, 1347 (Fed.Cir.2001) ("When a patent claim uses the word 'comprising' as its transitional phrase, ... [it] creates a presumption that the body of the claim is open. In the parlance of patent law, use of[the] transitional phrase 'comprising' creates a presumption that the recited elements are only a part of the device, and that the claim does not exclude additional, unrecited elements."); *Genentech, Inc. v. Chiron Corp.*, 112 F.3d 495, 501 (Fed.Cir.1997) (" 'Comprising' is a term of art used in claim language which means that the named elements are essential, but other elements may be added."); Manual of Patent Examining Procedure § 2111.03 (8th ed.2001) ("MPEP"). In addition, the court has determined that the '914 patent optical filters are "essential elements" thereof and that a night vision aid and local color display may be included or used together or in combination with these filters. *See* '914 patent, col. 5, l. 31. Claim 2 encompassed all display systems "comprising" a plurality of three filters, as described, and a fourth filter, as further described. *See* '914 patent, col. 6, ll. 12-28.

Therefore, the court construes the operative preamble language as follows:

> A system comprised of optical filters that can be used in combination with an aid, with light amplifying, passive, and night vision qualities, and a display of colors that includes a source of light perceptible by the night vision aid.

See Pitney Bowes, 182 F.3d at 1306 ("If the claim preamble, when read in the context of the entire claim, recites limitations of the claim, or, if the claim preamble is 'necessary to give life, meaning, and vitality' to the claim, then the claim preamble should be construed as if in the balance of the claim. ").

Since the court has determined that the preamble language common to Claims I and 2 is unambiguous and not contradicted by the specification, the court rejects Honeywell's entreaty that it consider extrinsic evidence to interpret this claim, including the Ieee Dictionary and the testimony of the experts. *See, e.g.*, 12/23/04 Honeywell Brief at 9-11; 4/1/05 Honeywell Brief at 12; 4/15/05 Honeywell Brief at 1.

2. "Local" And "Color Display."

[14] The term "local color display" appears in the preamble to Claim 1: "A display system for use in association with ... local color display including [.]" '914 patent, col. 5, ll. 31-32. The preamble to Claim 2 also utilizes the same language. *See* '914 patent, col. 6, ll. 11-13. In addition, in Claim 1(a), the '914 patent discusses "local color display" in the first two lines: "a first optical filter that filters light from the local color display [.]" '914 patent, col. 6, ll. 1-2. Claim 2(a)(1) also discusses "local color display" as "a plurality of filters at the local color display [.]" '914 patent, col. 6, 1. 15.

The parties have proposed the following competing constructions of the term "local color display:"

Honeywell's Proposed Construction	**Defendants' Proposed Construction**
Local: located in the vicinity of the night vision aid	**Local color display:** a functional device in proximity to an operator or an observer within a defined area, such as a cockpit, that presents information in a visual format in more than one perceptible color
Color display: device that provides a visual representation of data using more than one color	

Honeywell *Markman* Slides 60, 68; Gov't *Markman* Slide 008 (bold added by parties).

a. Honeywell's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

Honeywell's pre-hearing brief requested a separate construction of the word "local" and the term "color display," because "[t]he problem addressed by the '914 patent is interference between a full color display and a night vision aid ... [and][s]uch interference occurs ***438** only when the full color display is operated in the vicinity of the night vision aid [,] ... [accordingly, the court was advised that] the most appropriate construction for *local* is located in the vicinity of the night vision aid." *See* 12/23/04 Honeywell Brief at 11 (quoting '914 patent , col. 2, ll. 1-3) (emphasis in original) ("[A] night vision aid such as ANVIS goggles [is to] be operable while a full color display is presented in the vicinity of the goggles[.]").

Honeywell criticized the Government's proposed construction of "*local,* as incorporated in its construction of *local color display,* [because] *[f]irst,* in the context of the patent, *local* means in the vicinity of the night vision aid, not in the vicinity of an operator or observer." *Id.* at 12 (emphasis in original) (citing Dr. Tannas). Second, the court was warned that the Government's proposed construction "introduces an unnecessary and extraneous requirement, namely that the *local color display* be 'within a defined area, such as a cockpit. ' Nothing in the language of the claims requires this limitation." *Id.* (emphasis in original). Honeywell insisted that "[t]he claims are broad enough to encompass a *local color display* that is used in the vicinity of a *night vision aid,* but necessarily not in a defined area, such as a cockpit." *Id.* (emphasis in original). Moreover, Honeywell cited the specification as instructing that " 'the present invention can be used by other viewers in association with environments other than an aircraft cockpit' without placing any limitation on the type of environment in which the invention can be used." *Id.* (citing '914 patent, col. 2, ll. 49-59) (emphasis in original).

ii. At The Claim Construction Hearing.

At the claim construction hearing, Honeywell's counsel pointed out that the term "local" appears " twice in the preamble, first, to modify color display, to make it a local color display, and second, to modify source of light, to make it a local source of light." TR at 224. Honeywell's counsel further explained:

> HONEYWELL'S COUNSEL: The normal rule for claim terms is that the same term gets the same construction each time it appears in the claim. Therefore, Honeywell took the approach to define local for all purposes. The only exception to that rule is where the specification or elsewhere in the intrinsic evidence the patentee clearly indicated that the term should have a

different meaning in different contexts, and because we didn't see that in the claim, we defined local by itself to have the same meaning in each phrase. The Defendants, on the other hand, construed local color display and local source of light.... They say that local is in proximity to an operator or observer within a defined area such as a cockpit. But Honeywell's position is local is simply located in the vicinity of the night vision aid.

THE COURT: Why does it make a difference to you?

HONEYWELL'S COUNSEL: I'm not sure why it makes a difference. We tried to define the term as we thought it-in accordance with the meaning given to it in the patent. Local does have a unique meaning in the patent. The whole patent is talking about the relationship between the light emitted from a display, and the night vision aid, and the light interferes with the night vision aid. The invention solves that problem.

So local has the meaning of location, where are things located.

THE COURT: In relationship to something.

HONEYWELL'S COUNSEL: In relationship to something. I think the key here is the relationship between where the display is located in relation to the night vision aid. The operator, well, yes, the operator might be wearing night vision goggles, so that might be the same definition, but it might not in all cases. For example, if the display is located in the rear of the aircraft where there are no night vision goggles, but there is an operator viewing the display, then it wouldn't make sense to define local for local color display as being near an operator because that is not what's meant by the patent.

THE COURT: So if the operator is someplace totally different, then you don't-

*439 HONEYWELL'S COUNSEL: That's right.

THE COURT: Obviously your patent is not going to be relevant-

HONEYWELL'S COUNSEL: That's right.

THE COURT: -to that fellow in the back seat.

HONEYWELL'S COUNSEL: Precisely. It's just as simple as that. We tried to define it as we understood the patent. So the first issue is ... does local have a different meaning in those two phrases. Honeywell's answer to that is no, it has the same meaning. The second issue is does local, is that in relation to the night vision aid or the operator or the observer? And Honeywell's answer to that is it's in relation to the night vision aid. And the third question is, is local limited to a defined area such as a cockpit? And we think the term is not so limited.... I don't think Defendants have pointed to any place in the intrinsic evidence to indicate that the term should have a different meaning and a different-

THE COURT: But how does it harm you if I construe the language the way that the Defendant wishes to have it construed?

HONEYWELL'S COUNSEL: I think it's-I'm not sure what they are trying to accomplish by "in proximity to an operator" or-

THE COURT: Well, ... I'm just asking you does it make any difference to you.

HONEYWELL'S COUNSEL: Not that I know of, but I don't want to have it misconstrued because I don't know what's coming down the pike. And within a defined area though, such as a cockpit, I think that does harm us, because I don't think the invention is limited to cockpit applications.

THE COURT: Give me an example.

HONEYWELL'S COUNSEL: An example would be-we gave the example later in our presentation of a foot soldier carrying a PDA and wearing night vision goggles, so there is light from the display.

THE COURT: All right, I need a PDA definition here.

HONEYWELL'S COUNSEL: Personal computer, like a palm pilot or-

THE COURT: Oh, okay, got it. All right. So he's carrying a palm pilot with his goggles on.

HONEYWELL'S COUNSEL: Right, and he's in a open area. There is no confined area such as a cockpit.... Like a handheld GPS as an example, Your Honor.

THE COURT: Okay, so?

HONEYWELL'S COUNSEL: I mean, in this case we're not aware of any such-

THE COURT: But that circumstance has nothing to do with your patent.

HONEYWELL'S COUNSEL: Well, as far as we know reading the claims, it would have something to do with the patent.

THE COURT: Why? You don't have the two pieces that you're looking for, the display system.
HONEYWELL'S COUNSEL: The display would be the PDA, the palm pilot with the screen that's lite, and light coming out of that display.
THE COURT: And you're saying ... there is no filter on that, and there is nothing inside the machine that-
HONEYWELL'S COUNSEL: Well, you certainly could put the night vision filter concept in a PDA. There is nothing in the claim that says you couldn't. Just because the example is given in the patent of a cockpit and a pilot-
THE COURT: That's a much broader reading of display[.]
HONEYWELL'S COUNSEL: I don't think-
THE COURT: The display was the box. I mean, I'm pretty sure that's exactly the way you defined it. Here is the display.
HONEYWELL'S COUNSEL: We were talking about display system being-
THE COURT: Yes.
HONEYWELL'S COUNSEL: -a comprehensive system.
THE COURT: Right.
HONEYWELL'S COUNSEL: That included the display, and the night vision aid, and the filters. But the local color display is just that. It's a color display. It has to ***440** have more than one color. It has to display information to a viewer, and local places it in the vicinity of a night vision aid. But other than that the claim isn't limited. It doesn't say cockpit display. It isn't necessarily an instrument that's in an airplane.
THE COURT: Well, that went to ... my question about who was the person that's skilled in the art.
HONEYWELL'S COUNSEL: Well, the history of the invention definitely goes back to aircraft and aviation.
THE COURT: I don't have any trouble with that, but I guess I-I'm having difficulty foreseeing whatever claims you may want to assert that may not even be in this case that are broader.
HONEYWELL'S COUNSEL: But technology expands. Somebody invented the personal computer, but nowadays we put computers in everything from dishwashers to microwaves to television. They are all ubiquitous, but that doesn't mean that the core invention of the computer isn't in these various devices. If the claim doesn't say cockpit, it's not limited to a cockpit.

TR at 225-31.

* * * * * *

THE COURT: [B]ut one does have some sense about when privilege is given up for a time period from the public to someone, what do they get for that period, and it cannot be the universe. It's got to be something less than the universe, in my view.
HONEYWELL'S COUNSEL: Well, I think we've heard many times from opposing counsel the claims are king, and we agree with that principle, the claims are king.... And one of the concepts that comes out of Federal Circuit case law, the *Rennashaw* case, for example, stresses the importance that you have to find a word in the claim to define before you can engage in claim construction, and here we're trying to engage in construing the claim "local."
THE COURT: Yes.
HONEYWELL'S COUNSEL: And local certainly pertains to location, and where things are located in relationship to one another, but I don't believe there is anything in the claim that limits the invention to a cockpit.
THE COURT: Okay.... My local was not in relation to cockpit, it was a relationship to the pilot itself. I mean, without the pilot there is no-none of the rest of this makes much difference.
HONEYWELL'S COUNSEL: But I think it does as Mr. Brafman's example pointed out because the night vision aid could be hooked up remote to a remote viewer, and he could be viewing the area outside whatever confined area he happens to be in.

TR at 236-38; *see also* TR at 248.

* * * * * *

In addition, Honeywell objected to the Government's proposed construction utilizing the words "visual" with "format," "functional" with " device," and "perceptible" with "color."

HONEYWELL'S COUNSEL: So Honeywell's construction for color display alone is a device that provides visual representation of data using

more than one color, and Defendants have modified that construction, and the portion of their construction that pertains to the color display is a functional device that presents information in a visual format in more than one perceptible color. So as you can see, there are not great differences between those two definitions. However, what Honeywell takes issue with is the addition of the words "functional " to modify "device," and the addition of the word "perceptible" to modify the word "color." We think those words are extraneous, and unnecessary to define what the claim terms.

THE COURT: How is perceptible extraneous?

HONEYWELL'S COUNSEL: We believe a color is inherently perceptible. Color pertains to human vision. Without the human there would be no color. The world doesn't know color without the human, and the human visual system, and therefore perception .... We also rely on Dr. Task's definition in his expert report and in his direct. The definition did not *441 change. He defined color as a display presenting more than one color. He did not believe it was necessary to insert the word "perceptible." He did agree with it once Defendants adopted that, but he didn't believe it was necessary when he first defined it.

THE COURT: And functional, you disagree with that because you think that's redundant of device?

HONEYWELL'S COUNSEL: Right, a device-

THE COURT: Because a device is inherently functional?

HONEYWELL'S COUNSEL: -is inherently functional, right.

TR at 240-42.

iii. Post-Claim Construction Hearing Briefs.

During post-hearing briefing, Honeywell's briefs appeared to abandon arguing that "local" required construction separate from "color display" and, instead, moved to focus on "whether the starting period for filtering is inside or outside the local color display." 4/1/05 Honeywell Brief at 23. Here, Honeywell maintained that "[a]ll that is required is that you have 'light from the local color display' and a 'first optical filter' that filters such light [.]" *Id.* By shifting the argument to the location of the filters rather than construing the term "local color display," Honeywell failed to provide the court with any meaningful guidance as to the meaning of "local color display," other than to state: "in the case of the '914 patent, there is clear disclosure of filters located *inside* the local color display." *Id.* at 24 (emphasis in original). The court was advised, however, that "[s]uch filters filter light 'from the local color display,' even though the starting point for filtering is not external to the local color display, nor has the light left the local color display before it is filtered." *Id.* In addition, Honeywell asserted that "nothing in the language of the claims or the written description permits the court to limit the scope of claim 1 to the Figure 1 embodiment, in which a first optical filter 23 is 'located in front of local display 17.' " *Id.* at 25.

b. The Government's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

The Government's pre-hearing brief advised the court that one of ordinary skill in the art would conclude that the court should adopt the Government's proposed construction that a "local color display" is a "functional device that presents information in a visual format[,]" a fact the Government represented that Honeywell does not contest. *See* 1/14/05 Def. Joint Brief at 15 (citing 12/23/04 Honeywell Brief at 12). In support, the Government cites the portion of the '914 patent specification that instructed: "Figure 3 shows an arrangement in which the local source of light 50 comprises red 51, green 52, and blue 53 color bands sourced from the monochromatic display transducers." '914 patent, col. 4, ll. 40-48; *but compare* '914 patent, col. 1, ll. 25-26 ("It is intended that the local display may be viewed either with or without the night vision aid in use.") *with id.* ll. 42-48 ("A local color display ... is also viewable by the crewmember ... the local display is intended to be viewable without the aid of the ANVIS.") *with* '914 patent, col. 2, l. 57 (emphasis added) ("The cockpit has *several local displays such as color display*[.]"). The prosecution history indicated that

the "local color display" may be "a full color cathode ray tube display." Ex. 7 '914 Wrapper D000018, ll. 35-36; *see also* Ex. 8 '760 Application D001179, ll. 29-30. In fact, Figure 3 of the specification depicts CRTs that provide "a monochromatic image ... for full color display, which appears on a front screen as a combined full color image." Ex. 7 '914 Wrapper D000010, ll. 8-11; *see also* Ex. 8 '760 Application D001182, ll. 2-5.

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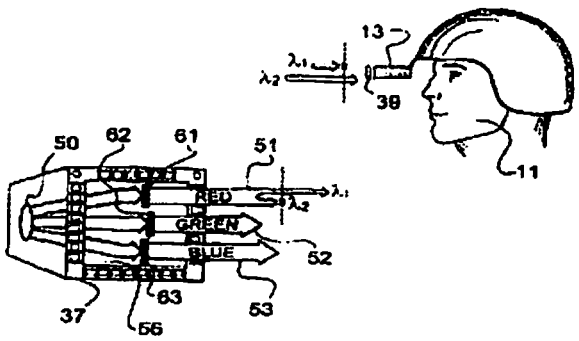
FIG. 3



Therefore, the Government assured the court that " the proper reference point for 'local' ... is the observer." 1/14/05 Def. Joint Brief at 15. But, the Government also argued that " 'local' *refers to the location of the display within the cockpit* such that it is visible with or without the use of ANVIS." *Id.* (citing '914 patent, col. 2, ll. 46-48, 58-59; col. 1, ll. 41-46) (emphasis added). The Government concluded that "one of ordinary skill in the art could understand that a local color display must be *within a defined area* for an operator or observer to view and to act upon, if necessary, the data and information produced by the local color display." 1/14/05 Def. Joint Brief at 15 (emphasis added).

ii. At The Claim Construction Hearing.

At the claim construction hearing, the Government continued to argue that "local" means in reference to a human observer.

GOVERNMENT'S COUNSEL: The differences are for local, what the reference point for vicinity is, and for color display, the functional and the

perceptible. And we don't think that any of these terms are necessarily superfluous. We don't think that they are wrong. With respect to local, we believe that the correct reference point is the observer. This is straight out of the patent specification, and specifically out of the specification where it states that the local color display, ... needs to be visible to a viewer. So for example, the first section I cited here, which is column 2, lines 46 through 48, says that "The local display is intended to be viewable without the aid of the ANVIS," referring to, of course, as I spoke about before, the goggle sits in front of the eyes but not against the eyes so you can look around the goggles, so you can look down and see the display. The second provision is, "The cockpit has several local displays, such as a local color display, which are illuminated so as to be clearly visible without the use of ANVIS." Again, it makes it clear that the observer is the one that's going to be looking at the displays. So the reference point is again the observer. And finally, the last provision says, "It is important that the display indicators remain illuminated not only for the benefit of the crewmen who are not wearing night vision aids, but also because those using the goggles will typically view the instruments by looking under the goggles." And again this just recognizes the point that the observer is going to be viewing the display without the goggle. So really what should be important is whether the viewer is local to the display and not the goggle, because if the viewer is not *443 local to the display, he can't view it anyway.

TR at 243-44.

* * * * * *

GOVERNMENT'S COUNSEL: [W]e believe Honeywell's construction runs counter to the expressed purposes of the patent, which is to get a full color display which you can view without the goggles, and it doesn't overwhelm you [sic] goggles. So you want to be able to look around your goggles and see a full color display. If it wasn't important for the observer to be able to look at a display without the goggles and see color, then you wouldn't have any reason to have this patent.

TR at 245.

* * * * * *

GOVERNMENT'S COUNSEL: We think it's clear that local refers to a defined area. It doesn't have to be a cockpit enclosure. It could be some other defined area. But we believe that local carries with it the implication that there is a defined area. The phrase from the patent that was recited, it's column 2, lines 53 through 54, I believe, "The present invention can be used by other viewers in association with environments other than an aircraft cockpit." We believe that phrase-that term "environment" also implies that there is a recognized environment. There is a recognized region around the observer and the display that local implies. So it's a defined area, whether it's an environment, whether it's an enclosure, whether it's a cockpit, but we believe that all of this comes out of the clear meaning of local. If the Court is satisfied, I'll turn to perceptible in the color display. We don't believe the perceptible before color is superfluous. The whole point is having a full color display meaning it has to show more than one color. If the colors are not perceptibly different, then it doesn't look like a color display. It looks like a monochrome display. That's the only reason ... perceptible is in there. It's not superfluous, and it just shows that the colors need to be perceptibly different. And then finally, going back to the functional language, we don't believe that is superfluous either. As we discussed before with respect to display system, the-I'm sorry-as related to the display system, the color display has to be functional apart from Honeywell's proposed system. So saying it's a functional device implies that it is functional on its own. It doesn't require the patent to perform its function.

TR at 246-47.

iii. Post-Claim Construction Hearing Briefs.

The Government's post-claim construction brief conceded that "local" means "in proximity to," but that the display should be proximate to an observer or operator, despite the fact that Honeywell

maintained that "local" means in proximity to the location of the night vision aid. *See* 4/1/05 Gov't Brief at 20. Since the specification clearly indicated that local color display may be seen by a crewmember not wearing night vision goggles, the Government argues that Honeywell's proposed construction is wrong. *Id.; see also id.* at 21 (citing '914 patent, col. 1, ll. 41-46) ("[I]t is important that the display indicators remain illuminated, not only for the benefit of the crewmen who are not wearing night vision aids, but also because those using the goggles will typically view the instruments by looking under the goggles.").

c. Intervenor Lockheed Martin's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

Lockheed Martin's construction of "local color display" was the same as that of the Government. *See* 1/14/05 Def. Joint Brief at 14-16.

ii. At The Claim Construction Hearing.

At the claim construction hearing, Lockheed Martin disagreed with Honeywell's explanation that "local is used differently when it's referring to the local display and local source of light ... the ordinary, customary meaning of local source of light is that the local source of light must be part of the local *444 color display." TR at 253. As for the specification, it teaches that the "original Figure 3 ... shows the local source of light as being integral to the local color display." TR at 257. In sum, the claims and specification "lead to the conclusion that local source of light must mean that ... it is integral to and part of the local color display." TR at 257.

iii. Post-Claim Construction Hearing Briefs.

After the claim construction hearing, Lockheed Martin advised the court that the " '914 patent's claims do not expressly define the proper reference point for the local color display.... A review of the specification establishes, however, that the reference point for the 'local' is the observer and not simply the night vision aid." 4/1/05 Int. Brief at 24. Subsequently, Lockheed Martin appeared to move to seek a construction of a different phrase, " light from the local color display." 4/15/05 Int. Brief at 12. In that regard, Lockheed Martin argued that Claim 1 "applies to filters located outside of the [local color display] and Claim 2 applies to filters located inside the display." *Id.* at 13.

d. The Court's Construction Of "Local Color Display" In This Case.

The court has declined to construe the word "local" in the abstract. Construing an adjective without the object noun provides no guidance to the parties or the public as to how the court has determined the legal parameters of the '914 patent subject matter.

i. In The Preambles To Claim 1 And Claim 2.

The court has determined that a "local color display" is a device that may be used together or in combination with optical filters, *i.e.,* "a display system." *See* '914 patent, col. 5, l. 31; *see also* '914 patent, col. 6, l. 13. In the preamble language common to Claims 1 and 2, a "local color display" is also one that shows or exhibits at least one color perceptible to an observer or observers who may be located near or in proximity to the "local display system." Since a display system would be irrelevant without an observer or observers capable of perceiving the display, necessarily a "local color display" also must be perceptible to an observer or observers, *i.e.,* one utilizing a night vision aid. Therefore, the court construes "local color display" as:

> A device that may be used together or in combination with optical filters and shows or exhibits at least one color perceptible to an observer or observers utilizing a night vision aid.

This construction is not contradicted by the specification. *See* '914 patent, col. 2, ll. 46-48 and 58-59 (emphasis added) ("as the local color display

is intended to be *viewable*"); *see also* '914 patent, col. 1, ll. 63-64 ("filtration of light according to wavelengths generally permits the use of full color displays").

ii. In Claim 1(a).

Claim 1(a) describes "a first optical filter that filters light from the *local color display.*" '914 patent, col. 6 ll. 1-2 (emphasis added). The court does not construe this language to limit the location of the " first optical filter" 23, described in Claim 1(a), to a location external to the "local color display." *Id.* The "first optical filter," whether located internal to or external to the "local color display" is included in the claimed invention. *Id.*

iii. In Claim 2(a).

In Claim 2(a), a "local color display" includes a source of light having blue, red and green color bands. *See* '914 patent, col. 6, ll. 13-14. Therefore, the court construes "local color display" in Claims 2 and 2(a) to include a source of light presenting at least one or more colors. *See* '914 patent, col. 6, ll. 12, 15. Similar to the "first optical filter" in Claim 1(a), the "plurality of filters at the local color display" is not limited to a location internal or external to the local color display. *See* '914 patent, col. 6, ll. 15-22. The plurality of filters, whether located internal or external to the "local color display," is included in the claimed invention. *Id.*

Since the court has determined that claim term " local color display" is unambiguous and not contradicted by the specification, the ***445** court considers it unnecessary to consider any extrinsic testimony regarding the meaning of "local color display."

3. "Local" And "Source of Light."

[15] The term "local source of light" appears in the preambles to Claim 1 and Claim 2 to describe part of the "local color display." *See* '914 patent , col. 5, l. 33; '914 patent, col. 6, l. 13.

The parties have proposed the following competing constructions of "local source of light:"

Honeywell's Proposed Construction	**Defendants' Proposed Construction**
Source of Light: device that emits electromagnetic radiation within the visible spectrum and may also emit infrared radiation	**A local source of light:** the integral element of the local color display that provides the light that enables the display to be seen by the human eye

Honeywell *Markman* Slide 73; Gov't *Markman* Slide 012 (bold added by parties).

a. Honeywell's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

Honeywell's pre-hearing brief represented that " [t]he term *light* usually refers to electro-magnetic radiation in the visible spectrum." 12/23/04 Honeywell Brief at 13 (citing Webster's at 1308) (emphasis in original). In addition, Honeywell asserted that "it is clear that the *source of light* may also emit infrared radiation, *i.e.*, longer wavelengths of electromagnetic radiation that are invisible." 12/23/04 Honeywell Brief at 14 (emphasis in original) (citing '914 patent, col. 1, ll. 38-40). The specification language cited by Honeywell, however, provides: "illumination from cockpit display sources overwhelms sensor elements which are used in such night vision aids, and thereby interrupts the night vision aid for up to several minutes. " '914 patent, col. 1, ll. 37-40. The remainder of Honeywell's pre-hearing brief weaved in extrinsic evidence, particularly that of Dr. Task, to persuade the court that "the claim states that the local color display *includes* the local source of light, [and therefore], it is superfluous to specify that it is *integral* with the display." 12/23/04 Honeywell Brief at 14-15 (emphasis in original).

ii. At The Claim Construction Hearing.

At the claim construction hearing, Honeywell continued to argue that the "ordinary meaning of source of light does not require ... that it be an integral element of the local color display." TR at 250-51.

HONEYWELL'S COUNSEL: So now I'll go to source of light, and this again is in the preamble, and Honeywell again has construed the term " source of light," and Defendants have construed the entire phrase "local source of light." And here the key difference between the parties' proposed constructions is the requirements in Defendant's construction that the local source of light be an integral element of the local color display.

TR at 250.

* * * * * *

THE COURT: Well, I would think the "local," going back to your prior discussion, would be the focus for you.

HONEYWELL'S COUNSEL: But once again, there is no indication in the patent that the term " local" when it modifies color display has a different meaning from when it modifies source of light, and the principle is that when the same term is used in different places in the patent, it has to be given the same meaning, and I don't believe Defendants have tied integral to local. They haven't come out and construed local differently when it comes to local source of light. I think what they rely on is the term "includes," but includes is not limited to a device that is integral. It has to include it. It has to be part of it, but it need not be integral. I don't believe Defendants have pointed to anything in the claim language itself or the specification that requires that the source of light be integral with the local color display, so it's a narrow difference.

TR at 251-52.

During rebuttal, Honeywell's counsel argued:

> *446 HONEYWELL'S COUNSEL: [T]hey say, " The ordinary and customary meaning of local source of light is the local source of light be part of the local color display." And Honeywell agrees with that, and we would accept that as the construction. And then ... with Figure 3, first of all, to address the new matter argument, the examiner approved the amendment of Figure 3, and held it was not new matter, so I think that's a red herring. Then we believe Defendants make irreconcilably different arguments with respect to these two figures. First, when they are talking about filter 61, 62, 63, they say those are functionally distinct from the local color display. But then when it comes to the local source of light, 51, 52, 53, they say those are integral with the local color display. We accept that both are integral. However, this is only one embodiment of the invention. The claims are not limited either to integral filters or integral source of [light]. But the Defendant[s'] arguments can't be reconciled, and do not support reading the term " integral" into "local source of light" because this is only one embodiment of the invention.

TR at 258-59.

iii. Post-Claim Construction Hearing Briefs.

In post-claim construction hearing briefs, Honeywell reminded the court that Claim 1(a) does not require that "the starting point for filtering the source of light ... is the local color display." 4/1/05 Honeywell Brief at 23. Instead, Honeywell argued that the claim is satisfied whether the "starting point for filtering is inside or outside the local color display. All that is required is that you have 'light from the local color display' and a 'first optical filter' that filters such light[.]" *Id.* Figures 2 and 3 demonstrate that filters 61, 62, and 63 are located inside the local color display 37 filtering light "from the local color display." *Id.* at 24. Therefore, Honeywell concluded that "nothing in the language of the claims or written description permits the court to limit the scope of Claim 1(a) to the Figure 1 embodiment, in which a first optical filter 23 is ' located in front of the local display 17.' " *Id.* at 25 (citing '914 patent, col. 3., 1. 15); *see also* 4/15/05 Honeywell Brief at 8. In fact, Figures 2 and 3 show that the filtering is done within the local color display. *See* 4/1/05 Honeywell Brief at 24.

b. The Government's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

The Government countered that one of ordinary skill in the art would conclude that the "local source of light is an integral part of the local color display .. .. Honeywell's [use] of the word 'including,' ... indicates that [Honeywell] intended for the local source of light to be part of, and not external to, the local color display[.]" 1/14/05 Def. Joint Brief at 17. The Government relied on two portions of the specification in support. *Id.* at 17 (citing '914 patent, col. 3, ll. 9-10 ("it may be necessary to filter light from the local light source 50 of the display[.]")); *see also id.* (citing '914 patent, figure 3 (showing the local source of light 50 as being within the display)).

ii. At The Claim Construction Hearing.

At the claim construction hearing, the Government deferred to the argument of Lockheed Martin. *See* TR at 257, 11. 18-23.

iii. Post-Claim Construction Hearing Brief.

The Government's initial post-hearing brief urged the court to construe "local source of light" to mean "the integral element of the local color display that provides the light that enables the display to be seen by the human eye." 4/1/05 Gov't Brief at 21. In doing so, the Government appeared to abandon prior reliance on specification requirements in column 3, ll. 9-10, and instead argued that "[the] proposed construction arises from the plain language of the claim: The preambles of both claims state that the local display includes-*i.e.*, has an integral part-a local source of light nothing more is necessary [.]" 4/1/05 Gov't Brief at 22. The Government also argued that Honeywell adopted

the Government's construction at the claim construction*447 hearing. *Id.* (citing TR at 258) (Honeywell's Counsel: "The local source of light [must] be part of the local color display. Honeywell agrees with that, and we would accept that as the construction. We accept that both [the filters and local source of light] are integral.").

c. Intervenor Lockheed Martin's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

In the pre-hearing brief, Lockheed Martin's construction of "local source of light" was the same as that of the Government. *See* 1/14/05 Def. Joint Brief at 17-18.

ii. At The Claim Construction Hearing.

At the claim construction hearing, Lockheed Martin warned the court that:

> LOCKHEED MARTIN'S COUNSEL: [T]he cases indicate look at words in context, look at the totality of the words to arrive at a meaning. And when you look at the totality ... here you are going to find that local is used differently when it's referring to the local display and the local source of light. And we are focusing on the definition of "local" when we talk about local source of light.... [T]he ordinary, customary meaning of local source of light is that the local source of light must be part of the local color display.

TR at 253.

* * * * * *

> LOCKHEED MARTIN'S COUNSEL: If we turn to the specification, ... we see ... new Figure 3 on the right, new Figure 3, that is, is the Figure 3 that appears in the 914 patent as opposed to the original application. And we have the description that new Figure 3 shows an arrangement in which the local source of light comprises red, blue, and green color bands sourced from monochromatic display transducers such as the three cathoid ray tubes which are used to provide a color display. We heard earlier today from [Honeywell's counsel] ... that the local source of light, that source of light was part of that display, was in that display. Certainly if we look to the original Figure 3 ... we find that the local source of light, which are the catho[de] ray tubes 51, 52, and 53. They are integral to or part of that local display. It's important to look at this original figure because ... *Tanden Corporation* ... basically holds that amendments to a patent cannot change the disclosure in any way contrary to its substance as filed. So when the Court looks at the prosecution history, looks at the different drawings, what you have to do is consider them in light of the original application.

TR at 254-55.

iii. Post-Claim Construction Hearing Brief.

Lockheed Martin's initial post-hearing brief represented that one of ordinary skill in the art would conclude that "local source of light" means " the integral element of the local color display that provides the light that enables the display to be seen by the human eye." 4/1/05 Int. Brief at 26. The court also was advised that the specification does not show that Honeywell defined this term differently. *See* '914 patent, col. 3, 11. 9-10 ("it may be necessary to filter light from the source 50 of the display[.]"). Lockheed Martin also made no further argument about the meaning of "local source of light." *See* 4/15/05 Int. Brief at i.

d. The Court's Construction Of "Local Source Of Light" In This Case.

For the reasons previously discussed, the court has declined to construe the word "local" in the abstract. Construing an adjective without the object noun provides no guidance to the parties or the public as to how the court has determined the legal parameters of the '914 patent subject matter.

The court has determined, in the preamble language common to Claims 1 and 2, that "local source of light" as:

An essential element of the local color display that must be perceptible to an observer or observers with a night vision aid.

*448 This construction is not contradicted by the specification. *See* '914 patent, col. 2, ll. 46-48; *see also* '914 patent, col. 1, ll. 63-64.

4. "Optical Filter" And "Filter."

The parties have agreed that the terms "optical filter " and "filter," when used as nouns in the claims of the '914 patent, mean "a device that selectively passes and blocks electromagnetic radiation." FN10 The parties agree that "filters" (plural), when used as a noun, means two or more filters.

FN10. The United States Court of Appeals for the Federal Circuit recently observed in *Nellcor Puritan Bennett, Inc. v. Masimo Corp.*, 402 F.3d 1364, 1367 (Fed.Cir.2005) that the Authoritative Dictionary of the Instruments of Electrical and Electronics Engineers Standard Terms 435 (7th ed.2000) lists eight different meanings for " filter" when this word is used as a noun.

5. "Filters" And "Filtering."

The parties have agreed that the terms "filter" and " filtering," when used as verbs in the claims of the '914 patent, mean "selectively to allow (or allowing) light to pass and be blocked." Jt. Stip. ¶ 2.

6. "Filters Light From The Local Color Display."

[16] In Claim 1(a), "a first optical filter" is described as one that "filters light from the local color display." '914 patent, col. 6, ll. 1 and 2. No other claim recites this specific language.

The parties have proposed the following competing constructions of "filters light from the local color display":

Honeywell's Proposed Construction	**Defendants' Proposed Construction**
Filters light from the local color display: No further construction is necessary. To the extent this phrase needs to be construed at all, it should be construed as follows: "filters light coming from the local source of light that is part of the local color display and the filtered light is transmitted from the local color display."	**Filters light from the local color display:** the starting point for filtering the source of light is the local color display

Honeywell *Markman* Slide 91; Gov't *Markman* Slide 021 (bold added by parties).

a. Honeywell's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

In Honeywell's pre-hearing brief, the court was advised that the proposed construction of "filters light from the local color display" is consistent with the plain meaning of the claim and specification and that nothing therein requires that the starting point for filtering the source of light occur at the "local color display." *See* 12/23/04 Honeywell Brief at 19. The court was warned that it would be improper to limit Claim 1 to "embodiments wherein the optical filter is 'located in front of the display' or 'is placed over displays.' " 12/23/04 Honeywell Brief at 20 (citing '914 patent, col. 3, ll. 15-16; *see also* '914 patent, col. 2, l. 13).

The specification's use of the phrase "light ... from the local color display" includes the embodiment of Figure 2 that shows local color display 37, without any filter in front of the display. *Id.* at 20. Honeywell also argued that Figure 3 shows "the same local color display 37 as shown in Figure 2, but in more detail." *Id.* (citing '914 patent, col. 4, ll. 44-46). And, Figure 3 shows that "light from the local color display 37 is filtered by filters 61, 62, and 63, all of which are 'part of and located within the local color display.' " *Id.* at 20. In addition, the specification described the filtering in Figure 3 uses the same language as Claim 1(a), *i.e.*, "a filter 61, such as a band pass *filter*, may be used with CRT 51 so that any *light* within a narrow range of frequencies may be transmitted *from* the *local color display* 37." *Id.* (emphasis added) (citing '914 patent, col. 4, ll. 49-57). Accordingly, Honeywell concluded that the specification is clear that filtering light from the local color display does not require an external filter in front of or over the local color display or that the starting point for filtering is the local color display. *Id.*

***449 ii. At The Claim Construction Hearing.**

At the claim construction hearing, Honeywell reiterated that:

> HONEYWELL'S COUNSEL: The plaintiff's primary position is that [this] term ["filters light from the local color display"] does not require any construction whatsoever.... If it does need to be construed, it has got to mean at least what we say .... So the plain meaning of the claim then is clear from its face and there is no reason to rewrite the English here, Your Honor. We have light from the local color display and we have a first optical filter that filters light and that's exactly what the claim says. Nothing in the claim places that filter anywhere.

TR at 329; *see also* TR at 331.

iii. Post-Claim Construction Hearing Briefs.

After the claim construction hearing, Honeywell continued to argue that the phrase "filters light from

the local color display" in Claim 1 does not require that the local color display be the "starting point" for filtering light. *See* 4/1/05 Honeywell Brief at 23. Instead, Honeywell advised the court that this claim only required that there be "light from the local display" and a "first optical filter" that filters that light. The starting point for filtering may be either inside or outside the local color display. *Id.* In support, Honeywell emphasized that Figure 2, showing a local color display at 37, and Figure 3, showing the filters at 61, 62, and 63 within the display, teach that they all filter light "from the local color display, the starting point for filtering is not external to the local color display and the light is filtered before it exits the local color display." 4/1/05 Honeywell Brief at 23-24.

In addition, Honeywell disputed defendants' dictionary definition of "from" to require that the first optical filter must filter light that has left the color display. *See* 4/15/05 Honeywell Brief at 8. Instead, Honeywell suggested that an alternative definition that designated the "source or origin" of light as the color display. *Id.* at 8-9. Honeywell also relied on specification language instructing that "a filter 61 ... may be used with CRT 51 so that only light with a narrow range of frequencies may be transmitted from the local color display 37." *Id.* at 9 (citing '914 patent, col. 4, ll. 54-57). In addition, Figure 3 teaches that the starting point of the color band is *not* the local color display, but filter 61 inside the local color display. *Id.* Therefore, Honeywell disputed defendant's attempt to limit Claim 1 to Figure 1 since the phrase "from the local color display" is used to describe Figure 2 and Figure 3. *Id.*

b. The Government's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

The Government, in its pre-claim hearing brief, conceded that the '914 patent "indicates that some of the filters for its display system will be placed external to the local color display and thereby filter light from the local display." 1/14/05 Def. Joint Brief at 24 (citing '914 patent, col. 3, ll. 15-24) (" first optical filter is placed over displays"); *see also* '914 patent, col. 2, ll. 10-15 (emphasis added) ("an [aviator's night vision ("ANV")] aid, such as [a] ... goggles set, is provided with an optical filter. A second optical filter blocking light in an opposite sense from the first optical *filter is placed over displays,* which may otherwise present light that would interfere with the ANVIS.").

ii. At The Claim Construction Hearing.

At the claim construction hearing, the Government's principal focus was the preposition "from" in the phrase: "filters light from the local color display."

> GOVERNMENT'S COUNSEL: We believe the claim term "from" does need to be construed. It provides structure and function to the claim. There is obviously a disagreement over what it means, so it is obviously ripe for construction.... First optical filter that filters light from the local color display. I don't think that could be any clearer that the light has to be from the local color display before it is filtered. ***450** It is the clear meaning, it is absolutely clear from the English grammar what we're talking about here.

TR at 337-38.

* * * * * *

> GOVERNMENT'S COUNSEL: [Honeywell] started talking about figure 3 and I think a couple misrepresentations were made and I want to clear that up. But first I want to just note that the specification uses this sort of the same way. It shows that filter can be placed over displays. [Honeywell's counsel] spoke at length about figure 3 and how it shows things inside the displays. I don't think that's clear from the specification at all.... [I]t shows that there are filters at the display in figure 3, but ... figure 3 is even irrelevant to what we're talking about here because ... we have figure 1, which actually [Honeywell's counsel] started to try to put up in front of figure 3 when we started talking about this[.] Figure 1 is obviously what is being described by claim 1. There is no requirement that every claim read on every embodiment of the invention. Claim 1 can pertain to figure 1. Claims 2 and 3 could pertain to figures 2 and 3.

> There is nothing saying that claim 1 has to cover figure 3. So I don't think that argument carries any weight at all. As you see from figure 1, there is clearly a filter on top of the display. The specification clearly says located in front of the local display, 17, is a first optical filter 23. That filter is on top of it, would filter light from the local color display. Again, as I mentioned before, Honeywell turns to figures 2 and 3 and which there is absolutely nothing in the patent tying claim 1 to figures 2 and 3. There is nothing in there that says figures 2 and 3 show a filter filtering light *from* the local color display.

TR at 339-40 (emphasis added).

* * * * * *

> GOVERNMENT'S COUNSEL: Claim 1 talks about something with two filters but also says the first filter filters light from the local color display.
>
> When we get to claims 2 and 3 we're talking about a different embodiment. Now, that's what figures 1, 2, and 3 show is different embodiments, different examples of the different embodiments.
>
> So figure 1, again, is relevant because it shows light being filtered from the local color display; whereas 2 and 3 don't.

TR at 341.

* * * * * *

> GOVERNMENT'S COUNSEL: And there is nothing in the specification that would tie claim 1 to figures 2 and 3, which plaintiff is trying to do.
>
> I don't have much else to say on this. I think it is absolutely clear from the language, from the grammatical usage of the word "from" in the common, ordinary meaning of "from."

TR at 342.

The Government also argued that it was not necessary to consult the specification because the clarity of the language at issue:

> GOVERNMENT'S COUNSEL: The claims are clear. It says filters light from the local color display. You don't need to look at the specification. You don't need to look at the figures. If you do look at those things, they confirm our construction, but it is a clear reading of the English that it filters light from the local color display. I don't know how you can be any clearer than that. Now, we got into this argument about preferred embodiments and that you can't read the claims to exclude preferred embodiments. That is accurate law. I agree.
>
> We have two things missing here. One, *there is no preferred embodiment listed in the claims or listed in the specification,* so I don't know what they are saying is the preferred embodiment.... I would like to hear it but I don't know.
>
> THE COURT: So it is not the three figures?
>
> GOVERNMENT'S COUNSEL: I don't know. There is nothing in there that says in a preferred embodiment, this happens. You see that sometimes in patent language in the specification, but I don't think it is in the specification here. The other thing is that the rule is that the claims cannot be construed to exclude the preferred embodiment. Each claim does not have to cover each embodiment. And that's the difference.***451**
>
> You can't construe the claims as a whole such that it would read out the preferred embodiment because that makes sense, if you have a preferred embodiment, the inventor would have drafted the claims to cover it. But what does not follow from that is that claim 1 has to cover every embodiment, claim 2 has to cover every embodiment. That's wrong. It is also wrong to characterize claim 1 as a generic claim. There are *Vitronics* claims, and then you can have, they are genus and species, sometimes, that's what they are called, but that's not what we're talking about here. We're talking about claims that are directed to different embodiments. And, again, it comes out in a clear reading of the claims. It doesn't have to say in the specification that claim 1 pertains to one embodiment and claim 2 to a different embodiment. It just comes out of the claims.

TR at 362-64 (emphasis added).

iii. Post-Claim Construction Briefs.

The Government's post-hearing brief argued that the "claim construction analysis [of "filters light from the local color display"] can literally 'begin and end ' with the words of the claim." 4/1/05 Gov't Brief at 27. Here, the Government made three new arguments. First, that Honeywell's construction

improperly reads "from" out of the phrase "filters light from the local color display." *Id.*

Second, Honeywell's reference to Figure 3 confused the issue by misreading language that provides: Figure 3 shows "light within a narrow range of frequencies may be transmitted from the local color display." *Id.* at 28. Instead, the Government argued that this language confirms that because Figure 3 shows exiting the display that light is being transmitted from the display and hence is filtered external to the display. *Id.*

Third, the Government criticized Honeywell for misreading *Vitronics* for the proposition that a claim should not be construed to exclude preferred embodiments. *Id.* The Government distinguished *Vitronics* as inapplicable because there was only one claim at issue in that case, and the court excluded the only embodiment in the patent. *Id.* (citing *Vitronics,* 90 F.3d at 1583). Accordingly, the Government reasoned that *Vitronics* did not establish a rule that all claims must cover all embodiments described in the specification. Therefore, since the Government concluded that the '914 patent did not state a preferred embodiment in this case, the law does not require that Claim 1 " cover Figure 3" or that all claims be construed to cover all figures. *Id.* Instead, a patent claim should be "construed to encompass at least one disclosed embodiment in the written description." *Id.* at 29 (quoting *Johns Hopkins Univ. v. CellPro, Inc.,* 152 F.3d 1342, 1355 (Fed.Cir.1998)).

c. Intervenor Lockheed Martin's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

Lockheed Martin's proposed construction of "light from the local color display" was the same as that of the Government. *See* 1/14/05 Def. Joint Brief at 24.

ii. At The Claim Construction Hearing.

LOCKHEED MARTIN'S COUNSEL: And for our definition of the term "from" we mean "from" when it is used "with". From the local color display means the starting point for filters the source of light is the local color display. So the filtering occurs outside the local color display, not in the local color display under our recitation.... Claim 1 recites a first optical filter that filters light from the local color display. And the plain and ordinary meaning-

THE COURT: Why is it that the box at the bottom of the 3 doesn't do that? Explain that to me.

LOCKHEED MARTIN'S COUNSEL: You know, it is interesting when you look at the box at 3. You can't tell where those filters are located when you look at that particular box. It is indeterminate. The box is not like-we see in figure 1 of the patent that I'm showing up here where we ***452** show the filter 23 being outside the display 17.

TR at 342-43.

* * * * * *

LOCKHEED MARTIN'S COUNSEL: [Y]ou can't tell whether those filters are inside or outside from that particular diagram, whether those filters are inside or outside the local display. We have tried. Everybody has tried to look at it, but you can't tell from that particular one. If you looked at original figure 3, which we don't have, you would see those filters are inside the local display.

THE COURT: That's what I thought.

LOCKHEED MARTIN'S COUNSEL: In the original figure 3. The original figure 3 is that rectangular box that shows the three cathode ray tubes and filters in front of them. Now, under the rules that we talked about yesterday, you would have to read this figure 3 as being consistent with the original figure 3, so you would say that-

THE COURT: They would have to be then outside?

LOCKHEED MARTIN'S COUNSEL: On the inside. They would have to be on the inside because they were in the original specification that was filed, they were on the inside. And figure 3 can't change the original-and that was figure 3 in the original specification.

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(Cite as: 66 Fed.Cl. 400)

THE COURT: Okay.
LOCKHEED MARTIN'S COUNSEL: So the new figure 3 can't change that specification. But the key term is it filters light from the local display. It does not filter light in the local color display. And we know that figure 1 is an embodiment that shows a filter being outside the display, not only from figure 1 itself, but also from the statement that appears in the patent in column 2, line 13 that says a first optical filter is placed over displays. So ... the ordinary meaning of the term "from the first optical display" means that it must filter light that has left the local color display at a filter that's located inside or internal to the display, cannot filter light from the display, it can only filter light in the display. [T]he Federal Circuit has held in the *Forest Laboratories* [v.] *Abbott Laboratories* case at 239 F.3d 1305 [(2001)], that there is a difference in meaning and scope presumed when different words are used in different claims. And if ... we were to look at the claims, claim 2, comparing it to claim 1, claim 2 recites a plurality of filters at the local color display. And from [Webster's] we know that "at" can mean "in" and we also know from [Webster's] that "from" can never mean "at" or can never mean "in." Consequently, we have different meanings. "From" is different from-" from" is different from "at." The terms were used differently and that further supports the argument that "from" should be interpreted that way that we believe it should be interpreted. [I]f we look at the page provided to us ... by Honeywell. All that this page says is that there is light that may be transmitted from the local color display. And that's all that it supports. It doesn't address the claim where the claim is reciting an optical filter, a first optical filter for filtering light from the local display. So what we have here in this provision of the specification is a discussion of a different embodiment of the invention than we see in figure 1. It is the embodiment we see in figure 3. So to sum it up, again, "from" never means "in." It means external. It means away from. And, therefore, the term "from" should be construed in the manner we suggest.
TR at 344-47.

LOCKHEED MARTIN'S COUNSEL: Just three brief points. It seems to me that it is impossible to have a filter inside a display that can filter light from the display. I don't know how you do that. [Honeywell's counsel] suggests that you can but it seems to me that that violates the law of physics.
With respect to ... my comment on figure 3 ... was that you can't tell from figure 3, the figure 3 that's in the patent, where those filters are. I then went on to describe the figure 3 that appeared in the original application, and saying there it showed in the original application that the filters were inside the ***453** display, but the original application of figure 3 also showed things that you don't see in this figure 3. It showed three cathode ray tubes, each of which provided individual sources of light. So there are differences between the two figures.... And in respect to the issue on embodiments, a lot has been made out of the fact that every claim has to include an embodiment.
It can't exclude an embodiment. [Honeywell's counsel] just got up here and said claims 2 and 3 do exclude embodiments, that they are limited to the embodiments only shown in figures 2 and 3. And there are patents issued every day by the Patent Office where claims are listed in a hierarchical fashion or listed in series, where you have a separate set of claims, that the only way you would read them was to read them as being limited to one embodiment. And the specification may have five embodiments and you will find five sets of claims in the patent, each directed at different embodiments. That's what we had in this case. When we look at the history of this case, we started out with the '637 patent, which eventually was spun off in a continuation.
Part of it was spun off in a continuation. The '637 patent claims are limited to particular embodiments and that's the use of polarizers.
The claims in the '637 patent that dealt with band pass filters were the ones that appear in the continuation and show up in the '914 patent. So even in the history here, we have a situation where we have claims limited to particular embodiments and that's the standard practice of drafting claims.
TR at 370-72.

* * * * * *

iii. Post-Claim Construction Hearing Briefs.

After the claim construction hearing, Lockheed Martin argued that "from" in Claim 1 means "a starting point" and cannot be constructed to mean " at." *See* 4/15/05 Int. Brief at 13. Therefore, Claim 1 "applies to filters located outside of the display and [C]laim 2 applies to filters located inside the display." *Id.* Lockheed Martin discounted Honeywell's argument that both Figure 2 and Figure 3 disclose that the filters are located inside the local color display and that Claim 1 therefore covers both of these embodiments, because not every claim must read on every embodiment. *Id.* (citing *Johns Hopkins,* 152 F.3d at 1355). In addition, Lockheed Martin asserted that Honeywell admitted at the claim construction hearing that Claim 2 does not read on Figure 1. *See* TR at 359.

d. The Court's Construction Of "Filters Light From The Local Color Display" In This Case.

The term "a first optical filter" in Claim 1(a) of the '914 patent consists of the noun "filter," modified by the adjectives "first" and "optical" to describe the order and functional type of filter. The term " filter" also is modified first by the phrase "filters light from the local color display" that described the purpose or function of the "first optical filter," which necessarily requires: 1.) the presence of a local color display; 2.) light emanating from the local source of light; and 3.) light filtered at least once thereafter, *i.e.,* by the first filter.

Accordingly, the court construes "filters light from the local color display" as: "the starting point for filtering light occurs at the filters."

Contrary to the Government's representation, *see* TR 362, the specification at the Detailed Description of the Invention Section does designate Figure 1 as the preferred embodiment. *See* '914 patent, col. 2, 1. 49. The specification clearly provides that the "display system" invention "can be used by other viewers." *See* DMX 1 ('914 patent , col. 2, 1. 52).

7. "Notch Filter."

[17] The language of Claim 1(a) states that "a first optical filter ... is a notch filter that passes light ... and that substantially blocks light associated with color bands[,] other than predetermined color bands. " '914 patent, col. 6, ll. 1-6.

The parties have proposed the following competing constructions of "notch filter:"

Honeywell's Proposed Construction	Defendants' Proposed Construction
Notch filter: optical filter that either passes or blocks a narrow range of wavelengths of electromagnetic radiation	**Notch filter:** a narrowband filter that may block light within the narrow wavelength band or may pass light within the narrow band, and do the opposite outside of the narrow wavelength band

***454** Honeywell *Markman* Slide 102; Gov't *Markman* Slide 026 (bold added by parties).

a. Honeywell's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

Honeywell's proposed claim construction of "notch filter" did not differ with that of the defendants, insofar as all parties agree that a "notch filter" either passes or blocks a narrow range of wavelengths of light. *See* 12/23/04 Honeywell Brief at 22. Honeywell, however, disputed defendants' imposition of "an additional limitation, namely that the notch filter [does] the opposite outside of the narrow wavelength band," as being inconsistent with the language of the claims and the specifications. *Id.* Therefore, Honeywell warned the court that if defendants' construction was adopted, it would "exclude a common type of notch filter, namely a filter with multiple notches, such as a triple notch filter." *Id.*

ii. At The Claim Construction Hearing.

At the claim construction hearing, Honeywell advised the court that the use of "notch filter" was generic and therefore could be limited to either a single notch filter or a multi-notch filter.

> HONEYWELL'S COUNSEL: Plaintiff's construction of notch filter is that it is an optical filter that either passes or blocks a narrow range of wavelengths of electromagnetic radiation. Defendant's construction generally agrees with that-well, does agree with the first part of our construction, but then inserts a second component to the construction that says that it does the opposite outside of the narrow wavelength band. And what this is all about is that-
>
> THE COURT: Let's talk about what a notch is.
>
> HONEYWELL'S COUNSEL: Yes. I have that, Your Honor. First of all, a notch filter, the key issue is whether or not a notch filter has this element of requiring to do the opposite, and what this goes to, Your Honor, once again, is the notion of whether a notch filter is limited to a single notch or excludes multi-notches as it is used in the patent and understood by one skilled in the art. And I can show you what a notch filter is.
>
> THE COURT: Good.
>
> HONEYWELL'S COUNSEL: Okay. A notch filter is a filter that has a portion, it is used to basically allow a range of wavelengths to be passed or blocked. So you can think of that, if I have a red filter, just a single red filter that I put over a white light, Your Honor, which has the entire visible spectrum in there all mixed together, which is why it is white. And if you put the red filter over that, the filter will only permit the red light to go in, go out, and it will exclude the other red light to go out, if it is a single notch filter. If it is a multi-notch filter, it may permit, say, red, green and blue light to come out, but block everything else in between.
>
> THE COURT: So what, notch means one color?
>
> HONEYWELL'S COUNSEL: Notch means-notch is referring to the notch in the wavelength spectrum which you see up here, Your Honor. The reason it is called a notch filter

is that this is the notch. Here is the wavelength. This is the light. If this is your white light coming out of here, this spectrum was all the white coming out. The notch, see, this is zero and this is-well, in this particular instance, it will be not letting any light through in these wavelength ranges and only letting out what they call a notch. And they call it a notch because it sort of cuts out of the spectrum a notch and let's the red light through. And this notch filter, you have the light letting through-the filters are letting through the blue line, the green light, and the red light and blocking everything in between. So it has got a notch-and this has notch, okay? Now, in the patent, that is significant, because we use ***455** these notch filters in the patent to alter the characteristics of the light. Remember when we talked in the beginning about using, for example, a red filter, which is one notch of the notch filter, to block certain wavelengths and pass certain wavelengths, lambda 1 is the light permitted through the notch. It would look like the red notch over there. Likewise, the green filter passes only the green notch and the blue filter only the blue notch. And then you combine those three colors together on the front face of the projector, which is defined as 55 in the display, to combine them all together to make an image just like here.

THE COURT: What does the word notch mean?

HONEYWELL'S COUNSEL: The notch means the notch out of the visible spectrum that is either allowed to pass through or not allowed to pass through.

THE COURT: One notch equals one color?

HONEYWELL'S COUNSEL: One notch equals-well, it can or cannot be limited to one color but it is at least limited to a wavelength range. It doesn't have to be associated with a particular color, so one notch per wavelength range.

THE COURT: All right.

HONEYWELL'S COUNSEL: Now, the defendants would like to limit the term, notch filter, to read in that it is a single notch filter, and they say that instead of meaning notch filter in the claim, they meant to write single notch filter and that would then limit it to the circumstances you have on the left-hand side. The plaintiffs make-

THE COURT: What would the plural of notch filter be, notch filters?

HONEYWELL'S COUNSEL: No, no, you would use-the generic term is notch filter. And if you want to have a single notch, you call it single notch filter. If you want multi-notch, you call it multi-notch filters. Again, we will-

THE COURT: But you didn't use the word multi-notch.

HONEYWELL'S COUNSEL: We didn't use the term single notch either. The generic term is notch. That's the point of the discussion here. There is nothing in the ordinary meaning of notch filter that requires a single notch. To the contrary, it is common parlance, both within the industry, filter area, and even in patents to use the term notch to talk about either single or multi-notch filters, okay?

TR at 385-89.

Honeywell also argued that the language referring to color bands in Claim 1 "are multiple bands being passed ... that correspond to the multiple notches. A fair reading of the patent is there is no way to get those multiple bands or to cover a full color display unless you, in fact, have a notch filter which is passing multiple bands which makes it a multi-notch filter. So from the face of the patent and the claim itself, it is clear that certainly multi-notch filters are contemplated." TR at 391. Therefore, Honeywell concluded that since the specification contemplates a full color display, multiple notches must be used and the term "notch filter" must not read a multi-notch filter out of the claim. *See* TR at 392.

iii. Post-Claim Construction Briefs.

In Honeywell's post-claim construction briefs, prior art is discussed, *i.e.*, U.S. Patent No. 4,663,562 (the "Miller Patent") that discloses a multi-notch filter in the specification thereof. *See* 4/1/05 Honeywell Brief at 28. The Miller Patent also used the specific terms "multi-notch didymium filter" and a " multi-notch filter" in the claim language, although the latter uses the term "notch filter." Honeywell represents that the "use of a multi-notch filter [in the Miller Patent] was 'indicative of what those skilled in the art generally believe a certain term

means.' " *Id.* at 29 (quoting *Vitronics,* 90 F.3d at 1584). Therefore, Honeywell concluded that " [m]ultiple color bands implies multiple notches, one for each color band, as taught for example, by the Miller patent." 4/15/05 Honeywell Brief at 10.

***456 b. The Government's Proposed Construction.**

i. Pre-Claim Construction Hearing Brief.

The Government argued that "one of ordinary skill in the art would conclude that the term notch filter means a narrowband filter that may block light within the narrow wavelength band or may pass light within the narrowband, and do the opposite outside the narrow wavelength band." 1/14/05 Def. Joint Brief at 25. Although the Government recognized that the term notch filter is not defined in the '914 specification, the Government argued that Claim 1 provides that "the first optical filter is a notch filter that passes light, comprising predetermined color bands ... and that substantially blocks light associated with color bands[.]" '914 patent, col. 6, ll 2-3, 5. Therefore, a notch filter is one that both "passes light" and "substantially blocks light." *Id.* The specification, however, provides that the "[l]ight blocking device 39 on the ANVIS *may* therefore be a notch filter for blocking light corresponding to the narrow color band ." '914 patent, col. 5, ll. 13-15 (emphasis added).

ii. At The Claim Construction Hearing.

At the claim construction hearing, the Government argued that a notch filter "could also be termed ... a band pass filter ... no light is getting through, and then ... you let some light through and then you go back up on the other side." TR at 400-01. "[A]t zero ... no light is getting through and then as you get to this wavelength here, you drop down and you . .. let some light through ... [n]ow what you have is a pass, passage of a band of light.... [T]he other thing is what is called a band stop filter which according to this representation here, you would have something going along at the bottom and it would peak up like this and come back down.... And so there you would have light over a broad range transmitted and only blocked within a certain area. And that's what's called a band stop filter." *Id.* In addition, the Government asserted that notch filter " can either pass or block light with that narrow range of wavelengths ... the patent as a whole is silent on what the transmission of a notch filter looks like." TR at 401-02.

THE COURT: Let's flip back to your other chart, you go to "it may block light or may pass light."
GOVERNMENT'S COUNSEL Right.
THE COURT: What would be required for [a notch filter] to do either?
GOVERNMENT'S COUNSEL Well, it has to do one or the other. It may block light or it may pass light. And I think that that's just implicit in the-they say either passes or blocks. We say may block light or may pass light. I think we were trying to be more explicit, that it may do one or may do the other.
THE COURT: I thought the notch filter always passed the light.
GOVERNMENT'S COUNSEL If you have one-no. And I think that comes out here. And I will show you how it comes out in the specification as well that the patent contemplates that it can pass or block within a narrow range.
THE COURT: What features does it have that makes it do that or what makes it do that?
GOVERNMENT'S COUNSEL What makes it sensitive to that one band?
THE COURT: Yes. What about the notch filter allows it to do one or the other?
GOVERNMENT'S COUNSEL It is the construction of the filter. I'm not a filter expert. I think once we get our experts on the stand they can explain it better than me. It has to do with-they are typically called interference filters. And as I understand it that means that the light interferes with itself in certain wavelength ranges and doesn't in others. So it is able to go through in some and not in others.
THE COURT: But there is nothing inherent within a notch filter which does one or the other?
GOVERNMENT'S COUNSEL Well, I think once you have built it, it is a notch filter and so it does one or the other. But when you say notch filter, it could mean one or the other. You are

talking about *457 two different pieces of hardware. Notch filter could be a band pass or a band stop filter.... Now, you asked me why it must block when all the examples we saw from [Honeywell's counsel] were passing a narrow range. I think that comes straight out of the specification, which says light blocking device may be a notch filter for blocking light corresponding to the narrow color band, lambda sub 1. There you go. Going back to it has to be read in light of the specification. The specification clearly says that the notch filter blocks light within a narrow band. Now, it also comes out here, why it must do the opposite outside of that, because, as I have highlighted there, this provides a minimum of filtration of total light input. The idea is the-you want to block light in the narrowest band possible and let the rest of the light in because as you can see on figure 3, the excerpt I pulled out there, the filter they are talking about is the filter on the ANVIS.
As we talked about before there is always a tradeoff with the sensitivity of the ANVIS versus what lights are getting out of the display. So you want your ANVIS to be able to see as much light as possible because it allows you to see better at night. So you want lambda sub 1 to be as narrow as possible. And you want to allow all the other light in that you can. That's what this part of the specification talks about. It shows clearly that it needs to-
THE COURT: What do I do with the word "may" ?
GOVERNMENT'S COUNSEL Right. It is because as I said before, the figures are exemplary. They show that this is one embodiment of the invention. We believe that it is clear that notch filter must do at least what it says that it may do. Now, it may do other things as well, or, as I said before, as [Honeywell's counsel] put up here, it may be a band pass filter which would be the opposite of what it is talking about here. But you have got-it would be the conversion. You can think of them as mirror images of one another, the mirror image of a band pass filter would be a band stop filter, if you inverted it.
THE COURT: Okay. Both of which could be notch filters?
GOVERNMENT'S COUNSEL Yes, Your Honor.
TR at 402-05.

iii. Post-Claim Construction Hearing Briefs.

The Government's post-claim construction hearing briefs continued to insist that in addition to passing or blocking light, the specification required that the notch filter also "must have a specified characteristic outside the narrow band." 4/1/05 Gov't Brief at 29. Therefore, the Government asserted that the filter " 'does the opposite'-namely block-light outside the narrow range." *Id.* at 30. Not surprisingly, the Government dismissed Honeywell's view that the notch filter could include multiple notches as contrary to the claim and specification language. *Id.* at 31; *see also* 4/15/05 Gov't Brief at 12-13.

c. Intervenor Lockheed Martin's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

Lockheed Martin's pre-hearing construction of " notch filter" was the same as that of the Government. *See* 1/14/05 Def. Joint Brief at 25-26.

ii. At The Claim Construction Hearing.

At the claim construction hearing, the issue of whether notch filters meant a single notch or permits the use of a multi-notch filter was explained by Lockheed Martin:
LOCKHEED MARTIN'S COUNSEL: So what we're saying is that the notch filter here is referring to a single notch. I will discuss that a little bit more but it is referring to a single notch that passes light comprising predetermined color bands and also has a feature that it substantially blocks light. It passes light including a predetermined red color band and then substantially blocks light associated with color bands other than said predetermined color bands. So it doesn't define the size of the notch but it

simply defines the size ***458** of the characteristic which are to both pass and block.
THE COURT: By size, you're not meaning several notches, you are saying how long?
LOCKHEED MARTIN'S: Right. It doesn't say how wide, how wide or how long.
THE COURT: How much of the band is taken up?
LOCKHEED MARTIN'S: Right, how much of the band is taken up, how deep is the notch. And it doesn't say, there is no reference there that there is more than one notch. Now, our position is based on the language of the claim that's understood by one of ordinary skill in the art, and, again, it doesn't, this construction doesn't contradict the intrinsic evidence and specification and prosecution history. The specification-
THE COURT: You mean, do we run into a problem with this notch filter issue, meaning "a" doesn't mean one?
LOCKHEED MARTIN'S: We run into a problem where "a" means one or more notch filters? You do when you say a first optical filter is a notch filter. But it is describing here what we have, it is describing a notch filter. So, I mean, if they are going to say one or more optical filters that are one or more notch filters, I think we run into problems with whether "a" means one or more.
THE COURT: Well, the word "is" before that, though, the tense on that would imply that it is single.
LOCKHEED MARTIN'S: Exactly. We're saying the filter is a notch filter.
TR at 411-12.

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In addition to discussing the specification references cited in its brief, Lockheed Martin also discussed the relevance of the prosecution history of "notch filter:"

LOCKHEED MARTIN'S COUNSEL: [W]e see a reference to a letter that the Patent Office issued on March 20th, 2001. And that letter, by the way, went to both the '760 application and the '914, the application that was then the '914 application because the '760 application had not yet been banded. So the identical letter went out for both the '760 and the application that was the then-the one that was supporting the '914 patent. And there the Patent Office rejected the claims that were pending as being unpatentable over a patent issued to Swift. And what the Patent Office did is it gave their interpretation of the application, that was the '914 and '760 application.
THE COURT: Were they any more specific in saying why it was unpatentable?
LOCKHEED MARTIN'S COUNSEL: There are more details that go into-on the next page.
THE COURT: Okay.
LOCKHEED MARTIN'S COUNSEL: We have, we give you more from that, more of an extract from it but essentially what you had in Swift was you had a filter, a notch filter at the goggles, not at the display. And the notch filter at the goggles had basically a hole in them to allow a certain amount of light, for example, green light, to pass through because green light doesn't interfere with the night vision goggles. And so there was some ability to look at a, to have that type of light in the cockpit without interfering with the night vision goggles. But, anyway, what the patent examiner said is that Swift teaches "an effective filter by virtue of the operation" and it is a reference to filter 9 in column 3, where "it may be such as to transmit all available light in the circumstances of use, except for one narrow spectral band." Our point in citing this correspondence is that here the patent examiner is rejecting the application and the claims in the application based on the conclusion by the patent examiner that what was taught in the applications was a notch filter that had one narrow spectral band.
TR at 414-15.

iii. Post-Claim Construction Hearing Briefs.

In the post-hearing brief, Lockheed Martin argued that the specification descriptions concern a single notch filter, although Claim 1(a) admittedly did not specify whether a ***459** notch filter is a single notch filter or multi-notch filter. *See* 4/1/05 Int. Brief at 38 (citing '914 patent, col. 3, ll. 34-38) (specification providing that either the first or second filter (23 or 25) will be a notch filter; the other filter (23 or 25) will substantially block the "

light of a predetermined red color band , passed by the notch filter."); *see also* '914 patent, col. 5, ll. 13-15 (the "[l]ight blocking device 39 on the ANVIS may therefore be a notch filter for blocking light corresponding to the narrow color band ."); '914 patent, col. 4, ll. 52-57 ("a filter 61, such as a bandpass filter [a type of notch filter], may be used with CRT[.]"); '914 patent, col. 4, ll. 59-61 (CRTs "may be provided with high pass ... filters 62 and 63[.]").

d. The Court's Construction Of "Notch Filter" In This Case.

Honeywell's proposed construction, defining an optical filter that "*either* passes *or* blocks," must be rejected since the claim language provides that a notch filter *both* "passes" *and* "substantially blocks light." '914 patent, col. 6, ll. 2-5 (emphasis added). Since the court is satisfied that the claim language clearly delineates the purpose and function of a notch filter, the court also declined to adopt the Government's more restrictive construction, *i.e.*, defining a "notch filter" as a "*narrow* filter that *may* block light ... or *may* pass light ..., and do the opposite outside the narrow wavelength band." *See Renishaw PLC,* 158 F.3d at 1248 ("A party wishing to use statements in the written description to confine or otherwise affect a patent's scope must, at the very least, point to a term or terms in the claim with which to draw in those statements; without any claim term that is susceptible of clarification by the written description, there is no legitimate way to narrow the property right."); *see also id.* at 1249 (quoting *Specialty Composites v. Cabot Corp.*, 845 F.2d 981, 987 (Fed.Cir.1988)) (" Where a specification does not *require* a limitation, that limitation should not be read from the specification into the claims."). Although the term "notch filter" is "susceptible" to further clarification, the specification of the '914 patent does not require that the "notch filter" exclude multi-notch filters. A

Accordingly, the court construes "notch filter" to be "an optical filter that has the capacity both to pass and substantially block light and may be a single-notch filter or a multi-notch filter."

8. "Passes."

The parties have agreed that the term "passes," as used in the claims of the '914 patent, means "allows to go through." Jt. Stip. ¶ 3.

9. "Color Band[s]."

[18] "Color band" does not appear in the '914 patent, although the plural "color bands" is found in Claim 1(a) to describe the light that is passed at a filter notch, *i.e.*, "a notch filter that passes light comprising predetermined color bands." *See* '914 patent, col. 6, ll. 2-3 (emphasis added).

The parties have proposed the following competing constructions of "color band [s]:"

Honeywell's Proposed Construction	**Defendants' Proposed Construction**
Color Band: range of wavelengths within the visible spectrum	**Color Band:** a range of wavelengths within a single color

Honeywell *Markman* Slide 118; Gov't *Markman* Slide 031 (bold added by parties).

a. Honeywell's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

Honeywell's pre-hearing brief argued that "color band" means "a range of wavelengths within the visible spectrum." 12/23/04 Honeywell Brief at 25. Honeywell asserted that defendants agreed with this definition but also imposed an impermissible limitation that the range of wavelengths be "within a single color." *Id.* Honeywell further asserted that because the '914 patent does not specify any particular division of the visible spectrum, there is "no requirement that a particular color band falls within a single color." *Id.* at 26.

***460 ii. At The Claim Construction Hearing.**

HONEYWELL'S COUNSEL: What we say is a color band is a range of wavelengths in the visible spectrum. Visible spectrum is what you can see, it is this.

THE COURT: Correct.

HONEYWELL'S COUNSEL: And the parties agree that a color band is explained as a range of wavelengths. And what we disagree on is that the defendants seek to say, add the word, the color band means a single color band, okay?

TR at 461-62.

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HONEYWELL'S COUNSEL: The color band definition, like what we discussed before, the color band is a continuum. There are any number of ways around the color band. What we call those colors is a matter of convention, not a matter necessarily of science. It is what individuals over the years have been programmed to call red or to call green or to call blue. And, in fact, you might go to other countries and they refer to it differently. It is frankly very much a cultural thing. It is an industry-specific thing. And so the reason we say that you should not be talking about a color band as limited to a specific single color by name is, first of all, the band is a continuum around here. This is the visible spectrum, if you will. And what single color you name it depends very much on how you carve it. Are you going to call it red or reddish orange? And the notion that you would call, pick a single name is not just the-it doesn't make any sense because what one person calls red, somebody else might call reddish-orange. And what one band, the band includes what somebody calls red, might be a band somebody else calls reddish-orange. And the notion of a color band generically is only intended to make it clear that ... [i]t starts with wavelengths down here, which are x-rays, for example. And then you have got all the-from there you go to the other end, which is, you know, long electrical oscillations and microwave, infrared, we have x-rays, gamma rays, cosmic rays. These are all in the electromagnetic spectrum. Each one of these can be defined as a range of wavelengths in the electromagnetic spectrum, but they are not colors because they are not in the visible spectrum. So the notion of a color band is nothing more in this patent than a band ... that covers the visible spectrum. It is something within the visible spectrum and it is called a color band because the visible spectrum can differentiate it from an x-ray band, cosmic ray band, it is a range of wavelengths. The patent, on the other hand, when it wants to talk

about a particular band, it does so. When it wants to talk about the red color band, it calls it the red color band. And when it talks about the green color band, it calls it the green color band. And you can have an orange-red color band and a green-blue color band, it would be a wider band. So the idea that there is nothing in the way the term color band is used that suggests it should be a single color. That doesn't make any sense to suggest that-whether it is a single color or multiple colors depends on how thin you slice it.

THE COURT: Let me ask you this ... under claim 1(a), you used the word predetermined red color band. Now, to me what that means is you have wavelengths within the parameters of what is red that you predetermined.

HONEYWELL'S COUNSEL: Yes.

THE COURT: It could be from wavelength here to here, all these are red, or it may be within that red grouping.

HONEYWELL'S COUNSEL: That's correct, Your Honor. We start out with color band and sort of whistle your way down. Color band is something within the visible spectrum, and then you can have a red color band which says that red color band is now within the red portion or red region of the visible spectrum. And now you can have a predetermined color band or I think it is also called, in claim 2, the narrow band of the red color band, so you can have a portion of the red color band. So in each instance, though, the patentee has said when he wants to refer to a particular aspect of the color band, of the visible ***461** spectrum, he tells you what aspect he has in mind.

THE COURT: Now, why wouldn't the inventor put in ... specific, wavelengths between X and Y? . .. Why don't they say, including-I don't know how you measure these things, but by wavelength 1 to wavelength 3?

HONEYWELL'S COUNSEL: -actually, the inventors certainly could have written a claim that said we want to block everything between 620 and 630. I think that's your question, Your Honor, why don't they instead say we're going to call that a predetermined color band.

THE COURT: Right.

HONEYWELL'S COUNSEL: I think the answer is that shows manifest intention that the claim shouldn't be narrowly limited to a specific range of wavelengths, but should be limited to what the people consider to be the red color band and red region.

TR at 467-72.

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HONEYWELL'S COUNSEL: We would agree with the defendants that the color band is a range of wavelengths. And I believe we have agreement that that range of wavelengths has to be within the visible spectrum. The place we seemingly disagree with the defendants on is whether or not you need to be-a color band has to be associated with a specific single color. And just to point out the dilemma in doing that, Your Honor, as I indicated previously, you can divide up the spectrum by any variety of color names, but if you look, for example, over here, that-this would be a color band[.]

TR at 479-80.

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HONEYWELL'S COUNSEL: Your Honor, let me answer the question you were interested in first and then I will hit the other points.... When we get to the claim on color bands, we're not designing to a color band. We're designing to the red, green, and blue color bands, which are later on specified in the claim. For example, here, in claim 1, we're designing to the red color band and if we had claim 2 up, I have it here, because [the Government's counsel] put it up, there you are designing to the specifics called out, blue, green, and red color bands. What I mean by that is when you want to practice the invention, you know you need a blue, green, and red color band. And the engineer, the person who-

THE COURT: But the second portion of 1(a) says associated with color bands other than predetermined ones, which could be a large-that could be a bit of a guessing game, wouldn't it?

HONEYWELL'S COUNSEL: No, because you know which ones you are blocking. It says it is a filter that passes light comprising a predetermined color band, including the red color band. That means it has to be at least red, it is passing some other colors, that's how you get the color display.

And it substantially blocks light associated with the other color bands. All that says, Your Honor, is we're going to figure out which ones are passing, it is going to be red and something else. So if it is a full color display, it is passing red, green, and blue, and it is blocking-

THE COURT: What about the associated with? What does that mean, associated with color bands?

HONEYWELL'S COUNSEL: And blocks light associated-

THE COURT: Next to?

HONEYWELL'S COUNSEL: Because the color bands are the mathematical formulations of what is part of the spectrum.

THE COURT: What does associated with mean?

HONEYWELL'S COUNSEL: So it is the light, it is the light that is in those wavelengths of that color band. So the light associated with the red color band, if we assume the red color band was 600 to 620, the light associated with the color band would be the light at 600 to 620.

THE COURT: Isn't that substantially blocks light within, would have been a better way of saying it if that's what you wanted to do?

*462 HONEYWELL'S COUNSEL: No, not if it is. This is the predetermined color band. So it is-

THE COURT: I am looking at the part that goes, "and that substantially blocks light associated with color bands other than said predetermined color bands."

HONEYWELL'S COUNSEL: Yeah, maybe within or maybe at. We can always sit here and sort of figure out another way to write it, but that's what it means. I think that's-I have never got focused on that language. It is clearly the light, though, at those wavelengths. I don't think that's particularly in dispute. So it blocks the light. Let's assume we said that the color band that is-it says it is passing certain light, that's the reds and greens, and it is blocking the blues, okay. Then it is blocking the light associated with the blue color band, but the claim-which would be the range of wavelengths that are blue. But the claim is not attempting to specify anything other than say-which is they clearly want to block red and depending on what other colors you want to let through, you are either going to block them or pass them. It doesn't really have anything to do with what the color bands are in terms of how you specify them. What is claim-

THE COURT: Well, within this, let's just stay within 1(a) right now. Is the only thing that's predetermined is red?

HONEYWELL'S COUNSEL: The only thing that is required to be predetermined is red. But it says it passes light comprising predetermined color bands, plural, including a red. So it has got to be more than one band but at least one of the bands has to be red. This all goes to the notion that claim 1 is, again, not specific to whether it is full color, whether you have the idea of three bands or two bands. You know you have to have more than one band. The claim is being drafted in a way that is broad enough to be multiple color bands, whether it is two or three, and doesn't tell you which ones are being blocked and which ones are being passed. And it doesn't need to. All it is telling you is for sure you have to block the red.

THE COURT: Wasn't that this other gentleman's point, it doesn't tell you that and how would someone know?

HONEYWELL'S COUNSEL: You don't have to know. The invention only worries about making sure you block the red. And whatever else comes and goes, is going to affect the color gamut associated, the colors you can get out of your display.

THE COURT: Because the red is the only thing we're worried about.

HONEYWELL'S COUNSEL: So the claim is intentionally broad to make sure, okay, we know red has to be stopped, but now there is going to be other things that are stopped, other things that pass. And we're not necessarily going to decide here now because that's not really the important part of the invention. The important part of the invention is making sure that you at least block the predetermined red color band.

THE COURT: Why are they making the argument they are making? I am going to flip it on you.

HONEYWELL'S COUNSEL: I don't know for sure, but I have a guess. I am trying to think of what is the best exhibit to use to explain this. Maybe it is-this is the Westinghouse guide, Plaintiff's Markman Exhibit 24. This is a

phosphor handbook. This is a book-we're going to see more of these later on, but these are specifications for particular phosphors. And in this particular case, it is-it happens to be an orange, what they call an orange-red phosphor.
And so what that means is that this area from here to here (indicating) is clearly a range within the color portion of the spectrum. It satisfies our definition. And our definition never says it is the entire spectrum. It says it is a range within. So we're not trying to cover the entire visible spectrum. It is always a subset of it. But you see this particular one goes back all the way down from roughly 550 and all the way up to-I don't know where it trails off and that clearly would be a band, it clearly is associated with something, with red and orange, but it is not associated with a single color. But it is a range of wavelengths in the *463 color spectrum. And I assume that they would probably want to say that this is not a color band. I think it also comes into play when they try to carve up certain bands, they want to call in Plaintiff's Markman Exhibit 44.... [W]hen they were trying to-when defendants were trying to explain their theory of why claim 1 has multiple color bands instead of just one, they said, well, under their definition, maybe not ours, this band covers both red and orange. So they would want to say that's multiple bands, and in our definition, we would say, no, that is a band within the visible spectrum here. It happens, and it is a range within, it is not the whole spectrum, and it is a range within the color spectrum, which makes it a color band. And it happens to be associated with these two, this area, which, one may call-they would call, red and orange. So they would say that's not one band, it is two, and we say no, it is one band, it is one range, it is within the color spectrum. And just because somebody chose to call it red versus orange doesn't make it two color bands. It clearly-see, it has, this is a filter, but if you assume this is light, it has, you see, the characteristics of being one band. This also gets to the point that [the Government's counsel] said, which was what he said, in claim 2, that he says when they meant bands, plural, they said bands, and when they meant band, singular, they must mean band singular, so it must mean one color.
And he pointed to the claim where he talks about having blue, red, and green color bands, plural, and he said uh-huh, down here, when they want to talk about one band, they talk about the green color band. That's, I think, making our point once again, that there are-see, we're not suggesting that the color band is the entire spectrum. And when you talk about red, green, and blue, they are separated apart. So they are separate bands. They happen to be called red, green, and blue. And when you want to talk about one of those bands, one of those ranges within the color spectrum, you talk about a red band. We're not saying, we have never said this whole thing is one big band and then that's why it should be singular, not plural. So the claim is entirely consistent. There are three bands, that's why you use, when you are talking about all three, it uses a plural. And when it talks about the single band, it talks about it in the singular.
But nothing in the definition of color band by itself says we have to figure out and call it by some conventional single name. And if we can't find the color system that comes up with a name that particular band, it is not a color band. It is clearly a range within, regardless of what you call it.
TR at 500-08.

b. The Government's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

Lockheed Martin's pre-hearing construction of " color band" was the same as that of the Government. *See* 1/14/05 Def. Joint Brief at 28-34.

ii. At The Claim Construction Hearing.

GOVERNMENT'S COUNSEL: [W]e agreed that color band is a range of wavelengths. And we actually agree that it is the range of visible wavelengths. The difference is whether it is within a single color. We believe it is clear from the extrinsic evidence, clear from claim construction rules you don't read a word out of the claims that it needs to be within a particular color. I want to

point out that-

THE COURT: How would they be reading out? . .. So, in other words, that his construction would be band equals a range of wavelengths? Is that what you are saying?

GOVERNMENT'S COUNSEL: Right, Your Honor, by adding in color, specifying it is a color.

TR at 483.

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GOVERNMENT'S COUNSEL: Claim 2 uses color bands a number of times. But if you notice, every time it refers to one color, it is a color band. Every time it refers to multiple colors, it is color bands. I think that clearly shows that every time *464 you are talking about a color band, you are talking about one color, a primary color. It doesn't have to be a primary color but the claim clearly shows that it is a primary color. The only thing time you get into multiple colors, the blue, red and green is color bands.

THE COURT: But how could you convey to someone that you are just working within the wavelengths that we, most people look at as blue without saying it the way they did? What would you suggest they do?

THE WITNESS: I guess I don't follow the question.

THE COURT: Well, what you are arguing is that every time they use bands they have several colors. Every time they use the word band, they only have one color. And therefore, what you are suggesting is that your argument is band means one color. And they are saying, no, it is the entire, it can be the spectrum or portion of the spectrum, depending on kind of what you want to convey.

GOVERNMENT'S COUNSEL: Yes, Your Honor. I think it is clear from this, and I will show you some more evidence, more intrinsic evidence that a color band is also referred to as being within one color. You are not talking about the whole spectrum. It doesn't make sense to say the red, orange, yellow, green, blue, color band. It just doesn't make sense to say that.

THE COURT: I would agree with you on that.

GOVERNMENT'S COUNSEL: As I said before, claims never refer to a color band as containing more than one color. So when you use color bands, plural, it refers to more than one color. The specification says-figure 2, each color band provides a monochromatic image in one primary color.

THE COURT: Each.

GOVERNMENT'S COUNSEL: Each color band, meaning one color band provides a monochromatic image in one primary color. Because what this is referring to is figure 3 that they keep flashing up, there is 51 through 53, 51, 52, 53 are the color bands. Each one is one color. And again, the portion of the specification that discusses figure 3 says figure 3 shows an arrangement in which the local source of light, 50, comprises red, green, and blue color bands. Source for monochromatic display transducers, again, monochromatic again meaning one color.

THE COURT: One color.

GOVERNMENT'S COUNSEL: Again, this is going back to what I said before. The color band under their definition could cover the entire spectrum. Again, reading color out of the claims, you talk about, you know, as I said before, red, orange, yellow color bands. It doesn't make sense to say it that way. Now, there is no evidence where a color band refers to more than one color. And that's just-you read the whole entire specification, every time you talk about a color band, it is one color. You don't say the red-blue color band. It doesn't make any sense.

THE COURT: Your argument is there are color bands within the spectrum and really what they are using is using the word color band to mean spectrum?

GOVERNMENT'S COUNSEL: That would be the effect of their interpretation, Your Honor, is that the entire visible spectrum could be a color band.

THE COURT: And what you are saying is that their use of color band means this effect or where you are defining it as each color is a band?

GOVERNMENT'S COUNSEL: That's correct, Your Honor.

TR at 489-92.

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GOVERNMENT'S COUNSEL: One of skill in the art reads red and they say, oh, I know exactly

what that means. The lay person has to pick up a dictionary or treatise and educate themselves up to that level of skill but that's what you get when you read it. So there is no need to put that in there. Some level of knowledge is always assumed or else patents would be hundreds of pages long.

THE COURT: Well, I guess I can see your construction by looking at 1(a) because*465 when they decided to talk about red color and they have got that-and then they have associated with other color bands, meaning other bands of color. That's what I was mentioning before. So they did not really mean to have it being associated with the entire spectrum.

GOVERNMENT'S COUNSEL: Exactly, Your Honor.

TR at 495-96.

iii. Post-Claim Construction Hearing Briefs.

In the Government's post-hearing brief, "color band" was asserted, without citation, to mean: "range of visible wavelength within a single color." 4/1/05 Gov't Brief at 32. The Government also argued that Honeywell agreed during the claim construction hearing that "color band" means "a range of visible wavelengths," but later modified its construction to mean "light that can be characterized by color." *Id.; see also* TR at 479 (Honeywell's Counsel: "We would agree with the defendants that the color band is a range of wavelengths ... and ... that range of wavelengths has to be within the visible spectrum."). The court, however, did not find that portion of the record inconsistent with Honeywell's argument that "color bands" means a range of wavelengths within the visible spectrum.

c. Intervenor Lockheed Martin's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

Lockheed Martin's construction of "color bands" was the same as that of the Government. *See* 1/14/05 Def. Joint Brief at 28-29.

ii. At The Claim Construction Hearing.

At the claim construction hearing, Lockheed Martin argued that unless color band is defined by a specific color: "how does the optical engineer know which wavelengths are of interest? If a color band can go across individual color bands, what do you design to [in order to avoid infringement]?" TR at 498.

LOCKHEED MARTIN'S COUNSEL: I think that when you subject any of the terms that Honeywell is or any of the definitions or constructions that Honeywell is proposing throughout the course of the Markman hearing, and you subject them to the analysis that [Lockheed Martin's co-counsel] set forth under *Vitronics*, what you are going to conclude is that they don't work.... There is going to be examples where Honeywell acted as a lexicographer. There are going to be examples where the specification defines things in a manner that is inconsistent with the construction that is being proposed by Honeywell. And the other thing you are going to find is that there are numerous instances in the intrinsic evidence, the patent file history, where they have surrendered the broader definition that they are now trying to take back and they can't do that.

THE COURT: But they didn't do that on color band.

LOCKHEED MARTIN'S COUNSEL: No, ma'am, they didn't.

TR at 499-500.

iii. Post-Claim Construction Hearing Briefs.

Lockheed Martin further asserted that "[o]ne of ordinary skill in the art would conclude that the term 'color band' means 'a range of visible wavelengths within a single color.' " 4/1/05 Int. Brief at 40. The court was warned that Honeywell's proposed construction reads the adjective "color" out of the term "color bands." *Id.* Therefore, Lockheed Martin argued that the specification refers to single primary individual

color bands. *See* '914 patent, col. 4, ll. 46-47 (" [e]ach color band 51-53 provides a monochromatic image in one primary color for the full color display. ").

d. The Court's Construction Of "Color Bands" In This Case.

The specification provides no definition of "color band." "Color bands" appears at '914 patent, col. 4, l. 51, wherein we are informed that the invention has "different" color bands that are to be filtered by "multiple monochromatic display transducers." '914 patent, col. *466 4, ll. 51-52. In Claim 1, where " color bands" is used, without such adjectives as " predetermined" or "predetermined red," the court construes "color bands" as: "a range of visible wavelengths that may include all colors visible to the human eye." *See* '914 patent, col. 6, l. 5.

On the other hand, when "color bands" is used in Claim 2(a), with adjectives such as "blue, red, and green color bands," the court construes "color bands " "to include the range of wavelengths, within which the colors blue, red, and green are visible to the human eye." *See* '914 patent, col. 6, ll. 13-14.

This construction is consistent with the specification that discusses "color band" in two contexts. First, the specification refers to single primary individual color bands. *See* '914 patent, col. 4, ll. 46-47 (" Each color band 51-53 provides a monochromatic image in one primary color for the full color display. "). Second, in Figure 3, local source of light without reservation "comprises red, green, and blue color bands[.]" '914 patent, col. 4, l. 41.

10. "Predetermined Color Bands."

The parties have agreed that the term " predetermined color bands," as used in Claim 1(a) of the '914 patent, requires no further construction aside from the term "color band." Jt. Stip. ¶ 4.

11. "Red Color Band."

[19] The term "red color band" appears in the preamble to Claim 2 and in Claim 2(a)(3) of the '914 patent. The preamble to Claim 2 speaks of "a local source of light having ... red ... color bands[.]" '914 patent, col. 6, ll. 13-14. Claim 2(a)(3) provides for a "third filter for filtering the red color band." '914 patent, col. 6, l. 21. FN11

> FN11. Claim 2(b) and Claim 3 include the term "narrowband of the red color band," which the parties have agreed means "a narrow range of wavelengths within the red color band." Jt. Stip. ¶ 6.

The parties have proposed the following competing constructions of "red color band:"

Honeywell's Proposed Construction	**Defendants' Proposed Construction**
Red Color Band: range of wavelengths within the red region of the visible spectrum	**Red Color Band:** a range of color in the range from 622 to 770 nanometers

Honeywell *Markman* Slide 130; Gov't *Markman* Slide 043 (bold added by parties).

a. Honeywell's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

Honeywell's pre-hearing brief argued that the term " red color band" means a "range of wavelengths within the red region of the visible spectrum." 12/23/04 Honeywell Brief at 27. Honeywell asserted that this construction also is consistent with the specification wherein there is a reference to "the first monochromatic display transducer, such as a CRT providing a red color band 51, projects an image in the red spectrum." '914 patent, col. 4, ll. 52-54. In addition, the '914 patent provides: "In the case of CRT displays, the narrow color band may be defined for example as the band at which the most light is transmitted by a phosphor coating on the CRT." '914 patent, col. 5, ll. 8-11. Honeywell insisted that this language "clearly defines the narrow band , (an example of a red color band) as the region of the spectrum where a red phosphor emits most of its light." 12/23/04 Honeywell Brief at 32. Honeywell also argued that since the '914 patent does not define a red color band by reference to any specific range of wavelengths, it would be improper for the court to limit this claim term in that manner. *See* 12/23/04 Honeywell Brief at 27 (citing *Invitrogen Corp. v. Biocrest Mfg., L.P.*, 327 F.3d 1364, 1371 (Fed.Cir.2003)) ("The district court properly declined to read into the claim any specific numerical improvement, such as ten-fold increase in competence."); *RF Delaware, Inc. v. Pacific Keystone Tech., Inc.*, 326 F.3d 1255, 1263 (Fed.Cir.2003) ("When a claim term is expressed in general descriptive words, it typically will not be limited to a numerical range."). In the alternative, Honeywell argued that if the court were to define " red color band" by using a specific wavelength, a plethora of extrinsic evidence contradicts defendants' selection of 622 nanometers*467 as the lower limit of the "red color band." *See* 12/23/04 Honeywell Brief at 28-33.

ii. At The Claim Construction Hearing.

HONEYWELL'S COUNSEL: We believe that both parties agree that a color band is a range of wavelength, as we have talked about. We believe that for purposes of the patent, it is more appropriate to define it as the red region of the spectrum, but not to pick one set of numbers that define that with sharp boundaries because we don't think it lends itself to sharp boundaries, as I will go into more detail. We think that the patent itself gives you guidance as to how to determine whether you are red or not[.]TR at 509-10.

* * * * * *

HONEYWELL'S COUNSEL: [T]he question is, you know, is this the proper time for the Court to engage in fact-finding, to try to define an absolute bright line lower boundary for red because we don't believe we're ever going to get there in this case. I mean, that could be figured out through testing and psychological studies or through other resources and references, perhaps, but that hypothetical exercise is not going to be important because we know that the displays have red. The government calls them red. And we know that they are right within the range of what people call red, so we will never have to figure that out. Even if you did, that number just won't-doesn't square with the display industry. So maybe if I walk through it, it will become clearer as well.

So we had based our construction on the intrinsic evidence, which the patent itself does not put wavelengths in, because everybody knows what the red color band in [sic]. It is a region within the red portion of the spectrum.
TR at 512-13.

iii. Post-Claim Construction Hearing Briefs.

After the claim construction hearing, Honeywell continued to argue that "red color band," as " described in the specification and set forth in the claims of the '914 patent, is light from the local source of light that provides the *primary red color* for producing a full color image in the display." 4/1/05 Honeywell Brief at 30 (emphasis added) (citing '914 patent, col. 4, ll. 46-54) ("*Each color band 51-53 provides a monochromatic image in one primary color for the full color display,* which appears on a front screen 15 as a combined full color image ... For example, ... the first monochromatic display transducer, such as a CRT providing a red color band 51, projects an image in the red spectrum[.]"); *see also* '914 patent, figure 3 (wherein the red color band 51 is mixed with the blue and green primaries to generate a full color image).

Honeywell's revised proposed construction was submitted to conform to the evidence at the claim construction hearing that "red color band" could be differentiated from other color bands by wavelengths. *See* 4/1/05 Honeywell Brief at 31. As Honeywell recognized, however, at least three extrinsic sources were cited as providing a wavelength for the "red color band," *e.g.,* the CIE color chromatic diagram, Munsell coordinates, and dominate wavelength. *Id.* Therefore, Honeywell urged the court to adopt "dominant wavelength," *i.e.,* 600 nm "or greater" to demark the boundaries of the "red color band." *Id.* at 31-32.

b. The Government's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

The Government's pre-hearing brief advised the court that "red color band" inherently would be understood by one of ordinary skill in the art to be " light in wavelengths from 622 to 770 nanometers." 1/14/05 Def. Joint Brief at 30 (citing Mcgraw-Hill Dictionary of Scientific and Technical Terms (3d ed.1984) at 1344); *see also id.* at 31 (citing Ex. 22 at 52 (RCA Electro-Optics HandbookK) that red is in the 622 nm-770 nm range). The court also was advised that the prosecution history supported this proposed construction. *See* 1/14/05 Def. Joint Brief at ***468** 31 (citing Ex. 7 '914 patent Wrapper at DOOO364-5,369) (referring to French patent application concerning night vision goggles compatible with "rouge" wavelengths bounded at approximately 620-770 nanometers); *see also id.* (citing Ex. 7 '914 patent Wrapper at D000633) (referring to United States Department of Navy document discussing night vision goggles compatible with a color chart showing a boundary of red at approximately 620 nanometers).

In addition, the inventor of the '914 patent testified during his deposition that "Red is in the range of 625 to 700 (nanometers)." Ex. 5 at 66.

ii. At The Claim Construction Hearing.

GOVERNMENT'S COUNSEL: We talked a lot about color. I want to go back. I mean, I know that Your Honor has had a chance to review the primer, but color is a psychological response to a physical perception.
THE COURT: I found that very interesting when I read that. Because I certainly-did not consider it that way.
GOVERNMENT'S COUNSEL: You ask the inventors, I don't remember which one said it, but I asked him, you know, how would you determine if something is red and he said-
THE COURT: Psychological primer.
GOVERNMENT'S COUNSEL: There was a little bit of dispute over which one. I think-I mean, I think there is a physical element to it as well, but whichever one, the key is it is psychological. We asked one of the inventors how would you define what red is. He said I would ask a bunch of graduate students and do a

study, but the key is the study has been done and that's what that Beare study that was cited by the plaintiffs talks about.
TR at 549-50.

* * * * * *

GOVERNMENT'S COUNSEL: You look at the claim context first. I know a lot of times I will come across things I know from the context I can't figure out, and I have to go to the dictionary. This is one of the instances where that's the case here. So we believe that since the patent doesn't define it, it is not defined anywhere in the intrinsic evidence, you have to say, well, what does one of ordinary skill in the art say about it. And we believe the [Mcgraw-Hill Dictionary] authoritative, famous book, shows clearly 622 to 770. There is no disputing that's what it says. Now, it is backed up by the [RCA Electro-Optics Handbook.]
TR at 552.

* * * * * *

GOVERNMENT'S COUNSEL: Now, I want to talk about Honeywell's construction briefly. There are a number of problems with it, but I think the Court is focused in on the most important one. They say: Well, okay, it is inappropriate to construe red color band to any particular range of wavelengths. [Honeywell's counsel] said today maybe we can do a study and figure out what it is. That's not what that says in their brief. I don't know what their position is. But if it is this first one, patent is indefinite, claim is indefinite because you can't figure out whether you are in the red color band or not.
THE COURT: That's why I asked this gentleman before, why didn't the Patent Office pick that up.
GOVERNMENT'S COUNSEL: I mean, I really can't say. I think it is because the patent examiner has the same understanding of what red means as we do, which is that it is set within a particular well-known wavelength range. Now, what I am saying is that if you adopt their definition, it is indefinite because you cannot find whether you are inside the claim or outside the claim.... That's only if one of skill in the art would understand the bounds of the claim, when you read the claim. Now, we think that they would. They think that one skilled in the art wouldn't. And you would have this vague-
THE COURT: Remember yesterday when I asked the question, who was the person skilled in the art and whether or not they had to have-I probably said it inartfully, but aviation background, okay? ***469** And it seemed to me that that question is equally relevant here because one who is skilled in the art of, it is more than just aviation, it is in terms of what is used in [instrument and panel lighting,] IPL they would have to be skilled in IPL?
GOVERNMENT'S COUNSEL: I think the knowledge of night vision goggle compatible lighting is relevant.
THE COURT: Which is the broader category.
GOVERNMENT'S COUNSEL: But the claims are construed as one of skill in the art at the time of the invention.
THE COURT: And you wouldn't have had the IPL at that time?
GOVERNMENT'S COUNSEL: You would have had IPL. You wouldn't have had NVIS red. So you go and ask-
THE COURT: Which came up in '88.
GOVERNMENT'S COUNSEL: Right. So that's another reason why we think NVIS red is inapplicable. The wavelength cutoff, sure, they don't change over time, but somewhere, [the inventor] writing the patent in 1985 had no idea what NVIS red was because it didn't exist yet, so how could he have referenced that?
THE COURT: Right. And you don't want to use the word IPL. You gave me-
GOVERNMENT'S COUNSEL: Instrument and panel lighting.
THE COURT: I have got that. There was a broader category you used a moment ago.
GOVERNMENT'S COUNSEL: Aviation red.
THE COURT: No, no.
GOVERNMENT'S COUNSEL: Night vision compatible lighting?
THE COURT: Yes.
GOVERNMENT'S COUNSEL: Okay.
THE COURT: Hold on.... [I]f I use that term in the time the patent was filed, that would have been a known specialty?
GOVERNMENT'S COUNSEL: I think if you talk to someone who was knowledgeable in

night-vision goggle compatible lighting and displays, we will add that in there since this talks about displays, that they would have had knowledge in display, manufacturing for cockpits.
TR at 572-75.

c. Intervenor Lockheed Martin's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

Lockheed Martin's pre-hearing construction of "red color band" was the same as that of the Government. *See* 1/14/05 Def. Joint Brief at 29-35.

ii. At The Claim Construction Hearing.

LOCKHEED MARTIN'S COUNSEL: Honeywell's construction potentially includes any range of visible wavelengths. And it is regardless of the color, and so there are no divisions. There are potentially no limits. And we think that such a construction really violates one of the fundamental tenets of patent law that we have been talking about over the past two days. And that is that a patent has to have metes and bounds. It has to have some definite tightness to it so people that are trying to improve upon what's there or make it better know what the invention is so they know what they are trying to improve upon. And we think that the construction of color band doesn't enable people to accomplish that.

THE COURT: Why wasn't that picked up by the patent examiner?

LOCKHEED MARTIN'S COUNSEL: I don't know, Your Honor. It could have been the patent examiner interpreted the term in accordance with our definition. Because, again, yesterday when-

THE COURT: Because if your point is valid, that is a big issue.
TR at 496-97.

* * * * * *

LOCKHEED MARTIN'S COUNSEL: [I]f you look at Honeywell's proposed construction, it doesn't provide any guidance. If a color band isn't a specific band of blue, red, or green, how does the optical engineer know which wavelengths are of interest?***470** If a color band can go across individual color bands, what do you design to? So in order to know which color bands to design to-

THE COURT: That's a very good point.
TR at 498.

iii. Post-Claim Construction Hearing Briefs.

Lockheed Martin represented that "[b]ased on the intrinsic evidence, one of ordinary skill in the art would determine that the term 'red color band' means a 'range of colors ... from 622 to 700 nanometers.' " 4/1/05 Int. Brief at 41. For the construction of this term, the court was advised that it was appropriate to consult dictionaries and technical treatises, along with the intrinsic evidence, *i.e.*, specifically the Mcgraw-Hill Technical Dictionary (DMX 18 at DE-963; DMX 21 at DE-980) or the RCA Electro-Optics Handbook (DMX 22).

Here, Lockheed Martin emphasized the relevance of the prosecution history to the need to construe the color red within a specified wavelength range. Since Honeywell relies on a February 14, 2001 Information Disclosure Statement citing a French patent designating that the "red color band" begins at approximately 622 nanometers. *See* IMX 36 at DE-1401. Therefore, on June 20, 2002, Honeywell submitted a Supplemental Disclosure Statement, to include a technical article by Breitmaier and Reetz that contained the Kelly Chart of Color Designation of Lights, showing that the "red color band" begins at 622 nanometers. *See* IMX 36 at DE-1670.

Therefore, Lockheed Martin argued that this prior art confirms that one of ordinary skill in the art would define the color "red" in accordance with the defendants' proposed definition, rather than by dominant wavelength, particularly since the '914 patent does not specify a dominant wavelength and the only reference in the specification are to peak wavelength. *See* 4/1/05 Int. Brief at 46 (citing '914 patent, col. 5, ll. 8-12) ("the narrow color band may

be defined ... as the band at *which most light is transmitted* by a phosphor coating on the CRT, typically a five to twenty nanometer band.").

Nevertheless, Lockheed Martin insisted that peak wavelength is "more important" than the dominant wavelength because "optical filters filter the physical manifestation of light, *i.e.*, the peak wavelengths of phosphors in the visible range of the electromagnetic spectrum, and not the dominant wavelength, which is the wavelength at which the human eye perceives color." 4/1/05 Int. Brief at 46. Lockheed Martin also pointed out that Honeywell could have drafted the patent to cover specific lower wavelengths or define red to include " reddish orange, orangey red, or orange," but did not do so. *Id.* at 47. Therefore, Honeywell should not now be allowed to interpret words "to convey the special definition it now asserts." *Id.*

In Lockheed Martin's April 15, 2005 post-hearing brief, the court was urged "to define the term 'red color band' according to its peak wavelengths," because "one of ordinary skill in the art would utilize peak wavelength because this is where the filtering will occur." 4/15/05 Int. Brief at 20 (citing '914 patent, col. 5, ll. 8-11). In this regard, Lockheed Martin staked out a more aggressive position than the Government by arguing that " subsumed within Honeywell's construction is the apparent belief that if a display produces a color that is defined by a dominant wavelength, then the device must infringe irrespective of the wavelengths filtered by Honeywell's display system." 4/15/05 Int. Brief at 21.

d. The Court's Construction Of "Red Color Band" In This Case.

The term "red color band" is not defined in the claims or specification. Honeywell conceded that wavelengths are an appropriate measure of this term, as it must, in light of numerous citations to the symbol in the specification. *See* '914 patent, col. 3, l. 38; col. 4, l. 56; col. 5, ll. 7-8, 15. The court, however, declines to construe "red color band" without defining a specific range of light wavelengths, because the claim would be indefinite, in light of the psychological and subjective nature of the term without such *471 parameters. FN12

> FN12. The court is mindful that in *Modine Mfg. Co. v. U.S. Int'l Trade Comm'n*, 75 F.3d 1545, 1557 (Fed.Cir.1996), the United States Court of Appeals for the Federal Circuit held that "technical terms are not *per se* indefinite when expressed in qualitative terms without numerical limits .. . [m]athematical precision should not be imposed for its own sake." The court, however, does not view "red color band" as a technical term, but rather as a synonym for wavelengths expressed within a range measure of nanometers. *See, e.g.*, '914 patent, col. 4, l. 13 ("colors at lower wavelengths (red)").
>
> In addition, as will be discussed below, after the claim construction hearing, Honeywell changed its position to agree to defendants' proposed construction of "blue color band" and "red color band" by specific ranges of wavelengths. Therefore, Honeywell's continued insistence that the court should not construe the "red color band" by a specific range of wavelengths, but may do so with regard to "blue color band" and "green color band," has no credible basis in logic.

Since defendants agree that the prosecution history of the '914 patent recognized the lower end of a red color band is 620 nm, rather than 622 nm, the court construes 620 nm as the lower end wavelength boundary of the "red color band." *See* 1/12/05 Def. Joint Brief at 31 (citing '914 Wrapper at D000364-65, 368-69); *see also* D000633. The court is aware that Honeywell's expert, Mr. Tannas, criticized Dr. Task's opinion that red color band begins at 622 nm, because "numerous prior patents .. . (*see* U.S. Patent Nos. 4,542,084; 4,390,637; 3,742,277; and 3,721,849) [have] cited a lower range." *See* PMX 36 ¶ 15 at 4. None of these patents, however, are listed as prior art of the '914 patent. *See* DMX 1. Moreover, although Honeywell introduced these patents at trial, *see* PMX 3-6, they are still extrinsic evidence that the

court does not need to consult at this juncture in light of the fact that the intrinsic evidence provides a low range parameter in this case.

To determine the high end of the red color band, the court has no alternative based on the record, but to turn to extrinsic evidence. Although both the Mcgraw Hill and RCA Electro-Optics Handbook define the upper end of the red color band range as 770 nm, the court must decline to adopt that suggested construction since prior art of a related technology is more relevant than dictionary or treatise definitions, albeit latter are industry-specific and widely respected reference sources. In this case, USPTO No. 4,390,637, filed on September 9, 1981 and issued on June 28, 1983, "X-Ray Absorbing Glass For A Color Cathode Ray Tube Having a Controlled Chromaticity Value And A Selective Light Absorption" describes "highly transparent for the red color light (the wavelength of about 610-780 m)[.]" 4,390,637 patent, col. 1, ll. 29-30. FN13 The court has reviewed the entire prosecution history of the '914 patent and related patents and found no reference to USPTO No. 4,390,637. Nevertheless, this prior art is extrinsic evidence and, in the court's judgment, more relevant and reliable than either industry-specific references and the expert testimony proffered by the parties. Therefore, the court construes "red color band" in this case as having an upper end range of 780 nm. FN14

> FN13. The invention described in this patent "relates to glass for use as a color cathode ray tubes, and in particular, to X-ray absorbing glass for use as panels of color television tubes having a selective light absorption and a controlled chromaticity value." 4,390,637, col. 1, ll. 8-12.
>
> FN14. Although several federal trial courts have issued constructions related to the wavelength of the color red, these constructions have not been reviewed by the United States Court of Appeals for the Federal Circuit. *See, e.g., Metrologic Instruments, Inc. v. PSC, Inc.*, 2003 WL 22077652, at *2 (D.N.J.2003) ("Because laser light is usually measured in the range of 640-670 nanometers, ... the appropriate wavelength of the color red .... [T]he high band-pass filter, which blocks ambient light with wavelengths above 640 nanometers, is also called the red pass filter. [The invention at issue] lies at 670 nanometers, in the visible region of the electromagnetic spectrum, at or near the color red."); *Jena v. Bio-Rad Lab.*, 2002 WL 181699, at *12 (S.D.N.Y.2002) (federal trial court relying on Eugene Hecht and Alfred Zajac, Optics (1974), stating that the low end of the red color range was 622 nm and the high end was 780 nm).

Honeywell also argued that in the event that the court construed "red color band" by a range of wavelengths, the court also should specify that the " dominant wavelength" should be 600 nm or greater. *See* 4/1/05 Honeywell Brief at 31. Although there was a great deal of discussion at the claim construction hearing about the relevance of dominant*472 versus peak wavelengths, since the '914 patent did not specifically address this issue, the court has declined to import what might be viewed as a limitation into the '914 patent by construing "red color band" either by a dominant or peak wavelength. *See Nellcor Puritan Bennett, Inc. v. Masimo Corp.*, 402 F.3d 1364, 1370 (Fed.Cir.2005) (forbidding a federal trial judge from adding a "limitation that is not present in the claim language and is not supported by the specification or prosecution history"). FN15

> FN15. On April 20, 2005, after the claim construction hearing, Honeywell moved for leave to supplement the record with: Dr. Darrel Hopper, "*Draft Standard for Color Active Matrix Liquid Crystal Displays in U.S. Military Aircraft: Recommended Best Practices*" (Doc. No. GVT032-0001-00740). Honeywell represented to the court that this document states that red is defined by a dominant wavelength and in the field of military

cockpit display, a claimed wavelength of 610 nanometers is considered "red." *See* 4/20/05 Honeywell Motion at 1-5 (citing GVT032-00034; GVT032-00037, Table 4). The court admitted this document into the record to create a complete record, but has not relied on it to construe "red color band" because the document was published in June 1994, almost a decade after the '914 patent issued and therefore is irrelevant. Moreover, the document is not a party admission against interest for several reasons, not the least of which is it is a "draft" and never formally was adopted by the Government for any purpose.

12. "Predetermined Red Color Band."

The parties have agreed that the term " predetermined red color band," as used in the claims of the '914 patent, means "a specific range of wavelengths within the red color band." Jt. Stip. ¶ 5.

13. "Substantially Blocks."

[20] Claim 1(a) describes a display system comprising a first optical filter that "filters light" and "substantially blocks light[.]" '914 patent, col. 6, ll. 1, 5. Claim 1(b) describes a display system comprising a second optical filter that also "filters light" and "substantially blocks light. " '914 patent, col. 6, ll. 7, 8-9.

Claim 2(b) describes a display system comprising a fourth filter that "filters light" and "cooperating with said plurality of filters to substantially block at least said narrowband of the red color band[.]" '914 patent, col. 6, l. 26.

The parties have proposed the following competing constructions of "substantially blocks":

Honeywell's Proposed Construction	**Defendants' Proposed Construction**

Substantially blocks: obstructs the passage of light sufficiently to permit the night vision aid to be used for its intended purpose	**Substantially blocks:** to render a large degree of light unsuitable for passage by an optical filter, such that the invention is fit for the intended purpose

Honeywell *Markman* Slide 180; Gov't *Markman* Slide 066 (bold added by parties).

a. Honeywell's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

In Honeywell's pre-hearing brief, the court was advised that "[a]s used in the patent, *substantially blocks* means to obstruct the passage of light sufficiently to permit the night vision aid to be used for the intended purpose." 12/23/04 Honeywell Brief at 34 (citing PMX 37 (Tannas Suppl. Report) ¶ 2 at 2; Webster's at 235 defining "block"). In all three claims utilizing the term " substantially blocks," Honeywell argued that "the objective of the substantially blocking is to permit the night vision aid to work ... without being disrupted by light from the local color display." 12/23/04 Honeywell Brief at 35 (citing '914 patent, col. 2, ll. 5-7) ("[T]o permit light which originates at the full color display from overwhelming the night vision aid."). The court further was advised that the "benchmark" for determining whether light is "*substantially blocked* is whether the night vision aid can be used for its intended purpose." 12/20/04 Honeywell Brief at 36 (emphasis added).

ii. At The Claim Construction Hearing.

At the claim construction hearing, Honeywell argued that "substantially blocks" is "talking about what night vision goggles do." TR at 702.

> HONEYWELL'S COUNSEL: So Plaintiff's construction is that it obstructs the passage of light sufficiently to permit the *473 night vision aid to be used for its intended purpose.

TR at 704.

* * * * * *

THE COURT: Is your noun the same for all of the ...

HONEYWELL'S COUNSEL: The noun is different ... in ours [construction of "substantially blocks"], we're saying it's the night vision aid, to render night vision aid suitable. And in the second, in Defendant's construction, they are saying it renders the invention suitable.

THE COURT: Is there a difference?

HONEYWELL'S COUNSEL: Well, we think there is a difference, Your Honor. I don't know how-this is one of those where we're just trying to do what we think the claim says. I'm not sure why-what the significance of what the issue is, but it's one we didn't reach agreement on. I think the claim example here, it's quite clear substantial blocking-this is claim 2, substantial blocking that is associated with the fourth filter which is on the night vision aid. So the whole notion is that you're blocking to make the night vision aid work the way it's supposed to work. The-likewise, here, you are substantially blocking-this is in claim 1, to make the night vision aid work. And then substantial blocking up here. It all seems-the whole invention is associated with preventing interfering with the night vision aid. So I'm not sure what it means when they say, you know, the-render the entire invention suitable for its intended purpose, versus a night vision aid. So since we don't know what they're getting at, and we do think the claim itself, the whole substantial blocking aspect was relating to the proper functionality of the night vision aid, that's why we have focused on that in our construction.

And perhaps we'll learn more from the Defendants and why they think that's incorrect. But there's no requirement-substantially blocked imposes no particular requirement on the colors that are displayed on the local color display itself.

It's all-it's all surrounding what's happening for the functionality of the night vision aid in both claims. Here even in claim 1, in 1(a), we have

substantially blocks the light. But, again, that blocking, going back to figure 1, which there's no-
TR at 704-06.

* * * * * *

HONEYWELL'S COUNSEL: So in any event, the-the substantial blocking, again, if you look at figure 1, remember, the whole notion of why we're doing this blocking is to permit the night vision aid to operate as it's intended to, at the same time that it, again, doesn't-without interfering with the display itself[.]

THE COURT: So the pilot can look at the display and look straight out into the ... window?

HONEYWELL'S COUNSEL: Right. So there are three areas we disagree on. We already touched on one. I haven't got much more to say on it other than the fact that the third one, which is what we just covered-substantially blocks requires that the night vision aid or the entire-whether substantially blocks requires the night vision aid or the entire invention to be used for its intended purpose. That's the question. We think that intended purpose is a perfectly good way to characterize this term. But we think the perfectly good ought to be looked at in the context of the night vision aid.

THE COURT: Well, your construction ... you're using the word obstruct the passage of light sufficiently, which to me means "a lot of."

HONEYWELL'S COUNSEL: Actually, I think it might be the other way around. We're not trying to quantify it. Our second issue-

THE COURT: You're not.

HONEYWELL'S COUNSEL: No. The quantification is does it work for its intended purpose. In other words-but there's no quantification of this in the patent, nor should there be. If the thing works and it's doing what it's supposed to do, then so be it.

THE COURT: Let's back up ... [i]s there a finite amount of light that needs to be either blocked or obstructed?

*474 HONEYWELL'S COUNSEL: The reality-

THE COURT: Do we know?

HONEYWELL'S COUNSEL: Well, I think-I don't think there's a number that exists.

THE COURT: Could you put a number there?

HONEYWELL'S COUNSEL: There certainly have been-there are certainly numbers of things that have been done, well after the patent, to try to figure out well, how good does it have to be, you know, and so forth. That wasn't in existence at the time of the patent. That wasn't in the inventor's head. In the inventor's head was I am going to make something which is unsuitable suitable. Our view is that's sort of self-explanatory in the end, frankly, if this thing makes its way into a $500 million aircraft with a several hundred thousand dollar display, it must be there because it's doing its job. And I-we don't think there's really any more that needs to be said about that in these patents. One might come up with another patent that has all sorts of other things and tests and parameters, but that's not what this patent is all about. This patent tells you you're going to do this and make it, and it's going to do what it's supposed to do.

THE COURT: Let's go back to the idea of the engineer looking at this and wants to make one of these things, or make something better than what you have. How does that person know that a-a person skilled in the art know how much [light] to block?

HONEYWELL'S COUNSEL: Well, you know, frankly, there's no-you have to see if it works. There's nothing in the rules or the law that says you can't do routine experimentation. Not everything in the world is set down and quantified. But if it's doing its job, if it's blocking-if it didn't work adequately without the filters and it does work adequately with the filters, it's substantially blocking and it's achieving its intended purpose.

THE COURT: Well, is the amount blocked each time different? In other words-

HONEYWELL'S COUNSEL: Well, I think-I guess, the reality is if the display has a changing image, what's actually blocking is going to vary with what's in the-what the output is of the display.

THE COURT: Of the display.

HONEYWELL'S COUNSEL: I think as a general matter the filter properties are not going to change, you know. So that's an implementation area. But, again, this is not a patent that's designed to sort of figure out exactly how you implement, nor do you have to. But the

invention here is the notion of striking a compromise, it's block some light that makes the night vision goggles suitable and, you know, permit enough so you can see color in the display.. .. There are really three issues. The first one, I think we've actually touched on the first one a little bit here, because the claim talks about substantially blocks. We've talked about obstructing passage sufficient to work for its intended purpose. And the Defendants have added in the word, a large degree. Well-

THE COURT: Go back ... It seems to me-obstructed to me is kind of a measure. It seems to me that you're-it implies to me that you are blocking more in your definition than they are in theirs.

HONEYWELL'S COUNSEL: That's funny, because I certainly hadn't intended that, Your Honor. We say obstructs it sufficiently to make it work. They say obstructs a large degree. I guess our view is it doesn't make much sense to go from substantially to large degree. You're substituting one word of degree for another one, ... they're trying to import a large measure of blockage in there. And it may not have to be a large amount. It just has to be substantial enough to do the job. So we think [the defendants are] the ones who are putting in a measure of degree of blockage that's just not there. And it really doesn't make much sense to take one relative term of degree and swap it out for another one. Claim construction doesn't sort of compel you to sort of say let's change every word in the claim and come up with a synonym for it. Because it's not particularly helpful to go from one synonym*475 to another, ... there's nothing that's compelling. Large degree, for example, is not anywhere in the claim. It may well be ... one of many definitions of substantially[.] But I don't think that means ... we haven't gone in the claim and every word you find substitute a dictionary definition. And oftentimes dictionary definitions don't shed any light on things.

TR at 707-12.

* * * * * *

HONEYWELL'S COUNSEL: [T]he claim language itself says substantially blocks. And in their construction, they then convert that. I think their large degree of is probably their synonym for substantially. So what they're doing is saying let's take substantially, which is a matter of degree in the claim, and let's stick in a large degree in lieu of that word in our construction. And I don't think that necessarily sheds a lot of light on the subject. And frankly, whether it's a large degree or an adequate degree or a-is-all that really matters is is it doing the job.

THE COURT: Would it be the same if they had you eliminate the words a large degree so it would be to render light unsuitable?

HONEYWELL'S COUNSEL: I have a problem with that part of the construction, too.... they have substituted blocks ... if you were to figure out where that came from, the light-the unsuitable for passage is a dictionary definition-one dictionary definition for the word blocks. I can block the door and render it unsuitable for passage, right. In the context of a filter and light, it's just not the appropriate definition because-actually filters don't render light unsuitable for passage. That's not what [filters] do. So it's just the wrong definition. Filters do block. Or they can absorb or they can reflect. There's all sorts of ways filters work. They don't render light unsuitable for passage. It's just not technically correct. It doesn't do anything for the light. It either sort of turns it into heat or redisburses it. So we don't think it's a proper choice for a dictionary definition in this case. So for that reason we-we think that the more proper-the notion of blockage is obstructs the passage.

THE COURT: All right.

HONEYWELL'S COUNSEL: We agree it obstructs the passage, but doesn't render the light unsuitable. And ... the last point, substantially blocks requires that the night vision aid-or doesn't require the night vision aid or the entire invention to be used for its intended purpose. I'm not quite sure where the [G]overnment is going with that. But the claim itself to us seems to suggest that the substantially blocked terminology is being used in the context of the night vision aid....

THE COURT: Are you going to move to the difference between [defendants'] use of the word invention and your use of the word night vision aid? Because your invention is larger than just-or more than just the aid itself.

> HONEYWELL'S COUNSEL: Well, the invention is ... what the filter is doing ... it's the filter that is substantially blocking. And that's the filter on the night vision aid to render the night vision aid unsuitable. I don't know that that's a huge issue for us. I just think that what we've proposed is correct.... I don't want to muddy up the issue into ... I don't know what [defendants are] suggesting we have to prove when they say the invention is used by-I guess I don't understand-I don't think they've helped us any here.

TR at 707-16.

iii. Post-Claim Construction Hearing Briefs.

In post hearing briefing, Honeywell reaffirmed that " substantially blocks" appears in three claims to describe the "function of three different filters," *i.e.*, 1.) the first optical filter in Claim 1; 2.) the second optical filter in Claim 1; and 3.) the fourth filter in Claim 2. *See* 4/1/05 Honeywell Brief at 47 (citing '914 patent, col. 6, ll. 5, 8-9, 26). Therein, Honeywell contended that the term "substantially blocks" has the same meaning in each of the claims, *i.e.*, "obstructs the passage of light sufficiently to permit the night vision aid to be used for its intended purpose." *Id.* Each term has the same ***476** meaning each time that it is used, *i.e.*, "obstruct the passage of light sufficiently to permit the night vision aid to be used for its intended purpose." 4/1/05 Honeywell Brief at 47. When "block" is used in context with the claim, Honeywell asserts that it is clear that "light is being rendered unsuitable and that the 'obstruction' is an optical filter." *Id.* at 36 (citing '914 patent, claim 1, *i.e.*, " optical filter ... that substantially blocks light."). Honeywell further advised the court that the " objective of the substantial blocking is to prevent light from the local display from interfering with the night vision goggles ... [*i.e.*,] the appropriate benchmark for measuring the degree to which light must be blocked is whether the night vision aid works for its intended purpose." *Id.*; *see also* 4/15/05 Honeywell Brief at 23 (emphasis added) (" no quantitative test is required for those skilled in the art to understand the meaning of *substantially blocks* or determine the limits of the claim.").

Honeywell also attacked defendants' interpretation of "substantially" to require that the offending light is to be blocked "to a large degree." 4/1/05 Honeywell Brief at 47. To which Honeywell appropriately asked the rhetorical question: by how large a degree? *Id.* at 48. Although Honeywell conceded that no quantifiable answer is provided by the Government, the court was informed that the '914 patent "implicitly defines *substantially blocks* by describing the objective of filtering light for the display 'to prevent light which originates at the full color display from overwhelming the night vision aid.' " *Id.* at 48 (citing '914 patent, col. 2, ll. 6-7). Therefore, "substantially" should be construed as " requiring the night vision aid to function for its intended purpose." *Id.* (citing *Seattle Box Co., Inc. v. Indus. Crating & Packing, Inc.*, 731 F.2d 818, 826 (Fed.Cir.1984)) ("[The] court must determine whether the patent's specification provides some standard for measuring that degree."). Honeywell also urged that "in the context of the '914 patent, ' substantially' should be construed as requiring the night vision aid to function for its intended purpose . .., *i.e.*, if the filters do not block light for the display sufficiently to allow night vision goggles to be used in the cockpit, then the claim is not infringed." 4/1/05 Honeywell Brief at 48.

Finally, Honeywell challenged defendants' proposed construction of "such that the invention is fit for the intended purpose" to render the claim "vague and indefinite." 4/1/05 Honeywell Brief at 48. Honeywell asserted, however, without citation, that "the '914 patent imposes no such requirement." *Id.* On one hand, Honeywell argued that "[t]he objective of substantially blocking 'light from the local color display' pertains solely to the night vision aid." *Id.* On the other, Honeywell argued that "one of the objectives of the ['914 display system] invention is to allow the *full color* display in a NVIS compatible cockpit"-an "objective not invoked by the substantially blocks." *Id.* (emphasis in original). Nevertheless, the court was advised that the objective of allowing a full color display in a NVIS compatible cockpit is "achieved by ... the requirement for a *color display* and a *red color band*." *Id.* (emphasis added) (citing *Golight, Inc. v. Wal-Mart Stores, Inc.*, 355 F.3d 1327, 1331 (Fed.Cir.2004)) (holding that patentees are not

required to include in each claim all of the " advantages or features described as significant or important in the written description."); *Resonate Inc. v. Alteon Websystems, Inc.*, 338 F.3d 1360, 1367 (Fed.Cir.2003) ("[W]hen the written description sets out two different problems present in the prior art, is it necessary that the invention claimed, and thus each and every claim in the patent, address both problems? We conclude ... the answer is no.").

b. The Government's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

Prior to the claim construction hearing, the Government argued that the " 'ordinary meaning' of 'substantially blocks' is clear from intrinsic evidence ... the claim terms ... read in light of the specification, *i.e.*, "filtration must 'be *very* efficient' so light from the display will be nearly completely blocked." *See* 1/14/05 Def. Joint Brief at 36-37 (citing '914 patent, col. 1, ll. 1-54). Since the purpose of the optical filter "is to allow ***477** the use of a color display in connection with an NVG ... 'substantially' means 'to a larger degree ... such that the invention is fit for its intended purpose.' " 1/14/05 Def. Joint Brief at 37 (citing '914 patent, col. 3, ll. 8-11) ("[T]he purpose of the optical filter is to allow the use of a color display in the connection with an NVG.").

The Government, however, appeared so uncertain about the persuasiveness of this argument that it resorted to a dictionary definition and expert testimony in support before even mentioning the prosecution history in passing, that it attempted to reinforce by the disfavored testimony of the inventor. *Compare* 1/14/05 Def. Joint Brief at 36-37 (citing Webster's and Dr. Task) *with* 1/14/05 Def. Joint Brief at 38 ("This purpose is evident from ... the prosecution history and repeated by the inventors.") (citing '914 Wrapper D000109; Ex. 5 Cohen 7, ll. 16-18).

On the other hand, the Government persuasively argued that the word "overwhelm" is not defined in the patent, discussed in the prosecution history, and apparently is not a common term used by one skilled in the art. Therefore, to define " substantially blocks" by reference to "overwhelm" could render Claim 1(a), Claim 1(b) and Claim 2(b) indefinite. *See* 1/14/05 Def. Joint Brief at 38.

ii. At The Claim Construction Hearing.

At the claim construction hearing, the Government summarized the three significant differences in the parties' construction of the term "substantially blocks."

> GOVERNMENT'S COUNSEL: [T]he biggest difference ... is the invention versus night vision aid.... [W]e believe that [our construction] provides a workable test as one reading the patent would understand it.... [O]ne skilled in the art ... in night vision goggle compatible, will understand what the invention as a whole was meant to do.
>
> THE COURT: I was surprised that both sides decided they wanted to construe this. Do you want to shed some light as to why?
>
> GOVERNMENT'S COUNSEL: Why construe this at all? ... Well, Your Honor, I think it becomes necessary because, first of all, substantially ... has different meanings depending on the application and depending how the specification shows you should use it.
>
> THE COURT: Okay.
>
> GOVERNMENT'S COUNSEL: Second of all, substantially has different meanings depending on what the purpose of the invention is. So we wanted to make clear what the purpose of the invention was. Also we want to give Your Honor sort of a context for deciding this in terms of what someone would understand substantially blocked to mean.
>
> THE COURT: Okay.
>
> GOVERNMENT'S COUNSEL: Substantially blocked was used in the claims. Your Honor was right to point out that there are three times it's used. We don't believe it's always used in conjunction with the goggles.... [Y]ou can see that from 1(a). It says the filter passes light comprised of predetermined color bands, including predetermined red color band, and

substantially blocks light associated with color bands other than that predetermined color band. That filter is on the display.
TR at 717-18.

* * * * * *

GOVERNMENT'S COUNSEL: The filter in part A is the filter on the display.... This filter in part B is the filter on the goggles. Both of them must substantially block, whatever that means, whatever we decide that to mean.
THE COURT: Right. But they're two different items.
GOVERNMENT'S COUNSEL: Two different items. Two different things. We think that draws the invention in as a whole as opposed to just the night vision aid.... [T]here's nothing in the claim that tells you exactly what substantially means and what it doesn't. It doesn't give you a whole lot of context. But the specification uses substantially blocked only once. And, again, it's not extremely helpful. But what it does tell you is that the other filters, 23, 25, ... probably 24 may need to be in there as well, and that refers to figure 3, *478 which-... 23 and 25 are the filters that-you know, it says 25 being a notch filter. The other filter 23, 25, I think that's probably a typo. I think they probably meant to refer to one or the other. Substantially blocks light in a predetermined red color band. So that's the one use of it in the specification....
THE COURT: Let me ask you something totally different. Is substantially blocks in one sense redundant if you use the word notch?
GOVERNMENT'S COUNSEL: No, Your Honor. Because it has to block light or substantially block light of-
THE COURT: But I thought that's what [it] did, when we were looking at what a notch was, the notch did block within that range.... Do you remember what I'm talking about?
GOVERNMENT'S COUNSEL: I do exactly know what you're talking about.... Filters don't have to be 100 percent blocking or passing.
THE COURT: So the notch itself is not a total block.
GOVERNMENT'S COUNSEL: You could have a notch that only blocks at 50 percent.
THE COURT: Okay.
GOVERNMENT'S COUNSEL: I think that what this does is it adds in it must substantially block, whatever substantially means. Now, we think there's context for this given in the specification, because it says filtration of the objectionable light must be very efficient because small amounts of light within the active frequency range of the night vision goggle will overwhelm the aid. So it ties it to very efficient blocking. The blocking must be very efficient.
THE COURT: I thought that was an unusual use of words, too.... [F]iltering needs to be efficient.
TR at 719-22.

* * * * * *

GOVERNMENT'S COUNSEL: Now, the term substantially blocks isn't used in the prosecution history [or] in any of the art. We believe that it's a common word without special meaning. A dictionary definition is appropriate. The renders light unsuitable for passage comes straight out of [Webster's] dictionary. They use [Webster's] dictionary as well, a different definition. We believe ours is appropriate because it's a transitive verb, and because it says that the filter substantially blocks light. So if the filter is acting on the light and needs to render the light unsuitable for passage.... Now, getting to ... substantially in patent law is a term of magnitude or approximation.... If you look at claim 3, [it] says substantially 5 to 20 nanometers wide. We haven't even discussed claim 3 .... But substantially is used there as an approximation term. Approximately 5 to 20 nanometers wide. But it can also be used as magnitude. Now what you do to determine which one is you look at the specification and how it's used in the specification. The specification says it must be very efficient. Okay. Well, what does very efficient mean. That's a matter of degree as well.
So that leads you to the conclusion that substantially means to a large degree. Now, [Honeywell's counsel] has said well, that's just substituting one-one word for another.... But we think that it's actually clarifying between the two uses of substantially in patent law, which is that it's signifying a large degree. Now, I would also point out that [Honeywell's] construction suffers from the same fault, which is they use

sufficiently. That's a matter of degree as well ... substantially necessarily has a sort of mushy definition. And so sufficiently large degree, ... [defendants' construction] is more appropriate because of the very efficient language. You understand that it has to be, to a fairly high degree, a blockage. That's why we inserted that language there. And I don't think it's redundant ... [or] useless to make that construction. Now, I want to also talk briefly about how one of skill in the art would understand what substantially block means, because I think that goes to the invention as a whole.

THE COURT: That's why you use the word invention in your definition.... As opposed to just the night vision aid.

*479 GOVERNMENT'S COUNSEL: That's correct, Your Honor. We believe the law is clear that when you're construing substantially, you look to the purpose of the invention. And so substantially has to mean that whatever it does, it achieves the purposes of the invention. I think that's pretty much common sense, but it's also the law. So you need to look at the invention as a whole. Now, what's the purpose of the invention as a whole? Is it to have a workable night vision aid? Yes. But there's more to it than that. Because it's also you have to have a color display-

THE COURT: You've got to be able to read at the same time.

GOVERNMENT'S COUNSEL: That's readable, usability within the same environment as the night vision aid. So that adds a little bit more complexity to the whole question. I-I think it's going to come out later, and again, I don't want to get into it too much, but I think that the-the night vision aid being workable is not a usable distinction. And-a usable measure of what substantially blocks is. If you look at the invention as a whole, there were known ways to measure compatibility between a color display and a night vision goggle in 1985. And I'll give you two of them right here.

THE COURT: In terms of quantitative-quantified?

GOVERNMENT'S COUNSEL: There's both a quantitative and a qualitative way to do it. The quantitative way to do it is you measure overlap, you look at the curve that the filtered light is putting out. And you look at the curve that the sensitivity of the goggle is. Then you do sort of a mathematical integration under the overlap. Because they're going to overlap ... the area under that had to be under a certain amount.... [I]t was called ANVIS radiance.... [T]hat's actually how the military measures compatibility today. But it was coming out in 1985 ... is even talked about in the prosecution history as one of the ways [the military was] looking at making things compatible and measuring whether things are compatible.

* * * * * *

THE COURT: Well, could they have put a measurement into the claim? ... Or is this one ... where you don't need to because the person skilled in the art automatically is going to know what that number is?

GOVERNMENT'S COUNSEL: ... [S]omeone skilled in the art would understand. Now, I'm not saying that they adopted it. As I'm going to say here, there are two measurements. We think they give about the same answer.

THE COURT: And what type of skill would the person have to have to know both of these measurements?

GOVERNMENT'S COUNSEL: These were known in the field in 1985. And by the field, I mean the field of night vision goggle compatible lighting and displays.

THE COURT: Okay.

GOVERNMENT'S COUNSEL: It was being developed by the military. They were really the ones that were looking for how to do all of this. Now the qualitative measurement, as I was getting to, is what you would do is ... put a user in a cockpit with the goggles on in a dark hangar, simulating night. And you put a chart with a whole bunch of lines, a contrast chart on the far wall of the hangar. With the lights off. Then you turn on the cockpit lights. And he would be looking through the goggles at this chart. If there was any degradation of performance, they didn't pass this test.... [T]he first one was designed to sort of mimic the second, but you can get a quantitative measurement rather than qualitative. Now the reason I bring this up is that these were tests that were known at the time. Again, it goes

back to definiteness. And a claim has to be understood, the metes and bounds have to be understood by those skilled in the art. And we believe these were out here and they were understood. And, therefore-and these measure whether the invention as a whole-
THE COURT: And the patent examiner would know all that just by looking at this? He would have understood that these two measurements-
***480** GOVERNMENT'S COUNSEL: I think he would have learned by reviewing the prosecution history.... I'm assuming, because I don't know what the examiner was reviewing.... [T]he problem with-with focusing on whether the NVGs operate is problematic. First of all, ... it's contrary to the stated purpose of the invention, which comes out at the very beginning of the ['914] patent language, ... [and] says [that] it is desired that a night vision aid be operable while a full color display is ... presented in the vicinity of the goggles. And in particular, to operate them in an environment in which a full color display is illuminated. So you've got to have a workable goggle and workable display. If you just focus on the goggle, you can just turn off the display.
Or you can cover it up so it's not readable during daylight. That's a big problem. Because if you put too thick of a filter over the top of it, you can't read it during the day.... But the problem is Honeywell can't tell you what the test for goggles working for an intended purpose is. They're going to say, well, you look at the patent and the patent says it won't overwhelm the goggles.
What does overwhelm mean? And they'll give you a list of things. Now, my problem with that is that if you've got five different tests and you meet three of them, do you fall within or without the claims. And that's the real problem here. So our view is that, if you only look at the goggles, the claims become indefinite because you can't-*there's no accepted, in 1985, measure for whether a goggle works for its intended purpose.*
That's why you need to look at the invention as a whole.... [T]he prosecution history ... comes out of the same article that we were discussing earlier with the Kelly chart, which is by two gentlemen named Breitmaier and Reetz. And if you recall, Your Honor, ... Ferdinand Reetz was the gentleman who drafted that document that described the rationale behind the military standard... [that] comes from a-the 10th European Rotorcraft Forum that-... is August 28th through 31st, 1984.... [I]t's part of Defendant's Exhibit 36 . .. DE 1621[.]
THE COURT: Okay.
GOVERNMENT'S COUNSEL: Now, do you see the spectral radiance limitations in ... the middle of the page? It talks about defining a new quantity called ANVIS radiance, defined in the units of AR. It's the amount of energy emitted by a light source that is visible through the ANVIS defined as the integral of the curve generated by multiplying the spectral radiance of the light source by the relative spectral response of the ANVIS. That's what I was talking about before, the two curves. When you multiply the two curves together, you get some-some function.
And then what this shows you is that ANVIS radiance is you integrate from 450 to 930 the-that function.
THE COURT: And why do you want to know that?
GOVERNMENT'S COUNSEL: Because ... that's a measure of how much light is getting through.... And so if you integrate under it, that gives you the area under the curve.
THE COURT: So under ... is what you're telling me is that you could actually determine whether it was substantially blocked or not by utilizing this formula?
GOVERNMENT'S COUNSEL: There was a standard set-and it's in here that the military says [its]-okay.... They wanted to use-helicopter pilots wanted to use these goggles. The problem was ... defoliated trees, trees with no leaves on them are very dark, don't reflect very much light at all.
And you want to fly on nights where there's no full moon. You want no moon at all because you want the other guy not to see you coming.... Now the problem is ... you don't want anything to show up brighter than tree bark and starlight. So what they did is calculated what the radiance was of tree bark and starlight and came up with a number. ... That ends up being this number here. It says that the cockpit lights should be no brighter than the outside scene when viewed through the ANVIS. The ANVIS radiance of the cockpit lights should not exceed 1.7 times 10 to the

negative 10 AR when the cockpit is lighted to an acceptable level. So that was a standard that ***481** was known ... you could use that to determine whether a display was compatible with your night vision goggle.
THE COURT: Okay. And how does that affect the substantially blocks?
GOVERNMENT'S COUNSEL: We believe that that is one measure that one of skill in the art would use to determine-
THE COURT: To determine whether it's substantially blocked.
GOVERNMENT'S COUNSEL: Whether it was substantially blocked. If it met that standard, it would be substantially blocked.... This was known, this is a test that was known-
THE COURT: At the time of the patent.
GOVERNMENT'S COUNSEL:-in 1985. And-
THE COURT: Why wasn't it referenced then? Does it need to be?
GOVERNMENT'S COUNSEL: Well, I don't know. I think it was referenced in that it was inserted in the prosecution history.
THE COURT: Okay.
GOVERNMENT'S COUNSEL: So it was before the Patent Office.... The examiners presumed to have considered everything in the prosecution history.... So it was at least familiar with this. As I said, there was another measure that was being used at the time that was this qualitative measurement, you sat in the cockpit and looked at the chart. But I think that the idea was that those were approximations. I don't think Honeywell is going to give you a test such as this that is going to give you ... what can the night vision goggle be used for. What is the intended purpose of the night vision goggle. Well, it's to look outside. Well, what is preventing the intended use from happening? Is it a 10 percent reduction in view? Is it a 20 percent reduction in view? They don't know. We don't know. So you ... need to look at the whole thing.

TR at 722-37 (emphasis added).

iii. Post-Claim Construction Hearing Briefs.

The Government's post-hearing claim construction brief argued, again without citation to authority, that the "ordinary meaning of 'substantially blocks' ... is to render a large degree of light unsuitable for passage by an optical filter, such that the invention is fit for the intended purpose." 4/1/05 Gov't Brief at 44. Moreover, in this regard, the Government advised the court that it is necessary to consider " some extrinsic evidence to determine the degree of blocking that would have been considered ' substantial' at the time of the invention ... because the claims ... [*i.e.,* the specification and prosecution history] context provides little information as to the meaning of the term 'substantially.' " *Id.* The Government conceded, however, that the specification's use of "blocks" implies that an optical filter was acting on "incident light to obstruct or prevent its passage." *Id.* (citing '914 patent, col. 3, ll. 22-24).

c. Intervenor Lockheed Martin's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

Lockheed Martin's proposed construction of " substantially blocks" was the same as that of the Government. *See* 1/14/05 Def. Joint Brief at 36-38.

ii. At The Claim Construction Hearing.

Lockheed Martin also adopted the Government's proposed construction of "substantially blocks" at the claim construction hearing. *See* TR at 737.

iii. Post-Claim Construction Hearing Briefs.

Likewise, in Lockheed Martin's post-claim construction briefs, the Government's proposed construction of "substantially blocks" also was adopted. *See* 4/1/05 Int. Brief at 48; *see also* 4/15/05 Int. Brief at 24.

d. The Court's Construction Of "Substantially Blocks" In This Case.

In Claim 1(a), a first optical filter is described as a notch filter that "substantially blocks" light associated with color bands. ***482** *See* '914 patent, col. 6, l. 5. The court construes the verb "blocks" as preventing light from a color display from reaching the night vision aid and "substantially" to mean in a sufficient amount to enable the night vision aid to function. *See* '914 patent, col. 2, ll. 6-7 ("It is ... desired to prevent light which originates at the full color display from overwhelming the night vision aid."); *see also* '914 patent, col. 2, ll. 13-15 (" [T]he first optical filter is placed over displays, which may otherwise present light that would interfere with the ANVIS."); *Ecolab, Inc. v. Envirochem, Inc.*, 264 F.3d 1358, 1367 (Fed.Cir.2001) (quoting *Pall Corp. v. Micron Seps., Inc.*, 66 F.3d 1211, 1217 (Fed.Cir.1995)) (" We note that like the term ... 'substantially' is a descriptive term commonly used in patent claims to 'avoid a strict numerical boundary to the specified parameter.' "); *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 837 F.2d 1044, 1056 (Fed.Cir.1988) (The term " 'substantially' ... must be interpreted in light of the specification and prosecution history[.]").

In Claim 1(b), a second optical filter is described as a notch filter that "substantially blocks" light associated with color bands. *See* '914 patent, col. 6, ll. 8-9. Here, too, the court construes the verb " blocks" as preventing light from a color display from reaching the night vision aid and "substantially " to mean in a sufficient amount to enable the night vision aid to function. *Id.*

In Claim 2(b), a fourth filter located at the night vision aid works with other filters to "substantially block" at least a narrowband of the red color band from being admitted into the night vision aid. The court construes the verb "block," at a minimum, as preventing light from the narrowband of the red color band from entering the night vision aid. The use of the verb "being admitted" renders the term " substantially blocks" unnecessary surplusage, since if the light at issue is prevented from being admitted into the night vision aid, *ipso facto,* such light also is substantially blocked.

14. "First," "Second," "Third," "Fourth," And " Filter."

Claim 1(a) includes the term "first optical filter" twice. *See* '914 patent, col. 6, ll. 1-2. Claim 2(b) includes the term "second optical filter" twice. See '914 patent, col. 6, ll. 7-8. Claim 2(a)(1) includes the term "first filter." *See* '914 patent, col. 6, l. 6. Claim 2(a)(2) includes the term "second filter." *See* '914 patent, col. 6, l. 18. Claim 2(a)(3) includes the term "third filter." *See* '914 patent, col. 6, l. 20. Claim 2(a)(4) includes the term "fourth filter" twice. *See* '914 patent, col. 6, ll. 23-24.

The parties have proposed the following competing constructions of "First," "Second," "Third," " Fourth," and "Filter:"

Honeywell's Proposed Construction	Defendants' Proposed Construction
First Filter: a filter	**First Filter:** being number one in a countable series
Second Filter: another filter in addition to the first filter	**Second Filter:** being number two in a countable series
Third Filter: another filter in addition to the first and second filters	**Third Filter:** being number three in a countable series
Fourth Filter: another filter in addition to the first, second and third filters	**Fourth Filter:** being number four in a countable series

Honeywell *Markman* Slide 188; Gov't *Markman* Slide 075 (bold added by parties).

The court has not repeated the parties' arguments here since, as a matter of law, it is settled that the use of "first," "second," "third" is clearly "not a serial or numerical limitation, [because] the claim does not follow a consecutive order.... The claim is thus clearly not using the ordinals-first, second, third-to show a consecutive numerical limit but only to distinguish or identify the various members of the group." *Gillette Co. v. Energizer Holdings, Inc.*, 405 F.3d 1367, 1373 (Fed.Cir.2005); *see also 3M Innovative Properties Co. v. Avery Dennison Corp.*, 350 F.3d 1365, 1371 (Fed.Cir.2003) ("The use of the terms 'first' and 'second' as common patent-law convention to distinguish between repeated instances of an element or limitation."). Accordingly, the court declined to construct "first," "second," "third," etc., to impose a serial limitation on a claim, but rather identify the various members of a group. *See Gillette,* 405 F.3d at 1373-74.

***483 15. "Blue Color Band."**

[21] The term "blue color band" appears in the Preamble to Claim 2. *See* '914 patent, col. 16, l. 13. In addition, "blue color band" appears in Claim 2(a)(1). *See* '914 patent, col. 16, l. 17.

The parties have proposed the following competing constructions of "blue color band:"

Honeywell's Proposed Honeywell's Proposed range of wavelengths within the blue region of the visible spectrum	**Honeywell's Proposed Honeywell's Proposed** a range of color in the range from 455 to 492 nanometers

Honeywell *Markman* Slide 190; Gov't *Markman* Slide 079 (bold added by parties).

a. Honeywell's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

In Honeywell's pre-hearing brief, the court was advised that "[i]n the context of the patent, *blue color band* means a range of wavelengths with the blue region of the visible spectrum." 12/23/05 Honeywell Brief at 36 (emphasis in original) (citing Tannas Initial Report ¶ 17; Tannas Rebuttal Report ¶ 18). This construction was represented as being consistent with the specification wherein the "*blue color band* 53 is the light emitted by a monochromatic display transducer, such as a CRT, in the blue region of the visible spectrum." 12/23/04 Honeywell Brief at 37 (citing '914 patent, col. 4, ll. 40-43) ("the local source of light 50 comprises ... blue 53 color bands sourced from monochromatic display transducers, such as for example three monochromatic cathode ray tubes[.]"); *see also id.* at '914 patent, col. 4, ll. 46-47 (" Each color band 51-53 provides a monochromatic image in one primary color for the full color display. "). Honeywell argued that it is improper to define " blue color band" using specific wavelengths. *See* 12/23/04 Honeywell Brief at 37. In the alternative, if the court were to define "blue color band" by wavelength, Honeywell asserted that the defendants' proposed ranges are incorrect, referencing U.S. Patent No. 4,390,637, wherein the following wavelengths for the blue color band emitted by a cathode ray tube were represented to be 430-460 nanometers, as opposed to the defendants' proposed 455-492 nanometers. *Id.* (citing USPTO Patent No. 4,390,637, col. 5, 11.20-22). Based on this prior art, and other extrinsic evidence, Honeywell warned the court that defendants have specified a lower limit for the blue color band that excludes the wavelengths emitted by a blue CRT, which the '914 patent provides as "an example of a *blue color band.* " 12/23/04 Honeywell Brief at 38 (citing '914 patent, col. 4, 11. 40-43).

ii. At The Claim Construction Hearing.

HONEYWELL'S COUNSEL: Our position, for the same reasons we described previously, is that it's just not appropriate to put wavelength ranges. And now I have this same concern that I'm-that once you start using these ranges which came from the same source, I don't know what they mean or how they get interpreted. I'm not so sure-I have now come to the conclusion they don't shed much light on the subject. I'm not sure if anybody is any better off trying to figure out what's red, green or blue based upon these numbers, because we're all interpreting the actual numbers differently. But we do think, once again, there is, as you remember from all of the arguments-literature I showed Your Honor has RGB, red, green, blue. So the same sort of data that's out there to define or empirically establish red is out there to empirically establish green and blue.
So I think in the end these issues are going to-I think ought to resolve themselves the same way, however that is. And for that reason, we haven't said a whole lot about this. Again, as you'll see, the specification, in the same area it does talk about the green and blue bands the same way it talks about the red band. And by the way, just to-I didn't address [Government's counsel's] point before, but I'm happy to do it. These are not-there are no such things as monochromatic CRTs, but you can get pretty close. If you look at the-they are in a sense one color, which is what is meant by that, but they're not monochromatic in the Kelly chart sense. Because there is no such thing as a phosphor that looks like that. They all have a spike and a wavelength around them. So this is perhaps not ***484** the most artful language, but those skilled in the art would certainly understand there is no such thing as a monochromatic CRT, at least I don't think there is.TR at 686-87.

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* * * * * *

HONEYWELL'S COUNSEL: And that is because, if you look, they have selected a range of 455 to 492, for example, for blue. If you look at the Kelly chart-and by the way, there's absolutely-there's only one Kelly chart. So whatever is in the intrinsic evidence, whatever-it's got to be a bad copy, because there aren't different versions of the Kelly chart. And that's what's referenced in the Breitmaier and Reetz thing. So whether it looks like 620 or not, it's just not 620. Because it says it's the Kelly chart. And blue on the Kelly chart starts at around 460 and ends at 480. And their construction is 455 to 492. So once again, 492 extends all the way out to about here. So once again, you know, we have lots of experts disagreeing on those ranges. This came out of [Mcgraw-Hill] again. This is the Kelly chart, yet a different one. And JEDEC would be different still.

TR at 688-89.

iii. Post-Claim Construction Hearing Briefs.

After the claim construction hearing, Honeywell conceded that the "blue color band" could be construed as "light that can be characterized ... between approximately 455 and 492 nanometers." 4/1/05 Honeywell Brief at 47. Although Honeywell changed its position regarding the nanometer ranges that the defendants designated for "blue color band," Honeywell, nevertheless, maintained that if "blue color band" is to be construed by specific wavelengths, the court should specify a "dominant wavelength for the same reasons argued regarding the 'red color band.' " *Id.*

b. The Government's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

The Government advised the court that "blue color band" means "a range of color in the range from 455 and 492 nanometers." 1/14/05 Def. Joint Brief at 39 (citing Ex. 30 Mcgraw Hill at 701-02). The Government challenged Honeywell's construction based on extrinsic patents and phosphor references as providing "no metes or bounds." 1/14/05 Def. Joint Brief at 39. The Government also noted that Honeywell's reliance on a numerical indication of acceptable wavelengths from phosphor references is an impermissible use of extrinsic evidence, since the '914 patent contains no mention of specific phosphors, but, relies on such sources to expand the claim terms-to the point of indefiniteness. *Id.*

ii. At The Claim Construction Hearing.

GOVERNMENT'S COUNSEL: We've, again, shown what one of ordinary skill in the art would understand, which is definite wavelength boundaries .... [W]e believe this is known to those skilled in the art. The analysis is exactly the same as with red.TR at 692.

* * * * * *

GOVERNMENT'S COUNSEL: And, again, blue, 455 to 492, bleu, 455 to 492. The brief-and Mr. Gotts didn't turn to this, but their brief cites two things, one is the Westinghouse phosphor guide, we've discussed that to death. And then the U.S. patent 4,390,637, they say that shows different ranges than ours. I don't care. It's extrinsic. It doesn't matter. And finally, I don't know what their construction is anymore. The one that was popped up there, the one they had before that was in the briefs, the blue region and green region, again the same problem with the red color bands. It's unworkable, it's indefinite. Or if it is definite, we should decide where the boundaries are.

THE COURT: But the PTO didn't bounce it for that reason.

GOVERNMENT'S COUNSEL: No, because we think that one of skill in the art, ***485** when they look at blue ... color bands, something clicks in their mind and they know what the wavelength boundaries are. But you and I maybe don't, and so we need to go to the dictionary. The PTO, the examiner is either one of skill in the art or he educates himself to skill in the art. So he didn't bounce it for that same reason. He knew-

THE COURT: As someone who works with color in patents.

GOVERNMENT'S COUNSEL: Possibly. Or again, he can educate himself just as well as we can.
THE COURT: Okay.
GOVERNMENT'S COUNSEL: So I don't know what their new definition is that they're going to come up with, the same way they come up with the red one. I don't know if they are. If they don't, I think that's wrong and indefinite. If they do come up with a new one, if it's anything like the red one, I again think it's wrong. That's all I have.
TR at 693-94.

iii. Post-Claim Construction Hearing Briefs.

Although Honeywell changed its position after the claim construction hearing to agree with the Government that the nanometer range of "blue color band" was "between approximately 455 and 492 nanometers," Honeywell continued to seek a construction that designated a dominant wavelength. 4/1/05 Gov't Brief at 47. Likewise, the Government continued to argue that Honeywell's assertion that peak wavelength should be adopted as the "proper measure" was erroneous. 4/1/05 Gov't Brief at 48; *see also id.* at 34.

c. Intervenor Lockheed Martin's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

Lockheed Martin adopted the Government's proposed construction of "blue color band." *See* 1/21/05 Def. Joint Brief at 39.

ii. At The Claim Construction Hearing.

Lockheed Martin also adopted the Government's position regarding the meaning of "blue color band" at the claim construction hearing. TR at 694.

iii. Post-Claim Construction Hearing Briefs.

After the claim construction hearing, Lockheed Martin continued to adopt the Government's proposed construction of "blue color band." *See* 4/1/05 Int. Brief at 50.

d. The Court's Construction Of "Blue Color Band" In This Case.

The court construes "blue color band" as a range of color from 455 nm to 492 nm. For the reasons discussed in the court's construction of "red color band," however, the court has declined to designate a dominant or peak wavelength to the construction of "blue color band."

16. "Green Color Band."

[22] The parties have proposed the following competing constructions of "green color band:"

Honeywell's Proposed Construction	**Defendants' Proposed Construction**
Green Color Band: range of wavelengths within the green region of the visible spectrum	**Green Color Band:** a range of color in the range from 492 to 577 nanometers

Honeywell *Markman* Slide 190; Gov't *Markman* Slide 079 (bold added by parties).

a. Honeywell's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

In Honeywell's pre-hearing brief, the court was advised that "[i]n the context of the patent, *green color band* means a range of wavelengths within the green region of the visible spectrum." 12/23/04 Honeywell Brief at 36 (emphasis in original) (citing Tannas Initial Report ¶ 17, Tannas Rebuttal Report ¶ 18). The court was informed that this construction is consistent with the specification wherein the "green color band 52 is the light emitted by a monochromatic display ***486** transducer, such as a CRT, in the green region of the visible spectrum." 12/23/04 Honeywell Brief at 37 (citing '914 patent, col. 4, 11. 40-43) ("[T]he local source of light 50 comprises ... green 52 ... color bands sourced from the monochromatic display transducers, such as for example three monochromatic cathode ray tubes[.]"); *see also id.* (citing '914 patent, col. 4, 11. 46-47) ("Each color band 51-53 provides a monochromatic image in one primary color and for the full color display."). Honeywell also argued that it is improper to define " green color band" using specific wavelengths. *See* 12/23/04 Honeywell Brief at 37. In the alternative, if the court were inclined to define "green color band" by wavelengths, Honeywell asserted that defendants' proposed wavelengths are incorrect, referencing U.S. Patent No. 4,390,637, wherein the following wavelengths for the green color band emitted by a cathode ray tub is represented to be 500-570 nanometers, as opposed to defendants' proposed 492-577 nanometers. *Id.* (citing U.S.P.T.O. Patent No. 4,390,637, col. 5, 11. 20-22). Based on this prior art, and other extrinsic evidence, Honeywell concludes that defendants have specified a lower limit that excludes the wavelengths emitted by the green CRT. *See* 12/23/04 Honeywell Brief at 37.

ii. At The Claim Construction Hearing.

Honeywell argued at the claim consideration hearing that "green color band" should be construed under the same parameters as "blue color band." *See* TR at 685.

iii. Post-Claim Construction Hearing Briefs.

After the claim construction hearing, Honeywell changed its position to agree with the Government that the nanometer range of the "green color band" was "between approximately 492 and 577 nanometers." 4/1/05 Honeywell Brief at 47. Honeywell continued to insist that the "green color band" should be construed by a dominant wavelength.

b. The Government's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

The Government advised the court that "green color band" means a "range of color in the range from 492 to 577 nanometers." 1/14/05 Def. Joint Brief at 39 (citing Ex. 30 Mcgraw-Hill at 197).

ii. At The Claim Construction Hearing.

GOVERNMENT'S COUNSEL: [O]ne of skill in the art, when they look at ... green color bands, something clicks in their mind and they know what the wavelength boundaries are.TR at 693.

iii. Post-Claim Construction Hearing Briefs.

After the claim construction hearing, the Government continued to press the court to construe "green color band" by peak wavelength. *See* 4/1/05 Gov't Brief at 48; *see also* 4/15/05 Gov't Brief at 23.

c. Intervenor Lockheed Martin's Proposed Construction.

i. Pre-Claim Construction Hearing Brief.

Lockheed Martin's proposed construction of "green color band" was the same as the Government. *See* 1/14/05 Def. Joint Brief at 39.

ii. At The Claim Construction Hearing.

Lockheed Martin supported the Government's proposed construction of "green color band" at the claim construction hearing. *See* TR at 694.

iii. Post-Claim Construction Hearing Briefs.

Lockheed Martin's proposed construction of "green color band" continued to be the same as that of the Government. *See* 4/1/05 Int. Brief at 50; *see also* 4/15/05 Int. Brief at 23.

***487 d. The Court's Construction Of "Green Color Band" In This Case.**

The court construes "green color band" as a range of color from 492 nm to 577 nm. For the reasons discussed in the court's construction of "red color band," however, the court has declined to designate either a dominant or peak wavelength to the construction of "green color band."

17. "Narrowband Of The Red Color Band."

The parties have agreed that the term "narrowband of the red color band," as used in the claims of the '914 patent, means "a narrow range of wavelengths within the red color band." Jt. Stip. ¶ 6.

IV. CONCLUSION.

For the reasons discussed herein, defendant-intervenor Lockheed Martin Corp. is hereby granted the right to intervene in this case pursuant to RCFC 24(a). In addition, the court has determined as a matter of law that the disputed claims discussed herein are to be construed consistent with this Memorandum Opinion and Order Construing Certain Claims of United States Patent No. 6,467,914.

IT IS SO ORDERED.

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SUSAN G. BRADEN

JUDGE
UNITED STATES COURT OF FEDERAL CLAIMS
717 MADISON PLACE, N.W.
WASHINGTON, DC 20005

Judge Braden was appointed to the bench of the United States Court of Federal Claims on July 14, 2003, by President George W. Bush, after being confirmed by unanimous consent of the United States Senate. She was sworn into office by Senator Jeff Sessions, Chairman of the Senate Subcommittee on Administrative Oversight & the Courts. Her investiture was conducted on October 24, 2003 by Justice Sandra Day O'Connor and Justice Ruth Bader Ginsburg.

On October 22, 2004, Judge Braden was inducted as a Senior Fellow of the ABA's Administrative Law and Regulatory Section by Justice O'Connor at a ceremony held at the Supreme Court. Judge Braden also was recently named to the Editorial Board of the American Intellectual Property Law Association.

Judge Braden received a B.A. degree (1970) and J.D. degree (1973) from Case Western Reserve University in Cleveland, Ohio. She also attended post graduate courses at the Harvard Law School in the summer of 1978.

Prior to joining the bench, Judge Braden litigated complex federal and administrative law cases in private practice in trial and appellate courts. In particular, her work in the intellectual property area received favorable notice in the Wall Street Journal, New York Times, National Law Journal, Journal of the American Bar Association, and Interfaces on Trial: Intellectual Property and Interoperability In The Global Software Industry. In 1996, Judge Braden was honored by the Computer Law Association for winning multiple decisions in the Eastern District of New York, the Eastern District of Texas, the Second Circuit, and a certified question to the Supreme Court of Texas in Computer Assocs. Int'l, Inc. v. Altai, Inc., a landmark case that changed the application of copyright law to computer software. In 1998, she also won a companion case brought in France before the Cour de Appel de Paris.

In addition, Judge Braden has been lead counsel in a number of cutting edge cases. In 1995, she was lead counsel in a constitutional and state income tax case that challenged the industrial incentive law of the State of Alabama and received favorable mention in the Wall Street Journal, Business Week, and State Income Tax Alert, where it was described as "the case to watch." In 1991, she was lead counsel in a case noted in the Wall Street Journal where the federal district court awarded her client indemnification of environmental liabilities required to be assumed under an antitrust divestiture. In 1990, she was appointed by the Governor of the State of Alabama as a Special Assistant Attorney General to handle an antitrust divestiture required by the Federal Trade Commission.

In private practice, Judge Braden also represented a wide variety of client interests before almost every major department and federal agency, testified before the United States Congress on a variety of matters, and was a principal advocate of the Emergency Oil and Steel Loan Guarantee Act of 1999,

which established a $1 billion federal loan guarantee program to assist bankrupt and troubled steel mills and small oil companies.

Prior to entering private practice, Judge Braden served as Senior Counsel to the Chairman of the Federal Trade Commission and his predecessor, who was Acting Chairman and a Commissioner (1980-1985). In both positions she was responsible for advising on antitrust and consumer enforcement actions and handling congressional relations. From 1973-1980, Judge Braden was a Senior Trial Attorney in the Antitrust Division of the Department of Justice. She joined the Department under its Honor Law Program and initially was assigned to the Cleveland Regional Office, where she assisted in the trial of the first antitrust felony case and served as lead counsel in numerous criminal bid rigging cases and major merger investigations. In 1978, she was assigned to the newly formed Energy Section as lead counsel in a proceeding that conditioned the nuclear licenses of several electric utilities, bringing Texas into the national power grid. From 1978–1980, Judge Braden also represented the Department of Justice at OECD meetings in Paris, London, and Dusseldorf. During her tenure in government, Judge Braden received numerous Superior and Outstanding Performance Merit awards and in 1984, she received the Federal Bar Association's Distinguished Service Award.

Judge Braden is admitted to the Bars of the United States Supreme Court, the United States Court of Appeals for the Federal Circuit, the United States Court of Appeals for the District of Columbia Circuit, the United States Court of Appeals for the Second Circuit, the District of Columbia, and the Supreme Court of Ohio.

Judge Braden is married to Thomas M. Susman, a partner in the law firm of Ropes and Gray. Their daughter is a recent graduate of Yale University. Judge Braden is an avid gardener and passionate supporter of the Washington Opera and Shakespeare Theatre.

SETTLEMENTS IN SECURITIES FRAUD CLASS ACTIONS: IMPROVING INVESTOR PROTECTION

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Neil Gorsuch is a partner with Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. He is a former law clerk to Supreme Court Justices Byron R. White and Anthony Kennedy and he holds a doctorate in legal philosophy from Oxford and a J.D. from Harvard. Portions of this paper were originally presented as remarks at *Protecting Consumer Interests in Class Actions*, a workshop sponsored by the Federal Trade Commission and the Georgetown Journal for Legal Ethics.

Paul Matey is an associate with Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.

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SETTLEMENTS IN SECURITIES FRAUD CLASS ACTIONS: IMPROVING INVESTOR PROTECTION

by

Neil M. Gorsuch and Paul B. Matey
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.

INTRODUCTION

In 1941, Harry Kalven, Jr. and Maurice Rosenfield suggested a new use for class action lawsuits based on the emerging marketplace for publicly traded securities.[1] Kalven and Rosenfield argued that the securities markets had become so complex that investors had little incentive to seek remedies under the Securities Act because the cost of prosecuting a claim far surpassed the expected recovery.[2] To remedy this problem, the authors proposed using civil class actions to police abuses in the securities markets – a theory that would later be dubbed the "private attorney general."[3] The

[1] *See* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

[2] *See id.*; *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 569 (1992).

[3] The term was coined by Judge Jerome Frank of the United States Court of Appeals for the Second Circuit. *See Associated Indus. of New York State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) ("[T]here is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals."). For a discussion of the rise of private enforcement actions under federal regulatory

current class action provision codified in Federal Rule of Civil Procedure 23 embodies Kalven's and Rosenfield's idea that civil class action suits could empower individual consumer redress while simultaneously ensuring enforcement of the federal securities laws.[4]

While securities class actions have offered some of the social benefits Kalven and Rosenfield envisioned, experience has shown that, like many other well-intended social experiments, they are not exempt from the law of unintended consequences, having brought with them vast social costs never imagined by their early promoters. Today, economic incentives unique to securities litigation encourage class action lawyers to bring meritless claims and prompt corporate defendants to pay dearly to settle such claims. These same incentives operate to encourage significant attorneys' fee awards even in cases where class members receive little meaningful compensation. And the problem is widespread. Recent studies conclude that, over a five-year period, the average public corporation faces a 9% probability of facing *at*

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laws, *see generally* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983). For criticism of the private attorney general model, *see generally* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff's Attorneys' Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991) (proposing private rights of action be auctioned to attorneys seeking to bring the class claim).

[4]Although there is little documentation of the discussion of Kalven's and Rosenfield's theory during the advisory committee sessions, their arguments proved important to the final proposed rule. *See* Note, *Developments in the Law — Class Actions*, 89 HARV. L. REV. 1318, 1321-23 (1976).

least one securities class action lawsuit.[5] As Congresswoman Anna Eshoo (D-Cal.) has put it, "Businesses in my region place themselves in one of two categories: those who have been sued for securities fraud and those that will be."[6] In the last four years alone, securities class action settlements have exceeded two billion dollars *per year*.[7]

What are the sources of the problems confronting securities class litigation? And how might we address them in a way that ensures we protect the valuable function securities class action litigation was originally intended to serve? This article seeks to offer a preliminary step toward answering these questions.

I. CERTAIN STRUCTURAL PROBLEMS OF SECURITIES FRAUD CLASS ACTIONS

A. The Incentive to Bring – and the Pressure to Settle – Meritless Suits

Because the amount of damages demanded in securities class actions is frequently so great, corporations often face the choice of "stak[ing] their companies on the outcome of a single jury trial, or be forced by fear of the

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[5]*See* Elaine Buckberg et al., NERA, *Recent Trends in Securities Class Action Litigation: 2003 Early Update* 4 (Feb. 2004) ("*2003 Early Update*").

[6]Conference Report on H.R. 1058, Private Securities Litigation Reform Act of 1995, 141 Cong. Rec. H14039, H14051 (Dec. 6, 1995).

[7]*See Laura E. Simmons & Ellen M. Ryan*, Cornerstone Research, *Post-Reform Act Securities Settlements Reported Through December 2004* at 1 (Mar. 2005), *available at* http://securities.cornerstone.com. Settlements in 2001 were estimated at $2.1 billion, rising to $2.537 billion in 2002, holding at $2.016 billion in 2003, and rising to a record high 2.8 billion in 2004. *Id.*

risk of bankruptcy [into settling] even if they have no legal liability."[8] Unsurprisingly, executives faced with the potential destruction of their companies in a single trial typically opt to settle – even if it means paying out on meritless claims. They are, as Congress has recognized, "confronted with [an] implacable arithmetic . . . even a meritless case with only a 5% chance of success at trial must be settled if the complaint claims hundreds of millions of dollars in damages."[9] Illustrating just how powerful the incentive to settle can be, Bristol-Myers Squibb recently agreed to settle a pending class action for $300 million *even after the suit was dismissed with prejudice* at the trial court level.[10]

With such pressure to settle meritless suits comes, unsurprisingly, a concomitant incentive to bring them. As one academic commentator has candidly recognized, there is simply "*no appreciable risk* of non-recovery" in securities class actions; merely "*[g]etting the claim into the legal system,*

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[8] *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995); *see also* Victor E. Schwartz, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 490 (2000) ("For defendants, the risk of participating in a single trial [of all claims], and facing a once-and-for-all verdict is ordinarily intolerable.") (internal quotation marks omitted); Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2064 (1995); Woodruff-Sawyer & Co., *A Study of Shareholder Class Action Litigation* 25 (2002) (83% of securities fraud cases are resolved through settlement).

[9] H.R. Rep. No. 106-320, at 8 (1999). *See also West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002) (noting scholarly concerns that "settlements in securities cases reflect high risk of catastrophic loss, which together with imperfect alignment of managers' and investors' interests leads defendants to pay substantial sums even when the plaintiffs have weak positions"); Schwartz, *supra* note 8, at 490.

[10] Jonathan Weil, *Win Lawsuit – and Pay $300 Million*, WALL ST. J., Aug. 2, 2004, at C3.

without more, sets in motion forces that ultimately compel a multi-million dollar payment."[11] And the Second Circuit concurs: "[a]necdotal evidence tends to confirm this conclusion. Indeed, [Melvyn I.] Weiss and his partner William S. Lerach of the Milberg firm have stated that losses in these cases are 'few and far between,' and they achieve a 'significant settlement although not always a big legal fee, in 90% of the cases [they] file.'"[12] Even the Supreme Court has acknowledged that, as a result of this phenomenon, securities class action litigation poses "a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general."[13] Illustrating how tempting these cases are for plaintiffs' lawyers, one court found it "peculiar that four of the lawsuits consolidated in this action were filed around 10:00 a.m. on the first business day following [the defendant's] announcement" of business problems and that "[m]ost of the complaints are virtually identical (including typographical errors)."[14] At the hearing on the

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[11] Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 578, 569 (1991) (emphasis added). *Accord Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004) (noting "numerous courts and scholars have warned that settlements in large [securities] class actions can be divorced from the parties' underlying legal positions"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001) (discussing the "inordinate or hydraulic pressure on [securities fraud] defendants to settle, avoiding the risk, however small, of potentially ruinous liability").

[12] *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000) (quoting *In re Quantum Health Res., Inc. Sec. Litig.*, 962 F. Supp. 1254, 1258 (C.D. Cal. 1997)). The Milberg Weiss Bershad Hynes & Lerach firm has now divided into two separate partnerships known as Milberg Weiss Bershad & Schulman, and Lerach Coughlin Stoia Geller Rudman & Robbins.

[13] *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975).

[14] *Ferber v. Travelers Corp.*, 785 F. Supp. 1101, 1106 n.8 (D. Conn. 1991).

defendant's motion to dismiss, the judge inquired:

> [H]ow did you get to be so smart and to acquire all this knowledge about fraud from Friday to Tuesday? On Friday afternoon, did your client suddenly appear at your doorstep and say 'My God, I just read in the Wall Street Journal about Travelers. They defrauded me,' and you agreed with them and you interviewed them and you determined that there was fraud and therefore you had a good lawsuit, so you filed it Tuesday morning, is that what happened?[15]

The court tellingly noted that "[c]ounsel for the plaintiffs was not responsive to this line of inquiry."[16]

B. The Incentive to Reward Class Counsel But Not Necessarily Class Members

While plaintiffs' attorneys have a strong financial incentive to bring meritless suits, and defendants have a strong incentive to settle them, neither has a particularly strong incentive to protect class members. Once the scope of the settlement fund is determined, defendants usually have no particular concern how that fund is allocated between class members and plaintiffs' counsel. And with the threat of adversarial scrutiny from the defendant largely abated, plaintiffs' counsel has free reign to seek (and little reason not to try to grab) as large a slice of the settlement fund as possible. Thus, settlement hearings frequently devolve into what the Third Circuit has called "jointly orchestrated . . . pep rallies," in which no party questions the

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[15] *Id.*

[16] *Id.*

fairness of the settlement or attorneys' fee request and "judges no longer have the full benefit of the adversarial process."[17] This arrangement has led one prominent securities fraud attorney to boast that "I have the greatest practice in the world because I have no clients. I bring the case. I hire the plaintiff. I do not have some client telling me what to do. I decide what to do."[18]

Just how true that is can be illustrated by a 2002 settlement involving AT&T and Lucent regarding allegedly improper billing practices. A settlement fund for class members and counsel was established and valued at $300 million in settlement hearing proceedings. Soon after, the lawyers for the class collected some $80 million in fees, or more than 26% of the $300 million fund. Class members, meanwhile, "didn't collect as easily."[19] Two years later, in 2004, the parties revealed that class members found the settlement terms so unattractive that they had bothered to redeem a mere $8 million from the settlement fund – meaning that the plaintiffs' lawyers earned *ten times* the amount of the injured consumers.[20]

In re PeopleSoft Securities Litigation exemplifies the same problem.[21]

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[17] *Id.* at 1310. *See also Cohen v. Young*, 127 F.2d 721, 725 (6th Cir. 1942); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 532 n.7 (1984).

[18] *In re Network Assocs. Inc. Sec. Litig.*, 76 F. Supp. 2d 1017, 1032 (N.D. Cal. 1999).

[19] Editorial, *Fees Line Lawyers' Pockets*, USA TODAY, Apr. 6, 2004.

[20] *Id.*

Immediately following a decline in the common stock of PeopleSoft, Inc., 19 complaints were filed alleging that top company executives had made materially false and misleading statements to inflate the stock price. At the onset of the action, counsel represented that the case was worth hundreds of millions of dollars in damages. Yet, one year later, the plaintiffs sought approval for a settlement of $15 million. In reviewing the proposed settlement, the district court concluded that counsel had engaged in "minimal" discovery, "on the borderline of acceptability" given the purported scope of the case. Although the district court concluded that "a substantial part of the allegations that led the court to sustain the complaint in the first place are untrue, were never true, and had, at most, razor-thin support," plaintiffs' counsel pocketed $2.5 million in fees and expenses all taken from the common settlement fund.[22]

C. The Transfer Effect

Yet another unique structural issue affects securities class action settlements. Because settlement payments often come largely out of corporate coffers (directors' and officers' insurance policies also contribute), securities class actions frequently involve only "a transfer of wealth from

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[21] *See* Order Certifying Settlement Class, Approving Class Settlement, and Awarding Fees and Expenses, *In re PeopleSoft, Inc. Sec. Litig.*, No. C 99-00472 WHA, at 9-10 (N.D. Cal. Aug. 24, 2001).

[22] *Id.*

current shareholders to former shareholders."[23] That is, to the extent the corporation pays out, it is only transferring a portion of that wealth to existing shareholders' bank accounts (essentially an economic wash) in addition to sums paid to former shareholders who sold at some point during the class period and, of course, class counsel. Thus, to the extent that class members still own shares in the company at the time of the suit (as they often do), "payments by the corporation to settle a class action amount to transferring money from one pocket to the other, with about half of it dropping on the floor for lawyers to pick up."[24] All this led Judge Friendly to observe that securities fraud litigation carries the risk of "large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers."[25]

II. WHERE TO GO FROM HERE?

A. Recent Efforts at Reform

To be sure, Congress has recognized and sought to address some of

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[23]Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487, 1503 (1996). *See also* Frank H. Easterbrook & Daniel R. Fischel, *Optimal Damages in Securities Cases*, 52 U. CHI. L. REV. 611, 638-39 (1985); Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 698-700; Donald C. Langevoort, *Capping Damages for Open-Market Securities Fraud*, 38 ARIZ. L. REV. 639, 650 & n.48 (1996); Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 921-22.

[24]Alexander, *supra* note 23, at 1503.

[25]*SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968).

the negative side-effects of securities class action litigation.[26] In 1995, Congress enacted the Private Securities Litigation Reform Act[27] ("PSLRA").[28] It followed up in 1998 with the Securities Litigation Uniform Standards Act ("SLUSA").[29] Together, these bills sought to toughen pleading standards for securities class action suits,[30] encourage the appointment of pension funds as lead plaintiffs in the hope that they might better oversee class counsel,[31] and ensure that cases are tried in federal courts rather than in state courts.[32]

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[26]H.R. Conf. Rep. No. 104-369, at 31 (1995), *reprinted in* 1996 U.S.C.C.A.N. 730, 731. Congress explained that:

> The House and Senate Committees heard evidence that abusive practices committed in private securities litigation include: (1) the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action; (2) the targeting of deep pocket defendants, including accountants, underwriters, and individuals who may be covered by insurance, without regard to their actual culpability.

Id.

[27]15 U.S.C. § 78u-4.

[28]Pub. L. No. 104-67, 109 Stat. 737, 15 U.S.C. §§ 77k *et seq.* (1995).

[29]Pub. L. No. 105-353, 112 Stat. 3227, 15 U.S.C. §§ 77b *et seq.* (1998).

[30]*See* S. Rep. No. 104-98, at 15 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 694 (noting the PSLRA imposes a "strong pleading requirement" on the filing of any securities fraud action); H.R. Conf. Rep. No. 104-369, at 41 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 740 (the PSLRA "requires the plaintiff to plead and then to prove that the misstatement or omission alleged in the complaint actually caused the loss incurred by the plaintiff"); *see also Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 597 (2001) (noting the "stricter pleading requirements" imposed in the PSLRA).

[31]H.R. Conf. Rep. No. 104-369, at 34, *reprinted in* 1995 U.S.C.C.A.N. at 733.

[32]*See* H.R Conf. Rep. No. 105-803 (Oct. 9, 1998) (explaining Congress's intent that SLUSA would "prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court").

Congress's reforms, however, did little to address the underlying incentives that encourage plaintiffs' lawyers to bring – and defendants' lawyers to settle – meritless suits, or the incentives the parties have to benefit class counsel more than class members.[33] In fact, there has been a 32% nationwide increase in the mean number of securities fraud suits filed in the six years since the enactment of the PSLRA.[34] According to one published report, public companies now face a nearly 60% greater chance of being sued by shareholders.[35] And virtually all of these suits continue to be settled. One recent opinion quoted a statistic showing the dismissal rate in the Ninth Circuit as *only 6%*.[36] Studies show, too, that six years after the passage of the PSLRA, shareholders in class action suits collected, on average, just six cents for every dollar of claimed loss while their counsel continue to reap enormous fees.[37] As a result, despite congressional efforts at reform securities class action settlements reached an all-time high in

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[33]*See* Laura E. Simmons & Ellen M. Ryan, Cornerstone Research, *Post-Reform Act Securities Lawsuits: Settlements Reported Through December 2003* (May 2004) ("*Post-Reform Study*"), *available at* http://www.cornerstone.com.

[34]Perino, *supra* note 23, at 930.

[35]*See* Todd S. Foster et al., National Economic Research Associates, *Trends in Securities Litigation and the Impact of PSLRA* 4 (2003).

[36]*In re Infospace, Inc. Secs. Litig.*, No. C01-931Z, 2004 WL 1879013, at *4 (W.D. Wash. Aug. 5, 2004).

[37]Cornerstone Research, *Securities Class Action Case Filings 2002: Year in Review* (2003).

2004 of $2.9 billion.[38]

More recently, Congress passed the Class Action Fairness Act of 2005.[39] That law imposes several new hurdles for class action litigants. First, the Act expands the original jurisdiction of the federal courts to include suits where the aggregate amount of controversy exceeds $5 million and the class includes at least 100 potential members, only one of whom must be a citizen of a different state than the defendant.[40] Second, the Act eliminates restrictions on removal, including the one-year time limitation otherwise applicable to civil suits, the need for all defendants to consent to removal, and the inability for defendants to remove from state courts where they are citizens.[41] Third, the Act closes the so-called "joinder loophole" that allowed massive actions on behalf of numerous plaintiffs to proceed without seeking class action certification by extending federal jurisdiction over most all civil actions seeking monetary damages on behalf of 100 or more persons.[42] The Class Action Fairness Act also places new controls on the

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[38] *See Laura E. Simmons & Ellen M. Ryan,* Cornerstone Research, *Post-Reform Act Securities Settlements Reported Through December 2004* (Mar. 2005) at 1, *available at* http://securities.cornerstone.com. Notably, the $2.9 billion total was adjusted for the effects of inflation and did not include the $2.6 billion partial settlement in the WorldCom, Inc. litigation. *Id.*

[39] Class Action Fairness Act of 2005, Pub. L. 109-2, § 2 (outlining Congress's findings of class action abuses that have "harmed class members with legitimate claims and defendants that have acted responsibly").

[40] *Id.* § 4.

[41] *Id.* § 5.

settlement of class actions, particularly certain settlements awarding coupons in lieu of damages.[43]

For better or for worse, however, the Class Action Fairness Act will have little impact on securities class action litigation. By its terms, the Act does not apply to claims that could not already be removed under SLUSA, suits relating to "internal affairs or governance of a corporation," and suits relating to breaches of fiduciary duties in the sale of a security.[44] As a result, securities fraud class actions remain susceptible to the very problems that Congress sought to redress in other forms of class action litigation.

Beyond Congress, some have promoted recent changes to the Federal Rules of Civil Procedure as ways to improve the class action mechanism. Like Congress's reforms, however, these recent rule changes simply do not address the fundamental problematic incentives and structures unique to securities litigation.

First, until its recent amendment, the decision whether to opt out of a Rule 23 class action frequently had to be made early in the case – often before the nature and scope of liability and damages could be fully understood. As amended, Rule 23(e)(3) now permits courts to refuse to

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[42] *Id.* § 4.

[43] *Id.* § 3. The Act also authorizes the Court to receive expert testimony on the valuation of a class settlement.

[44] *Id.* § 4.

approve a settlement unless it affords a new opportunity to request exclusion at a time when class members can make an informed decision based on the proposed settlement terms. Early experience, however, shows that few courts have permitted additional opt-out periods following settlement approval.[45] Critically, too, a second opt-out offers no protection where settlement occurs before a class is certified – yet such early settlements are the norm in securities class action litigation given the scope of damages they involve, and the fact that securities class actions are so frequently certified.[46]

Second, Rule 23(f) has been amended to encourage interlocutory appeals from district court class certification orders. Early reports indicate, however, that Rule 23(f) has been used modestly, resulting in approximately nine published opinions per year since the rule was adopted in 1998.[47] The discretionary nature of Rule 23(f), moreover, has led to a patchwork of standards and guidelines in the circuit courts, thus raising the possibility of

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[45] *See In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 WL 1068807, at *3 (E.D. Pa. May 11, 2004) (finding "no significant developments since the original opt-out that would require . . . a second opt-out period"); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 518 (E.D.N.Y. 2003) (declining to offer the class a second opt-out opportunity "in light of the infinitesimal number of objections" by class members).

[46] *See* Lawrence J. Zweifach & Samuel L. Barkin, *Recent Developments in the Settlement of Securities Class Actions*, 1279 PLI/Corp. 1329, 1339 (2001).

[47] Brian Anderson & Patrick McLain, *A Progress Report on Rule 23(f): Five Years of Immediate Class Certification Appeals*, Washington Legal Foundation LEGAL BACKGROUNDER (Mar. 19, 2004).

inconsistent remedies depending on the forum.[48] And, once again, Rule 23(f) provides little assistance in cases where settlement occurs *before* class certification – and that is, again, the dominant practice in securities class actions.[49]

B. Toward Meaningful Reform in Securities Class Action Settlements

While the procedural fixes and patches enacted by Congress and in the federal rules may help, it seems clear that they have proven insufficient to the task of preventing unmeritorious securities fraud cases or deterring settlements that benefit lawyers more than their clients. Future reform efforts may be more effective if focused less on procedures and more directly on the underlying economic incentives. What does this mean? Here are some possibilities.

1. Enforce the PSLRA's Loss Causation Requirement

A majority of circuit courts have held that a securities fraud plaintiff must demonstrate that the price of the security at issue declined as the result of disclosure of previously concealed information, and have limited

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[48] *See* Aimee G. Mackay, Comment, *Appealability of Class Certification Orders under Federal Rule of Civil Procedure 23(f): Toward a Principled Approach*, 96 NW. U. L. REV. 755 (2002) (collecting the various standards of the circuit courts).

[49] *See* Zweifach & Barkin, *supra* note 46, at 1339.

the plaintiff's damages to the amount of that decline.[50] As recently explained by the Second Circuit in an opinion affirming the decision of the late Judge Milton Pollack in *Lentell v. Merrill Lynch*, "to establish loss causation, a plaintiff must allege . . . that the *subject* of the fraudulent statement or omission was the cause of the actual loss suffered."[51] There, a class of investors in once high-flying Internet startups brought suit for losses suffered after the now-famous "irrational exuberance" that fueled investments in the late 1990s diminished and the Internet stock price bubble burst. Eager to find someone to blame for their losses, the plaintiffs filed suit against Merrill Lynch claiming the company issued false recommendations in its analyst reports – this despite the fact that the plaintiffs were not clients of Merrill Lynch and had not relied on, read, or even seen a copy of any of Merrill's reports. The Second Circuit rejected the plaintiffs' construction of the loss causation requirement and held that they failed "to account for the price-volatility risk inherent in the stocks they chose to buy" or plead any other facts showing that "it was defendant's fraud – rather than other salient factors – that proximately caused [their] loss."[52]

In contrast, the Ninth Circuit has held that a securities fraud plaintiff

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[50] *See Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189 (2d Cir. 2003); *Semerenko v. Cendant Corp.*, 223 F.3d 165 (3d Cir. 2000); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997); *Bastian v. Petren Res. Corp.*, 892 F.2d 680 (7th Cir. 1990).

[51] *Lentell v. Merrill Lynch*, 396 F.3d 161, 173 (2d Cir. 2005).

[52] *Id.* at 177.

need only argue that the price of a security was "inflated" when he or she bought shares.[53] Rather than holding companies liable for the damage they inflict, as reflected by actual market events, the Ninth Circuit's rule thus permits liability to be found and damages to be awarded even when the plaintiff can point to *no actual market price reaction to a corrective disclosure at all.* Under this regime, a plaintiff can bring a class action simply on the allegation that a company's share price was once "inflated" because of the undisclosed accounting issue – and do so without ever having to establish a causal link between any price decline and the alleged misrepresentation. The Ninth Circuit's approach thus allows recovery where investors are *never hurt* by the alleged fraud, including in cases where the plaintiff sold before the alleged misrepresentation was exposed; where the misrepresentation was never exposed at all; or where the misrepresentation was exposed but the market did not respond negatively.

The facts of the Ninth Circuit case are illustrative. On February 24, 1998, Dura Pharmaceuticals announced a revenue shortfall for the following year, unrelated to any alleged fraud. By the next day, shares in Dura dropped from $39.125 to $20.75 for a one-day loss of 47%. Some *nine months later*, on November 3, 1998, Dura announced for the first time that the Food and Drug Administration had declined to approve its Albuterol

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[53] *Broudo v. Dura Pharms, Inc.*, 339 F.3d 933 (9th Cir. 2003); *see also Gebhardt* v. *ConAgra Foods, Inc.*, 335 F.3d 824, 831 (8th Cir. 2003).

Spiros product – an announcement that plaintiffs themselves contend constitutes the first public disclosure of the alleged fraud in this case. Following this announcement, however, Dura shares fell only slightly and briefly. Share prices initially dropped from $12.375 to $9.75, but, within 12 trading days, they recovered to $12.438, ultimately climbing to $14.00 within 90 days of the announcement. A claim of fraud on behalf of Dura investors followed.

But seeking to boost their recovery, the class plaintiffs never alleged damages based on the brief and shallow $2.625 stock price dip after the November 3 disclosure of the supposed fraud. Rather, they demanded recovery based on the much more significant February 24 stock price decline of $19. In other words, the plaintiffs sought damages based on a decline in share value that occurred nine months *before* the disclosure of the alleged fraud. The facts were as simple, and seemingly insufficient, as if Mrs. Palsgraf had filed suit for a headache she developed before ever leaving for the train station. The district court agreed and dismissed the action. The Ninth Circuit saw things differently, finding loss causation satisfied where the plaintiffs "have shown that the price *on the date of purchase* was inflated because of the misrepresentation."[54]

The economic implications of the Ninth Circuit's holding are

[54] *Broudo*, 339 F.3d at 938.

staggering. Rather than holding companies liable for the damage they inflict, as reflected by actual market events, the Ninth Circuit's rule permits liability to be found and damages to be awarded even when the plaintiff can point to no actual market price reaction to a disclosure of the supposed fraud. Denying courts any means for weeding out at the pleading stage suits where the alleged fraud had no empirical effect on share price, and thus imposed no demonstrable harm on class members, the Ninth Circuit's rule adds fuel to a fire in which virtually every case is settled, wealth is transferred away from current shareholders to former shareholders.

Recently, however, the Ninth Circuit's treatment of the loss causation requirement received a cool response when the Supreme Court granted certiorari and heard arguments in the *Dura* case – a case that gives the High Court its first chance to explain the loss causation doctrine.[55] The questions posed by the Justices at oral argument suggest a fundamental disagreement with the Ninth Circuit's logic, exemplified by Justice Ruth Bader Ginsburg's observation: "How could you possibly hook up your loss to the news that comes out later? There is no loss until somehow the bad news comes out."[56]

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[55]The Solicitor General had urged the Supreme Court to review the decision concluding that the Ninth Circuit's reasoning was "difficult to reconcile with the well-established principle that transaction causation and loss causation are distinct elements of a Rule 10b-5 cause of action." *See* Brief for the United States as Amicus Curiae at 12, *Dura Pharms., Inc. v. Broudo*, No. 03-932 (U.S. filed May 28, 2004).

[56]Hope Yen, *High Court Hears Securities Fraud Case*, SEATTLE POST-INTELLIGENCER, Jan. 12. 2005.

Justice Sandra Day O'Connor also summed up the problem: "The reason why loss-causation is used is because a 'loss' experienced by the plaintiff is 'caused' by the misrepresentation. You have to put pleadings that are clear, which you didn't do."[57]

The Court's skepticism is well-founded. The Ninth Circuit's holding introduces a new legal rule that only further encourages plaintiffs to file and companies to settle meritless claims by removing a key safeguard against such suits. Worse still, the Ninth Circuit's rule encourages risky investment behavior, effectively forcing issuers to insure against speculative losses having nothing to do with their own conduct. Under the Ninth Circuit's rule, an investor can file a claim and obtain recovery even when the disclosure of an allegedly fraudulent statement has absolutely *no effect* on the stock price. To estimate damages in the absence of any contemporaneous real world stock price movement, moreover, the Ninth Circuit's rule encourages, and in fact depends upon, a return to the use of "junk science" by allowing recovery where disclosures do *not* prompt any stock price decline – *i.e.*, any actual harm. Under this standard, the parties and courts are, by necessity, forced to rely on a grab-bag of speculative theories to estimate damages since no empirically verifiable proof of injury exists. Like *Daubert v. Merrell Dow Pharmaceuticals* and its progeny, the

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[57] *Id.*

loss causation requirement arms courts with a tool to ensure that the legal system compensates fully for empirically confirmable losses, but not for "phantom losses" based on "cause-and-effect relationships whose very existence is unproven and perhaps unprovable."[58]

By contrast, the alternative loss causation rule endorsed by the Government, petitioners, and four other courts of appeals would avoid all of these problems while ensuring full recovery of real losses. Requiring plaintiffs to plead facts showing loss causation enables judges to separate investor losses stemming from actual fraud from those caused by mere market downturns. Allowing the theory of "fraud-on-the-market" to satisfy the plaintiffs' entire burden on causation risks overcompensating investors for stock losses unrelated to any specific action by a defendant. Where an alternative cause (such as the marketwide drop in Internet, technology, and telecommunications securities in early 2000) results in comparable losses across similarly situated investors, plaintiffs must logically allege some facts that tend to show that their particular losses were caused by the defendants' alleged wrongdoings. Only by requiring a specific causal nexus can courts achieve optimal deterrence against fraud without transforming the federal securities laws into a system of national investor insurance.

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[58]Kenneth R. Foster *et al.*, *Phantom Risk: Scientific Inference and the Law* 1 (1993).

2. Mandate Separate Fee Funds

The practice of paying plaintiffs' attorneys' fees from the settlement fund creates a powerful incentive to "structure a settlement such that the plaintiffs' attorneys' fees are disproportionate to any relief obtained for the corporation,"[59] and insulates the fee request from adversarial scrutiny. Paying fees out of the common settlement fund reduces the recovery available to consumers, and shifts the burden of paying the class counsels' fees to class members. In contrast, a regime that requires fee requests to be made separately from, and outside of, the class settlement fraud would help reintroduce the possibility that defendants might have some incentive to scrutinize fee requests and more closely monitor a regime that currently doles out 25% to 30% of every settlement to securities class action attorneys – many of whom do little or nothing to prosecute their cases and simply "free ride" on SEC or Justice Department investigations.

3. Revive the Lodestar Method for Calculating Fees

While the trend in federal courts has been toward using percentage of recovery methodology to determine fee awards, the lodestar method can provide a useful cross-check. The purpose behind any fee award from a

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[59] *Bell Atlantic v. Bolger*, 2 F.3d 1304, 1308-09 (3d Cir. 1993) (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.9, at 570 (4th ed. 1992) (plaintiffs' attorney "will be tempted to offer to settle with defendant for a small judgment and a large legal fee, and such an offer will be attractive to the defendant provided the sum of the two figures is less than the defendant's net expected loss from going to trial")).

common fund settlement is to compensate attorneys for the fair market value of their time in successfully prosecuting the class claims. While the lodestar method has been criticized as burdensome and fact intensive (it is both), strict adherence to the percent of recovery standard can also overlook inequitable fee awards. For instance, when Bank of America paid $490 million to settle a securities fraud class action in 2002, plaintiffs' lawyers pocketed $28.1 million dollars in fees. Although at first glance the fee award appears reasonable as a percentage of recovery, the plaintiffs' lawyers actually earned $2,007 per hour.[60] In such cases, the lodestar method can provide an important safeguard against attorney over-billing through a closer review of counsels' hours, rates, and other charges.

4. Employ Competitive Bidding to Select Class Counsel

A bidding process to determine class counsel would employ market forces to constrain the supra-competitive prices often charged by plaintiffs' attorneys. This concept was first employed by Judge Vaughn R. Walker of the Northern District of California.[61] There, the district court solicited sealed bids from law firms seeking to represent the lead plaintiff,

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[60]Peter Shinkle, *Deal Was Just the Beginning in Class-Action Suit*, ST. LOUIS POST DISPATCH, Jan. 16, 2005.

[61]*See* District Judge Vaughn R. Walker, Remarks at the ABA National Securities Litigation Institute 7-8 (June 5, 1998) ("[I]nstances of institutional investors actively leading a [securities class] litigation effort remain relatively rare.... This is no surprise.... [I]nstitutional investors have disincentives to becoming [parties].... Lawsuits are costly in time, money and other resources.").

accompanied by a description of the firm's experience and qualifications in such actions. The court then selected the lead plaintiffs' lawyer from these submissions, and determined the attorneys' fees based on the firm's own bid.[62] In another approach to competitive bidding, the district court might interview each of the prospective class attorneys, and select the lead plaintiffs' counsel based on the judge's independent analysis of the attorneys' ability to monitor and represent the interests of the class. Although Judge Walker's innovative approach was initially rejected by the Ninth Circuit,[63] recent amendments to Rule 23 appear to have vindicated Judge Walker's experiment, allowing judges to conduct competitive auctions based in part on the fees class counsel will receive.[64]

5. Encourage Meaningful Oversight

Participation by the appropriate state and federal agencies in

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[62] *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 697 (N.D. Cal. 1990). Auctions for lead counsel have also been used in *In re Comdisco Sec. Litig.*, 141 F. Supp. 2d 951 (N.D. Ill. 2001); *In re Commtouch Software Sec. Litig.*, No. C 01-00719, 2001 WL 34131835 (N.D. Cal. June 27, 2001); *In re Quintus Sec. Litig.*, 148 F. Supp. 2d 967 (N.D. Cal. 2001); *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71 (S.D.N.Y. 2000); *In re Bank One Holders Class Actions*, 96 F. Supp. 2d 780 (N.D. Ill. 2000); *In re Lucent Techs., Inc., Sec. Litig.*, 194 F.R.D. 137 (D.N.J. 2000); *Sherleigh Assocs., LLC v. Windmere-Durable Holdings, Inc.*, 184 F.R.D. 668 (S.D. Fl. 1999); *Wenderhold v. Cylink Corp.*, 188 F.R.D. 577 (N.D. Cal. 1999); *In re Network Assoc., Inc., Sec. Litig.*, 76 F. Supp. 2d 1017; *In re Cendant Corp. Litig.*, 182 F.R.D. 144 (D.N.J. 1998); and *In re California Micro Devices Sec. Litig.*, 168 F.R.D. 257 (N.D. Cal. 1996); *see also* John F. Grady, *Reasonable Fees: A Suggested Value-Based Approach Analysis for Judges*, 184 F.R.D. 131, 142 (1999).

[63] *See In re Quintus Sec. Litig.*, 201 F.R.D. 475 (N.D. Cal. 2001), *rev'd sub nom. In re Cavanaugh*, 306 F.3d 726 (9th Cir. 2002).

[64] FED. R. CIV. P. 23(g)(1)(C)(iii) permits district courts to direct class counsel "to propose terms for attorney fees and nontaxable costs." *See In re Copper Mountain Sec. Litig.*, 305 F. Supp. 2d 1124, 1129 (N.D. Cal. 2004) (Walker, J.) (noting changes to federal class action rule cast doubt on Ninth Circuit's rejection of competitive bidding).

reviewing and commenting on proposed settlements could also help expose and prevent collusive deals. In recent years, the FTC has launched an aggressive and admirable effort in this area.[65] For example, in *In re First Databank* the FTC successfully challenged the fees sought in a consumer class suit that largely relied on an earlier enforcement action brought by the Commission.[66] In *Databank*, the FTC obtained agreement on $16 million in consumer redress as part of an antitrust enforcement action. Soon after, a private class action settlement added $8 million to the consumer fund, for a total of $24 million. Despite this marginal increase, class counsel sought fees of 30% of the *entire* $24 million fund, or more than 90% of the additional value added by the private action. Based largely on the FTC's objection, the district court reduced the fee award to 30% of the $8 million dollar additional recovery noting that the settlement was reached after the FTC "had already expended substantial efforts to establish" liability.[67]

Other agencies – including the Justice Department, the SEC, and the state attorneys' general – should be encouraged to follow the instructive example of the FTC and begin their own oversight of class action settlements purporting to piggy-back on their own investigations. Indeed, the Class

[65] *See* Thomas B. Leary, *The FTC and Class Action*, June 26, 2003, *available at* http://www.ftc.gov/speeches/leary/classactionsummit.htm; Remarks of R. Ted Cruz Before the Antitrust Section of the American Bar Association, Dec. 12, 2002, *available at* http://www.ftc.gov/speeches/other/tcamicus.

[66] 209 F. Supp. 2d 96 (D.D.C. 2002).

[67] *Id.* at 101.

Action Fairness Act of 2005 imposes just such a reporting requirement for class action settlements *not* involving securities fraud. Under the Act, each settling defendant must notify both the Attorney General of the United States and the appropriate state officials no later than 10 days after any proposed class action settlement.[68] The Act further states that final approval of a settlement may not issue earlier than 90 days after notice to the governmental officials. It is unclear why securities class actions should be exempted from these requirements — especially given the federal government's strong and historic interest in the regulation of the securities industry.

The FTC previously sought to address the notice problem in 2002 in a way that would have helped in the securities context when it proposed an amendment to Rule 23 under which parties to any class action would be required to notify the court of any related actions by government agencies, and to notify the government agencies involved in those actions of the related private class action.[69] The advisory committee, however, somewhat astonishingly declined to adopt these suggestions. Until the committee or Congress recognizes the value of a hard, independent look at securities class action settlements and reverses course, no procedure exists to ensure the

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[68]Class Action Fairness Act of 2005, Pub. L. 109-2, § 3.

[69]Federal Trade Commission, *Comments on Proposed Amendments to Rule 23 of the Federal Rules of Civil Procedure* (Feb. 15, 2002).

timely participation of interested governmental enforcement agencies.

6. Don't Duplicate Governmental Efforts

While agency oversight may help prevent collusive settlements, one well-intentioned feature of the Sarbanes-Oxley bill actually risks double recoveries. It is well known that actions by a federal regulatory agency frequently trigger parallel private class actions. Indeed, since the passage of the PSLRA in 1995, over 20% of all securities fraud actions have followed an SEC litigation release or administrative proceeding.[70] And more than half of recent SEC enforcement actions have produced parallel private civil actions.[71] The prevalence of these follow-on private actions is significant because Congress has recently granted the SEC the power to redress consumer harms directly. Section 308 of the Sarbanes-Oxley Act[72] allows the SEC to reimburse investors by depositing civil penalties for securities or accounting violations into a victim's compensation fund. And in the last couple years the SEC has exercised this authority with zeal, collecting hundreds of millions of dollars in compensation for affected shareholders.[73]

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[70] *See* Simmons & Ryan, *Post-Reform Study*, *supra* note 33.

[71] James D. Cox et al., *SEC Enforcement Heuristics: An Empirical Study* 53 DUKE L.J. 737, 777 n.113 (2003).

[72] 15 U.S.C. § 7246.

[73] *See* Paul F. Roye, Director, Division of Investment Management, U.S. Securities and Exchange Commission, Keynote Address at the 22nd Annual Advanced ALI-ABA Conference on Life Insurance Company Products (Nov. 4, 2004), *available at* http:// www.securitiesmosaic.com

Where the SEC exercises this authority, therefore, a parallel shareholder class action may be simply unnecessary to deter the alleged wrongdoing and adequately compensate the investors.

To date, however, the SEC, Congress, and the courts have not given this question the attention it deserves and parallel class actions continue even in cases where the SEC has already acted to compensate victims. Permitting plaintiffs to receive damages through private civil suits in addition to disgorgement awards risks overcompensating both class investors and plaintiffs' attorneys who fail to account for the government's efforts in their fee requests. At a minimum, courts should insist that disgorgement awards be treated separately from any class action settlement to prevent plaintiffs' lawyers from "free riding" on the good will achieved by the government's enforcement actions.

7. Encourage Meaningful Oversight by Litigants

In the PSLRA, Congress sought to reign in non-meritorious suits by expressing a strong preference for having institutional investors appointed as class representatives.[74] Congress, not unreasonably, believed that

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(noting that as of 2004 the SEC had "brought 51 enforcement cases related to the mutual fund scandals and levied $900 million in disgorgement penalties").

[74]The PSLRA requires courts to appoint as "lead plaintiff" the class member "that the court determines to be most capable of adequately representing the interests of class members." 15 U.S.C. § 78u-4(a)(3)(B)(i), and creates a rebuttable presumption that the most adequate plaintiff is the party with the "largest financial interest in the relief sought by the class." *Id.* § 78u-4(a)(3)(B)(iii)(I)(bb).

"increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions," rather than leaving the responsibility to small individual holders, many of which were often repeat players closely aligned with specific plaintiff law firms.[75] Congress may have failed, however, to consider the magnitude of the task it asked institutional investors to assume. Although some are suitable candidates to lead class action litigation, many lack the staff, resources, funding, and experience to monitor independently the suits brought on their behalf.

For example, the trustees of the Louisiana Teachers' Retirement System recently brought a derivative suit against the majority shareholders of Regal Entertainment to stop the issuance of a $750 million dividend, despite holding only a $30,000 investment in the company. The court denied the Louisiana Teachers' application for a preliminary injunction, finding "'not a shred of evidence' that minority shareholder would be hurt," and the Teachers subsequently dropped their claims.[76] Notably, the court found the claims so doubtful, that it asked plaintiffs' counsel "[t]o what extent has the plaintiff thought about the claims they're asserting and have

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[75]H.R. Conf. Rep. No. 104-369, at 34, *reprinted in* 1995 U.S.C.C.A.N. at 733.

[76]Editorial, *Pension Fund Shenanigans*, WALL ST. J., Aug. 20, 2004, at A12 ("[W]hat we have here is a public fund whose risky practices have cost the taxpayer billions throwing mud at a profitable company's management . . . a company . . . that was one of the fund's better-returning investments."). By way of full disclosure, the authors represented Regal in this suit.

they really studied them?"[77] As it turned out, the Louisiana Teachers' Retirement System has been involved in 60 class action lawsuits in the last eight years.[78] Citing this substantial docket, one district court judge in the Eastern District of Tennessee declined to allow the Teachers to serve as a lead plaintiff in one of these class actions, concluding that "the Court cannot help but conclude the Louisiana Funds' resources are being spread too thin."[79]

To help institutional investors from becoming spread too thin, and the concomitant loss of meaningful oversight promised by the PSLRA, courts might consider greater enforcement of the PSLRA's "professional plaintiff" rule to bar actions repeating allegations already considered and rejected in a prior suit. The PSLRA prohibits a party from serving as lead plaintiff in more than five securities class actions brought during a three-year period.[80] Some courts have disregarded this rule with respect to institutional investors, relying on commentary contained in the Conference Report accompanying the PSLRA.[81] As other courts have properly noted, however,

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[77]Transcript of Oral Argument Before the Hon. William B. Chandler, *Teachers' Retirement Sys. of La. v. Regal Entm't Group*, No. 444-N, at 156 (Del. Ch. June 1, 2004).

[78]*Pension Fund Shenanigans*, *supra* note 76.

[79]*In re Unumprovident Corp. Secs. Litig.*, MDL Case No. 03-1552, No. 03-CV-049 (E.D. Tenn. Nov. 6, 2003).

[80]15 U.S.C. § 78u-4(a)(3)(B)(vi).

[81]*See* H.R. Conf. Rep. No. 104-369, at 35 (stating that "[i]nstitutional investors . . . may need to exceed this limitation and do not represent the type of professional plaintiff this legislation

the PSLRA's plain language "contains no express blanket exception for institutional investors" and automatically excusing institutional investors from the rule would undermine rather than further the PSLRA's purposes.[82] Institutional investors themselves might also consider the creation of neutral litigation oversight committees to help them review solicitations made by plaintiffs' lawyers to ensure that the cases brought are meritorious, that fee agreements are fair and reasonable, and that any settlement benefits shareholders overall and does not, for example, simply result in a transfer of assets from current shareholders (very often including institutional investors themselves) to former shareholders.

CONCLUSION

Congress intended the PSLRA to reform the abuses that dominated securities fraud litigation in the early 1990s. Despite the best of legislative intentions, virtually all securities fraud claims that survive initial motions practice will be settled. With little prospect that their claims will be fully tested by the adversarial process, plaintiffs' attorneys have a strong economic incentive to bring ever-more securities fraud class actions without regard to the underlying merit of the suit, or the ultimate recovery to the

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seeks to restrict").

[82] *In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 443-44 (S.D. Tex. 2002); *see also In re Telxon Corp. Sec. Litig.*, 67 F. Supp. 2d 803, 821 (N.D. Ohio 1999).

class. Faced with such daunting prospects, businesses are frequently forced to comply with all but the most outrageous of settlement demands. As a result, new corporate investments are deterred, the efficiency of the capital markets is reduced, and the competitiveness of the American economy declines. And class members, who often have absolutely no interest in the suit from filing to final judgment, literally wind up paying the bills.

The reforms attempted so far are steps in the right direction. But none directly addresses the underlying economic incentives that drive the filing of frivolous securities fraud class actions in the first instance. Meaningful reforms must move beyond procedure to address these incentives directly. Enforcing the PSLRA's loss causation requirement will empower judges to dismiss securities fraud suits stemming from mere market downturns. Utilizing a competitive bidding process for the selection of class counsel will help address the de facto cartel responsible for the vast majority of securities class suits. Requiring attorneys' fees to be paid from a separate fee fund will increase adversarial challenges to exorbitant requests, and reviving the loadstar method will provide a tool to guard against overbilling. And no fees should be awarded for suits that do not provide meaningful benefits to investors after an opportunity for review by the appropriate regulatory agency. While no single reform can guarantee that securities fraud class action settlements will always be fair and reasonable,

these proposals are just a few possible steps in the direction of helping to secure the full promise of the securities class action mechanism as the vehicle for consumer protection envisioned by Kalven and Rosenfield nearly six decades ago.

The Attorney General's *News Briefing*

Prepared for the Office of Public Affairs, U.S. Department of Justice

To: The Attorney General And Senior Staff

Date: Wednesday, September 14, 2005 7:45 AM EDT

Today's Edition

Terrorism News:

McCain Threatens To Attach Detainee Rules Amendment To Defense Bill. The Hill (9/14, Tiron, Allen) reports, "Sen. John McCain (R-Ariz.) is threatening to attach an amendment to the defense appropriations bill defining acceptable treatment of military detainees if the defense authorization bill, to which it is currently attached, is not voted on this fall. 'I hate to do this,' said McCain, chairman of the Senate Armed Services Committee's Airland Subcommittee." The Hill notes, "The dispute between the White House and McCain is their first high-profile disagreement since the November election. Meanwhile, Sen. John Warner (R-Va.), chairman of the Senate Armed Services Committee, remains 'very supportive' of McCain's amendment, according to a committee spokesperson. And Warner also is committed to bringing the authorization bill to the floor this fall."

128 Gitmo Prisoners Are On Hunger Strike. The Los Angeles Times (9/14, Serrano) reports, "A hunger strike at the U.S. naval base at Guantanamo Bay, Cuba, has grown to 128 prisoners who are demanding that they be immediately released or granted access to a legal process to defend themselves against blanket allegations that they are terrorists. The strike, begun more than five weeks ago, has forced military authorities to hospitalize 18 of the prisoners and to take extraordinary measures to force-feed them. Some detainees have vowed to die if necessary, but the Pentagon insists that it will not let anyone starve to death. ... Along with demanding that they be freed or put on trial, some detainees also are complaining of assaults by guards and continuing to allege that there has been desecration of Muslim religious items."

Investigation Finds Gitmo MPs Distrusted Interrogators. The AP (9/14, Fox) reports, "A U.S. inquiry into alleged abuse at Guantanamo uncovered a climate of deep distrust between military police and interrogators, who were accused during the probe of giving terror suspects personal information about their guards. The MPs suspected interrogators gave their names and Social Security numbers to prisoners in exchange for intelligence, according to the investigation, which recommended that a senior interrogator be relieved of duty for 'failure to know his enemy.' The interrogator 'sees himself as a hero for the detainees, and against the MPs, on a crusade in the battle of the MPs against the detainees,' one investigator wrote in the report on the inquiry that The Associated Press obtained under a Freedom of Information lawsuit." The AP adds, "The investigation began in March 2004, when the same interrogator claimed military police had abused detainees. ... The interrogator claimed that guards mistreated a suspected al-Qaida member by not allowing him to use the bathroom immediately after a five-hour interrogation and that at other times withheld food and turned the temperature down on a cell to 52 degrees as punishment."

In Courtroom Outburst, Al Arian Lawyer Bumps Prosecutor, Challenges FBI Agent. The Tampa Tribune (9/14, Fechter) reports Sami al Arian attorney William Moffitt "bumped a federal prosecutor and challenged an FBI agent during a break Tuesday morning, saying the government was cheating in prosecuting the terror- support case that could send the defendants to prison for life." Moffitt said that

"prosecutors should have provided translations" for Israeli documents about al Arian's alleged support for suicide bombers, "throwing the documents onto the defense table. He then bumped" Assistant US Attorney Cherie Krigsman "and hollered 'This is business. You're trying to put a guy in jail for life. You cheat all the time.'" FBI Agent Kerry Myers "got in between Moffitt and Krigsman, telling Moffitt to leave Krigsman alone because 'she's a female.' Moffitt challenged the agent. 'Get in my face one more time,' he said."

Hayat Attorneys Secure $1.2 Million In Property For New Bail Request. The Lodi News Sentinel (9/14, Bohm) reports Umer and Hamid Hayat "have secured more than $1.2 million worth of property and hope it's enough to be released from jail while they await trial." The News Sentinel adds that the Hayats "have been held in the Sacramento County Jail for three months, charged with lying to FBI agents about their knowledge of terror training camps. ... Both have pleaded not guilty to the charges and through their attorneys have denied the allegations. Additionally, defense attorneys wrote in the motions, the charges have not been corroborated by others and are based on statements made 'during stressful, protracted and confusing interview sessions with FBI agents.'"

The Stockton Record (9/13, Hood) notes, "According to Monday's filing, the homes are: The Hayats' home at 302 E. Acacia St., which FBI agents searched June 6. ... A home belonging to Umer Hayat's brother," and two homes owned by "distant relatives." Defense attorney Wazhma Mojaddidi said, "We feel good about it because they're not a danger to the community. The judge told us if we came up with more property, he would consider that a new fact to reopen."

Brooklyn Illegal Money Transfer Trial Begins. The AP (9/14, Weissenstein) reports, "A Yemeni immigrant ice cream shop owner accused of illegally funneling $21.9 million overseas successfully fought to keep prosecutors from introducing evidence allegedly linking him to terrorist groups as his trial began Tuesday." Abad Elfgeeh "stands accused of transmitting money around the world without a license from a dozen bank accounts linked to his tiny storefront in Park Slope, Brooklyn. ... But prosecutors cannot raise the topic of terrorism at Elfgeeh's trial unless the defense does first because they did not have enough evidence to charge Elfgeeh with a terrorism-related crime." The AP notes, "Elfgeeh first came to the attention of FBI anti-terrorist agents as they investigated Sheik Mohammed Ali Hassan Al-Moayad, whom they eventually accused of funneling money...to al-Qaida and Hamas."

British Intelligence Monitoring Hundreds Of Potential Terrorists. The New York Times (9/14, Lyall) reports, "Hundreds of potential terrorists in Britain are being 'closely surveyed' by the security services, part of a battle with no obvious end in sight," said home secretary Charles Clarke. Clarke "was testifying before a special parliamentary committee investigating the government's handling of the July 7 suicide bombings " The Washington Times (9/14, Martin) reports Clarke said, "There are certainly hundreds of individuals we continue to watch very closely, who we believe need to be very closely surveilled because of the threat they offer." Clarke "explained that, although these suspects posed a 'threat,' they were not necessarily actively plotting more terrorist attacks."

Patriot Act:

Not All FBI Powers Covered Under Patriot Act. In the third of a three-part series on the Patriot Act, the Hayward (CA) Daily Review (9/14, Farooq) reports, "Poet Amir Sulaiman was on a professional high after his taped performance aired across the country on HBO's 'Def Poetry Jam' in February 2004. He had performed a piece titled 'Dangerous,' a poem he describes as passionate and intense. ... But just six days after his performance first aired, the 26-year-old African-American father of three had FBI agents waiting to question him at his mother-in-law's house in San Francisco. ... 'I'm not sure,' he said about the FBI knocking on his in-law's door soon after his HBO performance. 'The reason the two (events) are connected is six days after the show aired, they knocked on my mother-in-law's door. ... It was a bizarre, almost surreal, phone call that the FBI was waiting for me.'" The Review continues, "While they waited, FBI agents asked Sulaiman's brother-in-law why his poetry was 'anti-American.' That's a charge he denies, saying his ancestors help build America and he never once mentions America on his album, but instead tackles issues such as poverty, oppression and tyranny. ... The day after the FBI visited Sulaiman, he also found out, while trying to board an airplane, that his name had been added to the 'no-fly list,' subjecting him to extra security before he could board. He was never charged with a crime or given a reason

why his name was added to the list or why he was visited by the FBI." The Review adds, "Contrary to popular belief, both of Sulaiman's experiences had nothing to do with the controversial USA PATRIOT Act, passed by Congress days after the Sept. 11 attacks to give law enforcement more power to investigate potential terrorists. ... Since its passage, there have been a lot of myths attached with the Patriot Act's supposed power, from immigrant roundups post 9/11 to the creation of the 'no-fly' list. Some of the powers associated with the act are more of a general sense of heightened security by law enforcement agencies than any single bill. ... The 'no-fly' list, for example, was initiated before the Patriot Act was passed in 2001 —created by a Federal Aviation Administration-issued security directive in 1996. But, still the origin of the no-fly list is mired in secrecy and some confusion. Some security experts have been left scratching their heads when asked when or where exactly the list originated, who is on it and what rights innocent passengers have if their names are similar to those on the list. ... Another issue thought by some to be associated with the Patriot Act are FBI interviews and roundups. Both again are not tied to any legislation but instead to a heightened sense of security, according to Dorothy Ehrlich, the executive director of the American Civil Liberties Union of Northern California."

Homeland Response:

FAA Was Told In '98 That Al Qaeda Might Hijack Planes, Destroy Landmarks. The New York Times (9/14, Lichtblau) reports, "American aviation officials were warned as early as 1998 that Al Qaeda could 'seek to hijack a commercial jet and slam it into a U.S. landmark,' according to previously secret portions of a report prepared last year by the Sept. 11 commission. ... The White House and many members of the commission, which has completed its official work, have been battling for more than a year over the release of the commission's report on aviation failures, which was completed in August 2004." The Times notes, "While the new version still blacks out numerous references to particular shortcomings in aviation security, it restores dozens of other portions of the report that the administration had been considered too sensitive for public release. The newly disclosed material follows the basic outline of what was already known about aviation failings, namely that the F.A.A. had ample reason to suspect that Al Qaeda might try to hijack a plane yet did little to deter it. But it also adds significant details about the nature and specificity of aviation warnings over the years, security lapses by the government and the airlines, and turf battles between federal agencies." USA Today (9/14) reports, "The new version provides fresh details on repeated warnings about al-Qaeda and its desire to attack airlines in the months before Sept. 11."

The AP (9/14, Miller) reports, "A new version of the Sept. 11 commission's report...was released Tuesday with recently declassified information about terrorist threats and holes in airport security before the attacks." The AP notes, "The new version provides fresh details on the repeated warnings about al-Qaida and its desire to attack airlines in the months before" 9/11. "For example...the Federal Aviation Administration's intelligence unit received 'nearly 200 pieces of threat-related information daily from U.S. intelligence agencies, particularly the FBI, CIA, and State Department.' Also unclassified was the conclusion that the domestic aviation system had, since 1996, 'operated at a security level that was, in effect, a permanent code orange.'"

King And Weldon Look To Secure Votes For Homeland Committee Chair. The Hill (9/14, Kaplan) reports Rep. Peter King, "the leading candidate to take the helm of the Homeland Security Committee, expressed confidence late yesterday that his candidacy will prevail when the GOP Steering Committee meets today to decide the race." Rep. Curt Weldon "who is the current vice chairman of the panel, has campaigned hard for the gavel and continued to search for votes yesterday. He argued that he is the better choice because he has developed expertise and credibility on homeland-security issues. ... Other candidates for the post include Reps. John Linder (Ga.), Dan Lungren (Calif.) and Don Young (Alaska). Rep. Mac Thornberry (Texas) has been mentioned as a candidate, but he has not returned calls to confirm his candidacy."

DHS Begins Review Of Nuclear Plant Safety. The New York Times (9/14, Foderaro) reports, "The United States Department of Homeland Security on Tuesday began a top-to-bottom review of emergency preparedness and security at the Indian Point nuclear plant in Westchester County. The review is part of a sweeping initiative by the federal government to assess the vulnerability of the nation's infrastructure. A dozen experts from several federal agencies, including the Federal Emergency Management Agency, the F.B.I. and the Nuclear Regulatory

Commission, converged on Indian Point's two reactors, in Buchanan, N.Y., to conduct a three-day inspection."

Diplomatic Bags Bypass Airport Screeners. The Christian Science Monitor (9/14, Marks) reports, "Despite the intense scrutiny of airline passengers and their bags since 9/11, potentially explosive gaps still exist. Top among them, for some analysts, are diplomatic bags - the privileged cargo that is given special immunity. Security experts worry that terrorists could exploit the status of diplomatic pouches, which are protected from being opened or detained in any way by the Vienna Convention of 1961. In the past, rogue countries and individuals have used such bags to transport drugs, arms, and cash - and even to smuggle people. That's because a diplomatic pouch can be a crate big enough to carry a large desk."

Capitol's Improved Security Measures Noted. The Hill (9/14, Kucinich) reports, "For the second time this week, outside mail was halted yesterday because of a power outage at the House off-site mail facility, but recent improvements to mail security allowed interoffice mail and newspapers to continue to circulate. This is just one small example of the numerous security upgrades that have occurred on Capitol Hill since the Sept. 11 attacks. ... The Alternate Computing Facility, designed to handle some of the House and Senate data and communications in the event of a catastrophe, is just one of the security centers built after Sept. 11."

Congress And The Administration Accused Of Ignoring Threat To DC. The Washington Post (9/14) editorializes, "The Bush administration, pertinent congressional committees and the D.C. government are all aware of a study showing that an attack on a single railroad tank car of chlorine traveling through a crowded nation's capital could: Kill or seriously harm 100,000 people within an hour. Set off a toxic plume that could extend over 40 miles. Leave deadly a core area of about 4 miles by 14 1/2 miles. It is also true that while the D.C. government has enacted a law to deal with the issue, the federal government has taken no serious steps to prevent chemicals that are toxic if inhaled from being shipped through the District. What's more, the Justice Department and CSX Transportation Inc., rather than supporting D.C. legislation that sought to regulate the transport of ultra-hazardous materials through the city, instead obtained a court order to stop the District from enforcing its law."

War News:

Bush Calls On Assad To Stop Flow Of Insurgents Into Iraq. USA Today/AP (9/14) reports President Bush "warned Syria to stop foreign fighters who train there and then cross the border into Iraq." The Washington Times (9/14, Sammon) reports President Bush 'threatened to further isolate Syria if it does not stanch the flow of killers streaming into Iraq and vowed to press his case at the United Nations today. 'The Syrian leader must understand we take his lack of action seriously,' Mr. Bush said of Syrian President Bashar Assad. 'The government is going to become more and more isolated.' ... 'The Syrian government can do a lot more to prevent the flow of foreign fighters into Iraq,' Mr. Bush said. 'These people are coming from Syria into Iraq and killing a lot of innocent people. They're trying to kill our folks, as well.'"

The CBS Evening News (9/13, story 11, 0:30, Schieffer) reported President Bush yesterday "met with the visiting prime minister of Iraq. Both men said this is not the time to set a deadline for pulling American troops out of Iraq. The President also accused Syria of failing to stop the flow of Islamic militants across the border into Iraq."

NBC Nightly News (9/13, lead story, 3:25, Gregory) reported, "At the White House today, Mr. Bush welcomed Iraqi president Jalal Talibani. But the war has, for now, been overshadowed by crisis at home."

Bush Pledges To Keep US Forces Fighting In Iraq. The Los Angeles Times (9/14, Richter) reports President Bush "promised his Iraqi counterpart Tuesday that the United States would persevere in the joint fight against insurgents." Bush "pledged that U.S. forces would 'stay on the offensive alongside Iraqi security forces.'"

Talabani Says Timetable For US Withdrawal Would Be Counter-Productive. USA Today/AP (9/14) reports Iraqi President Jalal Talabani "said Tuesday in Washington that Iraq will not set a timetable for the withdrawal of U.S. troops. He said that to do so would send a signal to insurgents that they can weaken the alliance between Iraq and America. Speaking at a White House news conference with President Bush, Talabani held out the option of significant U.S. troop withdrawals by the end of 2006 if Iraqi forces are ready to assume more responsibility for

the nation's security. However, he said that would take place only if the United States agreed." Talabani said, "We don't want to do anything without the agreement with the Americans because we don't want to give any signal to the terrorists that our will to defeat them is weakened."

Iraqi Assembly Urges US "Occupation Forces" To Withdraw. Knight Ridder (9/14, Youssef) reports, "In an attempt to lay the legal groundwork for asking the United States to withdraw its troops, an Iraqi National Assembly committee released a report Tuesday that said the presence of the American military prevents Iraq from becoming fully sovereign. The 18-member National Sovereignty Committee, made up of legislators chosen in national elections in January, said the only way Iraq could achieve sovereignty was for multinational forces to leave. The report called for setting a timetable for the troops to go home and referred to them as 'occupation forces,' a first." According to Knight Ridder, "The report also asks the United Nations to issue a resolution declaring Iraq a sovereign country and the government to repeal an order enacted by the U.S. Coalition Provisional Authority that gives foreign nationals here immunity from prosecution in Iraqi courts. It also called for the government to have control over its intelligence operations, palaces and prisons. American forces so far have refused to grant Iraqis access to many intelligence operations, to allow them to occupy several palaces that Saddam built and to let them operate several prisons."

Final Draft Of Iraqi Constitution Unlikely To Satisfy Sunnis. The New York Times (9/14, Worth) reports, "On Tuesday, the leaders in the Shiite-dominated National Assembly said they approved a final, modified version of the proposed new constitution. But the charter still does not come close to mollifying Sunni leaders who had hoped to win far broader changes in the document before the Oct. 15 national referendum. The approval came more than two weeks after the draft was formally presented to Parliament over the objections of some lawmakers." The Times goes on to report, "The leaders of the constitutional drafting committee said they had signed off on a final version, as did Hussein al-Shahristani, the acting speaker of the National Assembly and a leader of its Shiite majority. Mr. Shahristani said that he would announce the document's completion at a news conference on Wednesday, and that it would then be given to United Nations officials, who are responsible for printing and distributing it."

Biden Says Bush Should Postpone Constitutional Referendum. In an op-ed for the Washington Post (9/14) Sen. Joseph Biden writes, "The Bush administration's mishandling of Iraq has brought us to the brink of a national security debacle. To salvage the situation, the administration must fundamentally change course inside Iraq, in the region and at the international level. ... The administration is taking a huge gamble by going forward with a referendum for a constitution that is more likely to divide Iraq than to unite it." Biden continues, "The Bush administration's hope seems to be that Sunnis and Iraqi women will 'get over it.' But hope and stubbornness do not constitute a strategy. ... If negotiators don't reach reasonable compromises that bring moderate Sunnis on board, the Bush administration should support postponing the constitutional referendum until after elections for a new National Assembly are held in December, which would allow a new committee with elected Sunni members to reconsider the draft."

Baghdad Bomber Kills At Least 82 Seeking Jobs. Reuters (9/14) reports, "A suicide bomber blew up his minibus after luring a crowd of men to the vehicle with promises of work in Baghdad on Wednesday, killing at least 82 people and wounding 163, police and officials said. ... Bodies lay in the street beside burned-out cars, witnesses said. Some used wooden carts to haul away the dead." USA Today/AP (9/14) reports, "At least 73 people were killed early today when a terrorist drove an explosives-filled vehicle into a crowd of laborers waiting for construction work. ... Lt. Col. Moayad Zubair said 73 people died and 162 were injured. He said the death toll would probably go up because some of the wounded were unlikely to survive."

The New York Times (9/14, Worth) reports, "The attack appeared to be the latest sectarian strike directed against Shiites in Baghdad, who have been repeatedly targeted by Sunni Arab insurgents and terrorists bent on exploiting Sunni-Shiite divisions across Iraq." The Los Angeles Times (9/14, Sanders) reports, "t was the deadliest bombing in Iraq since a suicide attacker ignited a fuel tanker July 16 near a Shiite mosque in the central town of Musayyib, killing almost 100 people."

US And Iraqi Forces Cut Down Frequency Of Attacks On Airport Road. USA Today (9/14, For) reports, "Attacks on and around the 7-mile highway linking Baghdad to its international airport have dropped 41% since May, the result of increased U.S. and Iraqi

troop presence and new tactics to battle insurgents along one of the world's most dangerous roads. There hasn't been a suicide car bombing on the road since April, according to U.S. military statistics through August. U.S. officers attribute the decline to an influx of Iraqi troops who have been stationed at key points. ... In May, insurgents staged 49 attacks on the road and in surrounding neighborhoods, including assaults with deadly roadside bombs and rocket-propelled grenades. ... The number of attacks fell to 29 in August, mostly small-arms fire."

US Warplanes Bomb Haditha In Northern Iraq. The AP (9/14, El-Tablawy) reports, "U.S. forces widened their operations against insurgents in northern Iraq on Tuesday, launching an attack on the Euphrates River stronghold of Haditha only days after evicting militants from Tal Afar. Residents also reported American air strikes in the same region near Qaim. The Americans called in bombing raids in Haditha, 140 miles northwest of the capital. They captured one militant with ties to al-Qaida in Iraq and killed four others. In the volatile city of Qaim, about 80 miles northwest of Haditha, residents said clashes broke out between insurgents and coalition forces. The U.S. military did not confirm the air strike. ... After the raid Tuesday on Haditha, Associated Press Television News videotape showed at least three houses that residents said were demolished in the U.S. air strike."

Army Colonel Alleges Insurgents In Tal Afar Have Committed Atrocities. The Atlanta Journal-Constitution/AP (9/14, Burns) reports Col. H.R. McMaster, commander of the 3rd Armored Cavalry Regiment, "asserted Tuesday that extremist fighters in northern Iraq committed atrocities against civilians, including beheadings, torture and the booby-trapping of a murdered child's body. The accusations...included some of the most graphic and specific charges by an American military officer during the ongoing battle for control of Tal Afar, a city about 50 miles from the Syrian border that has been an insurgent stronghold." McMaster "said Tal Afar is not yet under the control of the 5,000 Iraqi government forces and 3,500 to 3,800 U.S. troops that have been fighting together there for the past two weeks. He predicted eventual victory but said it was impossible to know how long it would take before the Iraqis can control Tal Afar by themselves." The Washington Post (9/14, A27, Finer) reports, "During the incursion into Tall Afar...more than 550 suspected insurgents have been killed or captured this month, commanders said. Much of the fighting was carried out with airstrikes or by the Iraqi army, which led the assault."

Jaafari Receives Warm Welcome From Iraqi Expatriates In Michigan. The New York Times (9/14, Hakim, Peters) reports Dearborn, Michigan's Iraqi-American population "embraced" Iraqi prime Minister Ibrahim al-Jaafari. But "they also had plenty of questions in a town hall meeting that was at times contentious. Attendees asked Mr. Jaafari about the future of Kirkuk, whether the rights of Chaldeans would be respected, whether there were still Iraqi prisoners of war in Iran and whether Iraqi embassies throughout the world and government agencies in the country were still stocked with former Baathists. And they wanted to know when justice and the rule of law would return to their native land." The Times notes, "Nisrin Kadum, 49, a banking specialist at Comerica Bank who fled Iraq in 1979, was almost shouted down when she asked about the role of women in the country."

Iraqi Legislature Considers Expanding Application Of Capital Punishment. The Los Angeles Times (9/14, Levey) reports, "Struggling to fight back against insurgents roiling the country, Iraqi lawmakers have begun to debate sweeping anti-terrorism legislation that could significantly expand use of the death penalty." Iraq's leaders "are contemplating expanding the list of crimes punishable by death to include offenses such as attacking government buildings, using explosives to kill people and advocating sectarian violence. ... Although many Iraqis have been calling for more executions since the insurgency began, some Sunni Arabs fear that they will be unfairly targeted by the death penalty because the rebellion is centered in Sunni regions of the country. And human rights groups are expressing concern that an expanded use of the death penalty may push Iraq back toward a time when the government wantonly executed its opponents."

Iraqi Economy And Currency Said To Be Performing Above Expectations. In an op-ed for the Wall Street Journal (9/14) Amir Taheri, author of "L'Irak: Le Dessous Des Cartes," writes, "In the Tehran moneychangers' bazaar" there is an increasing demand for the Iraqi dinar. Taheri adds, "With the world media depicting Iraq as a ship sinking in a sea of blood, and self-styled experts predicting civil war or disintegration, it is hard to imagine why anyone would want to abandon such all-time favorites as the U.S. dollar and the euro, not to mention the oil currencies of the region, in favor of the world's newest money.

One reason, of course, is the sharp rise in the supply of dollars, a result of the dramatic increase in the price of oil. (Iran is earning something like $200 million each day from its oil exports.) ... Some Americans might think that Iraq owes its robust economic performance to a flood of dollars provided by the U.S. taxpayers. The IMF report shows that this is not the case. Iraq is paying 90% of its own expenditures, including the cost of economic reconstruction."

US Considers Pulling 20 Percent Of Troops From Afghanistan Next Year. The Washington Post (9/14, A26, Graham) reports, "U.S. military commanders have drafted plans to lower the number of American troops in Afghanistan by roughly 20 percent next year if NATO-led troops from Europe continue to widen their role in securing the country, according to senior officers here. A reduction of as many as 4,000 of the nearly 20,000 American troops in Afghanistan would be the largest drop in a force that generally has grown since the U.S.-led invasion in late 2001. ... 'It makes sense that as NATO forces go in, and they're more in number, that we could drop some of the U.S. requirement somewhat,' Army Gen. John P. Abizaid, the senior U.S. commander in the region, said in an interview here. He stressed that no decision had been made to shrink the U.S. military presence." The Post notes, "The planning comes as intensified fighting in Afghanistan this year has killed more than 50 Americans, the highest death toll in any year since the troops arrived."

Rumsfeld Seeks More NATO Forces For Afghanistan. The Wall Street Journal (9/14. A19, Jaffe) reports, "Defense Secretary Donald Rumsfeld urged NATO nations to continue efforts to expand their presence in Afghanistan -- a move that eventually could enable the U.S. to draw down its own troops in the country. ... U.S. officials say they believe NATO troops will take over security in the country's once-restive south. The increased NATO presence and the development of Afghan security forces eventually should allow the U.S. to begin reducing its presence, Mr. Rumsfeld said." The New York Times (9/14, Schmitt, Cloud) reports, "Germany, supported by Britain, France and other European allies, said Tuesday at a meeting of defense ministers in Berlin that it strongly opposed any American-backed restructuring of the NATO command structure that could lead to having alliance troops become involved in counterinsurgency. Because those operations represent a large part of American troop activity in the south, it is not clear whether the reductions can go forward. In the past few months, violence has surged in the south, with Taliban forces conducting a campaign of assassinations and intimidation ahead of elections on Sunday."

The AP (9/14, Baldor) reports that at the two-day NATO meeting, Rumsfeld "aid NATO's move to take on a larger role in Afghanistan, including drug interdiction, will be a key topic of discussion throughout the meeting. 'Over time it would be nice if NATO would develop counterterrorist capabilities which don't exist at the current time,' he said. ... Rumsfeld said he is also urging his defense counterparts to find ways to increase the military flexibility of NATO's forces and the financing for the alliance. Several countries put limits on the military activity their forces can engage in as part of NATO, such as limiting where they can go or what type of combat force they can use."

Three US Soldiers Face Charges Relating To Afghans' Deaths. The New York Times/AP (9/14, Press) reports, "An Army officer and two more of his soldiers from a Reserve unit have been charged in a prisoner abuse investigation in Afghanistan, the Army announced Tuesday. The officer, Capt. Christopher M. Beiring, who led the 377th Military Police Company based in Cincinnati, was charged with dereliction of duty and making a false official statement. He is the first officer to be charged in the investigation. The abuse case primarily involves two detainees who died at the Bagram Air Base detention center, where Captain Beiring's unit worked. The first, Mullah Habibullah, was found dead in his cell at the detention center just days after being taken into American custody in December 2002. A second detainee, Dilawar, arrived at Bagram the day after Mr. Habibullah died. Mr. Dilawar died about a week later."

US To Fund Military Prison In Afghanistan To House Gitmo Detainees. The Washington Times (9/14, Scarborough) reports, "The Pentagon will help finance construction of a locally run military prison in Afghanistan as part of a plan to send to their home countries scores of terror detainees at the prison at U.S. Naval Base Guantanamo Bay" Matthew C. Waxman, deputy assistant secretary of defense for detainee affairs, "said the United States will help Afghanistan build a military prison to detain enemy combatants and to accept transfers from Guantanamo. A defense official could not supply details on the new prison, saying talks were in the early stages."

Pakistan Captures Afghan Insurgents

Running Recruitment Center. The New York Times (9/14, Khan, Sengupta) reports Lt. Gen. Safdar Hussain, "A top Pakistani military commander...said Tuesday that his forces had arrested 21 militants along the border, found a remotely piloted spy plane and seized a cache of arms and communications equipment believed to be used in insurgent operations in Afghanistan." Hussain "also said his forces had detected a recruitment office that was bringing in new fighters for the war against the Afghan government and the American-led forces there."

DOJ:

Eastern Kentucky US Attorney Tapped For Federal Bench. The AP (9/14) reports, "Greg Van Tatenhove, the chief federal prosecutor for the eastern half of Kentucky, is in line to become a federal judge after being tapped by President Bush." The AP continues, "Van Tatenhove, the U.S. attorney for the Eastern District of Kentucky, was nominated to fill a vacancy created on the federal bench when Judge Karl Forester took senior status in May. ... In a statement Tuesday, Van Tatenhove thanked Bush for nominating him and expressed gratitude to Republican U.S. Sens. Mitch McConnell and Jim Bunning for their support. ... The nomination requires confirmation by the U.S. Senate." The AP adds, "Van Tatenhove is well connected politically, having served as an assistant to McConnell before attending law school and later as a top aide to U.S. Rep. Ron Lewis, R-Ky. ... Van Tatenhove, 45, has been U.S. attorney for the 67-county Eastern District since 2001. The district runs from Shelbyville to Pikeville and from Covington to the Tennessee line."

DC's Top Lawyer Is Candidate For Judgeship. The Washington Post (9/14, Cauvin) reports, "D.C. Attorney General Robert J. Spagnoletti, the city government's chief lawyer, is one of three candidates for an opening on the bench of D.C. Superior Court." The Post continues, "Spagnoletti, 42, has had his eye on a judgeship for at least a few years, but when he took on his current job in May 2003, he indicated to Mayor Anthony A. Williams (D) that he was committed to staying through the mayor's current term. The new opportunity comes more than a year before the mayor's race, and Williams has yet to declare whether he will seek reelection." The Post adds, "A prosecutor for 13 years before joining the mayor's Cabinet, Spagnoletti was on the short list for the Superior Court bench once before, in 2000, while he was working at the U.S. attorney's office. His current job has given him a much higher public profile. ... In addition to Spagnoletti, the D.C. Judicial Nomination Commission chose Andrew Fois, a former assistant attorney general at the Justice Department, and Carol A. Dalton, a D.C. Superior Court magistrate judge, for consideration by President Bush. The opening was created by the appointment of Judge Noel A. Kramer to the D.C. Court of Appeals."

Corporate Scandals:

Judge Splits Enron Broadband Case Into Three Separate Retrials. The AP (9/14, Hays) reports, "Five former executives from Enron Corp.'s defunct broadband unit whose trial ended with jurors unable to reach verdicts on most charges will be retried in three separate cases next year." The AP continues, "Nearly two months ago a jury returned acquittals on some charges after a three-month trial but was deadlocked on dozens more. U.S. District Judge Vanessa Gilmore declared a mistrial on those charges and set retrial dates Monday." The AP adds, "At least one of the trials, involving conspiracy and fraud counts against the broadband unit's former finance chief and a former in-house accountant, was scheduled for May 1. It is likely to overlap with the conspiracy and fraud trial of Enron founder Kenneth Lay and former CEO Jeffrey Skilling, set to begin in January in a courtroom next door to Gilmore's. The other two cases were scheduled for June 5 and Sept. 5. ... All five broadband defendants, as well as Lay and Skilling, have pleaded innocent. ... Barry Pollack, who represents former in-house Enron broadband accountant Michael Krautz, questioned whether a a fair jury could be found in the middle of the publicity of the ongoing Lay and Skilling trial."

Criminal Law:

Court Discloses Rudolph Defense Cost Taxpayers More Than $4 Million. The AP (9/13, Reeves) reports, "Legal fees to defend Eric Rudolph in a deadly Alabama abortion clinic blast and the Atlanta Olympics bombing cost taxpayers more than $4 million before he agreed to plead guilty in a deal that spared his life, court documents show." The AP continues, "One of Rudolph's attorneys said Tuesday the bill would have been far higher had the case gone

to trial. ... 'That would have probably tripled the cost,' said Bill Bowen, part of a team of at least nine lawyers who defended Rudolph." The AP adds, "Rudolph is serving four life terms after pleading guilty in the Birmingham clinic bombing, which killed a police officer in 1998, and the Olympics bombing, in which a woman died in 1996. He also pleaded guilty in two other bombings that occurred in Atlanta in 1997. ... U.S. Attorney Alice Martin said the government had not computed the total cost of prosecuting Rudolph, who was the subject of an intense manhunt following the Birmingham bombing in 1998 until May 2003, when he was captured in Murphy, N.C." The AP notes, "The cost of defending Rudolph was disclosed in an order filed last week by U.S. District Judge Lynwood Smith. Attorneys in the Alabama case were paid $2.02 million for representing Rudolph, who declared himself broke and received court-appointed legal representation following his arrest in 2003."

Massachusetts Teen Pleads Guilty To Hacking Paris Hilton's Cell Phone. The Washington Post (9/14, Krebs) reports, "A Massachusetts teenager has pleaded guilty to hacking into the cell-phone account of hotel heiress and Hollywood celebrity Paris Hilton, a high-profile stunt by the youngest member of the same hacking group federal investigators say was responsible for a series of electronic break-ins at data giant LexisNexis." The Post continues, "The 17-year-old boy was sentenced to 11 months' detention at a juvenile facility for a string of crimes that include the online posting of revealing photos and celebrity contact numbers from Hilton's phone. As an adult, he will then undergo two years of supervised release in which he will be barred from possessing or using any computer, cell phone or other electronic equipment capable of accessing the Internet." The Post adds, "The U.S. Attorney's Office for Massachusetts and the state district court declined to identify the teen, noting that federal juvenile proceedings and the identity of juvenile defendants are under seal. But a law enforcement official close to the case confirmed that the crimes admitted to by the teen included the hacking of Hilton's account. ... The teen also pleaded guilty to making bomb threats at two high schools and for breaking into a telephone company's computer system to set up free wireless-phone accounts for friends. He also participated in an attack on data-collection firm LexisNexis Group that exposed personal records of more than 300,000 consumers. Prosecutors said victims of the teen's actions have suffered about $1 million in damages."

Indiana Dentist Sentenced To 57 Months For Medicaid Fraud. The South Bend (IN) Tribune (9/13, Heline) reports, "A former Warsaw (IN) dentist who operated a mobile dental lab in the South Bend area has been sentenced to 57 months in prison for Medicaid fraud." The Tribune continues, "U.S. District Judge Allen Sharp imposed the sentence specified in the plea agreement Dr. Bryan Spilmon accepted earlier this year." The Tribune adds, "Spilmon, 44, pleaded guilty to 12 counts of health care fraud and one count of money laundering. ... The remaining charges in the 52-count indictment were dismissed, as were charges filed against Spilmon's wife, Diane." The Tribune notes, "At the time of his guilty plea, Spilmon admitted to submitting billings and claims for reimbursement to Medicaid for treatments and diagnostic procedures that were never done or were not necessary. ... Spilmon was accused of falsely billing the heath care benefits program for the needy for more than $2.4 million from 2001 to 2003. ... He took his mobile dental units to areas where he could serve needy youths between 12 and 18, purporting to provide adequate dental care for them, when he was just engaging in a massive billing fraud, according to Assistant U.S. Attorney Donald Schmid. ... The U.S. Marshals Service may take the two mobile dental units to the Gulf Coast to assist in Hurricane Katrina relief efforts, Schmid said."

Four Chinese-Americans Plead Guilty To Illegal Technology Transfers. In a widely-distributed story, the AP (9/14, Gold) reports four naturalized US citizens "who operated an electronics firm in southern New Jersey pleaded guilty Tuesday to violating export regulations by shipping nearly $400,000 of electronics that could be used for military purposes to entities controlled by the Chinese government. The case involving Manten Electronics Inc. is the latest, but far from the largest, to deal with illegal technology and arms exports to China." The AP adds, "The four people at Manten, as well as four people at Universal Technologies Inc. ...were arrested in July 2004 following an 18-month investigation by ICE, the FBI and the U.S. Commerce Department." Manten president Xu Weibo "and his three co-defendants each pleaded guilty to a single charge of conspiring to violate export laws" and admitting "they lied to U.S. distributors and on shipping documents to conceal the nature of the shipments."

US Asks Philippines To Help Trace Documents In Spying Probe. Reuters (9/14)

reports, "The United States has asked the Philippines to help it trace recipients of classified documents suspected to have been stolen by a former Filipino police officer and an FBI employee, a senior official said on Tuesday. Michael Ray Aquino, a former top police official in the Philippines, and Leandro Aragoncillo, a Philippine-born U.S. citizen, were arrested in the United States on espionage charges on Saturday. ... 'The FBI is now asking for our help to find out who received those documents here in the Philippines and who provided the money for the transaction,' Reynaldo Wycoco, head of the National Bureau of Investigation...told reporters. Wycoco said the information was a 'classified assessment of the Philippine political situation and political leaders.'"

FBI Subpoenas Florida Sheriff's Campaign Finance Records. The Sarasota Herald Tribune (9/14, Ruger) reports, "The FBI has subpoenaed Sarasota County Sheriff William Balkwill's campaign financial reports for the 2000 and 2004 elections. ... Balkwill does not know why the records were subpoenaed, Sheriff's Office spokesman Lt. Chuck Lesaltato said Tuesday. ... The FBI has not served a subpoena to Balkwill or anyone else in the Sheriff's Office, Lesaltato said. ... The FBI special agent listed on the subpoena declined to comment Tuesday, referring questions" to Tampa FBI spokeswoman Sara Oates, who "said the FBI does not confirm or deny the existence of any investigations."

Tennessee Attorney Charged With Fraud Is Extradited From Brazil. The AP (9/14) reports, "The U-S Attorney for Middle Tennessee says a former lawyer wanted on fraud and money-laundering charges has been brought back to Nashville from Brazil." The AP continues, "George Nason is one of eleven people named in a 2002 federal indictment in connection with the former Loan Ranger company." The AP adds, "U-S Attorney Jim Vines says Nason is charged with conspiracy to defraud mortgage loan companies and financial institutions, mail fraud, bank fraud, money laundering and false statements to financial institutions. ... Prosecutors say Nason and the others bought properties, then sold them to 'straw buyers' at inflated prices. The government says the 'straw buyers' borrowed from the banks and mortgage lenders and the alleged conspirators paid them ten-thousand dollars per sale for helping in the scam."

Massachusetts Attorney, GOP Official Charged With Money Laundering. The AP (9/14, Lavoie) reports, "The vice chairman of the Massachusetts Republican Party was charged Tuesday with money laundering after he allegedly offered to 'cleanse' drug proceeds for a legal client." The AP continues, "Lawrence Novak, 54, an attorney from Brockton, Ma., was arrested at his home Tuesday after investigators said he allegedly offered to launder drug profits for Scott Holyoke, who is awaiting trial on federal drug trafficking charges and agreed to be a cooperating witness against Novak for the FBI. ... Novak was taken into custody after he allegedly deposited money in a Brockton bank, federal authorities said." The AP adds, "Gov. Mitt Romney called for Novak to step down while the investigation continues. ... 'The charges against Larry Novak are very troubling and Gov. Romney believes that it's appropriate while these charges are pending for Mr. Novak to step aside as vice chairman of the state party,' said Romney's spokesman, Eric Fehrnstrom." The AP notes, "Republican Party Executive Director Tim O'Brien said the charges are unrelated to Novak's GOP role. Novak served as the party's treasurer in the late 1990s. ... Novak made an initial appearance in U.S. District Court late Tuesday and was released on $25,000 non-surety bond. Neither he nor his attorney would comment on the charges. ... Novak allegedly offered to have Holyoke sign false affidavits in an attempt to invalidate some of his prior state court convictions in order to reduce the sentence he would face in his federal case."

Woman Faces Death Penalty In Texas Killing. The Washington Times (9/14, Aynesworth) reports, "Texas stands ready today to execute the first black woman, and only the third female, to be put to death since the state resumed capital punishment in 1982. Frances Newton, 40, was convicted of murdering her husband and two children in 1987. She always has maintained her innocence, though prosecutors convinced a Harris County jury that she killed her family for $100,000 in insurance money." The paper adds, "Only a last minute stay of execution by Gov. Rick Perry or intervention by the Supreme Court can halt the execution. Newton's lawyers wrote a letter to Mr. Perry Monday, asking for a 30-day stay in their efforts to show that prosecutors erred in linking her to a presumed murder weapon. Unlike the days preceding the executions of Karla Faye Tucker in 1998 and Betty Lou Beets in 2002, Newton's plight has not elicited much interest from outside the state, although the president of the American Bar Association has asked the governor to intercede, citing 'compelling new

evidence' that 'has not been evaluated by Texas courts.'"

Ohio Parents Charged With Caging 11 Adopted Children. The CBS Evening News (9/13, story 12, 2:00, Schieffer) reported, "The sheriff's department in a small Ohio town is investigating a possible case child abuse tonight that is simply incredible. No charges have been filed yet, but the case involves several children whose adoptive parents made them sleep in cages." CBS (Alfonsi) added, "Investigators say it looked like a cell block here. 11 children were living inside this home, and some of them were sleeping in cages." The children, "who range in age from one to 14, are all adopted and all severely disabled. They were locked up, their parents say, for their own good."

DeLay Associates To Face Additional Felony Charges. The Dallas Morning News (9/14, Slater) reports, "Two political associates of U.S. House Majority Leader Tom DeLay were indicted Tuesday on additional felony charges of illegally using corporate money to elect Republicans in 2002. John Colyandro and Jim Ellis were charged with using $190,000 in corporate money to make campaign contributions to GOP candidates for the Texas House in what prosecutors say was an illegal money-laundering scheme." Colyandro, "former executive director of the Texans for a Republican Majority Political Action Committee, and Mr. Ellis, who heads Mr. DeLay's Washington-based Americans for a Republican Majority, were indicted earlier on money-laundering charges. Tuesday's charges focus on the campaign contributions. Both defendants deny wrongdoing." DeLay, "who created both political action committees, is not charged in the three-year grand jury investigation into allegations of illegal corporate cash in Texas political races."

Civil Law:

2nd Circuit Approves Allocation Formula For Holocaust Settlement. The New York Law Journal (9/14, Hamblett) reports, "An Eastern District of New York judge's allocation of settlement funds to the most needy, elderly victims in the Holocaust Victims Assets litigation has been upheld by a federal appeals court." The Journal continues, "In a decision issued Friday written by Judge Jose Cabranes, the 2nd U.S. Circuit Court of Appeals upheld the formula used by Judge Edward Korman that placed special emphasis on compensating Holocaust victims who live in the former Soviet Union." The Journal adds, "The principal issues in the appeals were settled by the circuit in In Re Holocaust Victim Assets Litigation cases 04-1898-cv and 04-1899-cv. The appeals challenged Korman's geography-based allocation of a $1.25 billion settlement with Swiss banks and other organizations designed to aid victims of the Holocaust. ... The proceeds of the settlement are to be divided among five classes -- the Deposited Assets Class (those whose assets were stolen from Swiss banks); the Looted Assets Class (those whose possessions were stolen by the Nazis and then disposed of through Swiss banks), two classes of those forced into slave labor by the Nazis, and a fifth Refugee Class."

USA Today Says Bush Should "Pick A Fight" Over Base Closures. An editorial in USA Today (9/14) says President Bush must decide by the end of next week "what to do with a list of military base closings and realignments he received Thursday from a special commission. The president has two choices: approve the list, or kick it back to the commission for further review. Because the panel gave the Pentagon most of what it sought, and because Bush is occupied with Hurricane Katrina and other issues, he's not expected to pick a fight. But this is a fight worth picking. ... The president has a full plate right now, but he shouldn't pass up a chance to save money and improve defense — even if it means putting the commission back to work."

With Ellsworth Open, Thune Can Expand Nationally. Roll Call (9/14, Preston) reports, "A few days before a federal commission was scheduled to decide the fate of Ellsworth Air Force Base, South Dakota's two Senators," John Thune (R) and Tim Johnson (D), "preemptively released a lengthy statement pledging to work together on issues of importance to the state." Soon afterwards, the commission voted to keep it open. "The Ellsworth victory now allows Thune to spend part of his time helping the national Republican Party." Ellsworth's closing "would have been so damaging" because "it would have forced Thune to shore up support in his home state rather than advancing his national ambitions."

Civil Rights:

DOJ Probing Florida Prisons. The St. Petersburg (FL) Times (9/14) reports, "The FBI confirmed Tuesday it is investigating the Florida

Department of Corrections, though the nature of the probe is unclear." The Times continues, "FBI agents are working with the Florida Department of Law Enforcement, said FBI spokesman Jeff Westcott in Jacksonville. He declined to provide details. ... 'I can confirm that the FBI, along with FDLE, are involved in an investigation that concerns the Department of Corrections,' Westcott said." The Times adds, "A high-ranking state prison official, Region I director Allen "A.C." Clark, quit last week without explanation. Clark rose through the ranks under Corrections Secretary James Crosby, who also has declined to discuss why he quit, other than citing 'personal reasons.' ... Gov. Jeb Bush suggested Monday that he knew details but could discuss them. ... Four current or former Corrections Department employees were charged in February with illegal distribution of steroids. The case involved the Justice Department, FDLE, Clay County Sheriff's Office and federal postal inspectors."

Report Finds Blacks, Hispanics, Pay Higher Mortgage Interest Rates. Knight Ridder (9/14, Appelbaum) reports, "In a national report issued Tuesday, the Federal Reserve Board said blacks and Hispanics disproportionately receive high interest rates on mortgage loans, that it does not know why and it intends to find out." Knight Ridder continues, "Regulators will examine lending by about 200 selected companies to see if discrimination affected pricing decisions, the report said. The Fed declined to name the firms. ... The Fed also said it will examine whether blacks and Hispanics are sometimes steered to high-rate lenders when they could qualify for a market-rate loan." Knight Ridder adds, "The report is the federal government's opening statement in an accelerating public debate about the role of race in loan pricing. ... For the first time, lenders must disclose which of their loans carry a high rate. ... The Charlotte Observer reported in August that blacks were four times as likely as whites last year to receive high rates on home purchase loans, based on the newspaper's analysis of about half of all loans. Hispanics were twice as likely."

NYTimes Opposes Pennsylvania Bill Limiting Parolee Voting Rights. The New York Times (9/14) opposes a bill passed by the House that "could potentially deprive tens of thousands of parolees and probationers of the right to vote." The bill "represents an odious attempt by lawmakers to undo a state court ruling overturning a law that required newly released prisoners to wait five years before getting the right to vote. ... Legislators are also trying to direct public attention away from a hugely unpopular pay raise that they voted for themselves earlier this year. That makes the attack on voting rights all the more reprehensible."

Antitrust:

Microsoft, Google Claim Victory In Hiring Lawsuit. The Washington Post (9/14, D5, Vise) reports that a Washington state judge yesterday ruled "that a former Microsoft executive hired by Google can begin doing some, but not all, work for the search engine company in China, the latest twist in a battle that will play out into next year." The paper says, "In a written opinion, King County Superior Court Judge Steven C. Gonzalez ruled that Kai-Fu Lee can start recruiting employees for Google, meeting with government and university officials, and establishing a headquarters for Google's new research center. But, pending a trial in January, the judge barred Lee from hiring anyone away from Microsoft, using confidential information he learned during his employment there, or working in computer search and other specified fields for Google." The Post adds, "Tom Burt, Microsoft's deputy general counsel for litigation, said the Redmond, Wash.-based software giant had succeeded in severely restricting Lee's activities and use of corporate secrets. He said Google was paying Lee $10 million to head its China operations even though he could actually do very little of substance in light of the ruling. ... Nicole Wong, associate general counsel for Google, said Lee would immediately get rolling, hiring employees in China and establishing a new research center there."

The AP (9/14, Johnson) reports, "Lee cannot set budget or compensation levels or define the research that Google will do in China, but he can hire people to work there, the judge said. ... Lee, who has worked at Microsoft since 2000 and oversaw development of its MSN Internet search technology, including desktop search software rivaling Google's, left in July to lead Google's expansion into China. ... Microsoft sued Lee and Google, contending that Lee's job at Google would violate the terms of a noncompete agreement, which prohibits him from doing similar work for a rival for a year. Microsoft also accused Lee of using insider information to get his job at Mountain View, Calif.-based Google. ... Google has responded with its own lawsuit against Microsoft in U.S. District Court in San Jose, Calif."

Gates Discusses Microsoft's Competition With Google, Others. The Seattle Post-Intelligencer (9/14, Bishop) reports, "Microsoft Corp. is grappling with 'a lot of smart competitors,' including Google and Apple, who are ahead of the Redmond company in some key markets, Bill Gates acknowledges. ... But the Microsoft chairman on Tuesday said his company remains the overall industry leader, and he compared the current rivalries to legendary ones with Lotus, Novell and WordPerfect -- situations in which the Redmond company ultimately overcame steep odds to prevail. ... 'At any point in our history, we've had competitors who were better at doing something,' Gates said in an interview with the Seattle Post-Intelligencer, underscoring the fact that it wouldn't be unprecedented to come from behind now." The P-I continues, "That was one of the subjects addressed by Gates during the interview at the company's Professional Developers Conference, where Microsoft is seeking to rally support for Windows Vista and Office 12, the next versions of its dominant PC software programs. Among other things, the company showed plans to shift away from traditional drop-down menus to a new "ribbon" of commands across the top of the widely used Office programs. ... Gates answered questions on a wide range of topics, including Microsoft's growth prospects in the Seattle region, its ambitions in China, and efforts to shore up the security of its software."

Whirlpool Makes Intent To Acquire Maytag Official. The AP (9/13, Prichard) reports, "Whirlpool Corp. has officially notified the Federal Trade Commission and the U.S. Department of Justice of its intent to purchase rival appliance maker Maytag Corp. in a cash-and-stock deal valued at more than $1.7 billion." The AP continues, "Whirlpool sent notification letters last week to both agencies because it is unclear at this point whether it will be the FTC or the Justice Department that will investigate possible antitrust concerns, Whirlpool spokesman Steve Duthie said Tuesday. ... 'Neither Justice nor the FTC has considered or ruled on a merger in the U.S. appliance industry for a long time – 15 to 20 years, I think,' Duthie said." The AP adds, "Once the regulators figure out which of them has jurisdiction, Benton Harbor-based Whirlpool will provide the investigating agency with more details about its planned acquisition of Maytag, he said. ... Probably by the end of this month, Whirlpool will notify the Securities and Exchange Commission that it plans to issue new shares of stock to be given to Maytag shareholders as part of the proposed transaction." The AP notes, "Shareholders of Newton, Iowa-based Maytag must approve the acquisition and will vote on the proposal before the end of the year, the company said last month. The agreement does not need the approval of Whirlpool's shareholders."

US Cellular To Acquire Alltel's Kansas, Nebraska Operations. The AP (9/13) reports, "Wireless carrier U.S. Cellular Corp. said Tuesday it is acquiring Cellular One's operations in Nebraska and Kansas in a move to expand its presence in the Midwest. ... In exchange, U.S. Cellular will transfer its Idaho networks to an Alltel Corp. unit and pay $50 million." The AP continues, "U.S. Cellular said the deal will give it about 125,000 retail customers, 193 cell sites, 15 company-owned stores and 89 agent locations in an area containing about 1.4 million people. The company currently operates in 25 counties in southeastern Nebraska and 80 counties in northeastern and southeastern Kansas." The AP adds, "Little Rock, Ark.-based Alltel will receive about 91,000 customers, 84 cell sites, six company stores and 32 agent locations in a region containing about 500,000 people. ... The companies predicted that the deal will close in the fourth quarter, pending approval by communications regulators and the Justice Department. After the agreement is complete, both companies will continue operating their stores under the old brand names until they are remodeled."

PECO Submits Proposed Settlement To Resolve Exelon-PSEG Merger Concerns. Dow Jones Newswires (9/13) reports, "Exelon Corp.'s Peco Energy unit filed with Pennsylvania utility regulators a settlement that the company expects will resolve state regulatory concerns related to Exelon's planned merger with New Jersey utility Public Service Enterprise Group Inc." Dow Jones continues, "Exelon and PSEG agreed in December to merge. The deal has received regulatory approval from New York, Connecticut and the Federal Energy Regulatory Commission, but still requires the go-ahead from Pennsylvania, New Jersey and the Justice Department." Dow Jones adds, "In a press release Tuesday, PECO said its settlement offer to the Pennsylvania Public Utility Commission would cap rates for five years and give rate discounts of $120 million over the next four years. ... Peco said a judge with the Pennsylvania regulator will review the proposed settlement, which also includes funding for investment in 'alternative' energy and environmental projects. ... The judge is expected to make a recommendation before the settlement goes before the regulator for a full vote,

which Peco said may happen before the end of the year."

America West Shareholders OK Merger With US Airways. The Wall Street Journal (9/14, Urbanowicz) reports that America West Holdings Corp. said Tuesday its shareholders have voted in favor of the company's merger with US Airways Group Inc., "clearing the way for the deal to close this month." The Journal adds, "The parent company of low-fare carrier America West Airlines said 95.5% of total voting shares were voted in favor of the deal. Class A shareholders voted 100% in favor of the deal, while class B shareholders voted 85.2% in favor. Out of the class B shareholders, 4.4% opposed the deal and 10.4% abstained from voting." America West President and Chief Executive Doug Parker said in a prepared statement, "With US Airways final bankruptcy court hearing scheduled for later this week, we anticipate closing our merger with US Airways at the end of September as previously scheduled." The Journal notes that US Airways' bankruptcy turnaround plan relies on the merger with America West. The US Bankruptcy Court of Alexandria, Va., has a hearing scheduled for Thursday to consider final court approval of the air carrier's Chapter 11 turnaround plan. Under the deal, America West will become a wholly owned unit of US Airways, and existing America West shareholders will receive about 37% of the merged airline's shares.

The Washington Times (9/14, Glanz) reports, "US Airways Group Inc. yesterday took a big step toward emerging from bankruptcy when shareholders at America West approved combining the two airlines." The paper adds, "The combination of US Airways and America West would create the nation's sixth-largest airline and a low-cost carrier with a broad geographic reach. Perhaps more important for US Airways, yesterday's vote made it more likely that US Bankruptcy Court Judge Stephen Mitchell would approve its reorganization plan, analysts said. ... Judge Mitchell's hearing on US Airways' reorganization plan, scheduled for tomorrow, is the last hurdle the company must clear before a merger can take effect and its second trip into bankruptcy can end." Ray Neidl, an airline industry analyst for Calyon Securities Inc., in New York, said, "I expect [the court's] approval."

Lawsuit Charges Wal-Mart Ignores Overseas Labor Abuses. The New York Times (9/14, Greenhouse) reports, "A labor rights group filed a class-action lawsuit yesterday against Wal-Mart Stores in which apparel workers in Bangladesh, China and other countries assert that Wal-Mart violated its contractual obligations by not enforcing its code of conduct for overseas contractors. The lawsuit, filed in state court in Los Angeles, makes the novel argument that Wal-Mart's code of conduct created contractual obligations between it and thousands of workers employed by contractors who were supposed to comply with the code." The Times adds, "In the lawsuit brought by the International Labor Rights Fund, workers from Bangladesh, China, Indonesia, Nicaragua and Swaziland assert that the codes of conduct were violated in dozens of ways. They said they were often paid less than the minimum wage and did not receive time-and-a-half for overtime, and some said they were beaten by managers and were locked in their factories." The suit says, "Based on its vast economic power, Wal-Mart, based on its code of conduct, can and does control the working conditions of its supplier factories. It could use its power and position to prevent its producers from profiting from the inhumane treatment of plaintiffs." The paper notes "Wal-Mart executives say that they have the world's largest overseas monitoring program, with more than 5,000 factories inspected by 200 full-time inspectors who visit 30 factories a day."

The Washington Post (9/14, D6, Barbaro) reports, "An American labor rights group filed a class-action lawsuit yesterday against Wal-Mart Stores Inc., alleging that suppliers in five countries violated workers' rights, including denying a minimum wage, requiring overtime and punishing union activity." The Post adds, "The suit, which must be certified by a judge before achieving class-action status, is the latest legal salvo against the discount retailer, which faces class-action suits claiming that it discriminated against black truck drivers and female store employees. If certified, the suit could represent 200,000 to 400,000 people, said lawyer Terry Collingsworth of the International Labor Rights Fund." The paper notes The International Labor Rights Fund, a District-based advocacy group, filed the suit on behalf of 15 foreign workers who claimed they were subjected to illegal working conditions, and four California grocery employees who claimed that Wal-Mart's cost-cutting measures resulted in lower wages and benefits.

Patent Litigation Threatens Corporations. The Wall Street Journal (9/14, Bulkeley, A1) reports, "In one of Douglas Fougnies's early business ventures, he provided phony new-vehicle titles for stolen cars. His partner, Larry Day, is a onetime blackjack dealer in Las Vegas. Together, the two men have found a

more lucrative line of work: suing cellphone companies for patent infringement. Earlier this year their company -- which consists of four employees and six patents -- won $128 million in damages from Boston Communications Group Inc. and four other companies over alleged misuse of a 1998 patent." The paper adds that Fougnies and Day "are successful practitioners of a growing trade." The Journal notes, "Lured by the potential returns, hedge funds and other institutional investors now are bankrolling businesses that buy up patent portfolios. More law firms, including some branching out from product-liability and malpractice work, are taking patent cases on a contingency basis. That means the law firms are paid a percentage of any damages awarded but little or nothing if the patent-holder loses. Critics call the small litigants 'patent trolls' and say they are parasites on successful businesses."

Oracle's Purchase Of Siebel Raises Creativity Concerns. United Press International (9/14, Goto) reports, "Software group Oracle's bid for Siebel Systems for a cool $5.85 billion Monday was greeted by many Wall Street analysts as a signal of the return of mega-mergers and better still -- renewed confidence in the information technology sector. ... After all, earlier in the day online auction house eBay announced it will be acquiring Internet telecommunications group Skype for $2.6 billion." UPI continues, "As the world's biggest database-software company, the Silicon Valley-based Oracle would be acquiring a group that is one of the biggest players in customer relation management software, tracking marketing data, client information and other data that helps companies be more efficient in their sales strategies. The deal is still subject to U.S. government regulations under the auspices of the Department of Justice, but while some industry analysts have high hopes for Oracle making the most of the acquisition, others are not so certain." UPI adds, "One thing, however, is certain. For Thomas Siebel himself, founder and chief executive of the company and once himself an Oracle executive, the deal is a very good one as Siebel Systems was faced with a growing number of rivals, while not many companies expressed interest in taking it over. Meanwhile, for Lawrence Ellison, Oracle's chief executive, it could well be that he finally would feel vanquished after years of bitter and public animosity with Siebel following his departure from Oracle. ... 'The combination of Siebel applications with the development capacity of Oracle to enhance our (client relation management) product set ... is a very beneficial business combination that will allow us to be even more effective in delivering high quality, leading edge solutions,' Thomas Siebel said in a news release. ... Ellison too was equally ebullient about the deal, stating that 'in a single step, Oracle becomes the number one CRM applications company in the world. Siebel's 4,000 applications customers and 3,400,000 CRM users strengthen our number one position in applications in North America and move us closer to the number one position in applications globally.' ... Analysts, however, were less effusive about the planned buyout, even when they agreed it could be a mutually beneficial deal."

Realtors Under Renewed Fire From DOJ Suit. CNN/Money (9/14) reports, "Are home buyers any closer to actually saving money on commissions? ... The Department of Justice last week sued the National Association of Realtors over its "opt-out" policy -- the latest shot in an ongoing war to force competition in the real-estate industry, and one that could just maybe lead to a lowering of the standard 6 percent commission." CNN/Money continues, "The opt-out policy allows NAR members to keep their real-estate listings from being broadly disseminated over the Internet. ... Real-estate brokers regularly share information about listings. That enables them to put together buyers and sellers more efficiently. But if an agent opts out, it means that none of his listings can be displayed on other agents' Web sites. And he cannot list other agents' properties on his. ... If a buyer begins his home search on the Web, he may never see some of the properties available. That, to the Justice Department, does a disservice to consumers. Buyers would have fewer homes to choose from. Sellers would have fewer buyers bidding for their properties." CNN/Money adds, "Why would a broker want to opt out? After all, it's in the agent's best interest to have as many buyers as possible see (and bid on) a property, and the agent has a fiduciary responsibility to get the seller as high a price as the home can command. ... NAR spokesman Peter Cook said that the opt-out policy is simply a way to provide good service -- many clients don't want their properties widely displayed on the Internet. Some of the wealthy and the famous wish to avoid publicity and some sellers have safety or security issues. ... But critics, such as Bruce MacDonald, deputy attorney general in the antitrust division of the Justice Department, said this opt-out system is designed to 'elbow out' Web-based competitors. ... This is not the first effort by the Justice Department to shake up the real-estate

industry. ... Previous victories for the government agency came in Kentucky, on July 13, when the state real-estate commission agreed to allow real-estate brokers to offer rebates, discounts and other inducements to consumers to win their business. ... A similar agreement was reached in South Dakota this August. The Kentucky and South Dakota cases established the policy that brokers are allowed to lower their fees to drum up business."

WSJ Calls DOJ Suit Against Realtors "Right Target, Wrong Weapon." The Wall Street Journal (9/14) editorializes, "We've been pounding the National Association of Realtors over its anti-competitive behavior, and last week the U.S. Justice Department filed its own antitrust suit charging the Realtors with illegally squeezing low-cost Internet companies out of the market. So why aren't we thrilled? Because this is a case of right target, wrong weapon." The Journal continues, "At issue is the Realtor practice of preventing Internet competitors from having access to the properties for sale on the local 'Multiple Listing Service,' or MLS. The antitrust suit maintains that Realtor 'policy prevents consumers from receiving the full benefits of competition and threatens to lock in outmoded business models and discourage discounting.'" The Journal adds, "The Realtors have acknowledged in internal memos that many of their practices are meant to limit competition and preserve their lofty commissions -- typically 5% to 6% on the sale price. As such, the Realtor response to Justice that denying Internet firms access to MLS listings is 'pro-consumer, pro-competitive, and pro-innovation' fails to pass the laugh test. ... At the very least, these practices violate the ethical and fiduciary duty of real-estate agents to help find the best home at the best price for their clients. ... And yet we have to admit the Realtors have a legitimate claim that they created and own the local MLS database of homes for sale. They are thus within their rights to use their private property as they wish, even if that includes denying access to competitors. As an economic matter, there are no natural barriers to entry here; anyone can start a competing listing service if he desires. The Justice Department's lawsuit would require that all homes be listed on the MLS even if home sellers don't want them to be. ... A federal lawsuit seems to be an inferior way to crack the real-estate cartel, especially since it may well lose on the legal merits. Far preferable would be for the states to repeal their laws that sustain the Realtor racket to the detriment of their own citizens and the cause of homeownership."

Environment/Indian Affairs:

Senate Rejects Challenge To EPA Mercury Rules. The AP (9/14) reports that in a 51-47 vote, the Senate has "turned back a challenge to the Bush administration's strategy on mercury pollution, leaving intact federal rules that give power plants flexibility in how they reduce emissions of the dangerous toxin." Senators "defeated a resolution to void Environmental Protection Agency rules finalized last March. The Democrats and nine Republicans who supported the repeal contended the EPA approach was too slow and too weak in dealing with a pollutant that can cause serious neurological damage to newborn and young children. The White House insisted that its market-based approach to curtailing mercury pollution is effective and founded on sound science, and warned that the president would veto any legislation that overturned the EPA rules."

USA Today (9/14) reports, "Sen. Jim Jeffords, I-Vt., said the rules violate the Clean Air Act and are unwise. 'It is definitely unhealthy for Americans living downwind of coal-fired power plants, especially mothers and their soon-to-be-born children,' he said."

The New York Times (9/14, Janofsky) adds, "The resolution was brought up for a vote through a rarely used and rarely successful procedure, the Congressional Review Act. It allows lawmakers to challenge regulatory decisions. Even if the Senate had passed the resolution, it had little chance to go further. Such challenges require approval of the House, which was unlikely to act, as well as the president's signature. On Monday, the Office of Management and Budget said President Bush's senior advisers would recommend that he veto the effort."

Northeast Nuke Plants Could Impact Greenhouse Gas Pact. The New York Times (9/14, Wald) reports, "A proposed agreement among nine Northeast states to cap greenhouse gas emissions from power plants casts a new light on arguments in New Jersey and Vermont about whether the licenses of two aging nuclear plants should be extended. Community groups in both states are opposing the extensions of the licenses beyond their 40-year terms, but environmentalists are generally supportive of the proposed agreement among the governors to reduce these greenhouse gases, which contribute to global climate change. Shutting down the two reactors would mean immediate, substantial increases in the emissions,

because it would increase reliance on fossil fuel plants, probably tripling emissions in Vermont and doubling them in New Jersey."

Senator Shows Concern Over Rising Heating Costs. The Hill (9/14) reports, "Sen. Pete Domenici (R-N.M.), chairman of the Senate Appropriations Committee's Energy Subcommittee, yesterday asked the administration to estimate home heating prices this winter in light of the damage done by Hurricane Katrina" and "asked Energy Secretary Samuel Bodman yesterday to estimate how much Congress should provide in so-called weatherization assistance to help low-income families deal with higher prices." Energy experts told the Energy and Natural Resources Committee "that home-heating prices could be 31 percent higher than they were a year ago because of damage done to the Gulf Coast by Katrina."

European Court Rules EU Can Prosecute Polluters. The AP (9/14, Wielaard) reports, "European governments can bring criminal prosecutions against any company that violates the European Union's environmental legislation, the bloc's high court ruled on Tuesday." The AP continues, "The ruling boosts the powers of the European Commission, the executive body that drafts EU legislation which the bloc's 25 member states must incorporate into domestic law." The AP adds, "The Commission filed a lawsuit against all EU governments in 2001 for failing to include a reference to criminal prosecution of industrial violators in an anti-pollution bill it had drafted. ... The governments, keen not to be seen to be yielding more powers to the EU, argued that criminal prosecutions shouuld be left to national authorities. ... But the court said the Commission was entitled to ensure the laws it drafts are as effective as possible. ... It said the fight against pollution was a cross-border issue and 'one of the essential objectives' of the EU."

WSJournal Says CAFE Standards Pose Safety Risk. The Wall Street Journal (9/14) opposes Corporate Average Fuel Economy (CAFE) standards imposed on automakers that would raise the standard to 40 mpg by 2010 from 27.5 mpg today. While this measure would save gas, it also trades "blood for oil" because the primary way automakers meet the standards is to reduce the weight of their cars, and "research has consistently confirmed that the lighter the vehicle the more dangerous it is in a crash because there is less survival space and less physical structure to absorb impact."

LATimes Argues Against Power Grid Overhaul. In an editorial, the Los Angeles Times (9/14) says that Monday afternoon's blackout in Los Angeles "reminded Angelenos that their seemingly sturdy, self-contained municipal power system can still be brought to its knees in seconds by a single human error. That's not a comforting thought in the post-9/11 era, when we have to worry about misdeeds as well as mishaps." The Times notes that by Tuesday, Ron Deaton, the California Department of Water and Power chief, "was already promising the City Council that he would hire independent engineers to design a new system that would do a better job of isolating problems, rather than triggering broad shutdowns," but "such an overhaul won't be cheap. What's more, it would be prohibitively expensive to build an electrical grid with so many backups and safeguards that it would resist any and all human errors."

FBI Probes SC Firms' Ties To Tribe. The (SC) State (9/14, LeBlanc) reports, "The Justice Department is investigating allegations of election fraud involving federal campaign contributions raised through organizations tied to the Catawba Indian Nation." The State continues, "The FBI last month searched the offices of three Columbia companies, one of which is owned primarily by the York County tribe, according to investigative documents obtained by The State newspaper. ... The inquiry is being run out of Washington and the Justice Department's Public Integrity section, court records show." The State adds, "The Aug. 31 raid of New River Management & Development, SPM (formerly South Property Management) and Kapp Investment Management yielded 24 boxes of financial records, evidence of political contributions, computers, and business and tax documents, according to an inventory of the seized items. ... In seeking the search warrant, FBI agent Amylynn Miller told a federal magistrate judge the government believes evidence was being concealed in the offices. ... Jay Bender, a longtime attorney for the Catawbas, said Tuesday the tribe is not a target of the probe."

FBI/DEA/ATF/USMS:

DEA Says Cheaper Heroin Coming To Boston Via Cocaine Trafficking Routes. The Boston Herald (9/14, Crimaldi, Johnson) reports that a

"cheaper, purer heroin," once "shuttled into New England from Burma," is now coming to the Boston area "via established cocaine trafficking routes, drug enforcement agents say. 'They had routes they used for cocaine and just like any other organization, if it was successful, why not use it for another drug,' said Tony Pettigrew, a spokesman for the Drug Enforcement Administration's New England Field Division. While drug enforcement agents say there is no single heroin trafficking route, smack typically makes its way to Massachusetts through Florida and then New York City." According to state police Lt. Dennis Brooks, the "number of Massachusetts residents being treated for heroin addiction has climbed from 44,000 to 56,000 in recent years, he said, attributing the spike to the OxyContin craze, which is addicting people to opiates at a younger age. Heroin hits the street in a rock form that is broken down into a powder and sold for as little as $4 to $6 per bag. The DEA classifies heroin into four categories depending on where it comes from: South American, Mexican, Southeast Asian and Southwest Asian."

Ninth Circuit Court Of Appeals Cancels Oral Arguments In Medical Marijuana Case. Oregon Public Broadcasting (9/13, Fogarty) reports, "The Ninth U.S. Circuit Court of Appeals cancelled oral arguments Tuesday in an Oregon medical marijuana case. The lawsuit was filed by LeRoy Stubblefield of Sweet Home. In 2002, federal drug agents seized marijuana plants that he was growing under Oregon's 1998 medical marijuana law. In a separate case, the US Supreme Court in June sided with the federal government's efforts to crack down on medical marijuana in California." Paul Stanford of theHemp and Cannabis Foundation "says the California decision may be why the appeals court cancelled oral arguments in the Oregon case." In the California case, the "U.S. Supreme Court said the Drug Enforcement Agency has the authority to prosecute marijuana users under federal law, even if states allow the use of pot to treat medical ailments."

The California Recorder (9/14, Scheck) reports, "It was unclear why there was no drum circle on the third floor of the 9th U.S. Circuit Court of Appeals on Tuesday morning. ... The dozen or so people assembled outside Courtroom One were certainly loud enough -- despite repeated exhortations by security guards to keep the noise level down -- and the top thing on their minds was smoking pot. ... And these are people who take their weed seriously: pot lawyers, pot lobbyists, pot activists, pot smokers, a pot reporter and the requisite pot publicists -- a middle-aged assembly that ranged from besuited to bedraggled." The Recorder continues, "As the group waited for a 9th Circuit panel to finish hearing more conventional arguments -- a qui tam case, for example -- they had lots to say about marijuana. ... 'If you smoke pot, you have less of a chance of getting cancer than if you don't,' explained Ed Rosenthal, the focal point of the group." The Recorder adds, "Rosenthal is a pot celebrity, as well as an author and publisher of pot books. ('"The Big Book of Buds," volume one and volume two, are probably our best-sellers,' said the primly suited Jane Klein, Rosenthal's business partner and wife. 'They treat marijuana like you would roses,' she said, referring to pictures and descriptions of growing conditions.)" The Recorder notes, "In 2003, Rosenthal's celebrity moved beyond the pot community when he was convicted in San Francisco federal court of growing marijuana, despite the fact that the city of Oakland had licensed him to do so. ... Rosenthal appealed that verdict -- even though U.S. District Judge Charles Breyer sentenced him to just one day in jail -- because Breyer refused to let the jury hear that the pot was grown for locally sanctioned medicinal use. ... After the arguments, which ran nearly a half-hour longer than scheduled, the judges didn't seem swayed by either side. The same could not be said for the pro-pot contingent, which stood outside the courtroom expounding on the need to legalize marijuana -- though that was not the issue before the 9th Circuit."

FBI Nabs Eight In New York, New Jersey On Drug Conspiracy Charges. Long Island Newsday (9/14) reports, "FBI agents arrested eight men in New York and New Jersey on Tuesday on racketeering, money laundering and other charges stemming from an alleged conspiracy to distribute large quantities of marijuana and cocaine. The eight were named in an indictment returned by a grand jury in Florida that also seeks forfeiture of $75 million in profits from the alleged illegal drug sales, some of which involved truckloads of marijuana shipped from the U.S.-Mexican border to New York, New Jersey, Florida, Pennsylvania, Ohio, Kansas and other states." Among those charged was John Leto, "also known as 'Johnny Balls' and allegedly a member of an organized crime family in New Jersey. Leto, 39, allegedly used his connections as a 'La Cosa Nostra associate' and his construction business to protect the marijuana business and help distribute the drugs, according to the indictment."

Alleged Gang Members May Face Death Penalty For Murder, Drug Charges. The Valencia County (CA) News-Bulletin (9/14, Sandlin) reports that a California grand jury "is scheduled to take up potential death penalty charges against three alleged members of a Valencia County drug gang this month. The target notice sent to the three men shifts the focus away from a pending drug prosecution in U.S. District Court." Ben Gallegos, Frankie Gallegos, and Juan Calles, "alleged members of the East Side Locos, are being investigated for seven slayings, including shootings and strangulations. Investigators believe the shootings are either gang- or drug-related. ... The three men, along with eight others, were indicted by a federal grand jury in March for methamphetamine distribution. The indictment also seeks forfeiture of $63,900 in cash seized during a series of raids March 10. A superseding indictment was handed up in July charging Ben Gallegos with operating a continuing criminal enterprise, conspiracy and distribution of methamphetamine. Attorneys for the three in the federal case want to postpone pretrial matters because of the potential death penalty charges in state court."

Mississippi Teen Goes On Trial For Trying To Sell Bomb. The Jackson (MS) Clarion-Ledger (9/14, Gates) reports, "A Brandon (MS) teenager built a bomb designed to kill and injure, a prosecutor told a federal jury Monday." The Clarion-Ledger continues, "James Rankin, 19, of 3175 U.S. 80 East is charged with possession of an unregistered firearm, transfer of an unregistered firearm and the manufacture of an unregistered firearm. ... If convicted, Rankin faces up to 30 years in prison. The case continues today in U.S. District Court in Jackson. ... 'The defendant made a bomb, not a firework,' U.S. Assistant Attorney David Fulcher said in his opening statement. 'It's simple. The defendant made a bomb that was designed to kill and with the intent for it to kill.'" The Clarion-Ledger adds, "Rankin's attorney, U.S. Public Defender Dennis Joiner, told the jury he would delay his opening statement until after the prosecution concludes its case. ... Rankin was arrested Nov. 9, 2004, after he allegedly tried to sell a bomb to an undercover agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives. ... 'He asked if I wanted a large pipe bomb, a small pipe bomb or a hand-held grenade,' ATF special agent Connie Wilson testified. ... Wilson said she posed as someone wanting to harm an ex-husband in Texas after a confidential informant told her Rankin could make a bomb."

Former Deputy US Marshal Sentenced To 15 Years For Maryland Killing. The Washington Post (9/14, B3, Kunkle) reports, "A former deputy U.S. marshal who killed a young Navy seaman in a road rage incident last year at a Rockville shopping plaza was sentenced yesterday to 15 years in prison." The Post continues, "Arthur L. Lloyd, 54, who was convicted in June of voluntary manslaughter in the Oct. 29 shooting of Ryan T. Stowers, probably will serve about 11 years before he is eligible for parole, prosecutors said." The Post adds, "Calling the shooting 'an enormous tragedy' for both families, Montgomery County Circuit Court Judge Ann S. Harrington tailored a sentence that satisfied neither side completely. She went beyond state guidelines calling for a five- to 10-year sentence, but she declined to impose the maximum 35-year term requested by prosecutors."

The AP (9/13, Adelman) reports, "During their testimony, members of Lloyd's family portrayed the 54-year-old as a peaceful man distraught over his actions in the Oct. 28 shooting and asked the judge to be lenient. ... Lloyd's family members were followed by those of (Stowers, who) offered teary testimony and asked for the judge to issue the harshest punishment she could. ... When Lloyd was offered the chance to speak on his own behalf, he sought to explain his actions in the Rockville shopping center parking lot. He said law enforcement officers like him are skittish since the Sept. 11, 2001, terrorist attacks, and that he was incensed by a barrage of profanities and racial epithets that Stowers subjected him to. He also said he feared that Stowers might be someone he helped put in jail as a marshal, who was now seeking revenge."

USMS Gives $10,000 To Kentucky Cabbie Who Turned In Fugitives. The AP (9/14) reports from Covington, KY, "Cab driver Mike Wagers, credited with the tip that led to the capture of two Tennessee fugitives wanted in the killing of a corrections officer, was rewarded Tuesday with $10,000." The AP continues, "John Clark, acting director of the U.S. Marshals Service, presented the check for information leading to the arrest of George and Jennifer Hyatte, charging in the fatal shooting of a guard during George Hyatte's escape outside a courthouse in Kingston, Tenn. ... 'I'm just overwhelmed,' said Wagers, 33, who said he plans to split the money with a friend whose wife recently died, and will take a vacation."

The Cincinnati Enquirer (9/14, Hannah) reports,

"Wagers gave authorities a tip that helped lead to the Aug. 10 capture of George 'Shorty' Hyatte and his wife Jennifer Hyatte. ... The couple went on the run after George Hyatte made a daring Aug. 9 jail escape from Tennessee. He was being taken back to jail after a court hearing when his wife allegedly shot and killed corrections officer Wayne Morgan. During the shootout, Jennifer Hyatte received a bullet wound in the leg but was able to escape with her husband. The couple made their way north to Erlanger, where they stayed overnight at an EconoLodge and then hailed Wagers' cab to Columbus the following morning." The Enquirer adds, "Wagers called authorities after realizing the fugitives' description matched his two passengers. His tip led police to the hotel room in Columbus where the couple was staying. ... The couple had told Wagers that they were Amway salespeople who needed to get to Columbus for a convention. Wagers said he never suspected the two were fugitives, but he became suspicious of their Amway claim when they didn't try to sell him anything."

Immigration:

Lawmakers Seek To Avoid "Amnesty" Label On Immigration Plans. The Washington Times (9/14, Dinan) reports, "As the immigration debate warms up over the next few months, President Bush and congressional lawmakers will try to prevent their legislation from being tagged with the 'amnesty' label. ... The president demonstrated the power of the word during last year's campaign when he leveled the charge against his Democratic challenger, Sen. John Kerry of Massachusetts: 'Here is where my opponent and I differ. In September 2003, he supported amnesty for illegal aliens.' Some Republicans, however, say the president's guest-worker plan is an amnesty that he doesn't want to call an amnesty."

Tax:

Jury Selection Delayed In Nevada Trial Of Anti-Tax Advocate. The Las Vegas Sun (9/14, Kihara) reports, "Jury selection in the tax fraud case of anti-tax advocate Irwin Schiff was stalled Monday after potential jurors who were waiting outside the courtroom said a man tried to talk to them about the case." The Sun continues, "A potential juror told U.S. District Judge Kent Dawson that John Anthony Malan told prospective jurors outside an elevator on the sixth floor of the George Federal Building to 'just remember to listen to the facts' and not to listen to opinions. At least seven more potential jurors also heard comments from Malan and were called into a private sidebar individually with the attorneys from both sides and Dawson." The Sun adds, "The interruption came during jury selection in the criminal case against Schiff, a local author and businessman, and two other defendants, Cynthia Neun and Lawrence Cohen. ... All three were indicted in federal court in March of attempting to evade paying taxes, aiding and assisting in filing false tax returns and conspiring to defraud the government, among other charges. ... The outspoken Schiff is defending himself while Neun and Cohen have attorneys." The Sun notes, "Malan was brought before the judge and initially denied speaking to the jurors. ... After Dawson further inquired as to whether Malan attempted to communicate with prospective jurors about the case and asked if he was attempting to influence the potential jurors, Malan replied, 'I object to this entire proceeding.' ... Dawson, after calling for a hearing for Malan on Wednesday, ordered U.S. marshals to eject Malan from the federal courthouse."

Congress-Administration:

Roberts Remains Unruffled By Tough Questions During Questioning By Senate Panel. Judge John Roberts faced questions from the Senate Judiciary Committee yesterday in a performance lauded by most observers as polished and temperate. While he was quizzed on a number of issues, abortion and the precedential value of Roe Vs. Wade were the topics that drew most media attention. Most observers agreed Roberts acquitted himself favorably in the hearing.

ABC World News Tonight (9/13, story 6, 3:50, Douglass) reported Roberts "was cool and polished." Roberts "paid tribute to the principle of stare decisis, not overturning previous Supreme Court decisions. And he agreed there is a right to privacy." But he "would not say if Roe versus Wade is protected by the right to privacy. And he refused to answer questions about his views on abortion and on most subjects, insisting they might come before the court someday." Democrats "hammered him about things he wrote as a young government lawyer 25 years ago, when the Reagan Administration fought against expanding civil rights laws."

The CBS Evening News (9/13, story 6, 2:35, Borger) reported, "The first flash point, abortion rights --

the key question: Is the precedent of 'Roe v. Wade' so strong that Roberts would not vote to overturn it?" Judge Roberts: "I do think that it is a jolt to the legal system when you overrule a precedent." The "only woman on the panel grilled Roberts on his old legal memos which appeared to disparage women, and their complaints about unequal pay." Judge Roberts: "I have always supported and support today equal rights for women."

NBC Nightly News (9/13, story 5, 2:20, P. Williams) reported, "Democrats asked if the war on terror allows the government to cut back on freedoms at home." Sen. Patrick Leahy (D) Vermont: "Do you feel that you'd be able to interpret the Bill of Rights the same, whether we're at wartime or not?" Judge Roberts: "I do, Senator. And the obligation of the court to protect those basic liberties, in times of peace and in times of war, in times of stress and in times of calm, that doesn't change." Williams: "As for controversial memos that Roberts wrote as a lawyer in the Reagan Administration, including one referring to what he called the 'purported 'gender gap', Roberts said he never meant to suggest that women deserve less legal protection."

The New York Times (9/14, Stolberg, Liptak) reports that in "a day punctuated by flashes of hostility and humor, Judge John G. Roberts Jr. on Tuesday acknowledged a constitutional right to privacy and said overturning precedent was a 'jolt to the legal system.'" But he "artfully sidestepped the contentious question that has dogged him as a Supreme Court nominee, whether he opposes Roe v. Wade, the 1973 decision that established a constitutional right to abortion." Democrats "kept a tally of the number of questions they said Judge Roberts refused to answer, putting the number at 60." Judge Roberts "told the senators that he did not have a specific legal philosophy, and he resisted comparisons to William H. Rehnquist, the late chief justice for whom he once clerked, telling senators that he would be 'my own man.'" He also "flatly rejected the idea that his Roman Catholic religion played a role in his court decisions, saying: 'I look to the law books and always have. I don't look to the Bible or any other religious source.'"

The Washington Post (9/14, A1, Goldstein, Babington) reports in a front page story that "testified yesterday that he believes that the Constitution protects the right to privacy, the legal underpinning of the nation's landmark abortion law, but he refused to say whether he would vote to uphold Roe v. Wade if he is confirmed as chief justice of the United States." In a "day of sometimes testy exchanges with senators, Roberts distanced himself repeatedly from his conservative writings as a young legal adviser to President Ronald Reagan, including a memo in which he had disparaged privacy as 'amorphous' and a 'so-called right' not spelled out in the Constitution." Democrats "pressed him aggressively, seeking to elicit his views on abortion and a range of other volatile civil rights issues by reminding him of stances he had advocated in the past. But time and again throughout the first full day of questioning at his Senate confirmation hearing, Roberts refused to divulge the way he would rule on matters of voting rights, gender equity, fair housing and the role of religion in public life." Democrats "suggested that Roberts might be a stealth nominee who would shift the court more sharply rightward than his careful testimony suggests."

The Los Angeles Times (9/14, Reynolds, Schmitt) reports Roberts "indicated Tuesday that it would be hard for the Supreme Court to overturn the Roe v. Wade decision legalizing abortion, but he refused to say whether he would support efforts to do so." Roe and "the legal arguments behind it -- especially privacy rights and the rule of precedent -- came to the fore repeatedly during more than 10 hours of questioning." Democrats "used the opportunity to inquire into the nominee's views on issues central to their party's legacy over the last half-century -- abortion rights, civil rights and environmental regulation, among others." Roberts "kept his voice measured, his face placid and his manner deferential. A more deeply furrowed brow was his only sign of discomfort." As the "day wore on, Democrats at times seemed disarmed by the nominee's genial and sometimes self-effacing testimony," but they "also expressed frustration at what they viewed as his lack of responsiveness. Aides to committee Democrats said they counted 21 occasions in which Roberts declined to answer questions, including his views of cases that already had been decided."

USA Today (9/14, Kiely, Biskupic) reports the hearing was "sometimes testy" and was "marked by tart exchanges with Democrats," and that Roberts "would not say Tuesday if he'd vote to overturn the 1973 ruling that legalized abortion nationwide." But Roberts "did say he believes there is a constitutional right to privacy, and he said the Roe v. Wade ruling is 'settled as precedent' that must be viewed with respect by judges." Sen. Lindsey Graham "said the nomination may mark the end of an era in which most Supreme Court nominees won strong bipartisan approval. He noted that liberal Justice Ruth Bader Ginsburg was confirmed in 1993 with 96 of the 100 votes in the

Senate. Graham said Republicans, who hold 55 Senate seats, will retaliate 'if the Democratic Party votes against him (Roberts) en masse because of his (conservative) philosophy.'"

The AP (9/14, Benac) reports that from "the first question of the day — on abortion — right through the alphabet to the Zimmer case on voting rights, Roberts held his own as senators tried to goad him into revealing more of his thoughts than he wanted on the controversial issues of the day. The artful dodger employed a mix of humor, history and humility as he found 50 ways to defend his views and politely demur when he didn't want to discuss them." When Sen. Joseph Biden, D-Del., "complained that Roberts was filibustering, the judge lightly scolded, 'That's a bad word, senator.'"

The Washington Times (9/14, Dinan) reports Republicans and conservatives "said John G. Roberts Jr. acquitted himself perfectly," but "Democrats and liberal activists said he ducked questions and probably lost support for his nomination to be chief justice of the United States." Conservatives "from Leonard Leo, the executive vice president on leave from the Federalist Society, to the Family Research Council and Concerned Women for America said Judge Roberts expertly handled questions on abortion, in particular. But Democratic senators said he was being evasive." Ralph G. Neas, president of People for the American Way, said, "Yesterday he spoke about baseball and today he played dodgeball all day. He gave the illusion of candor and the appearance of openness, but he spent the entire day responding to direct questions with evasive answers."

The Hill (9/14, Allen) reports, "Despite a few testy early exchanges with Democratic Sens. Edward Kennedy (Mass.) and Joseph Biden (Del.) over his views on voting rights and sex discrimination, Roberts demonstrated a level of composure rare among high-profile nominees facing adversarial senators." In contrast to "some past nomination proceedings, senators limited themselves mostly to questions about jurisprudence, rather than Roberts's character or personal qualifications — perhaps yet another indication that Democrats do not intend to use all means necessary to defeat his nomination."

The Legal Times (9/14, Goldman, Mauro) reports, "Again and again, Roberts returned to familiar themes throughout the full day of hearings: that courts should judge, not legislate; that the right to be left alone is a fundamental American right, even though it is not specifically mentioned in the Constitution; that he would not answer specifics about any particular cases; and that his religious beliefs would not play any role in his decision-making. ... 'I do know this, that my faith and religious beliefs don't play a role in my judging,' Roberts said in response to questions from Sen. Dianne Feinstein, D-Calif., about his impartiality. 'When it comes to judging, I look to the law ... I don't look to the Bible.' ... Roberts also sidestepped a question from Feinstein about whether the federal courts should become involved in end-of-life decisions. His response: 'An abstract opinion [on that subject] that would pre-judge that case is inappropriate.'"

CNN's The Situation Room (9/13, Johns) reported that the hearings have gone "just about the way you would expect. John Roberts in the hot seat taking questions from Democrats and Republicans. Quite predictably he has said that he supports the notion of stare decisions, or that is settled precedence in the law. He's also said, importantly, to some folks that he does believe there is a constitutionally protected right to privacy. Of course, that's come up again and again here on Capitol Hill, in part, because, back in 1981, he wrote a memo while working over at the White House, questioning the right to privacy, some said. He's, clearly, in his view there is. ... And one of the key questions, of course, has been whether the right to privacy means there's a right necessarily to an abortion. Of course, people taking different views."

Fox News' Special Report (9/13, Hume) reported that Roberts "remained calm and cordial throughout a day of tough questions as members of the Senate Judiciary Committee tried to pin him down on matters that could come before the court that he could lead." Fox (Angle) added, "Roberts managed to get out of political quick sand of abortion without committing one way or the other. On that and other issues, he may not have won over senator Kennedy and other critics, but he wasn't likely to get their votes anyway."

Jeff Greenfield said on CNN's The Situation Room (9/13), "There's been some concern from folks on the conservative side of things that some of Roberts' critics or questioners might probe too deeply into this question of Catholic faith, and I think Roberts -- not only did Roberts answer that quickly and effectively, but he raised that where Dianne Feinstein didn't."

Abortion A Constant Subtext Of Hearing. A number of print stories focused specifically on Judge Roberts' responses to questions about Roe Vs. Wade and abortion. But there was no consensus on where, at the end of the day, Judge Roberts' ultimately stood on the question, with different outlets emphasizing different interpretations of his remarks, which raised concerns among conservatives as well as pro-choice

advocates.

The New York Times (9/14, Toner) reports that on no issue were Roberts' "words framed more carefully - or listened to more closely - than on the subject of abortion." Roberts "paid full tribute to the weight of 32 years of precedent behind Roe v. Wade, the 1973 Supreme Court decision establishing abortion rights." But he "stopped short, again and again, of endorsing Roe itself." Abortion rights advocates, "who were overwhelmingly opposed to the Roberts nomination before the hearing began, said his testimony Tuesday affirmed their fears." Abortion opponents "and social conservatives were praising Judge Roberts's testimony as appropriate and - by implication - politically acceptable." The AP (9/14, Espo) reports Roberts "repeatedly refused to answer questions about abortion and other contentious issues at his confirmation hearing Tuesday, telling frustrated Democrats he would not discuss matters that could come before the Supreme Court."

The San Jose Mercury News (9/14) ran a Chicago Tribune story by Jill Zuckman, who reports, "More than civil rights, more than property rights, more than environmental rights, the issue of abortion has insinuated itself into every aspect of the Supreme Court confirmation process. And Tuesday, it seemed to be frustrating nearly everyone." Not surprisingly, Roberts' answers "did not entirely satisfy advocates on either side." His "answers to questions about Roe v. Wade gave no comfort to liberals, who wanted - though they could hardly have expected - an explicit promise of support for high court ruling that legalized abortion nationwide. But neither did it give comfort to social conservatives who hoped Roberts would vote to overturn the decision."

The Washington Post (9/14, Becker) reports that "nearly a quarter of a century ago," Judge Roberts "wrote skeptically about the legal concept that underpins a woman's right to an abortion, calling it 'the so-called right to privacy.' Yesterday, when pressed by a Republican senator about his writing, the Supreme Court nominee said he believes that the Constitution contains such a right, but he refused to say whether it covers the termination of a pregnancy." Kate Michelman, former president of NARAL Pro-Choice America, said, "We still do not have clarity on his views."

But the Washington Times (9/14, Hurt) reported the story under the headline, "Roberts Defends Roe As 'A Precedent.'" Knight Ridder (9/14, Henderson, Kuhnhenn) headlined its story, "Abortion A `settled Precedent,' Roberts Says." Knight Ridder reports Roberts "gave strong indications Tuesday that he'd be reluctant to overturn court precedents such as Roe v. Wade, and he voiced support for a right to privacy - which underpins court rulings on gay rights and other individual liberties - that's much broader than his previously known stance."

The Wall Street Journal (9/14, Cummings, Bravin) reports Roberts "raised concerns among conservatives by telling senators that he recognized a constitutional right to privacy, and backed the 1965 Supreme Court opinion that was later invoked to justify abortion rights -- a central battleground in the current ideological debate over the direction of the judiciary." But Roberts "left open the fate of the 1973 Roe v. Wade decision on abortion rights -- often linked to the privacy case -- which he suggested rested on different reasoning." Judge Roberts's "embrace of the privacy right underlying Roe rejected the arguments of some prominent conservative legal scholars, and unsettled some religious activists who have made overturning the landmark abortion ruling a centerpiece of their political agenda."

The AP (9/14, Werner) reports Sen. Dianne Feinstein "said she was disappointed John Roberts wasn't more forthcoming in discussing abortion, women's rights and other issues during the first day of questioning Tuesday in his Supreme Court nomination hearings." Sen. Feinstein said, "I actually felt he made up his mind not to answer my questions, knowing what I might ask. What I was trying to do today is to get a sense of who Judge Roberts is. I'm disappointed that Judge Roberts was not more forthcoming."

The Los Angeles Times (9/14, Savage) reports that since Judge Robert Bork, "Republican nominees have responded to the senators' questions without directly answering whether they would uphold or reverse Roe vs. Wade. On Tuesday, Judge John G. Roberts Jr. followed that script, assuring pro-choice senators that the court's precedents were the building blocks of the law and should not be knocked down without good reason. It is a jolt to the legal system to overturn a precedent, he said."

Roberts Remains Enigmatic. The Washington Post (9/14, A1, Milbank) reports in a front page story that Judge Roberts, "star litigator, adviser to presidents and top-flight jurist, showed that he could be something else: the very model of an enigmatic nominee. The Roberts who answered questions for eight hours yesterday was very much the Roberts who emerged in his writings released over the summer. He maddened the committee's Democrats, delighted its Republicans and charmed most of both." Roberts was "sharp-

tongued," was "quick on his feet," and "showed flashes of wit. Asked about an old memo he wrote supporting judicial term limits, he admitted: 'You know, that would be one of those memos that I no longer agree with, senator. I didn't fully appreciate what was involved in the confirmation process when I wrote that.'" What Roberts "did best -- or, at least, most -- was deflect questions on charged issues." The "most inflammatory subject -- abortion -- was essentially off-limits."

The New York Times (9/14, Purdum) reports Roberts' "face never scowled. His level tone seldom varied. He answered questions he found useful to his cause and avoided those he did not. Above all, Judge John G. Roberts Jr. explained his views and defended his honor with the force and fluidity of an advocate who has argued often before tougher judges than those he faced on the Senate Judiciary Committee on Tuesday." In short, Roberts "was Delphic, and his supporters and critics each ended the day saying his performance had hardened their enthusiasm or their doubts."

The New York Times (9/14, Greenhouse) reports Judge Roberts "invoked the memory of a man who more than 60 years ago made a similar journey between two branches of government and who shed some of his earlier views in the process." Robert H. Jackson was attorney general "when President Franklin D. Roosevelt named him to the Supreme Court in 1941. As Judge Roberts pointed out in a colloquy with Senator Patrick J. Leahy of Vermont, the committee's senior Democrat, Justice Jackson then changed from 'someone whose job it was to promote and defend an expansive view of executive powers' to someone who 'took an entirely different view of a lot of issues,' including the scope of presidential power." The nominee's "message was oblique, but clear: Do not judge me by the hundreds of memorandums I wrote as a young lawyer in the Reagan administration."

Roberts Willing To Discuss Some Past Supreme Court Rulings. The New York Times (9/14, Liptak) reports that during the first day of questioning in his confirmation hearings yesterday, Judge John G. Roberts Jr. "was generally careful not to comment on the correctness of specific Supreme Court cases," but "not always. Judge Roberts was willing to discuss decisions concerning school desegregation, the privacy of the marital relationship, the internment of Japanese-Americans and the limits of presidential power. His willingness to comment on cases seemed to increase in direct proportion to his assessment of the extent to which they have become fundamental to an understanding of American constitutional law."

The Washington Times (9/14, Lakely) says Roberts "rebuked a recent high-court decision that relied on foreign law, calling it a 'misuse of precedent' that substitutes a judge's 'personal preferences' for the Constitution. Sen. Jon Kyl, Arizona Republican, asked Judge Roberts what, 'if anything, is the proper role of foreign law in U.S. Supreme Court decisions?' The question was a reference to the Roper v. Simmons decision by the Supreme Court in March, in which the majority cited foreign law to overturn a death-penalty sentence for a 17-year-old murderer. That 5-4 decision is cited by conservative legal scholars as one reason it is important for President Bush to appoint a reliable conservative to the Supreme Court. ... Judge Roberts maintained that he didn't want to comment on any particular case decided by the court. 'I would say, as a general matter, that there are a couple of things that cause concern on my part about the use of foreign law as precedent,' said Judge Roberts, beginning his critique by noting that while U.S. judges are not held directly accountable by the people, the politicians who appoint them are."

Specter Probes Roberts On Stare Decisis. The Washington Times (9/14, Taylor) reports that Senate Judiciary Committee Chairman Arlen Specter was quick to probe Roberts' view on "'stare decisis,' the Latin phrase meaning to let stand what has already been decided." Specifically, "Specter asked how stare decisis applies to Roe v. Wade, which legalized abortion in 1973, and a subsequent case which upheld it in 1992. Judge Roberts said he wished not to discuss abortion since it is likely to come before the Supreme Court again, but asserted that past rulings may indeed warrant reconsideration under special circumstances."

Roberts Downplays Pro-Bono Work For Gay Rights Group. The Washington Times (9/14, Hurt) says Roberts "downplayed his pro-bono legal work to help a homosexual rights group win one of the most significant Supreme Court cases regarding such rights. 'I was asked frequently by other partners to help out, particularly in my area of expertise,' he told Senate Judiciary Committee Chairman Arlen Specter, Pennsylvania Republican. 'And I never turned down a request.'" The Times adds, "While Judge Roberts did not write briefs or become deeply involved in preparing the case, he did review files and help prepare oral arguments for Lambda Legal without charge. He also played the role of conservative Supreme Court Justice Antonin Scalia in the mock trial."

Liberal Groups Seeking To Flip Liberal Republicans. The Hill (9/14, Bolton) reports liberal

interest groups "are focusing on flipping three centrist Republican senators from the Northeast as the key to their strategy at least to tarnish the confirmation of Supreme Court nominee John Roberts." Many Democratic Senate aides, strategists and journalists "believe that Roberts's confirmation is a foregone conclusion. But liberal activists such as Ralph Neas, president of People for the American Way, insist the battle is not over and the committee and floor votes will be close." Liberal leaders "are frustrated that the press has in some cases already called the fight a win for Republicans." Liberal strategists say "that if they can turn a Republican against Roberts it would embolden Democrats to follow suit. Accordingly, they are focusing their lobbying efforts on Sens. Olympia Snowe and Susan Collins of Maine and Lincoln Chafee of Rhode Island."

Blackmun Had Intended Roe To Be Narrow Reform Of Abortion Laws. The Los Angeles Times (9/14, Savage) reports that on "the fifth anniversary of" Justice Blackmun's "death, the Library of Congress opened his papers to the public. His thick files on the abortion cases tell the little-known story of how Roe vs. Wade came to be. It is the story of a rookie justice, unsure of himself and his abilities, who set out to write a narrow ruling that would reform abortion laws, not repeal them."

Specter's Independence Noted. NBC Nightly News (9/13, story 6, 4:00, Williams) profiled Sen. Arlen Specter, who "has been unafraid to act independently. It is a virtue he believes will serve him well throughout these hearings." That independence "got him into deep trouble in his own party when he said publicly that he doubted the Senate would confirm a nominee who would overturn Roe v. Wade."

Other Commentary. In a Washington Post news analysis (9/14, A9), Charles Lane says Roberts "appeared to sound a less conservative note on abortion-related issues than he had in the memos and briefs he wrote as a lawyer in the Reagan and George H.W. Bush administrations. He offered a surprisingly emphatic endorsement of a constitutional right to privacy -- the basis of the Roe v. Wade decision recognizing a right to abortion, which he seemed to disparage as a young lawyer in the Reagan administration. And, as if repeating a carefully formulated phrase, he referred time and again to a 1992 Supreme Court ruling upholding Roe as "a precedent entitled to respect.'" Yet, "ever the careful lawyer, Roberts committed himself to nothing more tangible than a promise to think hard before voting either to uphold or overturn the abortion precedents about which so much controversy revolves." The "overall impression was of a talented nominee who used his skills to avoid twin perils: revealing nothing of his views or revealing too much."

On the CBS Evening News (9/13, story 7, 1:30, Schieffer), Chicago Tribune reporter Jan Crawford Greenburg said Roberts said Roe "was settled law, subject to the legal principle that allows courts to rethink their decisions if there are compelling reasons to do so. He did not say he would not overturn Roe, despite question after question from senator after senator, trying to pin him down on those views." Today, "very much what we saw was the John Roberts that we've seen much of the summer, the John Roberts that the justices have seen when he argued before them before the Supreme Court. He's a man who is prepared, we saw his humor, we didn't really see him go off his points that he's made before."

On the CBS Evening News (9/13, story 7, 1:30, Schieffer), Gloria Borger said, "Privately, the Democrats I speak with are telling me we understand that John Roberts is going to get confirmed, and lots of them are starting now to focus on just who the second nominee for the Supreme Court is going to be. There's lots of thought that that nominee could be more conservative and more controversial and they ought to start thinking about that one."

In a USA Today news analysis (9/14), Joan Biskupic and Toni Locy say, "Roberts was a deft witness Tuesday, showing himself to be a smart, articulate, by-the-book jurist while offering only minimal answers to senators' questions." When Democrats "tried to put him on the defensive about his past positions as a Reagan administration lawyer or his current reluctance to explain his views, the conservative federal judge countered their assertions without losing his cool. It was senators such as Edward Kennedy, D-Mass., and Joseph Biden, D-Del., who became visibly frustrated."

In his Los Angeles Times column, (9/14), Ron Brownstein says Roberts "exuded the quiet confidence of a man who knew that he was ahead in the game during a lengthy but mostly sedate confirmation hearing Tuesday. He left the long first day of questioning before the Senate Judiciary Committee the same way he entered it: a clear favorite for confirmation as the youngest Supreme Court Chief Justice in two centuries. By firmly refusing to answer questions on specific cases he might face on the bench — including the 1973 Supreme Court decision guaranteeing the right to abortion — Roberts may have provided Democrats

already inclined to reject him more grounds to do so. But most analysts agree that he said little likely to enlarge the circle of senators opposed to him."

The AP (9/14, Fournier) reports Roberts "cast himself Tuesday as a humble, fair-minded jurist with views just nimble enough to please anybody - from the abortion-rights 'soccer Mom' to the staunchest red-state conservative. But there should be no mistake about his ideology. Roberts is deeply conservative. Period."

USA Today (9/14) sys in an editorial, "John Roberts more than lived up to his billing Tuesday as a knowledgeable, superbly prepared, genial and highly articulate legal mind — and as a nominee determined not to answer any question that could cause him trouble. But all-day testimony before the Senate Judiciary Committee nevertheless offered some new impressions of the prospective chief justice." The first is "that he is more likely to be a cautious, establishment jurist than a firebrand in the mold of Antonin Scalia or Clarence Thomas — or at least that is the impression he sought to convey. Most notably, Roberts distanced himself from some of his most troubling past writings, attributing them to youth (many were written when he was in his 20s), the need to reflect the views of his employer (the Reagan administration) or to misinterpretation (a comment about not wanting homemakers to become attorneys was just a lawyer joke)."

In an editorial, the Los Angeles Times (9/14) discusses the first day of John Roberts' judicial confirmation hearings. The Times says that Roberts' reaffirmation of "his commitment to the principle of stare decisis, which Sen. Arlen Specter (R-Pa.) helpfully defined for viewers who didn't go to law school as the importance of adhering to judicial precedents," surely "made opponents of a woman's right to choose an abortion a bit anxious (although its genius was that it was sufficiently opaque to worry supporters of abortion rights, too)."

Bush Accepts Responsibility For Slow Federal Response To Katrina. At a news conference yesterday, President Bush said he, ultimately, was responsible for the Federal government's slow response to the Hurricane Katrina disaster. The move was seen as a significant concession by the White House, which has in the past been reluctant to admit error. The networks featured the President's news conference prominently in their lead stories, but largely neglected the President's meeting with Iraqi President Jalal Talibani.

ABC World News Tonight (9/13, lead story, 2:45, Vargas) reported Bush "for the first time" took "ultimate responsibility for the Federal Government's failures in the wake of Katrina. Mr. Bush also admitted what people all over the country have been saying for the last two weeks -- namely that there are serious problems with the way the government responds to disasters." ABC (Moran) added it was "an extraordinary moment in this Presidency. George W. Bush has never said anything like this before. He's a man who does not like to look back or admit mistakes. He did both today." In "what seemed to be a difficult moment for him," Bush "acknowledged his Administration's failures and accepted a share of the blame." President Bush: "Katrina exposed serious problems in our response capability at all levels of government. And to the extent that the Federal Government didn't fully do its job right, I take responsibility." Moran: "And then, when asked directly if given the failures during Katrina, the US government is prepared to respond today to a major terrorist attack or disaster, Mr. Bush could not say yes." The President's "rare expression of contrition comes as his public support is hemorrhaging badly, even among his base. 57% of Americans now disapprove of his performance as President, according to the latest ABC News poll."

NBC Nightly News (9/13, lead story, 3:25, Williams) reported, "Today the President said Federal responsibility is his, and he'll say it again to the nation later this week." NBC (Gregory) added Bush "took the rare step of admitting a mistake, saying the storm exposed serious problems in the government's response capability." Aides said Bush "wanted to clear the air, remind the public he knows the buck stops with him. Mr. Bush also conceded the Katrina response raises grave questions about how the government would respond to another terror strike." White House officials "say the President will once again accept responsibility when he addresses the nation from Louisiana. We are told during that address the President will also update the country on what will be done for all of these victims left homeless by Katrina and over the long term." It was "a huge shift, for an Administration and particularly for a President who is loath to admit mistakes."

The CBS Evening News (9/13, lead story , 1:10, Schieffer) reported, "The death toll in New Orleans rose sharply today, and for the first time President Bush took responsibility for what the Federal Government did wrong." Bush "went on to say it is now in the national interest to find out if we are, quote, capable of dealing with a severe attack or another severe

storm."

CNN's Lou Dobbs Tonight (9/13, Dobbs) reported Bush, "facing escalating criticism over the hurricane disaster, today declared he takes full responsibility for the federal government's slow response. President Bush acknowledged the disaster exposed serious problems in the government's response to catastrophes. President Bush's declaration comes one day after he insisted it is too early to assign blame in the disaster." CNN (Bash) added that Bush's comments are "a dramatic change in tone, a contrite president uncharacteristically admitting a major failure. ... The new admission is striking for a president who prides himself on no regrets leadership and even more stunning because of his combative tone when asked a similar question just a day earlier. ... What worries Bush aides is the steady decline of an asset they thought was sealed after 9/11, leadership."

On MSNBC's Hardball (9/13), Chris Matthews called Bush's comments "a dramatic display of accountability so rare in public life."

The Los Angeles Times (9/14, Riccardi, Powers, Meyer) says "Bush spoke plainly when asked whether the government was prepared for another natural disaster or a terrorist attack." He "appeared to try to shift the debate away from finger-pointing to the reconstruction of New Orleans, a formidable task that could repair his frayed image as a leader if it succeeded. Widespread public dismay with federal efforts has translated to Bush's lowest polling numbers in his five years as president."

In a second article the Los Angeles Times (9/14, Gerstenzang, Muskal) says "It was the strongest statement of responsibility from the White House since the hurricane crisis began and initial relief efforts were sharply criticized." And in an article on the latest progress in the region USA Today (9/14) adds, "President Bush shouldered blame for mistakes in the federal government's response to Hurricane Katrina."

Nationally, the aftermath of Katrina was once again the subject of widespread local TV coverage. A significant number of stations decided instead to concentrate on President Bush's acceptance of some blame on behalf of the Federal government for its part in what went wrong with Katrina. WBBM-TV Chicago (9/13, 10:01 p.m.) offered up the best example of this when it reported that Bush acknowledged "his Administration and local officials bundled the response to Hurricane Katrina."

Meanwhile, the majority of local TV stations nationwide seemed to focus on the number of lives taken by the hurricane. For example, KCAL-TV Los Angeles (9/13, 9:57 p.m.) reported, "Hurricane Katrina's death toll climbing quickly." KXAS-TV Dallas (9/13, 10:02 p.m.) added that "659 people died in the storms. That's up nearly 150 from yesterday, as recovery workers focus on gathering and counting corpses. Most of those killed were in New Orleans."

Local TV along the Gulf Coast was mixed in its coverage of the recovery from Hurricane Katrina yesterday. Though many stations focused on positive developments in the area, an equal number focused on President Bush's acceptance of responsibility for any failures in the Federal response, or on the rising number of storm-related deaths. For example, WCFT-TV Birmingham (9/13, 5:58 pm) reported, "Signs of recovery are showing up today in New Orleans. The port is open, and for the first time since Katrina, a commercial flight has touched down at the city's airport." WCFT added that "in the wake of Hurricane Katrina, New Orleans shows signs of returning to normal, but there's still plenty to be done in the Crescent City."

Meanwhile, WBRC-TV Birmingham (9/13, 9:30 pm) reported, "President Bush is taking some of the blame for what some are calling a slow government response, as the number of dead in Louisiana continues to climb." WBRC noted that "state health officials say the number of people who lost their lives in Katrina is now up to 423. That is up from 279 just yesterday." Likewise, WVTM-TV Birmingham (9/13, 5:00 pm) reported, "Facing continued criticism and the lowest approval ratings of his administration, President Bush acknowledged for the first time serious problems in the government's response to Hurricane Katrina. The admission comes one day after the head of the Federal Emergency Management Agency called it quits and the Bush administration tapped David Paulison, head of the US Fire Administration, to serve as interim director. Paulison has three decades of firefighting and emergency management experience.

A number of stations separated their reports, noting both the recovery in the area and the continued political fallout. WTTO-TV Birmingham (9/13, 9:12 pm) reported that "the water is finally subsiding, but what isn't subsiding are the serious political questions that surround the government's obvious slow response to Hurricane Katrina."

Bush To Outline Comprehensive Strategy That Dovetails With Governing Philosophy. Fox News' Special Report (9/13, Goler) reported that Bush "said of the response to Hurricane Katrina at least part of the buck stops here. ... Mr. Bush said there were problems at all levels of government, but not with the

rescuers." Aides say "privately by accepting part of the responsibility today, the president will be able to focus Thursday on the way forward instead of what he calls the blame game." CNN's Paula Zahn Now (9/13, Bash) reported that the Bush team is "still searching for the right strategy to erase intense criticism the president did not help Katrina victims fast enough."

The Washington Post (9/14, A1, Vandehei, Weisman) in a front page story reports that with the White House concerned "the federal government's stumbling response...will shadow the balance of Bush's second term" Bush has "dispatched his top strategist, Deputy Chief of Staff Karl Rove, and other aides to assemble ideas from agencies, conservative think tanks, GOP lawmakers and state officials to guide the rebuilding of New Orleans and relocation of flood victims. The idea, aides said, is twofold: provide a quick federal response that comports with Bush's governing philosophy, and prevent Katrina from swamping his second-term ambitions on Social Security, taxes and Middle East democracy-building." In his speech Thursday night Bush "is to outline his vision more comprehensively than he has to date. A top aide said he will stress that New Orleans officials will dictate how the city will be rebuilt, but will also make plain the reconstruction should reflect his vision of government -- including reducing regulatory obstacles and emphasizing entrepreneurship over big government, the aide said. He will discuss plans to provide health care, education, jobs and housing assistance to flood victims, another aide said."

The Los Angeles Times (9/14, Chen) adds Bush's "comments signaled a new White House strategy as Bush and his top aides continued to work to stem the political damage to his leadership after Hurricane Katrina." His "statement contrasted with recent White House comments. For days, he and top aides have denigrated most questions about accountability for the hurricane response as part of a partisan 'blame game.'"

Poll Numbers Suggest Public Trust In Government Rebounding. In contrast to most coverage describing how the Federal government response to Katrina has resulted in low poll ratings for President Bush, the Christian Science Monitor (9/14, Feldmann) reports that "there are inklings that negative reviews of the government response to Katrina have bottomed out and may be on the upswing." For example, the latest Gallup poll "shows that a majority of Americans are feeling better about the role of government in dealing with the hurricane than they did initially. And despite the sense that the president has suffered grave damage to his public image over Katrina, Gallup and other polls show the effect has been minimal." Gallup poll managing editor David Moore in a Sept 13 report said, "Despite initial criticism of the federal government's slow response to Katrina, Bush's overall job approval rating remains essentially where it was at the end of August."

Most Of Bush Agenda Delayed Until 2006. The New York Times (9/14, Bumiller, Stevenson) reports, "A Republican ally of Mr. Bush who has been briefed on the administration's thinking said the White House's hope for the rest of this year was to deal with the hurricane and to win confirmation for Judge John G. Roberts Jr. as chief justice of the United States and for a second nominee, not yet selected, to the Supreme Court seat being vacated by Justice Sandra Day O'Connor. Next year, the ally said, Mr. Bush would return to issues like overhauling the tax code and the immigration laws that he had hoped to get a start on this year."

Administration To Continue To Make Changes At FEMA. The Kansas City Star/Knight Ridder (9/14, Borenstein, Bailey, Dodd) reports that as Bush took responsibility "Homeland security officials pledged a house cleaning of political appointees in top jobs who have little experience in disaster management." Knight Ridder adds, "As part of the administration's effort to rebound from the growing criticism, changes at FEMA won't stop with Monday's resignation of beleaguered director Michael Brown." DHS Secretary Michael Chertoff said "that he's going to put more emphasis on disaster and management experience in the agency, and will be bringing in a new deputy with more appropriate expertise."

Katrina Response Impact On US Budget Examined. The Christian Science Monitor (9/14, Trumbull) reports, "Think of it as the financial equivalent of another Iraq war. Relief efforts for the storm-ravaged Gulf Coast throw a huge fiscal burden onto a US Treasury that is already deep in the red." Comparing the fiscal cost of Katrina with spending for the war in Iraq, the Monitor notes, "Spending tied to hurricane Katrina has hit as much as $2 billion per day, or about 10 times the amount the United States is spending on military operations in Iraq. The pace will slow, but the recovery effort could easily cost the federal government $150 billion, experts say. Spread over a couple of years, that would roughly match the $6 billion a month being spent in Iraq." Now "the question is not whether America can absorb this shock but whether it will alter the mind-sets of policymakers and financiers on other budget matters."

Cochran Holds Key For Securing Relief

Funding. The Wall Street Journal (9/14, Rogers) reports, "Bigger names in Mississippi politics have long obscured Thad Cochran's steady rise in Congress. But in Hurricane Katrina's wake, no lawmaker is more important to the Gulf Coast, or a more calming force amid the chaos engendered by the storm." He "has been instrumental in securing $62 billion for the disaster recovery. A greater test will come in the months ahead as questions mount about paying for and managing the federal reconstruction effort." He "must protect the credibility of the process by controlling his committee's appetite -- and his own -- for pork-barrel spending. Katrina's costs will complicate his task of completing the regular spending bills for the fiscal year beginning Oct. 1. The Senate has borrowed heavily from defense funds to fill gaps in the president's domestic budget, and as chairman, Mr. Cochran is vulnerable to conservative criticism for being a big spender.

Use Of Medicaid For Relief Becomes Contentious Issue. The Wall Street Journal (9/14, Lueck, Rogers) reports that Medicaid "has emerged as the main way to provide medical coverage for many evacuees. But as the relief effort continues and costs mount, federal and state officials are in a tug of war over how much the federal government will reimburse states for their Medicaid spending and whether benefits should be extended to those not ordinarily eligible for the program." The White House "has signaled that it wants to help states taking on Katrina evacuees, both financially and by easing red tape. In Congress, some relief for states seems certain. 'I think it is likely that the federal government is going to have to step up more,' said Senate Majority Leader Bill Frist (R., Tenn.)." The key issue "is a proposed expansion of Medicaid for Katrina survivors. Democrats have proposed that all displaced families from the storm be made eligible for the next six months, simply to ensure coverage. Even conservative lawmakers from the affected states are sympathetic." Yet "the White House appears cool to any expansion, and Mr. Frist said he was 'not convinced' it was needed."

NYTimes Warns GOP Spending Cuts Will Hurt Evacuees. The New York Times (9/14) editorializes, "President Bush's vow to speed welfare assistance to the victims of Hurricane Katrina overlooks the gruesome determination of many Republican Congressional leaders to make $13 billion in cuts to Medicaid and food stamps. They quietly plan this even as they throw short-term emergency money at the crisis." Mississippi Gov. Haley Barbour "personifies his party leaders' contradiction in begging for emergency aid now after having championed painful cuts in the social safety net. Earlier this year, Mr. Barbour was in the spotlight as his state's unapologetic Medicaid antagonist. Rejecting the alternative of a tax increase, he severely cut drug benefits and sought to drop 65,000 poor, elderly and disabled people from the program before the courts intervened." Barbour "can spare his president and party a shameful episode by urging that the pending cuts for some of the storm's neediest be deep-sixed."

House GOP Gives White House Mixed Response On Katrina Cooperation. Roll Call (9/14, Pershing) reports, "As Congress and the Bush administration work aggressively to tackle the recovery from Hurricane Katrina, House Republicans are giving the White House mixed reviews on its communication effort with the Hill, on both the political and the policy fronts." Some "Congressional sources said that the flow of information from the administration has improved since the first week of the Katrina crisis. But with legislative proposals moving quickly through the system and a steady drumbeat of negative media coverage weakening the GOP's standing with the public, House Republicans are pushing for the White House to provide more substantive policy details as well as a more cohesive message."

Landrieu Praises Bush, Other Democrats Unsatisfied. The AP (9/14, Jordan) reports, "Sen. Mary Landrieu, D-La., welcomed Bush's conciliatory remarks. 'Accountability at every level is critical, and leadership begins at the top,' she said." But Sen. Robert Byrd and other Democrats "were less charitable." Byrd said, "The season has come for Americans to look homeward...instead of continuing to spend billions of dollars in Iraq."

And the Washington Times (9/14, Curl) notes that "Democrats continued to blame Mr. Bush for inadequate recovery efforts in the immediate aftermath of the hurricane, which left thousands of New Orleans' residents stranded and thousands more without food and water." Sen. John Kerry said, "This administration still hasn't figured out the difference between spin and leadership." Reuters (9/14) and Bloomberg (9/14) also reported on the details of Bush's acceptance of responsibility.

Laura Bush Takes Lead In Defending President. The AP (9/14, Pickler) reports, "Laura Bush is reprising her role as her husband's first defender, making several trips to the hurricane-ravaged Gulf Coast as President Bush's approval ratings sink to their lowest level yet." She "is highlighting the positive that has come out of the storm, telling the stories of strangers helping one another in a time of tragedy."

She "said Tuesday that much more human good than bad has come from the disaster, despite what people see on TV. She said the evacuees she has met in her three trips to the Gulf Coast are hopeful and thankful that they don't have to start from rock bottom because of the donations and the kindness of strangers."

Bush Witnesses Generosity Among New Orleans, NYC Rescue Workers. John McCaslin writes in his Inside the Beltway column in the Washington Times (9/14) about President Bush's visit to New Orleans, where he greeted rescue workers including some New York City firefighters "who were standing before a not-so-ordinary New York City firetruck. White House spokesman Scott McClellan revealed that this same fire engine was donated by the city of New Orleans to New York City in the days after the 9/11 terrorist attacks. And now New York has returned the gift, the report said."

Columnist Questions Need For "Big Government" Response. Anne Applebaum in her column in the Washington Post (9/14, A31) cites the US public's generous charitable response to Katrina and writes, "it is important not to draw hasty conclusions about the ultimate political impact of this tragedy. More specifically, it's important to ignore the hasty conclusions that have already been drawn, both here and abroad, about the victory of 'big government' and the death of a certain kind of American individualism." Applebaum "certainly" believes "there's a role for government in disaster and evacuation planning. But it is true that the worst failures of the past two weeks have been big government failures. The biggest successes, by contrast, have come out of this country's incredibly vibrant, amazingly diverse and fantastically generous civil society. Sooner or later, it will be impossible not to draw political lessons from that paradox."

Columnist Blames Bush For Delayed Response. Maureen Dowd in her column in the New York Times (9/14) writes, "President Bush continued to try to spin his own inaction yesterday, but he may finally have reached a patch of reality beyond spin. Now he's the one drowning, unable to rescue himself by patting small black children on the head during photo-ops and making scripted attempts to appear engaged. He can keep going back down there, as he will again on Thursday when he gives a televised speech to the nation, but he can never compensate for his tragic inattention during days when so many lives could have been saved."

WSJ Applauds Montana Community For Returning Pork. The Wall Street Journal (9/14, A20), in an editorial, notes a bipartisan movement in Bozeman, Montana "to give the feds back a $4 million earmark to pay for a parking garage in the just-passed $286 billion highway bill" in order to use the money for Katrina relief. The Journal adds that there are already ideas to, "Cancel the Bush tax cuts, raise the gasoline tax by $1 a gallon, increase deficit spending, and sharply cut spending on national defense and the war in Iraq. In Washington, it seems, everything is expendable except for the slabs of bacon that are carved out of the federal fisc to ensure re-election. The glory of what is happening in Bozeman is that taxpayers are proving to be wiser about priorities than their politicians."

US Pledges Crackdown On Katrina-Related Scams.

NBC News (9/14, Myers) reports, "As weather forecasters tracked the approach of Hurricane Katrina, Alan Paller, a computer security expert with the Sans Institute, tracked another gathering storm — the rush to register Internet sites containing the name 'Katrina.' ... 'Most of them,' says Paller, 'appear to be just plain thieves.'" NBC continues, "Tuesday, the U.S. Justice Department warned that many of some 4,000 Katrina Web sites could be fake. Sixty percent come from overseas, officials said, a warning sign the sites may be bogus. ... U.S. Attorney General Alberto Gonzales promised swift punishment for those who victimize generous Americans. ... 'Federal, state and local law enforcement officials are watching carefully,' Gonzales warned at a news conference Tuesday. '[We] will have zero tolerance for these kinds of crimes.'" NBC notes, "Missouri Attorney General Jay Nixon already has moved against 10 Web sites, tied to a group of white supremacists. ... 'It's totally outrageous,' Nixon said, 'for someone to take these domain names and then solicit funds, run them through what looks like a legitimate charity using pictures and other hurricane victims, when in reality that money was running to his hate sites.'"

Reuters (9/14) reports, "Senior FBI and Justice Department officials warned Americans who want to donate money to the relief effort to be cautious to avoid fraudulent charities, including those that pretend to be major organizations like the Red Cross. ... 'Just like these natural disasters bring out the best in people, they also bring out some of the worst elements of the criminal element out there who are willing to take advantage of those who are willing to give and those who so desperately need the relief,' said Chris Swecker, chief of the FBI's criminal

investigative division." Reuters adds, "Swecker said the FBI is investigating sites of fraudulent charities. He said there are about 4,000 sites advertising Katrina relief services, and about 60 percent of them are coming from overseas. ... 'That is not a reason unto itself to conclude that that's a scam Web site, but it is a reason to be cautious,' he said." Reuters notes, "U.S. Attorney General Alberto Gonzales said some of the bogus sites had been shut down but would not give details on the number or how many investigations had been launched. ... 'We must ensure that those offering a helping hand do not become victims themselves and that those found preying on the compassion of our citizens are punished,' he said."

The AP (9/14) reports, "The number of Katrina-related sites has more than quadrupled in the past week, according to FBI officials. ... 'A devious few have sought to take advantage of our collective generosity,' Attorney General Alberto Gonzales said at a news conference to highlight the government's efforts to combat fraud." The AP adds, "Swecker said the number of probes has grown a lot in recent days, but he declined to be specific. The Justice Department has a Hurricane Katrina Fraud Task Force looking especially at phony charities, identity theft, insurance scams and government benefit fraud. ... The American Red Cross, the relief group most frequently copied in Internet scams, also is working with authorities." The AP notes, "Officials again urged donors not to respond to unsolicited e-mails and to give only to well-known charities. ... 'If it doesn't look right, chances are it's not,' assistant Attorney General Alice Fisher said."

CNN.com (9/14, Frieden) reports, "Swecker said investigators have reviewed 2,100 sites and about 60 percent of them originate outside the United States. 'That's not a reason unto itself to conclude that that's a scam Web site, but it is a reason to be cautious,' Swecker said." CNN continues, "Swecker said no arrests have been made. But the number of criminal cyber probes has increased substantially since last Thursday, when the FBI acknowledged it was investigating eight instances of potential Web site fraud. ... 'I can't give you the exact number, but it's a lot more than eight,' he said." CNN adds, "Red Cross General Counsel Mary Elcano told reporters the organization is prepared to file civil lawsuits against operators of Web sites who do not promptly shut down when ordered to do so by the FBI. ... Some of the suspect activities are sophisticated endeavors that are created to look like authentic Red Cross sites. ... Many of the apparently fraudulent Web sites trying to tap into Katrina relief donations feature pop-ups, spam through provided links and other unsolicited e-mails."

Local Television. WRLH-TV Richmond (9/13, 10:23 p.m.) reported, "US attorney, general, Alberto Gonzales has a warning for people who may try to take advantage of the public's generosity in the wake of this storm. Gonzales says criminals have attempted to profit from this disaster by setting up fraudulent internet websites. Speaking today at a press conference in Washington, Gonzales said those offenders can expect to be prosecuted."

WEYI-TV Flint (9/13, 5:59 p.m.) reported, "US attorney general Alberto Gonzales says the federal government is keeping an eye on these fraudulent internet websites."

WPXI-TV Pittsburgh (9/13, 5:25 p.m.) also covered this story.

Chertoff Said To Have Been Confused About Position In Federal Response. Knight Ridder (9/14, Landay, Young, McCaffrey) reports, "The federal official with the power to mobilize a massive federal response to Hurricane Katrina was Homeland Security Secretary Michael Chertoff, not the former FEMA chief who was relieved of his duties and resigned earlier this week, federal documents reviewed by Knight Ridder show. Even before the storm struck the Gulf Coast, Chertoff could have ordered federal agencies into action without any request from state or local officials. Federal Emergency Management Agency chief Michael Brown had only limited authority to do so until about 36 hours after the storm hit, when Chertoff designated him as the 'principal federal official' in charge of the storm." Though Chertoff "was in charge of managing the national response to a catastrophic disaster, according to the National Response Plan," a memo obtained by Knight Ridder "suggests that Chertoff may have been confused about his lead role in disaster response and that of his department." DHS spokesman Russ Knocke, meanwhile, "disputed that the bureaucracy got in the way of launching the federal response. 'There was a tremendous sense of urgency,' Knocke said. 'We were mobilizing the greatest response to a disaster in the nation's history.'"

Paulison Says He Will Focus On Victims, Not Failures. Interim FEMA Director David Paulison held a press conference yesterday with Homeland Security Secretary Michael Chertoff, where he said that FEMA is "going to deal with" the devastation Katrina has caused. NBC Nightly News (9/13, lead story, 3:25, Gregory) noted, "Across the board today, the Administration wanted to look forward. Assuming the

helm at FEMA today, David Paulison, who brings years of emergency response experience."

Fox News' Special Report (9/13, Hume) reported Paulison "said today the first priority of his organization will be to get Hurricane Katrina evacuees out of temporary shelters and into more permanent housing.:

The Washington Times (9/14, Hudson) reports, "Paulison yesterday began work as acting director of the Federal Emergency Management Agency with a clean slate and the full backing of President Bush to help rebuild the hurricane-ravaged Gulf Coast." In a press briefing with Chertoff, Paulison said, "I can't deal with what happened in the last two weeks, but I can tell you from this point forward, we are going to be focusing on the victims of this hurricane." Chertoff said at the press conference that when naming FEMA directors in the future, disaster emergency management experience will be "a significant consideration."

Most local TV stations along the Gulf Coast noted interim FEMA Director David Paulison's news conference with Homeland Security Secretary Michael Chertoff. Typical of coverage was a report from WBRC-TV Birmingham (9/13, 5:30 pm), that Paulison "says he will work hard to get Katrina evacuees out of shelters as soon as possible." Paulison, who "was formally introduced this morning in Washington" by Chertoff, "says he will focus on helping storm victims, not on what went wrong."

The CBS Evening News (9/13, story 5, 2:15, Schieffer) noted, "The unprecedented task of housing the thousands of New Orleans residents displaced by Hurricane Katrina" is the "task new FEMA Director David Paulison called his top priority." Director Paulison: "I know it's a focus of mine, it's a focus of the President, that we get these people out of the shelters into some type of either semi-permanent or permanent housing."

Meanwhile, CNN's Anderson Cooper 360 Degrees (9/13, Meserve) reported that "some wonder if Paulison, a firefighter, can mesh with other disciplines like police and public health and if he is equipped to run FEMA programs like housing and financial aid, the bulk of its work." CNN added, "Administration officials won't speculate on whether Paulison will be asked to take the FEMA position permanently. They do say no changes in leadership are likely until the hurricane season is over and done."

Ridicule Of Brown Continues After Resignation. Mark Leibovich, in a special report for the Washington Post (9/14, C1) writes that former FEMA Director Michael Brown "had come to personify the rule that once you become a joke in Washington, there is no rehab. He had became the subject of hundreds of punch lines amid the tragically unfunny spectacle of Katrina -- too many to recover from."

After an especially lengthy barrage of jokes directed at Michael Brown Monday night by Jay Leno on NBC, last night it was David Letterman, on CBS, who focused his attention on the former FEMA director. "Well, former FEMA director Michael Brown resigned. He says that he wants to spend more time not responding to his family," said Letterman. "Yeah, he resigned. And he now plans to be ineffective in the private sector." Following his opening monologue, Letterman's Top Ten List featured questions for the FEMA director application. They were: "10. Are you able to convey a false sense of security? 9. What percentage of your resume is fabricated? 8. In a crisis, which state or local officials would you blame? 7. What are your plans after you resign? 6. Do you mind if the last guy left the office smelling like Arabian horses? 5. Which is most serious: A disaster, a catastrophe, or a dis-astrophe? 4. Does Robert Blake dating again count as an emergency? 3. Can the president easily add '—ie' to your last name to form a nickname? 2. Can you screw up bad enough to take the heat off the President's mistakes? 1. Michael Brown...idiot or moron?"

Jack Welch Says Katrina Disaster Follows Classic Pattern. Jack Welch, former chairman and CEO of General Electric, in an op-ed in the Wall Street Journal (9/14, A20) compares Katrina to a crises at a company, which "follows a well-worn pattern." Welch describes the journey from denial to containment to shame-mongering, followed by "blood on the floor, in which someone pays with their job, and finally, a solution to the problem." Welch writes, "We are a way off from the fifth stage in New Orleans, but the first four played out like an old movie."

Collins, Gregg Say Katrina Will Play Into Consideration Of DHS Reorganization. CQ Homeland Security (9/13, Starks) reported that Sen. Judd Gregg, who chairs the Senate Appropriations Homeland Security Subcommittee, and Sen. Susan Collins, chairwoman of the Senate Homeland Security and Governmental Affairs Committee, said Tuesday that "they were willing to take a fresh look following the Hurricane Katrina catastrophe at a proposal made by the Homeland Security secretary this summer to restructure his department." Gregg said "the hurricane gives Chertoff a chance to review his restructuring plan as it pertains to the department as a whole and FEMA specifically." Meanwhile, Collins said Tuesday

that "she intends to explore the proper structure for the department in light of Hurricane Katrina, including suggestions from some that the restructuring should be postponed. But if FEMA remains a part of the department, Collins said it appears that it should at least have a 'direct report' to the secretary, as Chertoff has proposed."

The New York Times (9/14, Hulse, Shenon) reports, "As Congress prepares to take its first tentative steps toward evaluating the government response to Hurricane Katrina, Democrats and others are pressing for an independent inquiry, saying lawmakers cannot be trusted to assess their own complicity in the failures." Sen. Hillary Clinton said, "I don't think the Congress can investigate ourselves." And Sept. 11 commissioners "will echo that call on Wednesday when they release a new privately financed study that will cite failures in the federal response to the storm to argue that the government remains unprepared to deal with a catastrophic terrorist strike on American soil."

Senate To Hear Testimony From Disaster Experts. USA Today (9/14) reports, "Veterans of floods, earthquakes and tsunamis will offer advice today to a Senate committee looking into how to help victims of Hurricane Katrina in the first of an expected multitude of congressional inquiries into the disaster." USA Today notes, "Pete Wilson, who dealt with 22 natural disasters when he was governor of California, and Marc Morial, a former mayor of New Orleans who now heads the National Urban League, will testify. So will Patricia Owens, the former mayor of Grand Forks, N.D., who successfully evacuated 50,000 people when the Red River flooded in 1997."

Congress Faces Hurdles In Tackling Katrina Response. The Los Angeles Times (9/14, Hook) reports, "When a Senate committee opens hearings today on what the government did wrong in response to Hurricane Katrina, there will be a conspicuous absence at the witness table: No one who actually handled the disaster will be there." The Times continues, "Hesitant to interfere with relief operations in the storm-ravaged South, lawmakers in Washington will be left to grill veterans of past disasters. That is emblematic of how hard it is for Congress to grapple with the calamity that has washed away much of the rest of its legislative agenda." The response to Katrina "is testing Congress' ability to do something that the lumbering institution is ill-equipped to do: move quickly and decisively on a huge, bipartisan project."

And Roll Call (9/14, Preston) reports, "Congressional Republicans vowed Tuesday to move forward with their plan to form a bicameral committee to examine the response to Hurricane Katrina, even as Democrats were making it clear that launching such a joint investigation would be impossible without their blessing." Senate Minority Leader Harry Reid said "that such a committee can be created only by legislation and GOP leaders would need his party's support for it to be approved in the Senate."

Meanwhile, The Hill (9/14, Hearn) reports, "The House is moving closer to a vote on a GOP plan that would create a joint committee to investigate the government's response to Hurricane Katrina, presenting Republicans with a potentially difficult vote to support a plan Democrats have derided as a political sham." It "is shaping up to be an intense test of party loyalty." The Hill adds, "House Majority Leader Tom DeLay (R-Texas) said yesterday that Democrats' refusal to participate in the joint committee did not worry him." DeLay said, "No one is rejecting Democrats. ... We will go forward. I think they will be incredibly embarrassed if they don't participate because you will find that the committee will be an objective committee, doing its responsibility and really looking at everything."

Lieberman Defends Decision To Place FEMA In DHS. ABC World News Tonight (9/13, lead story, 2:45, Moran) reported, "Many in Washington are now saying the problem" at the root of the Federal Government's belated response to the Hurricane Katrina disaster "was with the decision to fold FEMA into the new Department of Homeland Security after 9/11." Leo Bosner, president, FEMA employees union: "Within Homeland Security, the FEMA mission, I think, has really been sort of ignored. We were pushed off to the side." Moran: "But a Democratic architect of the Homeland Security Department says the plan is sound. The execution flawed." Sen. Joseph Lieberman: "It could be that FEMA belongs right where it is but it needed better leadership. And in the years before, more financial support."

Shays Raises Concerns About US Preparedness For Disaster. At his press conference yesterday, President Bush expressed doubt about the Federal Government's ability to respond to a major terrorist attack or another massive natural disaster. ABC World News Tonight (9/13, story 2, 2:35, Ross) reported, "What the President said today echoes what leading figures in field have been saying for some time. Despite the billions spent since 9/11, the country is unprepared for most major disaster scenarios. Most of the attention has been on another terror attack on a major city, biological or nuclear. There have been frequent emergency drills. But the Congressman overseeing domestic preparedness says the

government's plans ignore urban realities." Rep. Christopher Shays: "I think if there was a dirty bomb attack in any of our major cities, we would be very unprepared." Ross: "If there were a smallpox attack, the government says it now has enough vaccine for everyone in the country. But a study by the New York Academy of Medicine says the government's preparedness plans ignore human nature." There are "even more questions about readiness for a natural disasters, such as earthquakes. California is considered prepared, but not the Midwest and cities along the little-known New Madrid faultline." And "many officials say the federal government has been slow to recognize a new and potentially greater threat -- a rare and deadly strain of flu, now in Asia, but threatening to become a global epidemic and hit the US."

Homeland Security Vulnerabilities Highlighted By Response To Katrina. The Washington Post (9/14, A3, Eggen) reports, "Four years after the Sept. 11, 2001, attacks, the federal government has failed to enact crucial homeland security reforms that could have saved lives and improved the sluggish response to Hurricane Katrina, according to a report to be issued today by former members of the Sept. 11 commission. Local emergency officials are still unable to reliably communicate with one another during disasters, the federal government has no clear system of command and control for responding to a crisis, and authorities have faltered in enacting basic border controls designed to keep out terrorists, according to the report's findings, which commission members outlined in interviews." Former new Jersey Gov. Thomas Kean "said the bungled response to Katrina laid bare how unprepared the nation remains for a catastrophic event, whether it is another terrorist strike or a natural disaster."

Columnist Proposes BRAC As Model. Norman Ornstein in his column in Roll Call (9/14, Ornstein) suggests that "it is time to consider the Base Realignment and Closure Commission model for this important need. We all owe former Rep. Dick Armey (R-Texas) a vote of thanks for establishing the framework for dealing with base closings. It is imperfect, to be sure, but Armey found a good way to get bases closed while retaining a real role for Congress and protecting it against its worst parochial instincts. A parallel approach could work for allocating first-responder funds, hopefully channeling the money more efficiently to where it is most needed."

400 New York Court Officials Volunteer To Help Aid Katrina Victims. The New York Law Journal (9/14, Adcock) reports, "New York's Unified Court System has organized a stand-by contingent of up to 400 volunteer court officials to help the devastated legal communities of Louisiana and Mississippi, the two states hardest hit last month by Hurricane Katrina." The Journal continues, "In light of the Sept. 11, 2001, terrorist attacks, Chief Judge Judith S. Kaye said Monday, 'We have very special expertise, sad to say. We know what it's like to have courtrooms brought to a standstill. We lived it -- those unforgettable days and weeks when we had to figure out so many things for the first time.'" The Journal adds, "The volunteers, most veterans of 9/11, are set to offer emergency help in such areas as court security, records recovery, voice and data communications, computer networks and the creation of temporary court sites. ... The New York volunteers -- as well as commitments of equipment and money through a specially created relief fund -- have been registered with the State Emergency Management Office in Albany. Registration enables disaster-impacted states to quickly request specific assistance from other states, in accordance with the Interstate Emergency Management Assistance Compact, a federal program begun in 1996 when then-Florida Governor Lawton Chiles was unhappy with government response to Hurricane Andrew. ... Ronald Younkins, chief of operations for the Office of Court Administration, said that Gulf Coast court officials are currently assessing damage to their facilities and conducting a census of their scattered personnel."

Blanco Criticizes FEMA On Body Recovery Efforts. Knight Ridder (9/14, Fitzgerald, Tsai) reports, "Blasting federal officials for a 'lack of urgency and lack of respect,' Louisiana Gov. Kathleen Babineaux Blanco said Tuesday that the state would seize control of the task of recovering the bodies of Hurricane Katrina victims." Blanco "accused the Federal Emergency Management Agency of causing delays because the agency had failed to sign a contract with the firm hired to collect corpses and was not providing enough support for the firm's crews. FEMA spokesman David Passey responded that body recovery has always been the state's job, and federal authorities were in charge of body identification."

CNN's The Situation Room (9/13, Blitzer) reported, "There's some new tension developing apparently between state officials in Louisiana and FEMA, the Federal Emergency Management Agency, over the recovery of bodies in the wake of the disaster." CNN (Snow) added, "That tension was turned up today by the Louisiana Governor, Kathleen Blanco. She was at

a photo opportunity, so she did not field questions, but she lashed out at FEMA over recovery efforts, saying that they were not moving quickly enough. At issue is a contract with a private company hired by FEMA. Its contract expires at midnight tonight. She says that she pleaded for contract resolution, that she spoke with the Homeland Security Secretary Michael Chertoff, about this last week. And she says at this point, nothing has happened. And in her words, she is angry and outraged."

Meanwhile, the Los Angeles Times (9/14, Meyer, Moore) reports, "Until now, Blanco, a Democrat, has shied away from criticizing Washington's response to the hurricane since it hit shore more than two weeks ago. The governor said she decided to go public with her criticism after promises from Washington failed to come through, including a pledge from Michael Chertoff, the secretary of Homeland Security, 'that plans would be put in place for a system of 'recovery with respect.'"

DHS IG To Investigate No-Bid Contracts. The New York Times (9/14, Shenon) reports, "The inspector general of the Department of Homeland Security said Tuesday that his office had received accusations of fraud and waste in the multibillion-dollar relief programs linked to Hurricane Katrina and would investigate how no-bid contracts were awarded to several large, politically well-connected companies. The inspector general, Richard L. Skinner, who serves as the department's internal watchdog, said in an interview that he intended to be 'extremely aggressive' in monitoring the Federal Emergency Management Agency, which will receive most of the $62 billion in disaster-response financing approved by Congress last week." Skinner "said that his investigators would focus on several no-bid contracts awarded over the last two weeks to large, politically influential companies, including the Fluor Corporation of California, a major donor to the Republican Party, and the Shaw Group of Baton Rouge, La."

The Wall Street Journal (9/14, A4, Block, Dreazen) notes, "DHS Secretary Michael Chertoff said that as the effort to save lives winds down, his department will focus on recovery challenges, including ensuring that the contracting process is conducted properly. 'We want to get aid to people who need it quickly, but we also don't want to lose sight of the importance of preserving the integrity of the process and our responsibility as stewards of the public money,' he said."

Evacuees' Medical Records Put Online. The Washington Post (9/14, A24, Krim) reports, "The federal government is making medical information on Hurricane Katrina evacuees available online to doctors, the first time private records from various pharmacies and other health care providers have been compiled into centralized databases." The move is "one step in reconstructing medical files on more than 1 million people disconnected from their regular doctors and drug stores. Officials fear that many medical records in the region, especially those that were not computerized, were lost to the storm and its aftermath."

IRS Promotes Leave-Based Donation Program. The Wall Street Journal (9/14) reports, "Officials recently disclosed a plan designed to attract more charitable donations to storm victims. The IRS plan encourages employees and employers to participate in so-called leave-based donation programs." The Journal notes, "Under such programs, an employee generally gives up unused vacation, sick or personal leave, in exchange for the employer donating the value of that time to charities helping hurricane victims. Tax lawyers say numerous companies are considering offering this leave-donation program soon."

States Seek Waivers To Give Evacuees Separate Schooling. The Wall Street Journal (9/14, Page B1, Golden) reports some states are seeking exemptions from the McKinney-Vento act requiring school districts to integrate homeless students into regular public schools, "a stance supported by the Bush administration and some private education providers." Both Utah and Texas requested exemptions in order to educate evacuees on site at Utah's Camp Williams and in Texas "at a closed Air Force base in San Antonio." But opponents "fear that nearly two decades of gains in public-school enrollment for homeless children will be wiped out" if the exemptions are granted.

USED Official To Visit Dallas Area To See Needs Of Schools In Helping Evacuees. The Dallas Morning News (9/14, Dodge) reports, Assistant U.S. Secretary of Education Tom Luce "will meet with North Texas school superintendents today to learn firsthand about the problems local schools face in educating students displaced by Hurricane Katrina." Luce "will be accompanied by Texas Education Commissioner Shirley Neeley. They also will visit some of the 90 students and families displaced by the

hurricane at Madison High School in South Dallas." The superintendents "are also likely to request that the department relax its enforcement of academic requirements under the No Child Left Behind Act." Luce said that Secretary of Education Margaret "Spellings is leading a relief task force that meets twice daily to assess the immediate needs facing schools."

Stocks Markets Finish Down On Concerns Of Katrina Impact. NBC Nightly News (9/13, story 9, 0:10, Williams) reported, "A quick look at Wall Street today: Stocks finished lower. The Dow lost 85-and-a-half points on the day [to close at 10,597.44]. NASDAQ was down 11 points [to close at 2,171.75]."

The Wall Street Journal (9/14, McDonald) says stocks declined "as investors focused more on post-Katrina worries than positive economic data collected prior to the devastating hurricane and its aftermath." The market "started the day up about 3% since the hurricane slammed the Gulf Coast at the end of last month. But rising damage estimates are stoking fears that the economy and corporate profits will be dinged by higher gas prices and lower consumer spending resulting from Katrina."

Experts Say Reconstruction From Katrina Could Hurt Economy. Knight Ridder (9/14, Hall) reports, "Oddly enough, Katrina's biggest economic impact may not be the damage it left but the rapid growth it may spark next year when rebuilding begins in earnest along the Gulf Coast. That could fuel a pace of growth that adds to inflationary risks in an already strong economy. Higher interest rates are the medicine for inflation, and that could lead to higher mortgage rates, which could threaten the nation's housing boom."

Inflation Rise Fueled By Energy Cost Increases. The Washington Times/AP (9/14, Crutsinger) reports, "Surging costs for gasoline and other energy products fueled inflation at the wholesale level in August, pressure that is expected to become even more intense when the full effect of Hurricane Katrina is felt." The Labor Department Producer Price Index "jumped a sharp 0.6 percent in August following an even bigger 1 percent increase in July." And "the Commerce Department reported that oil imports reached an all-time high in July and the trade gap with China also set a record. However, the overall trade deficit improved slightly to $57.9 billion as exports rose and imports outside of energy fell."

The Wall Street Journal (9/14, Gerena-Morales) reports, "While energy prices soared during the summer, underlying inflation showed signs of stability in the weeks leading up to Hurricane Katrina. Moreover, the U.S.'s trade performance showed signs of improving." The Producer Price Index "for finished goods rose 0.6% in August from July and were 5.1% higher than a year earlier, the Labor Department said. The increase was driven largely by a burst in energy prices, much of which occurred even before the hurricane struck the Gulf Coast, disrupting energy production. Gasoline prices jumped 48% from a year earlier, the Labor Department said."

Fed Unconcerned About Economic Impact Of Katrina. The Financial Times (9/14, Balls) reports, "The US Federal Reserve is set to press ahead with its campaign of raising interest rates at its meeting next week, in spite of the economic impact of Hurricane Katrina. But there is expected to be intense discussion of whether substantial changes to the wording of the accompanying policy statement are needed." Inside the Fed "there is considerable scepticism about the need for the "compassionate" pause in the tightening campaign that some politicians have called for following the devastation in New Orleans and the surrounding region caused by Katrina. An important subject of discussion will be whether the Fed should drop its characterisation of monetary policy as 'accommodation' and whether it should maintain its guidance that it is likely to continue raising the federal funds rate at a 'measured' pace."

US Trade Deficit Narrowed In July. The Financial Times (9/14, Hughes) reports, "Record levels of exports helped shrink the US trade deficit in July, but analysts warned new peaks in energy prices are likely to widen the gap in the months ahead as the cost of imports rises." A Commerce Department report "showed a deficit of $57.9bn, down from an upwardly revised $59.5bn in June -- itself the second highest monthly gap on record."

Katrina Leads To Real Estate Boom In Surrounding Areas. The CBS Evening News (9/13, story 9, 2:05, Attkisson) reported, "In destroying miles of real estate in New Orleans, Katrina gave birth to a real estate boom nearby. Hundreds of thousands of people need new homes." Even "for those who can pay, there aren't enough to go around." It's "too soon for exact figures, but realtors say market values are rising as fast as Katrina's floodwaters, rentals are being snapped up, and oil companies are buying houses for their workers, sight unseen." Judy Burkett, President, Baton Rouge Association of Realtors: "Is it a happy market for realtors? No, it is not. There's no joy in seeing victims and people without homes."

Louisiana Landowner Profits In Katrina's Wake.

The Wall Street Journal (9/14, Cooper) says Katrina "has changed practically everything in southeast Louisiana, including the commercial real-estate market. Baton Rouge has been overwhelmed by evacuees and now hosts companies that were flooded out in New Orleans and Jefferson parishes, some 80 miles away. But for those businesses integral to the cleanup, such as power, insurance and engineering companies, towns closer to the devastation are the hottest properties around. In the early days of Katrina's aftermath, there was nowhere nearer to the action than Luling, which got raked by the western edge of the storm but is largely intact. Even before the streets were clear, logistics teams were combing over the place, snapping up every vacant hotel room and office they could find." The Journal adds that few "have benefited more from this than [Jay] Roberts, who has lived in Luling all of his life and assembled a modest real-estate empire even as the town itself struggled."

New Orleans Recovery Slowly Beginning. The CBS Evening News (9/13, story 5, 2:15, Schieffer) reported, "There are signs that New Orleans is beginning to come back to life." CBS (Pitts) added, "It was the first encouraging sign to come down from the sky over New Orleans in two weeks, the first commercial flights in or out of New Orleans International Airport since the storm hit. But like the city itself, the planes were virtually empty." Engineers are "pumping out 6.5 billion gallons of floodwater every day. Estimates are the city should dry out by mid-October." Mayor C. Ray Nagin (D) New Orleans Mayor: "We're out of nuclear crisis mode, and we're in normal day-to-day crisis mode." Pitts: "Trains are running, power's back on in nearly half the city, and the first cargo ship will be unloaded Wednesday. The port of New Orleans is the gateway to a river system serving 33 states along the Mississippi River. But there are also signs of the grim and difficult tasks ahead."

NBC Nightly News (9/13, story 3, 1:45, Williams) reported, "At the same time, there was progress reported today in the effort to pump out of the streets of New Orleans." NBC (Costello) added, "Two weeks in the fight to reclaim New Orleans from the lake and canals that drowned it, there is progress. The uptown, business district and French Quarter hope to have drinkable water by the end of the week. Repair crews still struggle to clear the debris away from sunken pumps, but 40 are running." But with "no sign of disease so far, the Mayor is anxious to reopen parts of the city to business. The city is out of money and can't make its payroll." Mayor Ray Nagin, New Orleans: "We are working very feverishly with banking institutions, with financial folk, as well as Federal officials to secure a line of credit that will sustain us at least until the end of the year." Costello: "But there was good news today: Louis Armstrong Airport reopened for passenger business, and the first cargo ship is expected to dock tonight in a city devastated by water, but desperate for the economic lifeline it provides."

ABC World News Tonight (9/13, story 3, :25, Vargas) reported, "In the hurricane zone, a milestone today. The New Orleans airport reopened for limited commercial service."

Public Figures Weigh In Rebuilding Plans. USA Today (9/14, Willing) reports that public figures "from local performers to President Bush are beginning to speak of reviving the 287-year-old city as if such a thing is inevitable. They are contemplating what urban planner Robert Lang of Virginia Tech says has 'never been done before in America': Using what could be hundreds of billions of public and private dollars to rebuild a modern city on a scale far beyond what happened in San Francisco after its 1906 earthquake, or in Chicago after its 1871 fire. ... Politicians, urban planners, business leaders and local residents with different views of a "new" New Orleans already are campaigning for their competing visions. U.S. Rep. William Jefferson, D-La., whose New Orleans home was flooded, would focus on creating a city where tax credits, housing subsidies and jobs programs would be used to encourage the return of its working class. U.S. Rep. Bobby Jindal, R-La., whose home in nearby Kenner also was damaged, would appoint a rebuilding czar and dust off plans to diversify the city's industrial base and modernize its hospitals and public housing.'

Nagin Hopes To Reopen Four Neighborhoods Soon. The New York Times (9/14, Luo) reports that New Orleans Mayor Ray Nagin said yesterday he hopes to reopen four neighborhoods including the city's central business district and the French Quarter in the next few days. At the same time, "he conceded that the city's financial problems were enormous. ... Mr. Nagin said that city officials were trying hard to secure a line of credit. Many contractors who are helping the city clean up are working under the assumption that the city will get money to pay them."

Efforts To Drain Water From City Are Paying Off. Work by the Army Corps of Engineers to pump the water out of New Orleans is paying off, USA Today (9/14, Levin) reports. As of today, "perhaps half of the flooded areas have re-emerged. Temporary

pumps and the giant permanent pumping stations are throwing as much as 9 billion gallons per day over the levees and out of the city."

Polluted Waters Being Pumped Into Lake Pontchartrain. The Los Angeles Times (9/14, Vartabedian, Cone) reports that the effort "is sending plumes of contaminated, brown, stinking water into Lake Pontchartrain, setting back years of effort to restore the environmentally sensitive home of Gulf Coast marine life. After festering for two weeks in neighborhoods, commercial districts and industrial zones, the water is laden with bacteria, silt, petroleum products and possibly toxic substances. City officials confirmed Tuesday that they were also releasing untreated sewage into the Mississippi River from one of two treatment plants operated by the New Orleans Sewerage and Water Board." The floodwaters "are overrun with fecal material, silt and other substances that could damage the marine environment."

New Orleans' Water Purification Plant Revived After Katrina. The Washington Post (9/14, A21, Brown) reports on efforts to resuscitate the Carrollton Water Purification Plant, a "70-acre complex of pumps and generators and pipes to draw water from the Mississippi River, treat it with purifying chemicals, filter it and send it out to the city's half-million residents." The Post adds, "The death and reanimation of the water plant is a story of ingenuity, self-reliance, loyalty and luck. It required doing something that had never been done -- the first cold start of Carrollton since it opened in 1906." The plant "normally pumps 120 million gallons a day. When a big water main breaks, moment-to-moment consumption may go up the equivalent of 10 million to 15 million gallons a day as water gushes out of the system. The plant kicks in to compensate and increases its output to maintain pressure and flow in the distribution system. Soon after the height of the storm, however, demand rose the equivalent of 40 million to 50 million gallons a day, a step-up never seen before."

New Orleans Airport Resumes Commercial Flights. The New Orleans airport has reopened to commercial flights, the AP (9/14, Nossiter) reports. While the airport was operating at only a fraction of its capacity, "the symbolic importance was not lost on a city that only days before had all but collapsed into looting and desperation." Airport officials "hope to be up to 60 flights a day within the week and back to full operation of 350 flights a day in six months."

Port Of New Orleans Reopens Sooner Than Expected. The Washington Post (9/14, D1, Alexander, Irwin) adds that the Port of New Orleans "began unloading its first cargo ship since Hurricane Katrina on Tuesday night, months sooner than was predicted, a sign that disruption to the nation's shipping capacity may be less severe than originally forecast. ... Gary P. LaGrange, chief executive of the port, said he expects it to be at 80 percent of capacity within three months. The Port of South Louisiana and Port Fourchon, on the Gulf Coast, have also partially restored service, and the Port of Pascagoula, Miss., expects to resume service by early October, according to the American Association of Port Authorities. That has made economists more optimistic about the hurricane's impact on the nation," it "doesn't mean the economy is in the clear."

Pollution In Nearby Parish May Prevent Rehabitation For Months. ABC World News Tonight (9/13, story 4, 2:30, Vargas) reported, "Next door to New Orleans, in St. Bernard Parish, the situation is very dire. It was located right next to an oil refinery and a levee, both of which breached. 70,000 people live there. And last night, they learned they may not be able to go home until next summer, if ever." ABC (Kofman) added, "The streets of St. Bernard Parish, that only weeks ago overflowed with life, are now deserted." The receding waters "have left behind a thick sludge, a noxious mixture of sea water and crude oil that spilled into the streets from a nearby refinery." Officials here say "that between the oil spill, the flood waters, and the wind damage, almost every one of the 27,000 homes in this community will have to be bulldozed."

Gulf Coast Slowly Recovering. A front page story in the Washington Post (9/14, A1, Nieves) reports that "life has noticeably improved in the five coastal counties where Katrina unleashed the brunt of her fury -- Stone, Hancock, Harrison, Jackson and Pearl River, where about 435,000 people lived and the death toll has reached 218, with 600 people reported missing. More businesses open every day, power is back to 80 percent of the buildings that could receive power and lines for gasoline are back to normal. The Gulf Coast has a future; on that, most agree. But whether it can re-create a culture that took more than 200 years to build, return with its blend of residents, black and white, rich and poor, old money and new immigrant, or will become an entirely new and unfamiliar version of itself -- that is another story."

Levees Said To Have Sustained Extensive Damage. The Los Angeles Times (9/14, Vartabedian) reports that New Orleans' levee system "has sustained

heavy damage well beyond the five breaches that are widely known to have caused flooding after Hurricane Katrina, the Army Corps of Engineers said Monday." Sections of the city are now left "with little or no protection midway through the hurricane season, senior Army officials said. And rebuilding the levees will be a massive undertaking that could take years, meaning the city could be vulnerable for a long time." The New York Times (9/14, Wald) adds, "Hurricane Katrina washed away a 17-foot-tall earthen levee that had protected St. Bernard Parish, east of New Orleans, from the waters of a shipping canal, and the Army Corps of Engineers said Tuesday that the ravaged parish would be left defenseless against even small storms at least until early next year because replacing the structure would take months. In a conference call with reporters, Col. Duane P. Gapinski of the corps acknowledged that the levee might not be rebuilt even by the start of next year's hurricane season."

Canal May Have Added To New Orleans Flooding. The Washington Post (9/14, A21, Grunwald) reports that on May 19, Hassan Mashriqui, a computer modeler at Louisiana State University's Hurricane Center, had used hydrodynamic modeling to offer proof "that a 'funnel' created by the [Mississippi River] Gulf Outlet and a nearby waterway would amplify storm surges by 20 to 40 percent. He described the funnel as 'Crescent City's Trojan Horse,' carrying the Gulf of Mexico's waters into the city." In determining the cause of New Orleans' flooding, attention thus far has focused on two breached floodwalls near Lake Pontchartrain, "But now experts believe that the initial flooding that overwhelmed St. Bernard Parish and the Lower Ninth Ward of New Orleans came from the Gulf Outlet, a channel that was an ecological and economic disappointment long before Hurricane Katrina."

Confirmed Death Toll Tops 600 In Hurricane Zone. The CBS Evening News (9/13, story 4, 0:20, Schieffer) reported, "The waters in New Orleans continued to recede today and as searchers moved into new areas the death toll went up dramatically. The known dead in Louisiana rose from 279 yesterday to 423 today. In Mississippi, the toll stands now at 218 dead."

Louisiana Death Toll Rises To 423. The AP (9/14, Nossiter) reports, "Hurricane Katrina's death toll in Louisiana jumped by more than half Tuesday to 423 as recovery workers turned more of their attention to gathering up and counting the corpses in a city all but emptied out of the living." The new count was up from 279 the day before, and "how high it might go is unclear." Though authorities said last week that "the toll could be well below the dire projections," there have been "no specific estimates."

Some Troops Set To Return To Regular Duties. Pentagon officials said yesterday that about 4,000 active duty troops, two large Navy vessels and three dozen helicopters which had been working on the hurricane relief effort, will return to their regular duties. The New York Times (9/14,) calls the move "a sign that initial rescue efforts after Hurricane Katrina are coming to an end."

The AP (9/14, Burns) adds, "Maj. Gen. Bill Caldwell, commander of the 82nd Airborne, said on Monday in New Orleans that it appeared the search for city residents who still want assistance could be completed within 10 days. He said it remained to be determined by state and federal civilian authorities what tasks his soldiers would be assigned after that."

Jefferson Under Fire For Using National Guard To Retrieve Personal Items. ABC World News Tonight (9/13, story 7, Tapper) reported, "On the night of September 2nd, military sources tell ABC News, the National Guard took Congressman William Jefferson, a Democrat, on a tour of his congressional district. A Louisiana National Guard truck and at least six soldiers were dispatched. On that tour, Jefferson decided to check on his property and recover his personal belongings. Three suitcases, a box and a laptop computer, while New Orleans residents were trying to get rescued from rooftops." Rep. Jefferson: "This wasn't about me going to my house. It's about me going to my district." Tapper: "The truck had pulled up on to Jefferson's front lawn so he wouldn't have to walk in the rising water. Jefferson went into the house alone, a source says, while the soldiers waited on the porch for about an hour. According to the Louisiana National Guard, after the long wait, the truck was stuck and could not drive off."

Texas Officials Fear State Will Get Stuck With Bill For Katrina. The Dallas Morning News (9/14, Gillman) reports that as the bills for Hurricane Katrina, including rent, police overtime, meals, transportation and hospital beds, Texas officials "are becoming increasingly worried that despite a federal disaster declaration, Washington will leave Texas taxpayers stuck with huge bills. The biggest items not yet covered by Congress: up to $450 million for schools and as much as $400 million for health

coverage for the 205,000 evacuees thought to be in Texas." Robert Black, spokesman for Gov. Rick Perry "noted that Texas still hasn't received $2 million it sought from the Federal Emergency Management Agency after Tropical Storm Allison four years ago."

California To Join Emergency Management Assistance Compact. The Los Angeles Times (9/14) reports that California Gov. Arnold Schwarzenegger signed legislation yesterday "allowing California to join 47 states in a pact to provide rescue responders and other resources to disaster locations. California's firefighters had balked at the Emergency Management Assistance Compact out of fear that they would have less legal protection and reduced death and disability benefits if they were hurt while assisting in another state. After a prolonged standoff, Schwarzenegger and Democratic legislators, in the aftermath of Hurricane Katrina, fashioned a compromise that protects the firefighters."

Owners Of Flooded Nursing Home Charged With Negligent Homicide. The CBS Evening News (9/13, story 2, 0:25, Schieffer) reported, "Of all the hurricane stories, perhaps none has been more shocking than the deaths of 34 elderly residents of a flooded nursing home, and then yesterday the news that 44 people died in a flooded hospital that was supposed to have been evacuated. Well, today the Louisiana attorney general announced that the operators of that nursing home, Mable and Salvador Mangano, have been charged with 34 counts of negligent homicide."

NBC Nightly News (9/13, story 2, 0:40, Williams) reported, "State officials said the owners of St. Rita's Nursing Home in St. Bernard's Parish were asked if they wanted to move the patients and did not, despite repeated storm warnings, and their inaction led to the patients' deaths in the post-Katrina flooding. Two of the facility's owners surrendered and were jailed today."

ABC World News Tonight (9/13, story 3, :25, Vargas) reported, "There was very disturbing news from the Louisiana attorney general's office. It says the owners of a nursing home, where 34 people were found dead, have been arrested and charged with 34 counts of negligent homicide."

CNN's Anderson Cooper 360 Degrees (9/13, Cooper) reported, "Louisiana's attorney general announced that the home's two owners have been arrested and were charged with 34 counts of involuntary homicide. ... The state department of health and hospitals officials say they were under the assumption that St. Rita's had filed its required evacuation plan. But as with all facilities, it was up to St. Rita's to decide when to evacuate."

The charges against the nursing home operators was widely reported in the print media with the Washington Post (9/14, A1, Whoriskey, Tyson), the New York Times (9/14, Dewan, Baker), the AP (9/14, Simpson), Knight Ridder (9/14, Gray, Bailey, Dodd), the Los Angeles Times (9/14, Powers, Riccardi) and USA Today (9/14, Parker) all reporting on it.

Authorities Investigating Deaths At Hospital. The CBS Evening News (9/13, story 3, 2:05, Schieffer) reported authorities "are trying to sort out exactly what did happen" at Memorial Hospital, where 44 patients died. CBS (Cowan) added, "Water had flooded the generators, leaving the hospital without air conditioning for four days. At least 44 of its 260 patients never made it out alive, despite doctor's best efforts." But the "nightmare was no different at other hospitals. At this medical center, the spray paint on the wall says at least 11 bodies were recovered here: Inside, an almost unimaginable wasteland of gurneys, bedpans and other biohazards too horrific to describe."

911 Calls For Aid Frequently Made In Vain. NBC Nightly News (9/13, story 4, 1:45, Williams) reported, "15 days after the hurricane and bodies are still in issue in Louisiana where the governor called for continued efforts to recover the bodies quickly and with dignity. Only now are we hearing the 911 calls to emergency dispatchers from the days the levees broke in New Orleans. The people needed help and many didn't get it."

Louisiana Prisoners Helping With Hurricane Cleanup. A front page story in the Wall Street Journal (9/14, Fields) reports, "As Louisiana digs out from Hurricane Katrina, convicts have been opening roads with axes and chainsaws and doing other useful work. At Angola State Penitentiary, near Baton Rouge, inmates produced mattresses for shelters. Some prisoners have even donated money from what little they are paid so evacuees can buy postage stamps. ... All of the prisoners who have been helping are 'trusties,' men who are given special privileges -- like getting to leave the prison grounds under supervision -- because of their exemplary disciplinary records." The Journal notes that Katrina "has resulted in neither riots nor escapes. Because the prison is surrounded by dense, forbidding woods, running away isn't much of an option. Indeed, since Katrina hit, the Louisiana state prison system has been relatively peaceful despite moving 8,000 inmates from prisons damaged by the

hurricane to 13 different facilities."

DeLay Declares "Ongoing Victory" In Battle Against Spending. House Majority Leader Tom DeLay yesterday declared an "ongoing victory," in his effort to cut spending "and said there is simply no fat left to cut in the federal budget," reports the Washington Times (9/14, Fagan, Dinan) reports. DeLay "was defending Republicans' choice to borrow money and add to this year's expected $331 billion deficit to pay for Hurricane Katrina relief. Some Republicans have said Congress should make cuts in other areas, but Mr. DeLay said that doesn't seem possible." Asked if the government is running at "peak efficiency," DeLay said, "Yes, after 11 years of Republican majority we've pared it down pretty good."

Katrina, Roberts Take Much Of Congress's Attention. The Hill (9/14, Schor) reports that Congress is "consumed...by just two issues at the moment," Hurricane Katrine and Judge Roberts' confirmation hearings. "For many on the Hill, the priority most in danger of slipping through the cracks is entitlement cuts mandated by the congressional budget resolution but put off to accommodate the response to Katrina."

First Responder's Frequency Windfall Delayed With TV Bill Due To Katrina. Roll Call (9/14, Ackley) reports that once television transitions from analog to digital, "first responders such as fire, rescue and police officers stand to benefit from a windfall of new frequencies that they can use to communicate with each other when handling emergencies." While Hurricane Katrina made "their case stronger than ever," it "also has set their cause back, at least temporarily, as Congress' legislative course has been thrown into disarray" and the bill the provision is in sits on hold for, as one GOP lobbyist put it, "somewhere between a few weeks and never."

Republicans Move To Deny Democrats "Traction" On Ethics Issues. Roll Call (9/14, Duran) reports, "Cognizant of how their effective portrayal of a Democratic Party drunk with power led to their historic takeover of the House in 1994, Republicans are moving quickly to ensure that Democrats do not get traction on the ethics issue for the 2006 elections." The "Republicans, in addition to counterpunching, maintain that Democrats are talking about ethics so much because they have nothing else to say ... Democratic pollster Celinda Lake said Republicans have to move aggressively to counter ethics charges because the issue hits home." Still, Brad Coker, president of the independent Mason-Dixon polling firm, said that while "individual Republican Members may be in exceptionally hot water, Democrats have a long way to go before they can truly nationalize the issue."

Other News:

Ophelia Upgraded To Hurricane As It Nears North Carolina. ABC World News Tonight (9/13, story 5, :25, Vargas) reported, "Tropical Storm Ophelia was upgraded to a hurricane this afternoon, with winds up to 75 miles per hour. After Katrina, people are nervous. In the Carolinas, a mandatory evacuation has been ordered for parts of the Outer Banks. Schools have already been closed in several counties along the coast, as a precaution." The CBS Evening News (9/13, story 10, 0:20, Schieffer) reported Ophelia "could drop more than a foot of rain." NBC Nightly News (9/13, story 7, 0:30, Williams) reported Ophelia was "strong enough to create high anxiety along the barrier islands on the coast of North Carolina where it is expected to make landfall as early as tomorrow evening."

Meanwhile, the Washington Post/AP (9/14, Nowell) notes, "Unlike Hurricane Katrina's devastating charge at the Gulf Coast, the week-old Ophelia had been following a meandering path, making predictions of its landfall difficult. The hurricane center's forecasts showed it running along the coast, then veering through Pamlico Sound, crossing the Outer Banks and heading back out to sea." USA Today (9/14, O'Driscoll) adds that Ophelia "may take an entire day to cross land before spinning back out to sea." The New York Times/REU (9/14) ran a similar report.

Delta, Northwest Consider Bankruptcy Protection. The Wall Street Journal (9/14, Perez, Carey) reports that the boards of Delta Air Lines and Northwest Airlines are meeting today to decide whether to file for bankruptcy protection, which comes after the hopes of an airline industry recovery "have been crushed by the surge in oil prices and the effects of Hurricane Katrina." The anticipated filings "could make competition in the industry much tougher. Both would want to sharply reduce costs while under bankruptcy protection, which gives them greater ability to abrogate union contracts and make other radical moves."

The AP (9/14, Weber) reports, "Delta Air Lines Inc., the nation's third-largest carrier, plans to file for

bankruptcy protection in New York as early as Wednesday, according to an industry consultant who has been informed of the company's plans." The AP continues, "The consultant, who was not authorized to disclose the information and thus spoke on condition of anonymity, said Delta is working with GE Commercial Finance and other creditors to arrange roughly $2 billion in debtor-in-possession financing. The money would allow the airline to operate in bankruptcy." The AP adds, "Delta, which has lost nearly $10 billion since January 2001, likely will pledge the few remaining assets not already pledged as collateral for loans as part of the bankruptcy financing agreement, the consultant said. 'There is nothing unencumbered after this,' according to this consultant. ..... The consultant said the filing was expected to come Wednesday afternoon but could be pushed to Thursday depending on when the bankruptcy financing is completed."

Competition, Fuel Prices Spur "Likely" Filing. The New York Times (9/14, Maynard) says its "likely" that two of the nation's biggest and most troubled airlines will file for bankruptcy protection. The filing "would not eliminate the challenge posed by low-fare carriers, like Southwest and JetBlue, which now carry one-third of passengers on flights within the United States. ... The low-fare airlines' growing presence, up from just 6 percent of passengers in 1990, has kept the big airlines from passing along the punishing rise in the price of jet fuel."

The Financial Times (9/14, Daniel) reports that Delta "was seen as weaker because of its larger exposure to domestic routes, more onerous pension obligations and the cash drain of renegotiating a deal with its credit card vendors." But, credit analysts "noted that Northwest had on Monday defaulted on an $18.7m payment to Mesaba, a regional feeder airline, and saw this as a signal that it was also close to filing."

Bush Returns Focus To Foreign Affairs, Meets With China's Hu. The Washington Post (9/14, A4, Baker) reports that "after nearly two weeks consumed by Hurricane Katrina, President Bush turned his attention back to the rest of the world Tuesday and confronted again the vexing challenges of an intractable war in Iraq, disputes with Iran and North Korea, and fitful relations with the United Nations. Bush played host to Iraq's first democratically selected president at the White House in the morning and persuaded him to abandon talk of imminent U.S. troop pullouts. Bush then flew to New York in the afternoon to attend a division-plagued U.N. summit and to solicit Chinese help in pressuring Pyongyang and Tehran to abandon nuclear weapons ambitions." The "full day of diplomacy marked the first time that Bush has resumed a normal schedule since clearing his calendar after the devastation wrought by Katrina along the Gulf Coast." Bush "canceled a pomp-filled visit by Chinese President Hu Jintao last week to concentrate on getting relief to storm-ravaged areas," but "began to make it up to Hu by meeting with him here Tuesday evening, one of the first sit-down sessions with another world leader since the crisis. The rest of the week is jammed with other foreign policy events, including meetings Wednesday with the prime ministers of Britain and Israel, a U.N. gathering of 170 world leaders and a White House summit Friday with Russian President Vladimir Putin."

The New York Times (9/14, Sanger) also reports that "for the first time since the Hurricane Katrina crisis, President Bush returned yesterday to dealing with festering global problems." Bush's "meeting with Mr. Hu was delayed a week by the hurricane, and was the first in a series planned for coming months, including a trip by Mr. Bush to China in November. When the session finally took place yesterday at the Waldorf-Astoria, Mr. Bush was lobbying hard to persuade Mr. Hu -- who has nurtured a close relationship with Iran -- not to block action by the International Atomic Energy Agency next week to refer Iran's work on uranium enrichment to the Security Council."

The Atlanta Journal-Constitution/AP (9/14, Hunt) reports that Bush "won a pledge" from Hu to "step up pressure on North Korea to abandon its nuclear weapons, but the two leaders remained apart Tuesday over whether to seek international sanctions against Iran." Bush said his discussions with Hu "ranged from how to prevent an avian flu pandemic to economic matters and feared nuclear proliferation in North Korea and Iran. He seemed pleased when Hu said, 'We stand ready to step up our communication and cooperation' to gain fresh progress in negotiations with North Korea."

The Wall Street Journal (9/14, A8, King) reports that Hu told Bush that China "was prepared to take 'effective measures' to ease the soaring U.S. trade deficit with China while also moving to crack down on rampant piracy problems at home. The U.S. last year imported $162 billion more from China than it exported to China. U.S. officials said that Mr. Hu's remarks on intellectual-property protection were particularly important, and among the strongest assurances on that front that any Chinese leader has ever offered. Mr. Hu said that on the whole, relations between the two countries

were 'developing quite well,' although he conceded that the rapid growth in bilateral trade had created 'some frictions' between the two economic powers."

Diplomats Concerned Katrina Response Will Distract US International Focus. Knight Ridder (9/14, Strobel) reports, "Katrina's main impact on foreign policy could be to simply divert the Bush administration's focus more toward domestic concerns." His "visit to the United Nations is sandwiched between two trips to the Gulf Coast." The President and Secretary of State Condoleezza Rice "have been bombarded with questions about Katrina and race issues. And diplomats from the Middle East and elsewhere say they are beginning to worry about sustained U.S. attention to their region."

Bush To Address UN General Assembly. The CBS Evening News (9/13, story 11, 0:30, Schieffer) was the only network to report that President Bush is "in New York tonight preparing to address the UN General Assembly tomorrow morning."

US Intelligence Experts Briefed China, India On Iran Missile Plans. The Wall Street Journal (9/14, A3, Robbins) reports, "As the U.S. and Europe prepare to face off with Iran at the United Nations, the Bush administration dispatched intelligence experts to China and India last week to brief them on Tehran's alleged efforts to develop a missile capable of delivering a nuclear warhead. The decision to share the highly classified intelligence is a measure of the resistance the U.S. is meeting as it pushes, along with the Europeans, for Iran's nuclear activities to be referred to the U.N. Security Council. Even after Tehran resumed some sensitive nuclear activities last month and ended negotiations with the Europeans, the U.S. and its allies face a challenge persuading China, Russia and other key nations that the situation is grave enough -- or Iran's weapons program advanced enough -- for international reprisals."

Administration Using PowerPoint Presentation To Make Case Against Iran. The Washington Post (9/14, A7, Linzer) reports, "With an hour-long slide show that blends satellite imagery with disquieting assumptions about Iran's nuclear energy program, Bush administration officials have been trying to convince allies that Tehran is on a fast track toward nuclear weapons. The PowerPoint briefing, titled 'A History of Concealment and Deception,' has been presented to diplomats from more than a dozen countries. Several diplomats said the presentation, intended to win allies for increasing pressure on the Iranian government, dismisses ambiguities in the evidence about Iran's intentions and omits alternative explanations under debate among intelligence analysts."

Ex-IAEA Official Says Security Council Should Authorize Action. In a New York Times (9/14) op-ed, former IAEA Deputy Director General Pierre Goldschmidt writes that under IAEA statute, "there is no deadline or expiration date after which noncompliance becomes moot. Thus, Iran is still accountable for its past breaches. And Iran's resumption of work related to uranium conversion eliminates the only reason for" France, Germany, and the UK "not to report Iran to the Security Council. A failure by the board to make such a report would considerably weaken the agency and the global nonproliferation regime. It would reveal that the world is unwilling to hold rule-breakers to account, inviting proliferation by other countries. ... It is time for the International Atomic Energy Agency to get the authority it needs from the Security Council to complete the verification that Iran's nuclear program is and has been, as claimed, exclusively for peaceful purposes."

As Talks Resume, North Korea Insists On Right To Nuclear Power. The Wall Street Journal (9/14, A18, Fairclough) reports that "talks aimed at persuading North Korea to give up its nuclear ambitions resumed with no public sign of progress toward a compromise between Washington and Pyongyang on a central issue: whether the North should be allowed to develop atomic energy. North Korea's chief delegate to the talks, Kim Kye Gwan, insisted that his country won't give up its right to nuclear power, despite American demands that Pyongyang dismantle all of its atomic programs, military and civilian." Still, the AP (9/14, Herman) adds that Kim said North Korea "would attend the talks with a sincere and flexible attitude."

The Washington Post (9/14, A28, Cody) reports that Kim's remarks "suggested continued difficulties in the talks despite renewed pledges from all participants to show flexibility and goodwill. The talks among China, North and South Korea, Japan, Russia and the United States are aimed at the stated goal of achieving a nuclear-free Korean Peninsula. The issue of peaceful nuclear energy was a major reason the last round was suspended Aug. 7, after 13 days of intense bargaining." The Bush Administration "remains adamant that North Korea must abandon its nuclear weapons programs and forgo nuclear energy production." But as the Washington Times (9/14, Salmon) reports, the "US position is complicated by Chinese and South Korean support for civil atomic

energy use by North Korea on the condition that it abandon nuclear weapons."

The Christian Science Monitor (9/14, Regan) reports that the US "rejected North Korea's stance. US chief negotiator Christopher Hill said Monday in Beijing that North Korea's position 'does seem to be wrong.' Still, US negotiators said they will renew efforts to convince North Korea to give up its civilian reactors at the talks."

US, South Korea Hold Preliminary Talks On Bilateral Trade Accord. The Financial Times (9/14, de Jonquières, Fifield) reports that "US and South Korean officials are holding preparatory talks on a bilateral trade agreement, potentially paving the way" for President Bush to "launch formal negotiations when he visits the country in November. A deal with Asia's third biggest economy would give the US an important economic bridgehead into the region."

"Widespread Disappointment" With "Gutted" UN Statement Of Goals. The New York Times (9/14, Hoge) reports, "The General Assembly unanimously approved a scaled-down statement of goals on Tuesday," amidst "widespread disappointment at the weakening of the 35-page document."

The Los Angeles Times (9/14, Farley) adds that because "the secretary-general is treated more like an employee of the member nations than their leader" and "a culture of consensus allowed a handful of nations with entrenched interests to shape the outcome," after "weeks of bitter negotiations," many of Annan's boldest reform proposals were "eviscerated."

The Washington Post (9/14, A6, Lynch, Kessler) adds that delegates "voiced relief that the entire process had not collapsed, which would have left the summit with no tangible result, and they highlighted relatively modest achievements in the document" which includes "provisions that call for an increase in foreign aid, condemn terrorism and underscore the obligation of states to halt genocide and ethnic cleansing." However, it does not address "proposals to expand the U.N. Security Council, to create an independent auditing board to scrutinize U.N. spending, and to impose basic membership standards for a new Human Rights Council."

The Atlanta Journal-Constitution/AP (9/14, Wadhams) adds, "To reach a consensus, most of the text's details were gutted in favor of abstract language ... Several nations were angry with the way the document was pushed through the General Assembly before it was translated from English into the five other official U.N. languages, a violation of U.N. protocol. That gave ambassadors little time to review it."

The Kansas City Star (9/14, Lederer) adds, "Many countries blame the United States for proposing hundreds of amendments just a few weeks ago to a document they believed was nearing agreement. The major organizations of developing countries, including the Group of 77 and the Nonaligned Movement, then responded with dozens of their own."

Some, Like Bolton, Content; Others, Like Annan, Say Missing Parts Are A "Disgrace.". The Washington Times (9/14, Pisik) adds, "Development specialists praised the outcome of the final declaration, noting that the passages were mostly strong and encouraging ... Jan Eliasson, Sweden's former ambassador to Washington and the president of the General Assembly for the upcoming year, praised the declaration and said it should be assessed compared with historic reform measures, not to recent reform proposals."

The Los Angeles Times (9/14, Farley) adds that diplomats said "there were many more disappointments than successes."

The Atlanta Journal-Constitution/AP (9/14, Wadhams) adds, "The outgoing president of the General Assembly, Gabon's Jean Ping, presented the compromise Tuesday afternoon in hopes of bridging the deepest divides and moving away from bitter line-by-line negotiations that had bogged down the debate ... Though Annan said he was pleased, the document was a significant step backward for him."

The Washington Post (9/14, A6, Lynch, Kessler) adds that Annan said that "members' inability to adopt...measures on disarmament and nonproliferation constituted 'a real disgrace.'"

The New York Times (9/14, Hoge) reports that Secretary General Kofi Annan "complained pointedly...about the elimination in the final version of language covering nuclear nonproliferation and disarmament." John R. Bolton, the American ambassador, said "the United States was satisfied with the outcome, which he said matched the limited hopes he had had for the document."

The Kansas City Star (9/14, Lederer) adds that Germany's U.N. Ambassador Gunter Pleuger said "in hindsight, member states underestimated the amount of preparatory work needed to reach consensus."

America Enters UN Summit With New Internal, External Views. Knight Ridder (9/14, Strobel) reports that as the President heads to the UN summit, the "botched response to Hurricane Katrina has changed views of America both at home and abroad." In other

nations there is "incredulity that the world's wealthiest country could fail to take care of its own," while "Americans want more attention on domestic concerns and less on the war on terrorism." Katrina "threw a light on America's class and racial divides," and "public opinion at home and abroad will pose challenges for" the Administration agenda of the "promotion of democracy around the world and the war in Iraq."

Author Says Summit Is On "Brink Of Failure." In an op-ed in the Financial Times (9/14), Nancy Soderberg, vice president for multi-lateral affairs of the International Crisis Group and author of The Superpower Myth: The Use and Misuse of American Might (John Wiley), "The depressing truth is" that the world "failed to take up the secretary-general's challenge. His proposals offer the right way forward for the 21st century but they will have to wait for the world to catch up with his vision. Until then, the world will remain the worse for it." Because of "the ideological clash between the US and much of the developing world," the meeting is on "the brink of failure."

NYTimes Says US Bears "Disproportionate Share" Of Blame For "Squandered" Opportunity. The New York Times (9/14) editorializes, "A once-in-a-generation opportunity to reform and revive the United Nations has been squandered," and "every one of the more than 170 national leaders attending, starting with President Bush, should be embarrassed." However, "the United States, as the host nation and the U.N.'s most indispensable and influential member, bears a disproportionate share" of the blame. President Bush "contended that contrary to all appearances and to common sense, Mr. Bolton was just the man to achieve the reforms the United Nations needed. Almost immediately, Mr. Bolton began proving Mr. Bush wrong," transforming "what had been a painful and difficult search for workable diplomatic compromises into a competitive exercise in political posturing ... By the time Washington retreated to a more realistic position, it was too late to retrieve much of the bold original agenda."

IMF Director Says Fund Needs To Be Redefined. In an op-ed in the Financial Times (9/14) Rodrigo De Rato, managing director of the International Monetary Fund, argues that globalisation "has brought cross-border financial crises and heightened the imperative to bring into the mainstream those who are being left behind ... As we address the challenges of our rapidly globalising world, change is essential if the fund is to remain relevant," and "redefining the fund's mission is inseparable from reassessing IMF governance ... The fund's legitimacy as a global organisation rests on fair representation for all members. The current allocation of quotas...puts this legitimacy at risk in many regions." The fund has collected new mandates "as old mandates remained unchanged" and became "diffuse, resource-intensive operations." Also, "the IMF's work in low income countries is overloaded with procedures that absorb substantial resources yet yield questionable gains. This work must be streamlined to ensure the needs of poverty reduction are met."

Bush May Have "Missed" Taking The Lead On Global Poverty. The New York Times (9/14, Dugger) reports, "Some say" President Bush "has missed an opportunity to take the lead on poverty." The quest to relieve crushing poverty "has been overshadowed by Katrina, the oil-for-food scandal and squabbling over reform of the United Nations itself," while "the administration's opening foray in the negotiations left some African leaders dismayed ... Whatever the verdict on Mr. Bush's role, others are seizing the initiative. Former president Bill Clinton will sponsor a three-day conference in New York beginning tomorrow that will focus on poverty and governing, climate change and conflict."

Clinton's Fight Against Poverty Could Yield "Spectacular" Results. The Financial Times (9/14, Sachs) reports, "The Clinton Global Initiative is surely the most visible of" the efforts against extreme poverty that flank the 2005 World Summit, "drawing upon former President Bill Clinton's ability to mobilize friends from in and out of government and industry. Clinton seems intent on achieving practical actions, following the path set by America's great former President, Jimmy Carter ... If President Clinton takes a page from President Carter's playbook, the results could be spectacular."

Abbas Will Disarm Small Militias Now, Hamas After Elections. USA Today (9/14, Patience) reports, "Mahmoud Abbas said Tuesday that he would impose law and order in Gaza in response to the chaos that followed the pullout of Israeli troops from the territory a day earlier," and "the Palestinian Authority president's chief of staff, Rafiq Husseini, said Abbas would begin disarming small militant groups soon. After parliamentary elections in January, he said, Abbas would insist that big militant groups such as Hamas and Islamic Jihad disarm in accordance with steps in the U.S.-mediated 'road map' to establish a

Palestinian state."

Looting, Illegal Board Crossings Continue In Gaza. The New York Times (9/14, Erlanger) reports that thousands "continued their active salvaging of saleable or usable materials from the 21 former Israeli settlements. In some places, Palestinians looted the greenhouses that were bought for their use by American philanthropists, taking nylon tarpaulins, irrigation hoses and electrical equipment," despite the "Palestinian security forces deployed around the greenhouses." Meanwhile, Egyptian "border guards looked the other way as Palestinians crossed the fences into Egypt through the Philadelphi route ... Some Israeli officials criticized the Egyptians and said the lax border controls boded badly for Israel's future security."

Palestine, Israel Disagree Whether Gaza Is Still Occupied. The Washington Times (9/14, Mitnick) reports, "Although Gazans are celebrating a liberation of sorts, the territory isn't a sovereign state, and many Palestinians don't consider Israel's occupation over. Israel, for its part, wants international recognition of the end of its military rule and the beginning of full Palestinian 'jurisdiction' over the Gaza Strip," even though "Israel will retain control of Gaza's airspace, its territorial waters and, for the near future, the border crossing to Egypt." The issue "at stake is whether Israel will be able to fully absolve itself of responsibility for Gaza's anarchy and economic blight, as well as the degree of force that the Jewish state would be able to use in retaliation for cross-border attacks."

While Not Considered Politically Adept, Merkel On Track For Chancellorship. The Washington Post (9/14, A1, Whitlock) reports, "Unsmiling, unstylish and uncharismatic," Angela Merkel "is bidding to become Germany's first female chancellor, as well as the first to have grown up behind the Iron Curtain, in the former East Germany. Polls show that her party, the Christian Democratic Union, holds a lead, albeit a narrowing one." However, "for many Germans she remains a remote figure" and "Merkel's rivals, inside and outside her party, show little regard for her political skills." Still, "in Germany's political system, national leaders are chosen by party, and the Christian Democrats lead the polls."

WPost Says US, Allies Must Continue Pushing Against Darfur Genocide. The Washington Post (9/14) editorializes, "Little by little, American diplomacy has made headway" in stopping the genocide in Darfur. "The progress over the past year demonstrates that the United States and its allies do have the power to save lives by the tens of thousands. It also suggests that, if the Bush administration had pushed harder and earlier, it could have saved many more people." This progress "is incomplete and reversible," and if the United States and its allies "lose interest in Darfur, violence may resume and humanitarian access may dry up."

Protestant Leaders In Northern Ireland Criticized. In an editorial, the Los Angeles Times (9/14) notes that violence recently "erupted in Northern Ireland...as authorities prevented the Orange Order, the largest Protestant organization in the province, from parading past a Catholic neighborhood." Although "blame for the...violence rests mainly with the leadership of the Orange Order, the silence of at least two key Protestant political leaders who could have helped head off the clashes gives them a share of the responsibility. The Rev. Ian Paisley, head of the Democratic Unionist Party, and Reg Empey, the leader of the Ulster Unionist Party, should immediately denounce sectarian violence as unacceptable." And since forbidding these parades seems to be an unenforceable option, the "only viable solution is to get political leaders to recognize equal rights for both communities, and to get Orange Order leaders to the table, negotiating directly with representatives of the communities through which it intends to march."

Washington's Schedule:

Today's Events In Washington.

White House:

PRESIDENT BUSH — Attends signing of the Convention for the Suppression of Acts of Nuclear Terrorism, UN headquarters, NY; speaks at the UN High-Level Plenary Meeting, UN headquaters; meets with the Prime Minister of Israel, UN headquarters; meets with the Prime Minister of the United Kingdom, UN headquarters; attends Security Council Summit, UN headquarters; attends international launch of the UN Democracy Fund, UN headquarters; attends luncheon hosted by UN Secretary General Annan, UN headquarters; travels to Washington; makes remarks at the National Dinner Celebrating 350 Years of Jewish Life in America, National Building Museum.

VICE PRESIDENT CHENEY — No public schedule.

LAURA BUSH — Attends the President's remarks at the UN High-Level Plenary meeting, New York; speaks at an USAID Fighting Malaria in Africa event, Waldorf-Astoria Hotel, New York.

US Senate: 9:30 a.m. JUDICIARY _ Full Committee. Hearing on the nomination of John Roberts to be Chief Justice of the Supreme Court. John Roberts. Location: Room 216, Hart.

10 a.m. COMMERCE, SCIENCE AND TRANSPORTATION _ Subcommittee on Aviation. Hearing to review the impact of Hurricane Katrina on the aviation industry. Air Transport Association CEO James May; Pensacola Regional Airport Director Frank Miller; Regional Airline Association President Deborah McElroy; Energy Information Administration Deputy Administrator Howard Gruenspecht. Location: Room 562, Dirksen.

10 a.m. HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS _ Full Committee. Oversight hearing on disaster relief and response efforts by all levels of government following Hurricane Katrina. Former California Gov. Pete Wilson, former Mayor Patricia Owens of Grand Forks, N.D., National Urban League President and former New Orleans Mayor Marc Morial, and Iain Logan of the International Federation of Red Cross and Red Crescent Societies. Location: Room 342, Dirksen.

10:30 a.m. SELECT INTELLIGENCE _ full Committee. Closed, members only briefing on pending matters. Location: Room 219, Hart.

US House: FLOOR SCHEDULE _ 10 a.m. Meets for legislative business. Highlights: Suspensions (3 bills): 1) H.R. 3408 - To reauthorize the Livestock Mandatory Reporting Act of 1999 and to amend the swine reporting provisions of that Act; 2) H.R. 3421 - To reauthorize the United States Grain Standards Act; 3) H.Con.Res. 208 - Recognizing the 50th anniversary of Rosa Louise Parks' refusal to give up her seat on the bus and the subsequent desegregation of American society. H.R. 3132 - Children's Safety Act of 2005.

10 a.m. ARMED SERVICES _ Full Committee. Hearing on the Quadrennial Defense Review. Dov Zakheim, Booz Allen Hamilton; Daniel Goure, Lexington Institute; Michele Flournoy, CSIS; Andrew Krepinevich Jr., Center for Strategic and Budgetary Assessments. Location: Room 2118, Rayburn.

10 a.m. FINANCIAL SERVICES _ Financial Institutions and Consumer Credit Subcommittee. Hearing on the response of financial institutions to Hurricane Katrina. McKinley W. Deaver, Mississippi Bankers Association; Ken Bordelon, E Federal Credit Union (LA); C. R. Cloutier, MidSouth Bank, N.A. (LA); Charles Elliott, Mississippi Credit Union Association; Diane Casey-Landry, Americas Community Bankers; David Gibbons, HSBC North America (IL); Hilary Shelton, NAACP. Location: Room 2128, Rayburn.

10 a.m. GOVERNMENT REFORM _ Full Committee. Meets on pending business. Location: Room 2154, Rayburn.

10 a.m. JUDICIARY _ Full Committee. Markup of H. Res. 420 - directing the Attorney General to turn over requested documents in the Valerie Plame case. Location: Room 2141, Rayburn.

10 a.m. VETERANS AFFAIRS _ Full Committee. Oversight hearing on the VA's proposed information technology infrastructure reorganization. Location: Room 334, Cannon.

10:30 a.m. APPROPRIATIONS _ Science, State, Justice, Commerce Subcommittee. Hearing on the transformation of the FBI following the 9/11 terrorist attacks. FBI Director Robert Mueller, former Governor and U.S. Attorney General Richard Thornburgh, Justice Department Inspector General Glenn Fine, Al Cumming and Todd Masse of the Congressional Research Service, Randy Hite of the Government Accountability Office. Location: Room 2359, Rayburn.

10:30 a.m. INTERNATIONAL RELATIONS _ Full Committee. Markup of H. Res. 375 - Requesting the President and directing the Secretary of State to transmit to the House of Representatives not later than 14 days after the date of the adoption of this resolution all information in the possession of the President and the Secretary of State relating to communication with officials of the United Kingdom between January 1, 2002, and October 16, 2002, relating to the policy of the United States with respect to Iraq; H. Res. 408 - Requesting the President and directing the Secretary of Defense to transmit to the House of Representatives not later than 14 days after the date of the adoption of this resolution all documents in the possession of the President and Secretary of Defense relating to communications with officials of the United Kingdom relating to the policy of the United States with respect to Iraq; H. Res. 419 - Directing the Secretary of State to transmit to the House of Representatives not later than 14 days after the date of the adoption of this resolution documents in the possession of the Secretary of State relating to the disclosure of the identity and employment of Ms. Valerie Plame. Location: Room 2172, Rayburn.

1:30 p.m. INTERNATIONAL RELATIONS _ Europe and Emerging Threats Subcommittee. Hearing on U.S. aide to Europe. Thomas C. Adams, Coordinator, U.S. Assistance to Europe and Eurasia, Bureau of European

and Eurasian Affairs, Department of State; Drew W. Luten III, Senior Deputy Assistant Administrator, Bureau for Europe and Eurasia, USAID. Location: Room 2172, Rayburn.

2 p.m. GOVERNMENT REFORM _ Energy and Resources Subcommittee.Hearing on natural gas demand. Rebecca Watson, Assistant Secretary of Interior for Land and Minerals Management; Guy Caruso, Administrator, Energy Information Administration, Department of Energy; Michael Zenker, Senior Director, North American Natural Gas, Cambridge Energy Research Associates; Logan Magruder, President, Independent Petroleum Association of Mountain States; Tyson Slocum, Research Director, Energy Program, Public Citizen. Location: Room 2154, Rayburn.

7 p.m. RULES _ Full Committee. Meets to consider H.R. 889 Coast Guard and Maritime Transportation Act. Location: Room H-313, Capitol.

Other: AIR AND SPACE CONFERENCE _ The Air Force Association hosts the Air & Space Conference and Technology Exposition 2005 geared to the professional requirements of Air Force enlisted and officers, Guardsmen and Reservists, civilians, retirees and industry representatives. It will focus on the future of air and space power during workshops and forums featuring academians and professionals. Highlights: 9:05 a.m. Ambassador Edward Walker, Jr., president and CEO, Middle East Institute. 10 a.m. Michael Scheuer, former chief of bin Laden Unit at CIA, author. 11 a.m. USAF Chief of Staff remarks. Location: Marriott Wardman Park Hotel, 2660 Woodley Road, NW.

FDA-PDA JOINT CONFERENCE _ The Food and Drug Administration (FDA) and the Parenteral Drug Association (PDA) hold the 2005 Joint Regulatory Conference and Exhibits. Highlights: 7 a.m. Breakfast Sessions, Rick Friedman, FDA; Timothy Ramjit, Global Technical Services; Vince Matthews, Eli Lilly and Co. Location: Omni Shoreham Hotel, 2500 Calvert St. NW.

HEALTH INSURANCE _ America's Health Insurance Plans holds its 2005 Medicare and Medcaid Conferences. Highlights: 8:30 a.m. Deputy Administrator CMMS Leslie Norwalk. 9:45 a.m. Maura Bluestone, CEO, Affinity Health Plan; Darnell Dent, CEO, Community Health Plan of Washington; Michael Dudley, CEO, Sentara Health Plans; Howard Kahn, CEO. LA Care. 11:15 a.m. National Governors Association Executive Director Raymond Scheppach. 12:15 p.m. Assistant HHS Secretary Michael O'Grady. 3 p.m. Virginia Medical Assistance Services Director Patrick Finnerty, Billy Millwee, Texas Health and Human Services Commission. Location: Marriott-Crystal Gateway, 1700 Jefferson Davis Hwy., Arlington, Va.

ROBERTS-PROTEST _ A coalition of groups join in protest of the confirmation hearings for Judge John Roberts to be chief justice. Groups include: National Organization for Women, Feminist Majority, People for the American Way, Human Rights Campaign, Rainbow PUSH/Coalition, and others. Highlights: 7 a.m. Protest behind Hart Senate Office Building on C Street. 12 p.m. Protest behind Hart Senate Office Building on C Street. Location: Capitol Hill, various locations.

USTR PORTMAN _ Schedule for USTR Rob Portman. Highlights: 9:30 a.m. Meets with EU External Trade Commissioner Peter Mandelson. Photo opportunity. Pre-clearance required. USTR offices, 600 17th St. NW. At about noon, they will have a media availability. RSVP required. 10 a.m. Attends public hearing on China's WTO compliance. USTR Annex, 1724 F St. NW. 5:15 p.m. Meets with Kenyan Trade Minister Mukhisa Kituyi. Photographers must be pre-cleared. USTR offices, 600 17th St. NW.

HOUSE DEMOCRATS _ 9 a.m. Closed meeting of the House Democratic Caucus. Location: Cannon Caucus Room.

HOUSE REPUBLICANS _ 9 a.m. Closed meeting of the House GOP Conference. Location: Room HC-6, Capitol. Notes: Stakeout in the Center Steps Hallway at 10 a.m., with Speaker Hastert and Reps. Roy Blunt and Deborah Pryce discussing the Children's Safety Act, Coast Guard reauthorization and the legislative agenda.

FUEL PRICES _ 9:30 a.m. House members, including Sherwood Boehlert and Edward Markey, hold a news conference to announce a bill to help provide consumer gasoline price relief by requiring automakers to increase the fuel efficiency of vehicles. Location: Room 2318, Rayburn.

CRITICAL TRIANGLE _ 10 a.m. The US Institute of Peace holds a panel discussion on ``A Critical Triangle: Iraq, Iran and the U.S.'' with Daniel Brumberg of the institute, Geoffrey Kemp of the Nixon Center, and Kenneth Pollack of the Saban Center for Middle East Policy. Location: 1200 17th St. NW.

DEMOCRATS-GASOLINE PRICES _ 10 a.m. Press stakeout for discussion with Democratic Leader Nancy Pelosi, Democratic Whip Steny Hoyer; Democratic Caucus Chairman Robert Menendez, and Democratic Caucus Vice Chairman Jim Clyburn following Democratic Caucus Meeting to Discuss Hurricane Katrina and the record gas prices Americans are paying at the pump. Location: Stake-out position outside of 345 Cannon (Cannon Caucus Room).

FLU VACCINATIONS _ 10 a.m. The National

Foundation for Infectious Diseases holds a news conference with leading health authorities to warn Americans to get their flu shots. Participants include CDC Director Julie Gerberding, CMMS Administrator Mark McClellan, others. Location: National Press Club.

REPUBLICANS _ 10 a.m. House Speaker Dennis Hastert joins Majority Whip Roy Blunt, Conference Chairman Deborah Pryce, and Budget Chairman Jim Nussle immediately following GOP Conference meeting to discuss Children's Safety Act, United States Coast Guard reauthorization, and legislative agenda. Location: Room HC-6, Capitol.

9/11 COMMISSIONERS-EMERGENCY RESPONSE REPORT _ 10:30 a.m. The former 9/11 Commissioners release a report assessing implementation of the Commission's recommendations on homeland security and emergency response. Location: Ronald Reagan Building and International Trade Center, International Gateway Room, 1300 Pennsylvania Ave. NW.

SANTORUM-ROBERTS _ 10:30 a.m. Sen., Rick Santorum, R-Pa., others, hold a press conference to discuss issues surrounding ``Civil Rights/Civil Liberties regarding the Supreme Court Hearings for Judge John Roberts. Location: Russell Senate Park.

ANTI-BOLTON _ 11 a.m. Global Exchange hosts a teleconference during which anti-poverty, environmental and women's groups will denounce Bolton/Bush positions as World Summit opens. Notes: Media call-in number is 800-351-4872. Passcode: 143219.

PENTAGON-IRAQ BRIEFING _ 11 a.m. Army Col. Robert Brown, commander of the 1st Brigade (Stryker), 25th Infantry Division, Multi-National Force - Northwest, will brief live from Iraq to provide an operational update in his area of responsibility. Location: DOD Briefing Studio, Pentagon 2E579.

KATRINA-JOBS _ 11:15 a.m. The Travel Industry Association of America holds a news conference to announce an online job bank to help workers displaced by Hurricane Katrina. Location: National Press Club.

ISRAELI-PALESTINIAN SECURITY _ 12 p.m. Americans for Peace Now hosts a discussion by Middle East experts regarding Israeli-Palestinian security issues in the post-disengagement period, with Israeli security expert Yossi Alpher and Palestinian security expert Ahmad Samih Khalidi. Location: Room 2203, Rayburn House Office Building.

ROBERTS _ 12 p.m. Reps. Deborah Pryce, Trent Franks, John Carter, Dan Burton, others, hold a news conference on the nomination of John Roberts to be Chief Justice of the Supreme Court. Location: Cannon Terrace.

RUSSIA-LOOSE NUKES _ 12 p.m. The Henry L. Stimson Center and the Center for American Progress release report, ``Securing Russia's Loose Nukes: Progress Since 9/1.'' Location: Center for American Progress, 1333 H Street NW., 10th Floor.

SUNUNU-FINANCIAL SERVICES _ 12 p.m. Sen. John Sununu, R-N.H., a member of the Senate Banking Committee, will deliver the keynote luncheon address to members of the Financial Services Institute. Location: Presidential Ballroom. Capital Hilton, 16th and K Sts. NW.

EPA-KATRINA _ 1 p.m. EPA Administrator Stephen L. Johnson will discuss the agency's work including rescues and testing for various pollutants or toxics following Hurricane Katrina. Location: EPA Headquarters, Ariel Rios North Building, 200 Pennsylvania Ave. NW.

KATRINA RELIEF _ 1 p.m. Rep. Carolyn Maloney holds a news conference on Hurricane Katrina and 9/11 recovery. Location: Cannon Terrace.

HOYER _ 1:30 p.m. House Democratic Whip Rep. Steny Hoyer holds a pen and pad only briefing. Location: Room H-306, Capitol.

KATRINA-MINISTERS _ 2 p.m. The Ministers for Racial, Social and Economic Justice organization holds a news conference to call on Congress to reprimand and/or censure President Bush for the administration's handling of the Hurricane Katrina relief efforts. Location: National Press Club.

ABU ALI _ 3 p.m. Arraignment of Ahmed Omar Abu Ali on a superceding indictment which includes charges of conspiracy to assassinate President Bush. Judge Gerald Bruce Lee will preside. Location: U.S. District Court, Alexandria.

INTERNET-INTERNATIONAL RELATIONS _ 6 p.m. The Council on Foreign Relations holds a special event celebrating the launch of the newly redesigned cfr.org, ``A Wired World: The Internet and International Relations,'' with Craig Calhoun, New York University; Andrew McLaughlin, Google Inc.; Daniel Burton, Jr., Entrust, Inc. Location: Council on Foreign Relations, 1779 Massachusetts Ave. NW.

NATIONAL PTA-TARGET _ 6 p.m. National PTA honors Target at a national gala dinner as the recipient of the 2005 National PTA Commitment to America's Children Award. Location: Ronald Reagan Building and International Trade Center, 1300 Pennsylvania Ave. NW.

USO-GEN. MYERS _ 6 p.m. The USO honors Gen. Richard Myers, chairman of the Joint Chiefs of Staff, for distinguished service to his country and an enlisted member from each branch of the armed forces. Deborah Norville is emcee. Guests include members of Congress, military leadership and

government officials, Miss USA 2005 Chelsea Cooley, John Elway, Kathy Kinney, Wayne Newton, Shaquille O'Neal, Tito Puente, Jr., Henry Rollins, Leeann Tweeden, Neal McCoy and soprano Harolyn Blackwell. Location: Hilton Washington, 1919 Connecticut Ave. NW.

The Big Picture:

Headlines From Today's Front Pages.

Los Angeles Times:
"Roberts Is Confronted On Abortion."
"Roe Ruling: More Than Its Author Intended."
"Roping In A Legacy."
"Haven Turned To Horror."
"Bush Accepts Blame For Slow Hurricane Response."
"Extent Of L.A. Blackout Gave DWP Chief A Jolt."
"Baghdad Blast Kills Scores Of Iraqis."

USA Today:
"Dreams Are Emerging Of A 'New' New Orleans — But Which One?"
"Roberts Avoids Specifics On Abortion."
"Pair Charged In 34 Deaths."

New York Times:
"President Says He's Responsible In Storm Lapses."
"Roberts Fields Questions On Privacy And Precedents."
"Two Major Airlines Seen Near Filing For Bankruptcy."
"Ferrer Is First; Runoff Possible Against Weiner."
"F.A.A. Alerted On Qaeda In '98, 9/11 Panel Said."
"Owners Of Nursing Home Charged In Deaths Of 34."

Washington Post:
"Roberts Avoids Specifics On Abortion Issue."
"Owners Of Nursing Home Charged."
"Bush Takes Responsibility For Failures Of Response."
"As Questioning Begins, Euphemisms Abound."
"The Region Starts To Stagger Back."
"No-Frills Candidate Aims For Germany's Top Spot."

Washington Times:
"Roberts Defends Roe As 'A Precedent.'"
"Nominee's Answers Get Mixed Reviews."
"DeLay Declares 'Victory' In War On Budget Fat."
"Europe Leaders Pump Up Volume."
"At War With An Enemy Of An Unspoken Name."
"New Orleans' Port, Airport Now Reopened."
"Toyota Commits To 'Future' Of All Gas-Electric Motors."

Detroit Free Press:
"NWA Near Bankruptcy."
"Barden: My 1% In Casino Is Too Little."
"Race Still Divisive In Mayoral Campaign."
"Iraqi Leader Welcomed In Dearborn."

Atlanta Journal-Constitution:
"Inflation+Growth=Spending."
"Storm Deaths Lead To Arrests."
"Roberts Deflects Pointed Queries."
"New Hope, New Home."
"Fake Evacuee Leaves Donor Feeling Burned."

Dallas Morning News:
"Bush Takes Blame For Response."
"At Least 73 Die In Iraq Blast."
"'We're Not Used To Just Listening To People Die.'"
"Democrats Press, But Judge Avoids Specifics."
"Words Getting In The Way Of U.N. Defining 'Terrorism.'"

Houston Chronicle:
"White's Handling Of Crisis Earning Political Capital."
"'I Take Responsibility' For Response, Bush Says."
"Death Toll In Louisiana Rises By 100."
"For Those Who Can't Find Kids, Misery Is Compounded."
"Roberts Stays Cool As Exchanges Sizzle."

Story Lineup From Last Night's Network News:
ABC: Bush-Katrina Blame; US Disaster Preparedness; New Orleans Airport; St. Bernard Parish; Hurricane Ophelia; Senate-Roberts Hearing; Jefferson-National Guard; Family Dinners.
CBS: Bush-Katrina Blame; New Orleans-Homicide Charges; New Orleans-Hospital Deaths; Katrina-Death Toll; New Orleans Recovery; Senate-Roberts Hearing; Roberts Hearing-Analysis; Katrina-Missing Children; Hurricane Zone-Housing; Hurricane Ophelia; Bush-Iraqi Prime Minister; Ohio-Caged Children; California-Duck Rescuing.
NBC: Bush-Katrina Blame; New Orleans-Homicide Charges; New Orleans Recovery; New Orleans-911 Calls; Senate-Roberts Hearing; Specter-Roberts Hearing; Hurricane Ophelia; Katrina-Donation Scams; Stock Market; Katrina-Separated Families.

Story Lineup From This Morning's Radio News Broadcasts:
ABC: Bush-Hurricane Response Failures; New Orleans Nursing Home-Homicide Charges Hurricane Ophelia; Roberts Hearings; Baghdad-Car Bomb.
CBS: New Orleans Nursing Home-Homicide Charges; New Orleans-Passenger Flights Resume; New Orleans Clean-Up; Hurricane Ophelia; Baghdad-Car Bomb; Roberts Hearings; Wall Street.
NPR: Baghdad-Car Bomb; Al Jafari-US visit; New Orleans Nursing Home-Homicide Charges; Bush-

Hurricane Response Failure; Hurricane Ophelia; Roberts Hearings; India, Pakistan-Prisoner Exchange; Foreign Stock Markets.

AAAS
ADVANCING SCIENCE, SERVING SOCIETY

Fax

Date 8/31/05

To Neil Gorsuch

Affiliation DOJ

Fax Number 202.514.0238

Phone Number 202.514.9500

From: Mark S. Frankel, Ph.D.
Director, Scientific Freedom, Responsibility and Law Program
AAAS
Fax: 202.289.4950
Ph.: 202.326.6793

Number of Pages (including cover sheet) 7

Done

Message

Please forward a bio for Mr. Gorsuch to MFRANKEL@aaas.org or FAX to 202.289.4950. Thank You!

Science and Policy Programs

American Association for the Advancement of Science
1200 New York Avenue, NW Washington, DC 20005 USA
Tel: 202 326 6600 Fax: 202 289 4950
www.aaas.org/spp

 9/14 2:00

AAAS
ADVANCING SCIENCE, SERVING SOCIETY

August 31, 2005

Mr. Neil Gorsuch
U.S. Department of Justice
Office of Associate Attorney General
950 Pennsylvania Ave., NW, #5706
Washington, DC 20530

Dear Mr. Gorsuch:

I am delighted to learn from JoAnn Bordeaux, that you have agreed to speak at the orientation for the 2005-06 class of AAAS Science & Technology Policy Fellows. Your session is scheduled for Wednesday, September 14, 2005, where you will be joined on the dais by the Honorable Susan Braden of the U.S. Court of Federal Claims. We are requesting that each of you give a 20-minute presentation that highlights the challenges faced by the legal system (in your case, from the perspective of the Justice Department) in dealing with cases that are marked by increasing technical complexity. This would then be followed by open discussion and questions from the audience. The entire session would run from 2:30-3:30 p.m. Enclosed is a preliminary agenda for the full orientation program. Additional information is available on our website, at www.fellowships.aaas.org.

The Fellowship Program was initiated in 1973, and since then more than 1,600 early to mid-career scientists and engineers have been competitively selected from across the United States to spend a year in Washington, D.C., working in Congress and federal agencies on issues relating to science, technology, and policy while learning about the federal policymaking process. The fellowship experience is a stepping stone to leadership positions, whether the Fellows remain in government, return to academia, or pursue careers in the non-profit or private sectors.

Although a highly sophisticated group, the new AAAS Fellows have varying degrees of familiarity with the policy process when they arrive in Washington. The orientation plays a critical role in their preparation for the fellowship year. Previous orientations have featured a wide range of speakers, including Members of Congress Sherwood Boehlert, Jeff Bingaman, Rush Holt, and John D. Rockefeller IV; journalists Cory Dean of *The New York Times*, Joe Palca of NPR, and Rick Weiss of *The Washington Post*; Nobel Peace Prize Laureate and former President of Costa Rica, Oscar Arias; Valdas Adamkus, President of Lithuania; the Ambassadors of Bulgaria, Switzerland and Sweden; and Bruce Alberts, immediate past President of the National Academy of Sciences.

Directorate for Science and Policy Programs

American Association for the Advancement of Science
1200 New York Avenue, NW, Washington, DC 20005 USA
Tel: 202 326 6600 Fax: 202 289 4950
www.aaas.org/spp

We will be hosting a luncheon with Rep. Ros-Lehtinen just prior to your session, at the Columbus Club at Union Station. We plan to convene your session there as well. We would pleased, if your schedule permits, for you to join the Fellows and other guests at the luncheon. Please let me know if you are able to attend. For both the luncheon and sessions to follow, we expect the audience to number around 150 people, including new and former Fellows and AAAS staff.

We are honored to have you join us as a AAAS orientation speaker along with some of the other distinguished individuals we have invited to participate, including Secretary of State Condolezza Rice, Brazilian Ambassador to the U.S. Roberto Abdenur, and Scientific Advisor to President Bush, Dr. John Marburger.

In the weeks ahead, you will be contacted by Chris McPhaul, Associate Director of the Fellowship Program, to answer your questions and to provide the necessary logistical information associated with organizing the session. In the interim, should you have any questions, I can be reached by phone at 202.326.6793 and via email at mfrankel@aaas.org.

Sincerely,

Mark S. Frankel

Mark S. Frankel, Ph.D.
Director, AAAS Scientific Freedom,
Responsibility and Law Program

PRELIMINARY

AAAS SCIENCE & TECHNOLOGY POLICY FELLOWSHIP PROGRAMS
2005-06 ORIENTATION SUMMARY

TUESDAY, SEPTEMBER 6, 2005

5:00 p.m.	Briefing about the AAAS Fellows' Health Plan

WEDNESDAY, SEPTEMBER 7, 2005

8:30 a.m.	Coffee
9:00 a.m.	Welcome *Alan Leshner, CEO, AAAS* *Al Teich, Director, Science & Policy Programs, AAAS*
9:15 a.m.	Overview of the Fellowship Orientation Program *Cynthia Robinson, Director, Science & Technology Policy Fellowships, AAAS*
9:40 a.m.	Expectations for Your Fellowship Year *Steve Nelson, Associate Director, Science & Policy Programs, AAAS*
10:00 a.m.	Introductions: AAAS Fellowship Program Staff Introductions: 2005-06 AAAS Science and Technology Policy Fellows and Jefferson Science Fellows
11:00 a.m.	Break
11:30 a.m.	Introductions: continued
1:00 p.m.	Get-Acquainted Lunch
2:30 p.m.	How to Operate in a Bureaucracy with Intelligence and Integrity *Jonathan Margolis, Director, Office of Regional Policy Coordination and Initiatives, U.S. Department of State*
3:30 p.m.	Coffee Break
4:00 p.m.	Breakout Sessions with Former and Renewal Fellows
5:30 p.m.	Welcome Reception

THURSDAY, SEPTEMBER 8, 2005

8:00 a.m.	Coffee
8:30 a.m.	The American Experiment in Government *Mark Talisman, Independent Consultant and Analyst on Government Affairs*
10:00 a.m.	Break
10:30 a.m.	Policy Analysis 101 *Eugene Bardach, Professor of Public Policy, University of California, Berkeley* *Karlyn Bowman, Resident Fellow, American Enterprise Institute*
12:00 p.m.	Lunch, AAAS
1:30 p.m.	Workshop: Analyzing a Policy Case Study
3:30 p.m.	Break
4:00 p.m.	Where Does Science Fit in Public Policy? *Paul Gilman, Director, Oak Ridge Center for Advanced Studies* *Al Teich, Director, Science and Policy Programs, AAAS*

FRIDAY, SEPTEMBER 9, 2005

8:30 a.m.	Security Check-In at the Eisenhower Executive Office Building
9:00 a.m.	The Presidency *Allan Lichtman, Professor of History, The American University*
10:30 a.m.	Break
11:00 a.m.	The White House Office of Science and Technology Policy *Shana Dale, Deputy Director for Homeland and National Security, White House Office of Science and Technology Policy* *Richard Russell, Associate Director for Technology, White House Office of Science and Technology Policy*

12:00 p.m.	Leave for AAAS
12:30 p.m.	Lunch
2:15 p.m.	The Nature of the Federal Bureaucracy: Its Structure, Function and Culture *Mark Rom, Associate Professor of Government and Public Policy, Georgetown University*
3:15 p.m.	Contrasting Cultures of Science and Policy-Making: What They Mean for Your Fellowship Year *Steve Nelson, AAAS*
4:15 p.m.	Ice Cream Social

SATURDAY, SEPTEMBER 10, 2005

12:00 p.m.	Fellows Picnic

MONDAY, SEPTEMBER 12, 2005

8:15 a.m.	Security Check-In at the State Department
9:00 a.m.	Science & Diplomacy at the U.S. Department of State *Anthony F. Rock, Acting Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs*
10:15 a.m.	Break
10:45 a.m.	Globalization *Clyde Prestowitz, President, Economic Strategy Institute*
11:45 a.m.	Travel to National Press Club for lunch
12:15 p.m.	Lunch – Sustainable Development *Warren Evans, Director, Environment Department, Environmentally and Socially Sustainable Development, The World Bank*
2:45 p.m.	Science & Security *Gerald Epstein, Senior Fellow for Science and Security, Center for Strategic & International Studies*
3:45 p.m.	U.S. Foreign Policy *William J. Dobson, Managing Editor,* Foreign Policy

TUESDAY, SEPTEMBER 13, 2005

8:00 a.m.	Coffee
8:30 a.m.	Introduction to Federal Budget Procedure: Or, Why You'll Never Understand the Policy Process Unless You Understand the Budget *Kei Koizumi, Director, Research & Development Budget and Policy Program, AAAS*
10:00 a.m.	Break
10:30 a.m.	An Interactive Workshop: Writing an Appropriations Bill *Kei Koizumi*
12:30 p.m.	Travel to Four Points Sheraton for Lunch
1:00 p.m.	Lunch – National Economic Policy *Alice Rivlin, Senior Fellow, Brookings Institute*
3:00 p.m.	Return to AAAS
4:00 p.m.	Barnard Lecture *Andrew Revkin, Reporter, the New York Times*
5:00 p.m.	Reception

WEDNESDAY, SEPTEMBER 14, 2005

8:30 a.m.	Coffee, Library of Congress
9:00 a.m.	Perspectives on the Congress *Walter Oleszek, Senior Specialist in Government and Finance, Congressional Research Service*
10:15 a.m.	The Legislative Process *Michael Koempel, Senior Specialist in American National Government, Congressional Research Service*
11:30 a.m.	Leave for Group Photo

12:00 p.m. Group Photo by the Capitol Reflecting Pool
12:30 p.m. Lunch with Member of Congress (Columbus Club, Union Station)
Rep. Ileana Ros-Lehtinen (R-Florida)
2:30 p.m. The Judicial Process (Columbus Club, Union Station)
The Honorable Susan Braden, U.S. Court of Federal Claims
Neil Gorsuch, Principal Deputy Associate Attorney General, U.S. Department of Justice
Moderator, Mark Frankel, Program Director, Scientific Freedom, Responsibility, and Law Program, AAAS
3:30 p.m. *Concurrent Sessions:* Ethical and Legal Requirements in Congress, AAAS
Kenyen Brown, Counsel, Senate Select Committee on Ethics
John Sassaman, House Committee on Standards of Official Conduct
Ethical and Legal Requirements in Executive Branch Agencies
Gregg Burgess, Assoc. General Counsel, Office of Government Ethics
Holli Beckerman Jaffe, Director, Ethics Office, NIH
5:30 p.m. Former Fellows Reception, AAAS

THURSDAY, SEPTEMBER 15, 2005 (***breakout day: concurrent sessions***)

Legislative Track
(to be planned by CRS)
8:30 a.m. Check in at CRS
8:45 a.m. Coffee/muffins
9:00 a.m.
9:15 a.m.
10:45 a.m.
11:00 a.m.
12:15 p.m.
1:30 p.m.
4:15 p.m.
5:00 p.m. Leave for reception
5:30 p.m. Reception for Congressional Fellows

International Track
8:30 a.m. Coffee/muffins
9:00 a.m. The Interagency Process
David Conover, DoE
Beverly Simmons, USDA
Andrew Weber, DoD
10:15 a.m. Break
10:30 a.m. The International S&T Community in Washington
Alice Abreu, OAS
Kamal Dwivedi, Embassy of India
Mary Kavanagh, European Commission
12:00 p.m. Lunch
1:00 p.m. Non-Governmental Organizations
Julee Allen, Save the Children
Oliver Langrand, CI
Joe Stork, HRW
2:15 p.m. International Law
Richard J. Wilson, AU
3:30 p.m. Break
3:45 p.m. Public-Private Partnerships
Lori Brutten
5:15 p.m. Leave for Cap City
5:30 p.m. Reception for all Fellows

Executive Branch Track
8:30 a.m. Coffee/muffins
9:00 a.m. Relations Between the Executive and Legislative Branches of Government
Sue Quantius, U.S. House Appropriations Committee
Marc Smolonsky, NIH
10:00 a.m. Break
10:15 a.m. Coordination of Domestic Science among Federal, State & Local Agencies
Kevin Clark, NYC Office of Emergency Management
Segaran Pillai, DHS
11:45 a.m. Lunch
1:15 p.m. Science Fellows in Agencies Filled with Scientists
Michael Slimak, EPA
Joanne Tornow, NSF
2:15 p.m. Break
2:30 p.m. Improving Accountability for Federal Support of R&D
Sarah Horrigan, OMB
William Valdez, DoE
3:30 p.m. Break
3:45 p.m. Federal Advisory Committees
Lexi Shultz, UCS
Robert Flaak, GSA
5:00 p.m. Leave for Cap City
5:30 p.m. Reception for All Fellows

FRIDAY, SEPTEMBER 16, 2005

8:00a.m.	Check-in at the National Academies
8:30 a.m.	Overview of the National Academies *E. William Colglazier, Executive Officer, National Academies* *James Jensen, Director, Office of Congressional and Government Affairs, NRC*
9:30 a.m.	Break
10:00 a.m.	Science and the Media *Sharon Begley, The Wall Street Journal (invited)* *David Malakoff, NPR* *Rick Weiss, The Washington Post* *Curt Suplee, NSF, moderator*
Noon	Lunch: BBQ at AAAS
1:30 p.m.	Lobbying in Washington *Gary Andres, Vice Chairman of Public Policy and Research, Dutko Worldwide (Invited)* *David Stonner, Head of Congressional Affairs Section, Office of Legislative and Public Affairs, National Science Foundation* *Patricia Bartlett, Director of Federal Relations, Georgia Institute of Technology (Invited)* *Moderator: Tom Williams, President, The Williams Group*
3:30 p.m.	What a AAAS Fellowship Can Do for You: Perspectives from a Former Fellow *Norine Noonan, Dean, School of Science and Mathematics, College of Charleston*

MONDAY, SEPTEMBER 19, 2005

Congressional Fellows

9:00 a.m.	Perspectives on the 109th Congress
10:30 a.m.	Break
10:45 a.m.	How a Congressional Office Works/Preparing for Placement
12:15 p.m.	Leave for Placement Office
12:45 p.m.	Meet at Placement Office

State Department Diplomacy Fellows

8:30 a.m. State Department will provide agenda

EPA Environmental Fellows

9:00 a.m. EPA will provide agenda

NIH Fellows

9:00 a.m. NIH will provide agenda

All Other Fellows

Report to assigned offices

ACLU FOIA file

THE AMERICAN LEGION
NATIONAL HEADQUARTERS

OFFICE OF THE
NATIONAL JUDGE ADVOCATE
P.O. BOX 1055
INDIANAPOLIS, IN 46206

October 3, 2005

Mr. Neil Gorsuch
Principal Deputy Associate Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Neil:

Have the opinion. Thank you.

Enclosed is a pamphlet including a resolution that was adopted at the recent National Convention of The American Legion for your information.

Sincerely,

P. B. ONDERDONK, JR.
National Judge Advocate

Enclosure

THE AMERICAN LEGION
NATIONAL HEADQUARTERS

700 N. Pennsylvania St.
Indianapolis, IN 46204
(317) 630-1200
www.legion.org

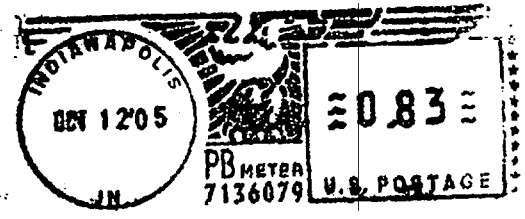
Cover Photo: USCG

THE AMERICAN LEGION

THE WAR ON TERRORISM

A GUIDE TO BUILDING PUBLIC AWARENESS

Adopted by
The American Legion National Convention
Honolulu, Hawaii – Aug. 23-25, 2005



From:

THE AMERICAN LEGION
NATIONAL HEADQUARTERS
700 N. PENNSYLVANIA STREET
INDIANAPOLIS, INDIANA 46204

TO:

Mr. Neil Gorsuch
Principal Deputy Associate Attorney General
United State Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

ADDRESS SERVICE REQUESTED

U.S. Department of Justice

Office of the Associate Attorney General

Principal Deputy Associate Attorney General

Washington, D.C. 20530

February 23, 2006

Mr. Wendell E. Kimbrough
ARCHS
539 North Grand Boulevard
Sixth Floor
St. Louis, MO 63103

Dear Mr. Kimbrough:

Thank you for your recent letter and the information you passed along. ARCHS's work is deeply impressive and I am grateful for all of your efforts in support of the St. Louis Family Justice Center. We have high hopes for its success.

It was a pleasure meeting you and I will certainly take you up on your offer to visit ARCHS when I next find myself headed to St. Louis. I hope you will likewise give a ring whenever you find yourself headed this way.

Warm regards,

Neil M. Gorsuch

Humboldt Building
539 N. Grand Boulevard, 6th Floor
St. Louis, Missouri 63103
314 / 534-0022 fax: 314 / 534-0055
www.stlarchs.org

Building Great Partnerships for the Greater Good of Greater St. Louis

January 20, 2006

Neil M. Gorsuch
Principal Deputy Associate Attorney General
Office of the Associate Attorney General
U. S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW
Room 5706
Washington, DC 20530-001

RE: St. Louis Family Justice Center Grand Opening and ARCHS

Neil,

First, a note to say I enjoyed meeting and talking with you, during the St. Louis Family Justice Center's grand opening. We at ARCHS are quite proud of our role in the FJS's realization and in its long term sustainability.

Secondly, to put more meat on our conversation, attached find a detailed info packet highlighting who ARCHS is and what ARCHS does on behalf of Metro St. Louis and the State of Missouri.

- On the packet's left side, you'll find all there is to know about ARCHS.
- On the packet's right side, you'll find info on our Workforce Development Department, specifically Workforce programming for soon to be or recently released parolees.
  In fact ARCHS and U.S. Probation Office, Eastern District of Missouri, our primary partner in federal parolee workforce programming, are anxiously awaiting final funding approval from the U. S. Department of Labor for a multiyear comprehensive program called " St. Louis CARES" (fact sheet enclosed).

Lastly, should your return trips to St. Louis allow time, I extend an open invitation to you to come visit ARCHS and allow my team to show you how we "Build Great Partnerships for the Greater Good of Greater St. Louis.

Cordially,

Wendell E. Kimbrough

Attachments: ARCHS information packet

I hope you will
[illegible] your [illegible]
whenever [illegible]
[illegible] [illegible]
this [illegible]
Warm regards,

Dear Mr Kimbrough,
Thank you for your recent letter and
the information you passed along.
ARCHS's work is deeply impressive,
and [illegible] we at The Department are
grateful for your role in helping make
the St Louis Family Justice Center a
reality.
It was a pleasure meeting you
and I [illegible] take you up
your offer to visit ARCHS the
next time I find
myself

[illegible] to
St. Louis. I hope
[illegible]

Building Great Partnerships

St. Louis Cares Re-Entry Partnership Fact Sheet

Facing the highest unemployment rate in Missouri (11.2%) and a host of barriers (educational issues, lack of skills, transportation, and childcare), ex-offenders returning to Greater St. Louis must negotiate major challenges as they seek to establish a new, productive life.

To assist them, the St. Louis Community Action Re-entry Employment System (***St. Louis CARES***) has designed a systems model featuring a holistic approach building upon the considerable resources of local community- and faith-based organizations in the St. Louis region. Our multi-year program will serve more than 600 ex-offenders from ages 14 through adult in the first year alone. Our goal is to place 75% of them in unsubsidized jobs or paid apprenticeship programs.

The mission of *St. Louis Cares* is to strengthen the Greater St. Louis region through an employment-centered re-entry program that will incorporate case management, mentoring, job training, job placement, registered apprenticeship programs, micro-enterprise development and job creation. This initiative draws together four critical social sectors to implement this program model: the justice community, community partners, the faith community, and business community.

Data collected by the Offender Employment Program implemented in the Eastern District of Missouri reveals an inverse correlation between employment and recidivism. In short, employment is the key to successfully reintegrating prisoners into society. The following risk and protective factors (ranked in order of their correlation to re-incarceration) are addressed in this program model: *Employment, Substance Abuse, Mental Illness, Family and Social Support, Education. Housing, Transportation, Attitudes and Cognitive Skills.*

Program components will be delivered by convening diverse segments of the St. Louis region. Faith-based organizations will provide mentors, supportive services and referrals; local job-readiness organizations and businesses will provide soft skills and hard skills training, job placement and retention services; businesses and local governments will be engaged as partners to address the need for transitional jobs and job creation; and criminal justice and corrections agencies will identify and refer participants to the program. A myriad of career tracks will be offered.

The work of these organizations will be aggregated in an employability plan and an individual life plan for each ex-offender who is in pre-release or post-release stages or has completed a probationary period. Especially important is the Follow-Up and Retention stage, which features 30-, 60-, 90-, and 180-day follow-up and case management, moderated by Faith-Based Retention Teams and guided by career assessment and continued education.

ARCHS- Area Resources for Community and Human Services and the U.S. Probation Office-Eastern Missouri -convened the community partners to create *St. Louis Cares.* As Missouri's Community Partnership for Greater St. Louis, ARCHS will provide *St. Louis Cares* with objective assessment, fiscal management and outcomes measurement expertise. *The three-year, $20.5 million St. Louis Cares Partnership proposal is pending final funding approval by the U.S. Department of Labor. (Winter 06)*

ARCHS

Building Great Partnerships for the Greater Good of Greater St. Louis

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Building Great Partnerships for the Greater Good of Greater St. Louis

FACT SHEET

Missouri's St. Louis Community Partnership

- ARCHS is a St. Louis 501c3 nonprofit organization that supports other nonprofits.
- We do not provide direct services – we build partnerships on behalf of the State of Missouri that enhance services.
- Our 250 partnerships delivered more than **$93 million** in combined services. (FY 05)
- $70 to $1 ratio: For every ARCHS' community partnership dollar, our partners added a combined $70. (FY 05)
- We manage $9.5 million in human service funds. (FY 06)
- ARCHS has 25 employees & 32 board members including:
  -St. Louis Mayor Francis Slay &
  -St. Louis County Executive Charlie Dooley
- ARCHS serves as one of Missouri's 21 Community Partnerships - created by the Governor in 1998.

ARCHS' Mission

We improve the lives of Greater St. Louis' residents by convening strategic community partnerships designed to continually, responsibly & measurably improve the funding, management & delivery of human service programs.

ARCHS' Partners

ARCHS annually partners with more than 250 national, state & local organizations. These include government, business, philanthropy & nonprofit groups.

ARCHS' Focus

Our 250 partnerships improve access to human services, education, healthcare & jobs.

ARCHS' Expertise

- Fostering collaboration & use of best practices.
- Maximizing & securing new funding from public & private sources.
- Tracking & measuring the impact of our partnerships.
- Providing fiscal management & nonprofit business services.

ARCHS' Impact

Since 1998 ARCHS has positively impacted the lives of more than 1.1 million St. Louisans. ARCHS' partnerships benefit the Greater St. Louis region – encompassing St. Louis City & County, neighboring Missouri counties & Metro East in Illinois.

FY 05 & FY 06 Data (Winter 2006)

Our 250 partnerships delivered $93 million in human service programs for Greater St. Louis. Highlights from our FY 05 partnerships include:

Education:
150,000 children served through healthcare, daycare, school-time and before & after school partnerships.

Healthcare:
125,525 children enrolled in healthcare insurance through Missouri's MC+ program.

Jobs/Economic Development:
1,100 job placements, supporting more than $15 million in payroll/benefits.

More than $5 million in local investment through daycare center expansions.

Funding:
Manage $9.5 million in regional human service funding:

- ARCHS' LRM provides fiscal management services to 10 other nonprofits with combined budgets of more than $4.2 million. Provides group-purchasing services to 15 nonprofits. (FY 06)
- Building partnerships through $5.3 million in direct funding (FY 06).

Secured $5.8 million in new funding for region. (FY 05)

ARCHS has been awarded $40 million in public & private funding since 1998.

For more information:
www.stlarchs.org
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Fw: This Tuesday: Briefing on Pandemic Influenza Modeling and Impact of Interventions - Message (Plain Text)

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From: Gorsuch, Neil M
Sent: Mon 11/14/05 8:30 AM
To: Shaw, Aloma A
Cc:
Subject: Fw: This Tuesday: Briefing on Pandemic Influenza Modeling and Impact of Interventions

In support of ongoing pandemic influenza planning efforts, we have asked the authors of recent Science and Nature papers on the subject to provide a presentation on their pandemic models and projections of the impact of various interventions on the spread of a pandemic virus. Both papers are attached.

The presentation will take place this Tuesday, Nov. 15 from 2:00-4:00 PM in EEOB Rm. 450. Departments and agencies are invited to send two representatives to the briefing. Clearance information should be provided to Sharon Wells by 3:00 PM on Monday (swells@who.eop.gov)

This work is supported by the NIH/MIDAS program, has been performed in the U.S. and U.K. and was presented at HHS last week. Further information on the MIDAS program can be found here: http://www.nigms.nih.gov/Initiatives/MIDAS/

Thank you

Neil:
Clearance info submitted. Copy of pdfs does attached.
1:45 CAL over - 4:05 pick-up
Aloma

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compartmentalization of components within the cell, and with temporal profiles of activation, to obtain a more comprehensive picture of the functional organization of a cell. Still, distance in chemical space (i.e., number of links between two distal nodes) is likely to be a major determinant of information processing that regulates phenotypic behavior.

The maps for individual ligands or cellular machines show distinct patterns of motifs. Combinations of ligands will likely produce many more patterns of connectivity. Thus, a cellular system may not be a single network but rather an ensemble of network configurations that are evoked by the stimuli-induced activation of various parts of the system. Identifying these network configurations and the functions they evoke is likely to provide more complete descriptions of how molecular interactions lead to cellular choices between homeostasis and plasticity.

References and Notes

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Supporting Online Material

www.sciencemag.org/cgi/content/full/309/5737/1078/DC1
Materials and Methods
SOM Text
Figs. S1 to S11
Tables S1 to S3
References

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Containing Pandemic Influenza at the Source

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Highly pathogenic avian influenza A (subtype H5N1) is threatening to cause a human pandemic of potentially devastating proportions. We used a stochastic influenza simulation model for rural Southeast Asia to investigate the effectiveness of targeted antiviral prophylaxis, quarantine, and pre-vaccination in containing an emerging influenza strain at the source. If the basic reproductive number (R_0) was below 1.60, our simulations showed that a prepared response with targeted antivirals would have a high probability of containing the disease. In that case, an antiviral agent stockpile on the order of 100,000 to 1 million courses for treatment and prophylaxis would be sufficient. If pre-vaccination occurred, then targeted antiviral prophylaxis could be effective for containing strains with an R_0 as high as 2.1. Combinations of targeted antiviral prophylaxis, pre-vaccination, and quarantine could contain strains with an R_0 as high as 2.4.

The world may be on the brink of an influenza pandemic (*1–4*). Avian influenza A (subtype H5N1) is causing widespread outbreaks among poultry in Southeast (SE) Asia, with sporadic transmission from birds to humans (*5*) and limited probable human-to-human transmission (*6*). Should an avian virus reassort with a human virus, such as influenza A subtype H3N2, within a dually infected human host or reassort in a nonhuman mammalian species, or if mutation of the virus occurs, the resulting new variant could be capable of sustained human-to-human transmission. The outbreak among humans would then spread worldwide via the global transportation network more rapidly than adequate supplies of vaccine matched to the new variant could be manufactured and distributed (*1*, *7*). The pressing public health questions are whether and how we can contain the spread of an emerging strain at the source or at least slow the initial spread to give time for vaccine development. We used a discrete-time stochastic simulation model of influenza spread within a structured geographically distributed population of 500,000 people in SE Asia to compare the effectiveness of various intervention strategies against a new strain of influenza. Here we examine the effectiveness of the targeted use of influenza antiviral agents (*8–12*), quarantine, and pre-vaccination with a poorly matched, low-efficacy vaccine in containing the spread of the disease at the source.

We used information about rural SE Asia (*13*, *14*) to construct the model population. Our goal was to represent the contact connectivity of a typical rural SE Asian population. The model population of 500,000 people was distributed across a space of 5625 km^2, yielding a density of 89/km^2, which is approximately the population density of rural SE Asia (*13*). The 500,000 people were partitioned into 36 geographic localities. This model is an extension of a model used to simulate interventions against pandemic influenza in the United States (*12*).

The model [see the supporting online material (SOM) for details] represents the number of close and casual contacts that a typical person makes in the course of a day. The age and household size distributions of the population are based on the Thai 2000 census (*13*). Many of the mixing group sizes and distributions are based on a social network study of the Nang Rong District in rural Thailand (*14*). We constructed the social network for contacts sufficient to transmit influenza as a large set of connected mixing groups. The close contact groups consist of households, household clusters, preschool groups, schools, and workplaces; and the casual contact groups consist of other social settings (such as markets, shops, and temples) and a single regional 40-bed hospital. All people can

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mix in their households and within clusters of households, whereas children mix in preschool groups or schools according to their age and the probability that they are still in school. Children are assigned to schools across the geographic space according to the Nang Rong study. Adults mix in workplaces according to a distance function that distributes them across the geographic space informed by the Nang Rong study and national migration statistics (*15*, *16*). One concern for containment is that infected people might leave the modeled 500,000-person rural area. We estimate that the daily probability that a person will leave (escape) the area is on the order of 10^{-3} (*15*). The population structure and the resulting social network graphs and statistics are given in the SOM.

The natural history of influenza (Fig. 1A) has been relatively invariant over the past two pandemics and during the interpandemic period since 1968 (*12*, *17*–*20*). Calibration of the model requires information about both the relative and absolute magnitudes of the age-specific illness attack rates. Because of uncertainty about the relative age-specific illness attack rates for a future influenza pandemic in SE Asia, we calibrated the epidemic to a pattern that falls between two extremes. At one extreme, children would have a much higher illness attack rate than adults, the pattern observed during the 1957–1958 A (subtype H2N2) Asian influenza pandemic in the United States (*17*, *21*, *22*). At the other extreme, all age groups would have roughly the same illness attack rates, the pattern observed during the 1968–1969 A (H3N2) Hong Kong influenza pandemic in the United States (*17*, *22*–*24*). The pattern for interpandemic influenza in SE Asia appears to be more like the A (H2N2) pattern (*25*). We used the pattern shown in Fig. 1B.

The magnitude of the illness attack rates will depend on the unknown transmissibility of the new strain. The overall illness attack rate for the past Asian and Hong Kong pandemics was about 33% in the first wave. We calibrated the model with a target overall illness attack rate of 33%, corresponding to a basic reproductive number (R_0) (the average number of secondary infections caused by a single typical infectious individual in a completely susceptible population) of 1.4 (see the SOM). By varying the per-contact probability of infection in the model, we alter the R_0. Figure 1B shows the age-specific attack rates at R_0 values ranging from 1.1 to 2.4. For calibration to historical attack rates, influenza was introduced by randomly assigning 12 initial infectives. We simulated the emergence of a new influenza strain by introducing a single randomly assigned infective.

Intervention is triggered by the first case (that is, symptomatic infection), with a delay of 7, 14, or 21 days to implementation. This delay can be interpreted as a delay in recognition of illness, a delay in implementation of intervention, initiation of transmission by more than one initial infection, or a combination of these three factors. A sensitivity analysis considers delays up to 56 days (fig. S14). Once intervention begins, intervention in additional localities is implemented 1 day after the first case in the affected locality.

Targeted antiviral prophylaxis (TAP) is carried out by treating identified index cases (the first symptomatic illness in a mixing group) and offering prophylaxis only to the contacts of these index cases in predefined close contact groups (*12*); namely, households, neighborhood clusters, preschool groups, schools, and workplaces. Index cases are therapeutically treated the day after the onset of illness, and prophylaxis of contacts begins at the same time, both being given a single course of oseltamivir. A susceptible individual may receive subsequent courses if exposed to further index cases. We assume that a certain percent, varied in a sensitivity analysis, of household (preschool) index cases could be ascertained and that all their other household (preschool) members would receive prophylaxis (fig. S11). For index cases in a school or workplace, only

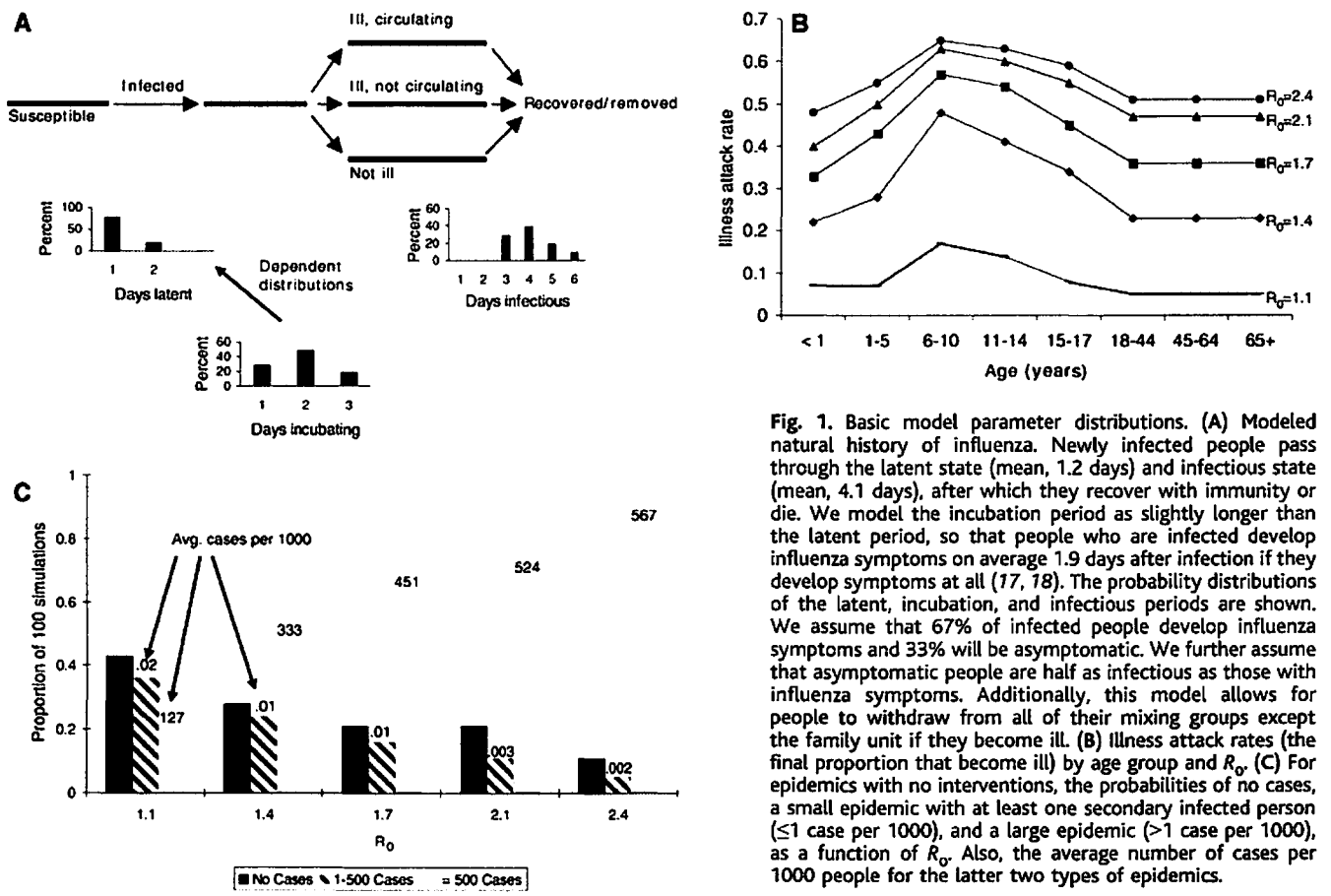

Fig. 1. Basic model parameter distributions. (**A**) Modeled natural history of influenza. Newly infected people pass through the latent state (mean, 1.2 days) and infectious state (mean, 4.1 days), after which they recover with immunity or die. We model the incubation period as slightly longer than the latent period, so that people who are infected develop influenza symptoms on average 1.9 days after infection if they develop symptoms at all (*17*, *18*). The probability distributions of the latent, incubation, and infectious periods are shown. We assume that 67% of infected people develop influenza symptoms and 33% will be asymptomatic. We further assume that asymptomatic people are half as infectious as those with influenza symptoms. Additionally, this model allows for people to withdraw from all of their mixing groups except the family unit if they become ill. (**B**) Illness attack rates (the final proportion that become ill) by age group and R_0. (**C**) For epidemics with no interventions, the probabilities of no cases, a small epidemic with at least one secondary infected person (≤1 case per 1000), and a large epidemic (>1 case per 1000), as a function of R_0. Also, the average number of cases per 1000 people for the latter two types of epidemics.

a certain percent of the people in that mixing group would receive prophylaxis. We used current estimates of the antiviral efficacy (AVE) of oseltamivir (*26–29*) (see the SOM).

The primary difficulty in TAP would be the identification of index cases. Because TAP is aimed at predefined close contact groups, the identification of potential TAP recipients would be less difficult than in classical contact tracing. An alternative and less resource-intensive strategy would be geographically targeted antiviral prophylaxis (GTAP), also known as ring prophylaxis. In this strategy, once an influenza case is identified in a locality, then a percentage, varied in a sensitivity analysis (fig. S12), of people in an entire locality are given one course of oseltamivir.

Household quarantine, like GTAP, is implemented within localities. The first case in a locality triggers a quarantine policy. Every case and a certain percentage of susceptible people restrict their movement to within their household and their neighborhood cluster. Because quarantined people would have more contact with their household and neighborhood contacts, the contact probabilities within households and household clusters are doubled for quarantined people.

A human influenza A (H5N1) vaccine is currently being tested (*7*) and may be available, but could be poorly matched to the emerging strain and thus be of low efficacy. For the model scenarios that use vaccination, we assume that pre-vaccination takes place long enough before the pandemic that vaccinated people can develop immunity. We assume a low vaccine efficacy for susceptibility (VE_S) (*30*) of 0.30 and a vaccine efficacy for infectiousness (VE_I) of 0.50. We carried out a sensitivity analysis on VE_I (fig. S19).

We consider an epidemic to be contained if there are fewer than 500 cases in the 500,000-person community (≤1 per 1000). The containment proportion is the proportion of simulations in which the attack rate is ≤1 per 1000. Another measure of how well we have contained the epidemic is the number of infected people who travel out of the 500,000-person community over the course of the epidemic. If this number is very low or even zero, we have effectively contained spread at the source. The number of cases per 1000 people in the population is another measure of success of the intervention.

Given an initial person infected with the newly emergent influenza strain, there are three possible outcomes: (i) no further people are infected; (ii) there is a small epidemic, between 1 and 500 total cases (≤1 per 1000); or (iii) there is a large epidemic (>1 case per 1000 people). The relative probabilities of these three outcomes as well as the average size of a large epidemic vary with R_0 (Fig. 1C).

Figure 2A shows a typical realization of a large epidemic due to a single initial infective at $R_0 = 1.4$, with no intervention, as well as the average times for intervention initiation. On average, the first symptomatic case appeared 4 days after the initial infection, with intervention initiation times on average 11, 18, or 25 days after the initial infection. Figure 2B shows a typical realization of an epidemic contained with 90% GTAP. Movies 1 to 3 in the SOM show the geographic spread of the epidemic with and without intervention.

Figure 3 gives bar plots of the results for the different intervention strategies and values of R_0. Table 1 gives numbers for the results for R_0 values of 1.4 and 1.7. The measures of containment did not vary much if intervention was initiated 7, 14, or 21 days after the first case, so we give results just for the 14-day delay, followed by a sensitivity analysis of the effect of further delay (fig. S14). When $R_0 = 1.1$, just above threshold, all of the interventions work well. Both 80% TAP and 90% GTAP would be effective in containing pandemic influenza at the source if $R_0 \leq 1.4$. If $R_0 \geq 1.7$, then neither 80% TAP nor 90% GTAP is consistently effective in containing the epidemic, and 300,000 to 350,000 courses of oseltamivir would be needed. Thus, for these interventions singly, a containment threshold exists somewhere between $R_0 = 1.4$ and 1.7. Further sensitivity analysis shows that the containment threshold is roughly at $R_0 = 1.6$.

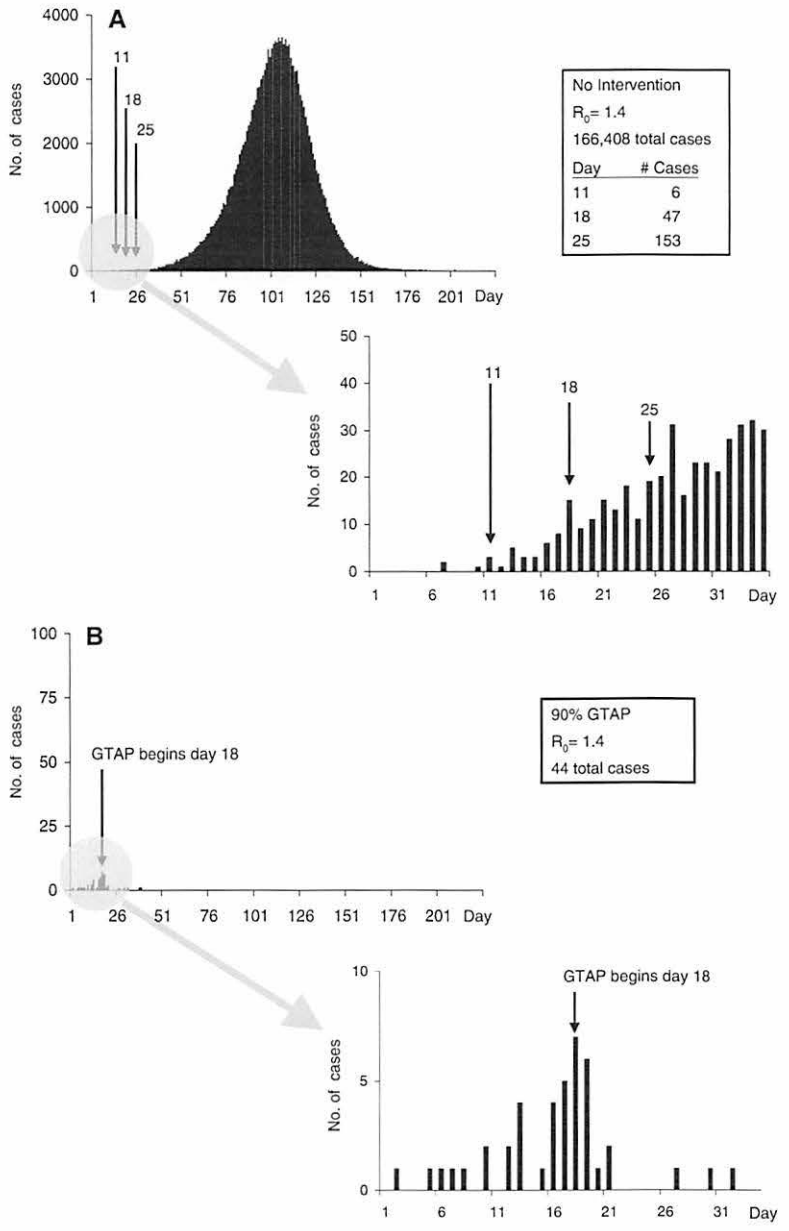

Fig. 2. Model stochastic realizations. **(A)** A typical stochastically simulated large influenza epidemic with no intervention and $R_0 = 1.4$. Also shown are the main intervention initiation times considered and the number of cases at those intervention times. **(B)** A typical stochastically simulated influenza epidemic that is contained using 90% GTAP initiated 14 days after the first case, when $R_0 = 1.4$.

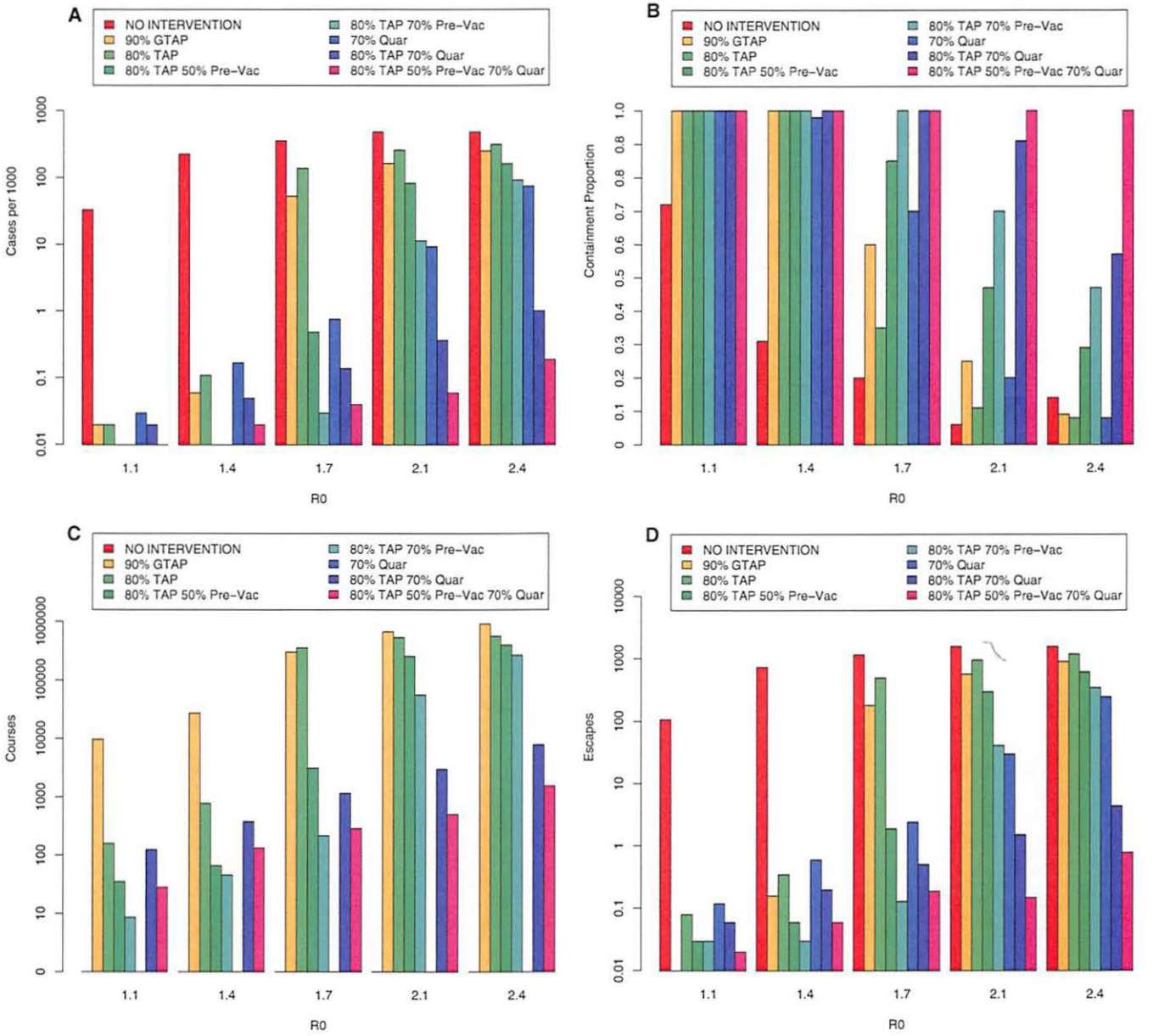

Fig. 3. The effectiveness of the different interventions as compared to no intervention started 14 days after the first case at different values of R_0. The interventions considered are 90% GTAP, 80% TAP, 80% TAP plus 50% pre-vaccination of the population (80% TAP 50% Pre-Vac), 80% TAP plus 70% pre-vaccination of the population (80% TAP 70% Pre-Vac), 70% household and household cluster quarantine (70% Quar), 80% TAP with 70% household and household cluster quarantine (80% TAP 70% Quar), and 80% TAP plus 50% pre-vaccination of the population with 70% household and household cluster quarantine (80% TAP 50% Pre-Vac 70% Quar). **(A)** Average number of cases per 1000 people with no intervention and with different interventions. **(B)** Average containment proportion defined as the proportion of epidemics with one or more secondary cases that had 500 or fewer cases in the population of 500,000 (or ≤1 case per 1000). The "no intervention" entry gives the proportion of these epidemics that had 500 or fewer cases with no intervention in the population of 500,000 (or ≤1 case per 1000). **(C)** Average number of infected people leaving the 500,000-person population. Each day, the number of infected people who have not withdrawn to the home or are quarantined is multiplied by 10^{-3}, the probability that a person will travel outside of the 500,000-person area. **(D)** Average number of courses of oseltamivir used for the intervention.

Pre-vaccination of the population with a low-efficacy vaccine greatly enhances the effectiveness of TAP and GTAP, even with just 50% coverage. With pre-vaccination, both 80% TAP and 90% GTAP are effective at containing the epidemic when $R_0 = 1.7$, but not at higher levels of R_0. Pre-vaccination essentially lowers the reproductive number (*31*). Local household quarantine is effective at containing the epidemic if $R_0 \leq 2.1$ but is not as effective at $R_0 = 2.4$. However, a combination of 80% TAP plus quarantine is effective at an R_0 as high as 2.4, and adding pre-vaccination makes TAP plus quarantine even more effective.

We conducted a number of sensitivity analyses of the effectiveness of the different interventions at different levels of implementation and delay (figs. S11 to S18). We found that at $R_0 \leq 1.4$, either TAP or GTAP alone is effective only at the 70% level or higher. At higher values of R_0, household quarantine must reach the 70% level to be effective. In terms of timing of the intervention (fig. S14), 90% GTAP and 80% TAP become less effective when the intervention starts 28 days or more after the detection of the first symptomatic case, when there is an average of 85 cases already. Quarantine at the 70% level becomes less effective 42 days (average, 313 cases)

Table 1. Simulated mean cases, escapes, courses, and containment proportion for various interventions and no intervention in a typical rural population of 500,000 people in SE Asia.

Intervention	Cases per 1000		Escapes		Courses		Containment proportion	
	$R_0 = 1.4$	$R_0 = 1.7$	$R_0 = 1.4$	$R_0 = 1.7$	$R_0 = 1.4$	$R_0 = 1.7$	$R_0 = 1.4$	$R_0 = 1.7$
No intervention	211	384	686	1254	–	–	–	–
80% TAP	0.13	149	0.43	525	1,042	381,273	0.98	0.33
90% GTAP	0.28	54	1	187	54,834	325,431	0.95	0.59
80% TAP + 50% pre-vaccination	0.02	0.16	0.06	0.67	87	1,338	1.00	0.98
80% TAP + 70% pre-vaccination	0.01	0.04	0.08	0.12	67	269	1.00	1.00
70% quarantine	0.17	1	0.72	3	-	-	0.98	0.57
80% TAP + 70% quarantine	0.06	0.14	0.18	0.36	484	1,349	1.00	1.00
80% TAP + 70% quarantine + 50% pre-vaccination	0.02	0.03	0.06	0.17	91	275	1.00	1.00

after detection of the first case, even with the addition of TAP. All other interventions in combination with pre-vaccination would be fairly effective even 56 days (average, 894 cases) after the detection of the first case.

It may not be practical to get antiviral agents to exposed people within 1 day of the index case developing symptoms. We carried out a sensitivity analysis for delays in initiation of TAP in the close contact mixing groups ranging from 2 to 5 days after detection of an index case, with 80% TAP. With a delay of up to 2 days, substantial reduction in the number of cases is still achieved, but with delays of 3 to 5 days, there is less benefit (fig. S15). Sensitivity analysis on antiviral efficacy (figs. S16 to S18) shows that the effectiveness of TAP and GTAP is moderately sensitive to variation in AVE_S but not as much to variation in antiviral efficacy in preventing symptomatic disease if infected, AVE_D. Both AVE_S and AVE_I need to be 0.5 or higher for either TAP or GTAP to be effective. Sensitivity analysis on VE_I shows that the effectiveness of 80% TAP with 70% pre-vaccination is sensitive to variation in VE_I (fig. S19). However, even at a level of VE_I as low as 0.1 (fig. S19), the epidemic is still well contained.

We have shown that the targeted use of antiviral agents, if implemented within 21 days of the first case and if $R_0 \leq 1.4$, would have a high probability of success for containing an emergent influenza strain at the source in a rural SE Asian population. Such interventions would be effective for R_0 values as high as 1.7 in the presence of pre-vaccination with a low-efficacy vaccine. For higher values of R_0, localized household quarantine would have to be implemented, possibly in combination with targeted antiviral prophylaxis to contain the pandemic at the source. Although the R_0 of a future newly emergent influenza strain is unknown, previous estimates are 1.89 from the first epidemic of pandemic A (H3N2) in Hong Kong (*19*) and 2 to 3 for 1918 pandemic A (H1N1) in the United States (*32*). However, a newly emergent influenza strain may not yet be well adapted to humans and could have an $R_0 < 2$, and possibly just above 1. As the virus adapts to human-to-human transmission, there would probably be an incremental increase in R_0 with each transmission event (*33*). This makes early intervention especially important.

Based on the results here, the current World Health Organization stockpile of 120,000 treatment courses could possibly be sufficient to contain a pandemic if the stockpile were deployed at the source of the emerging strain within 2 to 3 weeks of detection. Given that early containment at the original source may fail or the emergent strain may appear simultaneously in several locations, up to 1 million courses could be needed to deal with the multiple outbreak foci. In addition, pre-vaccination of populations at risk for a newly emergent influenza strain would be prudent, even if the vaccine provided only moderate protection. Although the effectiveness of most interventions was fairly invariant to the timing of intervention initiation up to 21 days after the first case, delay much beyond that could allow the pandemic to spread unless pre-vaccination takes place.

These results are probabilistic and demonstrate considerable variability in the potential size of the epidemic in the absence of and in response to intervention (*34*). Public health officials need to keep this probabilistic characteristic of success in mind when planning and evaluating their response. We have developed a flexible mathematical model that can help determine the best intervention strategies for containing pandemic influenza at the source. Should a newly emergent influenza strain appear, the model could be quickly calibrated to data and intervention options at the source of the epidemic. Data should be provided from the field to estimate the value of R_0; the serial interval between cases; the distributions of the latent, incubation, and infectious periods; pathogenicity; case fatality ratios; and secondary spread within important mixing groups.

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Supporting Online Material
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Drugs, Quarantine Might Stop A Pandemic Before It Starts

Thirty-six years after the last influenza pandemic, researchers wonder whether they can make these global disasters a thing of the past

It might just work. With military-style planning, a big stash of pills, and a lot of luck, the world might be able to stop a nascent influenza pandemic dead in its tracks, two new modeling studies conclude.

The models, published online this week in *Nature* and *Science* (www.sciencemag.org/cgi/content/abstract/1115717), are the first attempts to estimate the power of the antiviral drug oseltamivir to quash a pandemic—an unprecedented and audacious idea. If large numbers of people in the region first hit by a pandemic virus take the drug prophylactically and comply with some quite draconian measures to limit their movements and contacts, millions of lives might be saved, the authors of both papers say—and medical history would be rewritten in the process.

Drug of the day. A global stockpile of up to 3 million treatment courses of oseltamivir might be needed.

But just how likely is that scenario to succeed? As experts point out, the models, both of which chose Thailand as the presumptive ground zero, are based on several untested assumptions: that the runaway virus isn't highly infectious, for instance, and that large quantities of drugs can be distributed rapidly to the right people, even in remote villages. "The models make sense, and we should seriously consider this approach," says Harvard epidemiologist Marc Lipsitch, "but the take-home message is there's no way we can count on this."

The researchers—one team led by Ira Longini of Emory University in Atlanta, Georgia, the other by Neil Ferguson of Imperial College London—hope their work will lead to concrete actions because until now, there's been little if any official commitment to such a plan. The World Health Organization (WHO), which the researchers say would have to lead the effort, is "interested," says the agency's pandemic chief, Margaret Chan. Rich countries are stockpiling oseltamivir to protect their own populations, but they have no plans yet for shipping it to the cradle of a pandemic. Nor are the Asian countries affected by H5N1—the avian influenza strain most feared as the potential source of the next pandemic—on board or necessarily up to the logistics, although they were slated to discuss the idea at a meeting in Bangkok earlier this week.

Given influenza's history, most experts peg the chance that the world will be hit by another pandemic at 100%. The question is when it will occur and how bad it will be; there's widespread agreement that the death toll could be in the tens of millions. Vaccines offer by far the best chance to avert that danger—at least in countries that can afford them—but these would take months to produce after a pandemic begins (*Science*, 15 October 2004, p. 394).

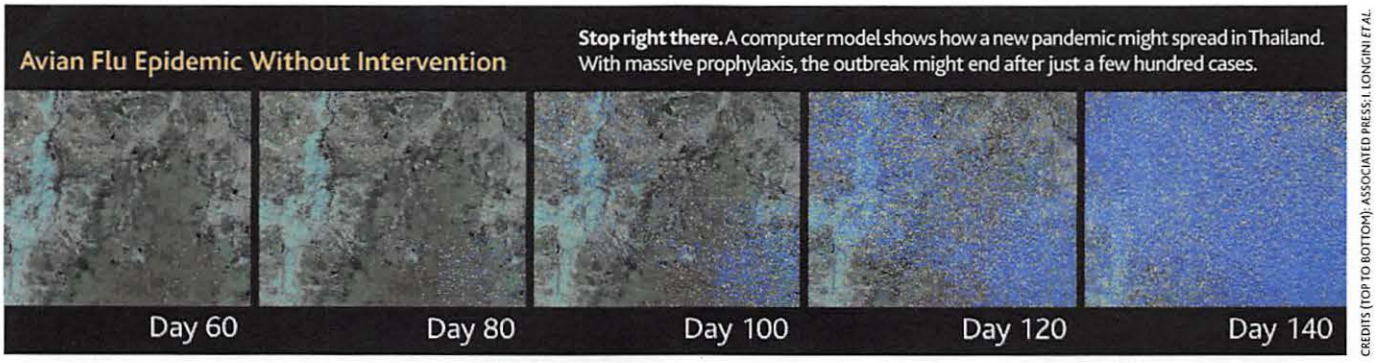
A bold new idea is to use oseltamivir to battle a potentially pandemic virus at the source, before it becomes a global threat, using an internationally run stockpile. The strategy might be the only way to prevent disaster in the majority of countries unable to afford vaccines or drugs at all, notes Arnold Monto of the University of Michigan, Ann Arbor. Oseltamivir would make those who get the flu less infectious to others, but by far its most important task would be to prevent infection in those exposed to the virus.

Now, that idea has been put to the test. Longini and his colleagues simulated an imaginary population of 500,000 people who live, work, and move about in rural Southeast Asia. Meanwhile, Ferguson and his colleagues built a model based on the 85 million people living in Thailand and a 100-kilometer-wide border zone in neighboring countries. Both then introduced a pandemic virus and looked at how well different containment strategies performed.

The cornerstone in each model was giving a 10-day prophylactic course of oseltamivir to the contacts of every suspected flu patient—either by treating everyone in their household, school, or workplace, or by simply giving it to anyone living within a certain radius. In both models, the drug regimens were supplemented by measures such as closing schools, "home quarantine," or "area quarantine," in which travel into and out of the hot zone is restricted.

And in both models, the more such measures were deployed, the higher the chances were that the pandemic petered out, with thousands or even millions of people taking an oseltamivir course, but only a few hundred actual flu cases. But success depended critically on a few factors.

One is the infectiousness of the pandemic virus. Epidemiologists characterize infectious agents by a factor called R_0, which denotes the number of secondary infections caused by a primary case. In both studies, viruses with an R_0 between 1.0 and 1.8 could usually be contained, depending on the exact set of measures; with an R_0 well above 2.0, the outbreak often spiraled out of control. Estimates for R_0 during past pandemics have varied; in a paper published in December, Lipsitch concluded that it was between 2 and 4 in the United States during the 1918–19 pandemic. But Ferguson estimates it was about 1.8.



Stop right there. A computer model shows how a new pandemic might spread in Thailand. With massive prophylaxis, the outbreak might end after just a few hundred cases.

CREDITS (TOP TO BOTTOM): ASSOCIATED PRESS; I. LONGINI *ET AL.*

A Drug Makes It Big—But Can It Deliver?

The worldwide fears triggered by the Asian outbreak of H5N1 have created one clear winner: oseltamivir, the drug that, from a quartet of candidates, is considered the best one to fight a pandemic. More than two dozen governments have placed orders for a stockpile with the producer, Roche in Switzerland; 2005 sales are expected to exceed $700 million—up from just $110 million 3 years ago—and seem poised to grow further, says Bret Holley, an analyst at CIBC World Markets in New York City.

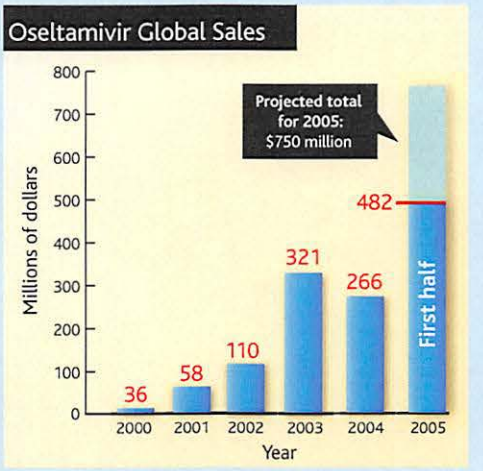
The procurement orders may be lucrative, but it remains to be seen just how effective oseltamivir, known commercially as Tamiflu, will be during an influenza pandemic. Nor is there agreement about how big a national stockpile should be, or who should receive the drugs to maximize their impact. And in the worst-case scenario, resistance in the flu virus might render stockpiles worthless.

As a remedy against nonpandemic flu, oseltamivir has certainly failed to win many supporters since its launch in 1999. The drug, which blocks a viral enzyme called neuraminidase, can make a bout with influenza more bearable and shorten the duration of symptoms by a day or more; it has also been shown to prevent complications and hospitalizations—but not mortality. The problem is that it needs to be given within 48 hours of infection to be fully effective. And even for patients who meet that deadline, most doctors don't think the benefits warrant the $65 cost of a prescription. (Japan, where sales have soared, is the exception.)

How well oseltamivir will perform against human infection with H5N1 is unclear. It has shown anti-H5N1 activity in test-tube and animal studies, but human cases have been so rare that experience is extremely limited.

Who should get treatment is also in question. Pandemics may sicken between 25% and 50% of the population in 3 months, but many people with milder cases can probably recover by themselves. Still, countries such as France, the United Kingdom, and Finland are amassing enough oseltamivir to treat 20% to 30% of their populations; the United States, on the other hand, currently has only 2.3 million doses for almost 300 million people. The Bush Administration was expected to announce a new order shortly—although nowhere near the 67 million to 124 million treatments that the Infectious Diseases Society of America has urged.

Recently, another potential role of oseltamivir has garnered a great deal of attention: that of preventing illness rather than treating it. Studies have shown that oseltamivir can reduce the risk of infection in people exposed to the virus by around 80%. That benefit is key in global plans to stamp out a pandemic early on (see main text); once a virus is on its worldwide rampage, national governments could similarly attempt to slow its spread within their own borders.



Last year, a study by Ira Longini's team at Emory University in Atlanta, Georgia, showed that using oseltamivir preventively could contain an outbreak in the United States, and a paper published this month by Ran Balicer of Ben Gurion University of the Negev in Be'er Sheva, Israel, suggests that stockpiling drugs for this purpose should be cost-effective if pandemics occur more often than once every 80 years. That may seem like a fairly safe bet, but it would require reserves for much more than 25% of the population—an amount few countries are considering at the moment.

For now, a more feasible and widely discussed approach may be to restrict prophylactic use to certain groups, such as health care workers, people performing "essential" jobs, or the elderly—although picking the beneficiaries might create wrenching ethical dilemmas.

Another worry is that once tens of millions of people start taking Tamiflu, the virus will become resistant. So far, resistance appears to be rare in other flu strains; during the 2003–04 flu season, when a whopping 6 million treatment courses were prescribed in Japan, only 4 of 1180 virus isolates tested there showed resistance, a group reported in April. And fortunately, mutations that confer resistance also appear to slow the virus's growth.

Tamiflu may soon face some competition, as other drugs are in the pipeline. And many researchers say they'd feel a lot better if the bullish market for flu drugs were split between a couple of rivals. **–M.E.**

SOURCE: ROCHE

Another key condition in both models is that the operation starts within a couple of weeks of the first cases. Chances of containment drop dramatically if it takes more than 2 days to reach new patients' contacts. Both conditions may be challenges, to say the least, in rural areas with poor health care.

Some infectious-disease experts put little stock in models like these. "In 30 years in public health, I've never seen any statistical modeling that had any impact on public health. And this is no exception," says Michael Osterholm, director of the Center for Infectious Disease Research and Policy at the University of Minnesota, Twin Cities. A single SARS patient in a Hong Kong hotel triggered a worldwide outbreak in 2003, he notes; no model could have predicted that turn of events.

But to Anthony Fauci, director of the U.S. National Institute of Allergy and Infectious Diseases, the studies provide an "interesting blueprint" of what might be possible. "Even if there's only a 20% or 30% chance of success, it's worthy of the effort," adds Frederick Hayden, an antiviral expert at the University of Virginia, Charlottesville, "given the enormous impact that a pandemic would have."

It wouldn't be all that expensive, Hayden notes. The amount of oseltamivir needed—some 3 million courses in Ferguson's most unfavorable scenario—isn't very much; the United Kingdom alone has ordered almost 15 million 5-day courses for its own citizens. WHO already has more than 100,000 treatment courses, donated by Roche, sitting in a stockpile. And Roche may soon make another, much larger donation to WHO, says David Reddy, the company's influenza pandemic task force leader.

But although WHO welcomes any oseltamivir it can get its hands on, more studies, as well as discussions with the affected countries, are needed to find out whether the snuffing-out scenario is feasible, Chan says. The Thai government, for its part, is interested in exploring the option, says Supamit Chunsuttiwat, a senior expert for communicable diseases at the Ministry of Public Health. The two papers, he says, "give us some hope that we might be able to do this."

But Osterholm worries that the two papers might calm fears prematurely. Even if the scheme envisioned by Ferguson and Longini were successful once, he said, it would need to be repeated as long as H5N1 is rampant in the bird population. Longini agrees. But who knows, he says, researchers might get better at it after the first time. And in any case, only a small region would be affected in every budding pandemic. "It's not like we're exposing the entire world to a fire drill every time," Longini says.

–MARTIN ENSERINK

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ARTICLES

Strategies for containing an emerging influenza pandemic in Southeast Asia

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Highly pathogenic H5N1 influenza A viruses are now endemic in avian populations in Southeast Asia, and human cases continue to accumulate. Although currently incapable of sustained human-to-human transmission, H5N1 represents a serious pandemic threat owing to the risk of a mutation or reassortment generating a virus with increased transmissibility. Identifying public health interventions that might be able to halt a pandemic in its earliest stages is therefore a priority. Here we use a simulation model of influenza transmission in Southeast Asia to evaluate the potential effectiveness of targeted mass prophylactic use of antiviral drugs as a containment strategy. Other interventions aimed at reducing population contact rates are also examined as reinforcements to an antiviral-based containment policy. We show that elimination of a nascent pandemic may be feasible using a combination of geographically targeted prophylaxis and social distancing measures, if the basic reproduction number of the new virus is below 1.8. We predict that a stockpile of 3 million courses of antiviral drugs should be sufficient for elimination. Policy effectiveness depends critically on how quickly clinical cases are diagnosed and the speed with which antiviral drugs can be distributed.

The continuing spread of H5N1 highly pathogenic avian influenza in wild and domestic poultry in Southeast Asia represents the most serious human pandemic influenza risk for decades[1,2]. Great potential benefits would be gained from any intervention able to contain the spread of a pandemic strain and eliminate it from the human population. However, the rapid rate of spread of influenza—as witnessed both in annual epidemics and past pandemics[3–5]—poses a significant challenge to the design of a realistic control strategy.

The basic reproduction number[6], R_0, quantifies the transmissibility of any pathogen, which is defined as the average number of secondary cases generated by a typical primary case in an entirely susceptible population. A disease can spread if $R_0 > 1$, but if $R_0 < 1$, chains of transmission will inevitably die out. Hence, the goal of control policies is to reduce R_0 to below 1 by eliminating a proportion $1 - 1/R_0$ of transmission. This can be achieved in three ways: (1) by reducing contact rates in the population (through 'social distance measures'), (2) by reducing the infectiousness of infected individuals (through treatment or isolation), or (3) by reducing the susceptibility of uninfected individuals (by vaccination or antiviral prophylaxis).

Vaccination and antiviral drugs offer protection against infection and clinical disease. However, although effective vaccines exist for interpandemic flu, candidate H5N1 vaccines have unproven effectiveness[7], and production delays would in any case limit availability in the first months of a pandemic. Antiviral agents—particularly the neuraminidase inhibitors, which show experimental effectiveness against all influenza A subtypes[8,9]—are therefore a key aspect of recently revised pandemic preparedness plans in several countries[10].

For antivirals to significantly reduce transmission, prophylactic use is necessary. Large-scale prophylaxis has the potential to limit spread substantially in a developed country[11], but the very large stocks of drug necessary make this policy impractical if the pandemic is already global. However, might such a policy nonetheless be a feasible strategy if applied at the source of a new pandemic, when repeated human-to-human transmission is first observed? Here we address this question, and focus on identifying the threshold level of transmissibility below which containment of any new pandemic strain might be feasible.

Modelling pandemic spread

We modelled pandemic spread in Southeast Asia, as this region remains the focus of the ongoing avian H5N1 epidemic and is where most human cases have occurred. Data availability led us to model Thailand rather than any perceived greater risk of emergence compared to other countries in the region; however, we believe our conclusions are also valid for other parts of Southeast Asia.

We constructed a spatially explicit simulation of the 85 million people residing in Thailand and in a 100-km wide zone of contiguous neighbouring countries. The model explicitly incorporates households, schools and workplaces, as these are known to be the primary contexts of influenza transmission[12–14] (see Fig. 1 and Methods) and because control measures can readily target these locations. Random contacts in the community associated with day-to-day movement and travel were also modelled.

Natural history and transmission parameters

Fundamental to the feasibility of any containment strategy is being able to quantify the transmissibility of the emergent virus, R_0. Reliable past estimates of transmissibility are rare, perhaps owing to the antigenic diversity of influenza and the consequent complex effect of population immunity on transmission.

We re-analysed incubation period and household transmission data for human influenza (see Methods) and derived new natural history parameters, which predict a profile of infectiousness over time that is remarkably consistent with viral shedding data from experimental infection studies (see Fig. 1g and ref. 15). This profile

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gives an estimate of the serial interval or generation time, T_g (the average interval from infection of one individual to when their contacts are infected), of 2.6 days, compared with the value of ~4 days assumed by most previous modelling studies[16]. Re-analysis of both US and UK 1918 pandemic mortality data using this new value of T_g revises pandemic influenza R_0 estimates[5] downwards to approximately 1.8 (Fig. 1f and Supplementary Information). This yields a predicted infection attack rate of 50–60% during a pandemic, consistent with what was seen in the first and second waves of past pandemics (see Supplementary Information). An R_0 value of 1.8 is also consistent with annual interpandemic attack rates seen in households where all members were highly susceptible to the prevalent strain[17] (see Supplementary Information). We also assumed that 50% of infections result in clinically recognizable symptoms, with the other 50% being too mild to be diagnosed clinically[18].

We cannot be certain that these parameter estimates would be applicable to any new pandemic strain. It is possible that the mutations or reassortment events that give rise to the new viral strain might initially increase its transmissibility only slightly over the $R_0 = 1$ threshold for self-sustaining transmission. In that case, additional mutations would have to accumulate for viral fitness to increase to its maximum. Given the extended viral shedding (and symptomatic disease) seen in severe human cases of avian H5N1 infection, this might also mean that the T_g of the initial pandemic strain could be considerably greater than for currently circulating human influenza viruses. We therefore examine the ability of control measures to contain pandemic spread not just at a single value of R_0, but for different values in the range $1 < R_0 < 2$, and analyse model sensitivity to the assumed value of T_g.

Baseline epidemic dynamics

We consider the scenario that a new transmissible ($R_0 > 1$) pandemic strain arises as a result of mutations or a reassortment event in a single individual infected with an avian virus. We seed simulations with a single infection in the most rural third of the population (that is, with the lowest population density), assuming that rural populations are most likely to be exposed to the avian virus. Figure 2 shows the typical pattern of spread for an emergent pandemic initiated by such a seeding event assuming $R_0 = 1.5$, but note that for low R_0, most epidemics seeded by a single individual go extinct by chance before becoming established in the population.

The pattern of spatial spread (Fig. 2a and Supplementary Video 1) is of interest: for the first 30 days, cases tend to be limited to the region around the seeding location, with few 'sparks' outside that area. However, as case numbers increase exponentially, so does the frequency with which infection events span large distances, and the epidemic rapidly transforms from being predominantly local to country-wide between days 60 and 90 (Fig. 2a–c). Any containment policy needs to be effective before this transition, in part because logistical constraints are likely to preclude containment of a widely disseminated epidemic, but also because the probability of international export of infection becomes high once case numbers reach the thousands (Hollingsworth, D., N. M. F. & Anderson, R. M., unpublished observations).

For $R_0 = 1.5$, the epidemic in the modelled population of 85 million peaks around day 150 and is largely over by day 200 (Fig. 2b), at which point 33% of the population has been infected (Fig. 2d). At $R_0 = 1.8$, the epidemic peaks around day 100 and infects about 50% of the population.

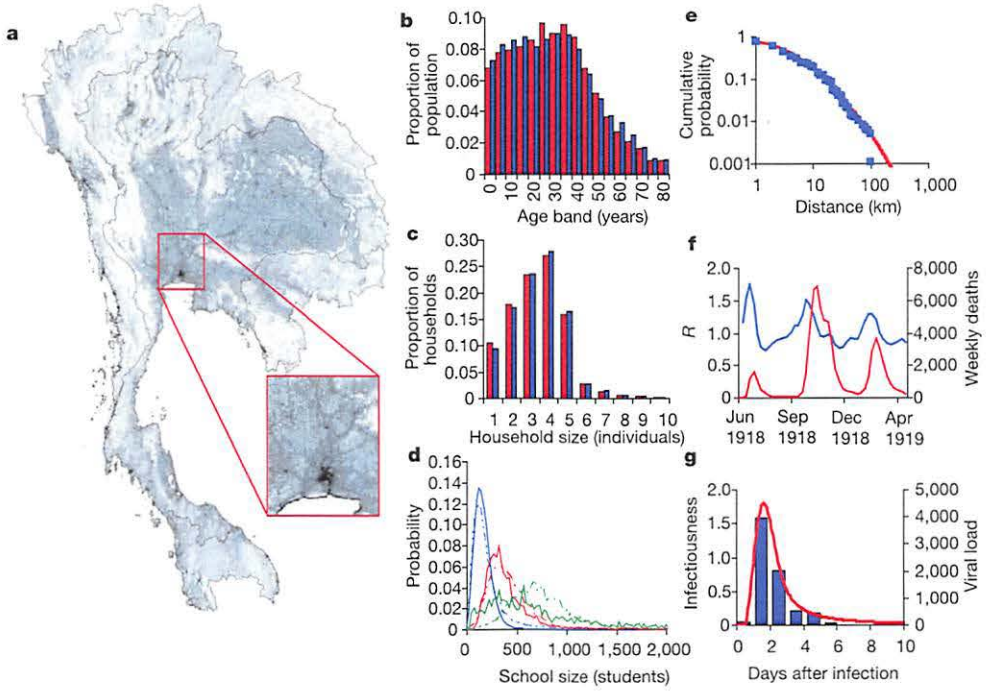

Figure 1 | Data. **a**, Modelled population density of Thailand and 100-km contiguous zone of neighbouring countries, based on Landscan[24] data and plotted on a logarithmic scale (light for low density, dark for high density). Inset shows Bangkok in more detail. **b**, Age distribution of Thai population in 2003 in 5-yr bands (blue), and the corresponding age distribution of the simulated population (red). **c**, As **b** but showing distribution of household sizes. **d**, Observed (solid lines) and modelled (dashed lines) distributions of school sizes (blue, elementary; green, secondary; red, mixed). **e**, Probability of travelling over a certain distance to work, estimated from data (blue) and from the simulated population (red). **f**, Weekly excess influenza-related mortality in 1918–1919 in Great Britain (red), and corresponding estimates of the reproduction number R (blue), calculated assuming $T_g = 2.6$. **g**, Viral shedding data for experimental influenza infection[15] (expressed in tissue culture infective doses ($TCID_{50}$) per ml of nasal lavage fluid) compared with the modelled profile of infectiousness over time. Note that the infectiousness profile was not fitted to shedding data. See Methods and Supplementary Information for more details.

Effect of antiviral prophylaxis

In evaluating containment strategies, we focus on two principal outcome measures: (1) the probability of preventing a large outbreak (which would eventually lead to a global pandemic), and (2) the number of courses of drug (assumed here to be oseltamivir) required to achieve containment.

Blanket prophylaxis of an entire country or region should be able to eliminate a pandemic virus with an R_0 of 3.6 or greater (see Methods). However, such a policy would require enough drug to prophylax everyone for up to three weeks (that is, at least two courses per person) and is hence unfeasible. Targeted strategies are therefore needed to minimize drug usage while maximizing effect.

Social targeting is the most straightforward approach. This involves prophylaxing individuals in the same household, school or workplace as a newly diagnosed symptomatic case. Unfortunately, if such a policy is only initiated after 20 or more cases, purely social targeting only has a ≥90% probability of eliminating the pandemic strain if $R_0 \leq 1.25$ (lowest curve of Fig. 3a; see also Supplementary Information). In reality, at least ten cases might have to be detected to be sure that viral transmissibility had significantly increased[19], and detection and decision-making delays could easily mean 20–30 cases had arisen before policy initiation. A containment policy will therefore probably have to go beyond social targeting in order to succeed. As most community contacts are local, geographic targeting—namely, prophylaxing the whole population in the neighbourhood of the household in which a case is detected—is an obvious policy extension, but one that will no doubt greatly increase the logistical challenges to delivery. In the absence of detailed administrative boundary data, we simulated geographic targeting as the prophylaxis of the population within a ring of a certain radius centred around each detected case, but in practice targeting administrative areas is likely to be more practical. For social or geographic prophylaxis, we assume that individuals are given a single course of ten days of drug, after which time they come off the drug unless more cases have arisen in their vicinity, in which case a second round of prophylaxis is delivered. The policies therefore cease automatically within ten days of the last case being reported.

Our analysis indicates that the additional effort required to deliver a geographic policy pays substantial dividends in terms of policy effectiveness. With a two-day delay from case onset to prophylaxis, a 5-km ring policy is able to contain pandemics with an R_0 of 1.5 (Fig. 3a) at the cost of an average of 2 million courses (Fig. 3b), but the maximum number of courses needed can increase by an (unfeasible) order of magnitude for scenarios in which cases arise in Bangkok at an early stage of the outbreak. Policy effectiveness increases with the radius of the treatment ring selected (but little benefit is gained from exceeding 10 km), as does the number of courses required (Fig. 3b). Policy outcome is still sensitive to the speed of case detection and drug delivery, but containment is always substantially better than for the purely socially targeted policy (Fig. 3d).

As pure radial prophylaxis is costly in terms of drug, we also examined a policy variant that limits the number of people targeted for prophylaxis per case by only targeting the nearest m people (where $m = 10{,}000$–$50{,}000$) within 10 km of a newly diagnosed case. In areas of low population density, this drug-sparing policy has the same effect as a pure 10-km ring policy, but in high-density areas many fewer courses of drug are used. The improved effectiveness in rural areas outweighs decreased effectiveness in urban areas, resulting in a greater effect than a pure 5-km ring policy and much lower drug use (Fig. 3e, f).

Epidemiologically, elimination occurs either because the treatment strategy reduces R_0 to below 1, or because it reduces R_0 to close to 1 when the epidemic is small, thereby enhancing the probability of random extinction. For scenarios in which the pandemic strain is successfully eliminated, geographic spread is usually limited. For example, the root mean square (r.m.s.) radius of spread is 27 km for $R_0 = 1.5$ using the 5-km radial geographic targeting strategy. When containment is successful, total case numbers are also limited to an average of fewer than 150 cases.

Policies to increase social distance

Measures to increase social distance have been used in past pandemics and remain important options for responding to future pandemics[1]. However, predicting the effect of policies such as closing schools and workplaces is difficult, as potentially infectious contacts

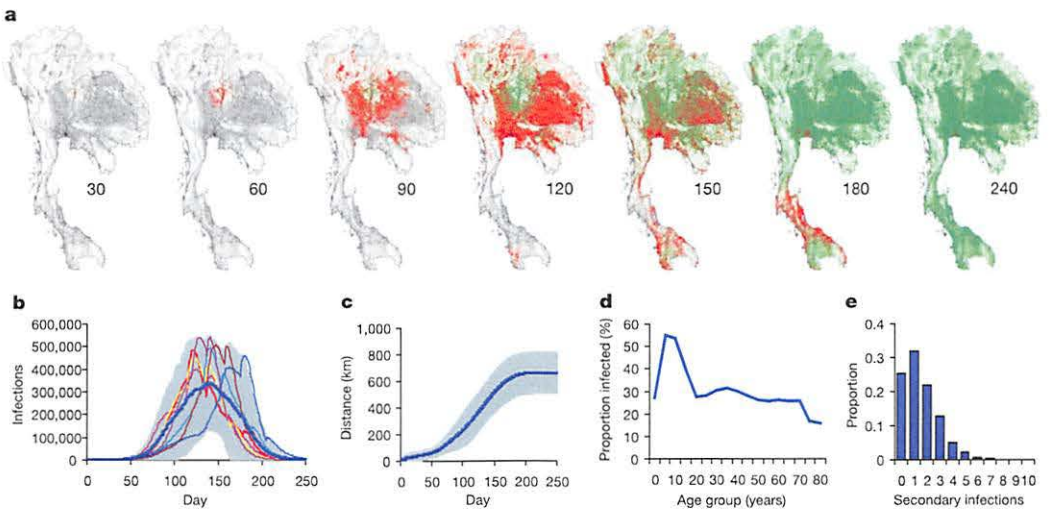

Figure 2 | Expected pattern of spread of an uncontrolled epidemic. **a**, Time sequence (in days) of an epidemic, showing spreading in a single simulation of an epidemic with $R_0 = 1.5$. Red indicates presence of infected individuals, green the density of people who have recovered from infection or died. **b**, Daily incidence of infection over time for $R_0 = 1.5$ in the absence of control measures. Thick blue line represents average for realizations resulting in a large epidemic, grey shading represents 95% confidence limits of the incidence time series. Multiple coloured thin lines show a sample of realizations, illustrating a large degree of stochastic variability. **c**, Root mean square (r.m.s.) distance from the seed infective for individuals infected since the start of the epidemic as a function of time. Thick blue line represents average distance for realizations resulting in a large epidemic, grey shading represents 95% limits. **d**, Proportion of the population infected by age for $R_0 = 1.5$, averaged across realizations that result in large epidemics. The infection attack rate is 33% for $R_0 = 1.5$ and 50% for $R_0 = 1.8$. **e**, Distribution of the number of secondary cases per primary case during the exponential growth phase of a $R_0 = 1.5$ epidemic. Between 50 and 1,000 realizations were used to calculate all averages (see Supplementary Information).

may be displaced into other settings. Furthermore, it is likely that population contact rates change spontaneously (as well as a result of policy) during severe epidemics (for example, 1918) in response to the perceived risk. Therefore, the estimates of pandemic transmissibility we derive from past pandemics might implicitly incorporate the effects of some degree of social distancing.

We are therefore deliberately conservative in the assumptions made here regarding the effect of school and workplace closure, by assuming that household and random contact rates increase by 100% and 50%, respectively, for individuals no longer able to attend school or work. Figure 4a illustrates how adding area-based school and workplace closure to a drug-sparing prophylaxis policy increases policy effectiveness significantly, with the combined policy having a >90% chance of elimination for $R_0 = 1.7$.

Quarantine zones, in which movements in and out of the affected area are restricted, are another strategy for enhancing containment, and may in any case be thought necessary to prevent population flight from affected areas or deliberate entrance of people into prophylaxis zones to receive drug. Figure 4a (see also Supplementary Video 2) shows that such an area quarantine strategy can greatly increase the effectiveness (to 90% containment at $R_0 = 1.8$) of radial geographic targeted prophylaxis even if only 80% effective at reducing movements. Combining school and workplace closure with area quarantine and prophylaxis further increases policy effectiveness (90% containment at $R_0 = 1.9$), and equally importantly, increases the robustness of the policy to shortcomings in case identification or treatment rates. For all these policies, containment is typically achieved after fewer then 200 cases have been detected.

Logistical constraints and sensitivity to parameter assumptions

Other constraints may affect the ability of public health authorities to deliver containment policies. Figure 4c shows that the size of an antiviral stockpile can have a substantial effect on policies that use pure radial geographic prophylaxis, as very large numbers of courses are required to prophylax populations around cases arising in large urban areas. However, policies using drug-sparing, geographically targeted prophylaxis (Fig. 4d) retain high effectiveness provided that at least 3 million drug courses are available. For scenarios in which containment fails with a finite stockpile, Fig. 4e shows that even an unsuccessful containment strategy can delay widescale spread by a month or more—a potentially critical window of opportunity for accelerating vaccine production.

Another possible constraint is that capacity to implement these containment policies might not be present in all countries in the region. A policy restricted to one country alone might have a substantially reduced chance of success (Fig. 4f and Supplementary Video 3) should the initial case cluster arise in a border region.

Multiple assumptions are inevitably made when undertaking preparedness modelling for a future emergent infection. Sensitivity analyses are therefore critical for assessing the robustness of policy conclusions. Here, critical assumptions not already discussed include (1) the ratio of within-place to community transmission, (2) the

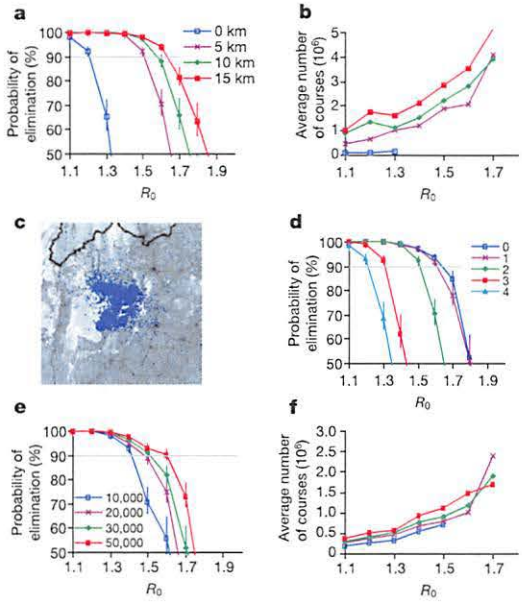

Figure 3 | Prophylaxis strategies. We assume 90% of clinical cases (45% of infections) are detected. Social targeting assumes prophylaxis of 90% of household members and 90% of pupils or colleagues in 90% of the schools or workplaces with detected cases. Geographic targeting assumes 90% of people within 5, 10 or 15 km of a detected case are also prophylaxed. **a**, Probability of eliminating an otherwise large epidemic using social and geographic targeting, as a function of R_0 of the new strain and the radius of prophylaxis. Results assume policy initiation after detection of 20 cases and a two-day delay from case detection to prophylaxis. Error bars show exact 95% confidence limits. **b**, Same as **a**, but showing average number of drug courses required for containment of an otherwise large outbreak. **c**, Map of northern Thailand (150 × 150 km square), showing the extent of spread during one contained $R_0 = 1.8$ epidemic assuming 10-km radial prophylaxis and other parameters as in **a**. Treated areas shown in blue. **d**, Same as **a**, but varying the delay (0–4 days) from case detection to prophylaxis for the 5-km radius policy. **e**, **f**, Same as **a** and **b**, but for drug-sparing policies that target only the nearest 10,000–50,000 people within 10 km of a detected case. Error bars show exact 95% confidence limits.

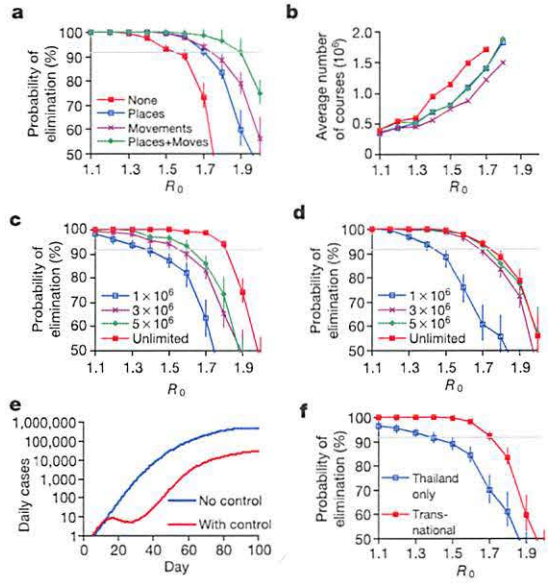

Figure 4 | Social distance measures. **a**, **b**, Same as Fig. 3a, b, but showing the effect of drug-sparing prophylaxis (50,000 courses per case, as Fig. 3e) together with: no social distance measures (red; as Fig. 3); 21-day closure of 90% of schools and 50% of workplaces within 5 km of a detected case (blue); 80% 'area quarantine' (that is, 80% reduction of movement in and out of a zone defined by merging 5-km rings around all detected cases) for 21 days (magenta); or a combination of school/workplace closure and area quarantine (green). **c**, Same as **a** but showing the effect of limiting availability of antiviral drugs to 1, 3 or 5 million courses on the effectiveness of the combined area quarantine and 5-km radial prophylaxis policy. **d**, Same as **c** but for drug-sparing geographic prophylaxis (50,000 courses per case) plus area quarantine. **e**, Case incidence over time without pandemic control measures and with the 3 million course policy of **d**, showing the approximate one-month delay achieved even when containment is unsuccessful ($R_0 = 1.9$). **f**, Same as **a** but showing the reduction in policy effectiveness seen if the combined school/workplace closure and drug-sparing prophylaxis policy is restricted to Thailand alone. Error bars show exact 95% confidence limits.

expected generation time, T_g, of a new pandemic strain (largely determined by the duration of viral shedding and therefore infectiousness), (3) the level of heterogeneity in individual infectiousness (for example, 'superspreaders'[20]), (4) antiviral efficacy/take-up, and (5) the sensitivity and specificity of case detection during the control programme. The effect of these assumptions on model output is presented in the Supplementary Information. In summary, points (4) and (5) are the most critical, as one might expect. If antiviral coverage or efficacy is considerably less than assumed, then policy effectiveness is substantially reduced. Similarly, if surveillance picks up fewer than 40% of infections (that is, 80% of symptomatic cases), policy effectiveness is again reduced. Poor surveillance specificity (that is, false positives) has an indirect effect on effectiveness as a result of wasted drug and logistical capacity.

Conclusions

We have shown that containment and elimination of an emergent pandemic strain of influenza at the point of origin is feasible using a combination of antiviral prophylaxis and social distance measures. A key conclusion is the need for multiple approaches: simple socially targeted prophylaxis is unlikely to be sufficient if the emergent virus has transmissibility levels near those of previous pandemic viruses. Geographically targeted policies are needed to achieve high levels of containment, with area quarantine being particularly effective at boosting policy effectiveness. The only scenario under which purely socially targeted strategies might be sufficient would be if viral transmissibility evolved incrementally and the emergent virus initially had an R_0 only slightly above 1 (see Supplementary Information); however, R_0 will be probably be uncertain at the time at which containment policies have to be implemented, arguing for precautionary policies that assume transmissibility comparable with that of past pandemics.

A number of key criteria must be met for a high probability of success: (1) rapid identification of the original case cluster, (2) rapid, sensitive case detection and delivery of treatment to targeted groups, preferably within 48 h of a case arising, (3) effective delivery of treatment to a high proportion of the targeted population, preferably >90%, (4) sufficient stockpiles of drug, preferably 3 million or more courses of oseltamivir, (5) population cooperation with the containment strategy and, in particular, any social distance measures introduced, (6) international cooperation in policy development, epidemic surveillance and control strategy implementation. Containment is unlikely if R_0 exceeds 1.8 for the new pandemic strain. Although our analysis of past pandemics suggests that transmissibility will fall below this threshold, it is unlikely that sufficient data will exist to verify this before a containment policy has to be introduced.

The mathematical model we have used to examine the feasibility of pandemic containment is perhaps the largest-scale detailed epidemic micro-simulation yet developed. A key goal of the modelling was parsimony. Although the representation of the population is detailed, this detail is underpinned by available demographic data. The natural history parameters used here have been estimated from primary data on existing influenza strains. The model has five key transmission parameters, of which two were estimated from household data and the remaining three were qualitatively calibrated to historical age-dependent attack rates. We believe that this type of simulation will increasingly become a standard tool for preparedness planning and modelling of new disease outbreaks.

Given the set of criteria listed above for successful containment, the obstacles to practical implementation of such a strategy are undoubtedly formidable. Surveillance is perhaps the single greatest challenge. Success depends on early identification of the first cluster of cases caused by the pandemic strain[19], and on detection of a high proportion of ongoing cases. Some level of mildly symptomatic infection is to be expected (and has been observed for human H5N1 infections[21]), but key to successful containment is the proportion of such cases and their infectiousness. Should the high pathogenicity of recently reported human infections with the H5N1 virus be even partly maintained, then containment might paradoxically be more likely, as case-ascertainment levels would be higher.

Achieving the rapid delivery of antiviral drugs to a large proportion of the population raises many challenges. Thailand, the country modelled here, is one of the best-prepared and equipped countries in the region in terms of being able to implement a large-scale and very rapid public health intervention. Other countries need considerable development in basic healthcare and disease surveillance infrastructure in order to meet the needs of containment.

Antiviral resistance represents a currently unquantifiable challenge to a prophylaxis-based containment strategy. The key will not be whether genotypic or clinical resistance is seen in a percentage of individuals, but whether resistant viruses are capable of self-sustaining transmission (that is, have $R_0 > 1$). Current evidence indicates that fitness deficits in oseltamivir-resistant strains mean that their transmissibility is limited[22,23], but we cannot rule out the possibility that compensatory mutations that increase transmissibility might be selected. If a transmissible resistant strain did emerge during implementation of a containment policy, it would be essential for prophylaxis to cease, lest the wild-type virus be eliminated and the world be left with a pandemic of resistant virus. If prophylaxis were abandoned, the likely higher fitness of the wild-type virus would give every chance for the resistant strain to become excluded from the population.

A feasible strategy for containment of the next influenza pandemic offers the potential to prevent millions of deaths. It is therefore in the interest of all countries to contribute to ensuring that resources, infrastructure and collaborative relationships are in place within the region most likely to be the source of a new pandemic. The challenges are great, but the costs of failure are potentially so catastrophic that it is imperative for the international community to prepare now, to ensure that containment is given the best possible chance of success.

METHODS

Demographic data. The model used Landscan data[24] to generate a simulated population realistically distributed across geographic space (Fig. 1a). Thai census data[25,26] on household size and age distributions were used for demographic parameterization (Fig. 1b, c). Data from the Thai National Statistical Office[26] were used to determine the number and proportions of children in school as a function of age, and data from the Thai Department of Education on 24,000 schools (available from the authors upon request) were used to determine the distribution of school sizes (Fig. 1d). Data on travel distances within Thailand were limited; here we used data collected in the 1994 National Migration Survey[27,28] on distances travelled to work (Fig. 1e and Supplementary Information) to estimate movement kernel parameters. The best-fit kernel had asymptotic power-law form as a function of distance d given by $f(d) \sim 1/[1+(d/a)^b]$, where $a = 4$ km and $b = 3.8$. Thai workplace sizes[29] also follow a power-law distribution[30], with an estimated maximum single workplace size of approximately 2,300 and a mean of 21 individuals.

Disease data. The natural history of any H5-based pandemic strain will not be known until it emerges, so we used parameter estimates for current human influenza subtypes, and used sensitivity analyses to investigate what effect deviation from these estimates would have on policy effectiveness (see Supplementary Information). The mean ± s.d. of the incubation period distribution was estimated as 1.48 ± 0.47 days, on the basis of data from a multiple-exposure event occurring on an aeroplane[31].

We adopt a more biologically realistic approach than most previous modelling studies (but see ref. 32), and rather than assuming that infectiousness is constant from the end of the latent period until recovery, we model it as a function, $\kappa(T)$ (assumed normalized), depending on the time elapsed from the end of the latent period. The generation time, T_g, is given by the mean latent period plus $\int_0^\infty T\kappa(T)\mathrm{d}T$. Experimental infection data[33] indicate the start of symptoms to be coincident with a sharp increase in viral shedding, so we assume that infectiousness starts at the end of the incubation period. We further assume a 0.25-day delay from when symptoms start to when diagnosis or healthcare-seeking behaviour is likely. We used bayesian methods (see Supplementary Information) to estimate $\kappa(T)$ from data collected in a recent household study of respiratory disease incidence[34,35]. Combined with the estimated incubation period distribution, this gives the profile of infectiousness shown in Fig. 1g.

T_g is estimated as 2.6 days (95% credible interval: 2.1–3.0), which is shorter than previously assumed (but see ref. 36).

Transmission model. The model is a stochastic, spatially structured, individual-based discrete time simulation. Individuals are co-located in households, with households being constructed to reflect typical generational structure while matching empirical distributions of age structure and household size for Thailand (Fig. 1b, c). Households are randomly distributed in the modelled geographic region, with a local density determined by the Landscan data[24]. In any time-step of $\Delta T = 0.25$ days, a susceptible individual i has probability $1 - \exp(-\lambda_i \Delta T)$ of being infected, where λ_i is the instantaneous infection risk for individual i. Infection risk comes from 3 sources: (1) household, (2) place, and (3) random contacts in the community. The last of these depends on distance, representing random contacts associated with movements and travel, and is the only means by which infection can cross national borders. Analysis of household infection data (see Supplementary Information), gave a within-household R_0 of 0.6 and an overall R_0 of 1.8. We partition non-household transmission to give levels of within-place transmission comparable with household transmission (that is, $R_0 \approx 0.6$) and to qualitatively match 1957 influenza pandemic age-specific attack rates. When varying R_0, the relative proportions of household, place and community transmission were kept fixed. Full model details are given in the Supplementary Information.

Antiviral drug action. We use recent statistically rigorous estimates of antiviral efficacy[37], but these are broadly consistent with previous estimates[22]. Prophylaxis of uninfected individuals is assumed to reduce susceptibility to infection by 30%, reduce infectiousness if infection occurs by 60%, and reduce the probability of clinically recognizable symptoms by 65% (ref. 37). In theory, blanket prophylaxis of a population should be able to contain a pandemic with an R_0 of $1/[(1 - 0.6)(1 - 0.3)]$, or approximately 3.6. Treatment of a symptomatic case is assumed to reduce infectiousness by 60% from when treatment is initiated. Overall, for the parameter values used here, antiviral treatment of a symptomatic case can reduce total infectiousness throughout the course of infection by a maximum of 28%.

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Supplementary Information is linked to the online version of the paper at www.nature.com/nature.

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Author Contributions N.M.F. designed, implemented and ran the model, integrated the demographic and disease datasets used, and drafted and revised the text. All other authors edited or commented on the text. D.A.T.C. identified, collated and processed the Thai demographic and travel datasets used and provided input on model assumptions. S.C. analysed the French household dataset used to estimate key epidemiological parameters. C.F. performed analytical modelling of household transmission, which aided the verification of the simulation and gave suggestions on control strategies to be modelled. S.R. contributed to the design of some algorithms within the simulation model. A.M. assisted with collating data on Thai schools and administrative boundaries. S.I. provided feedback on the realism of model assumptions and the likely feasibility of different control options. D.S.B. provided input into model design and assumptions, advised on the presentation of results, assisted with data collection and organized meetings with stakeholders.

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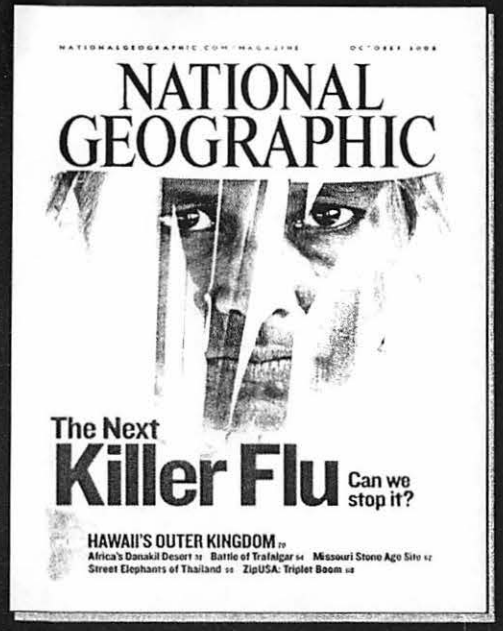
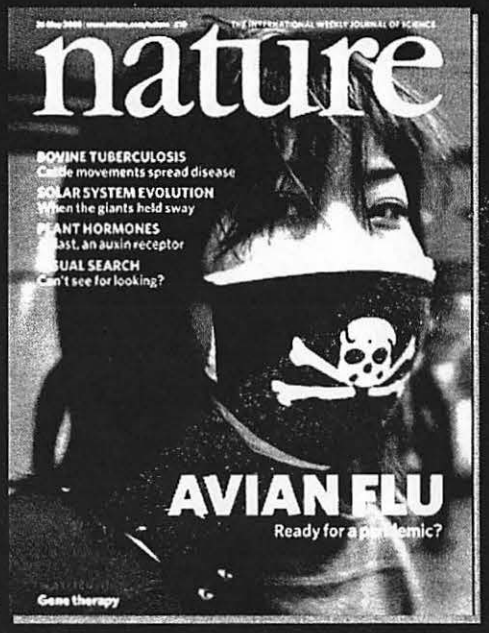
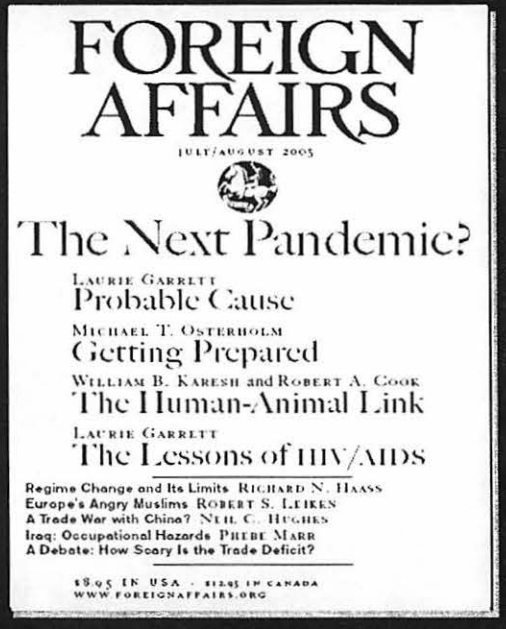
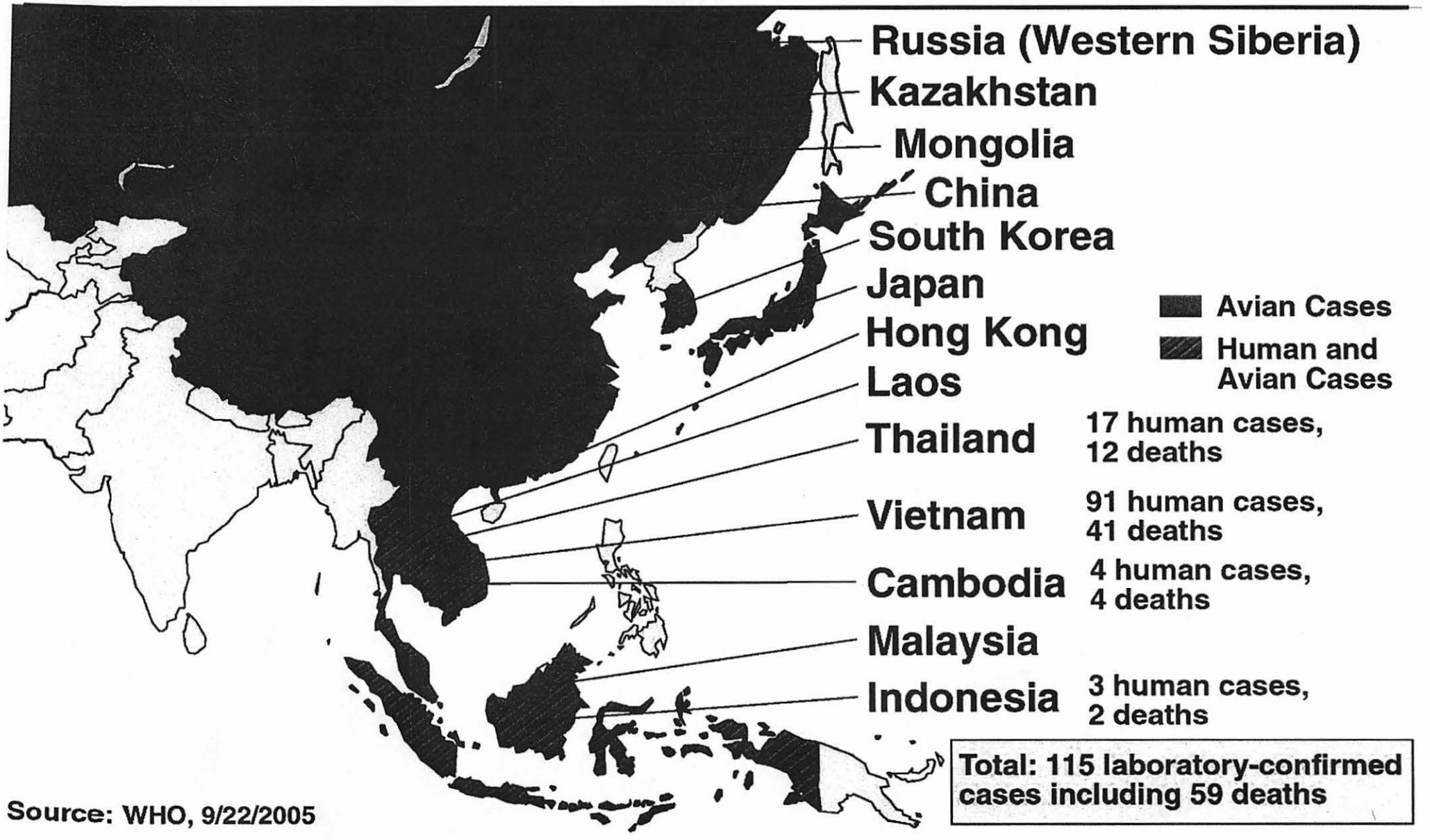






No immunity to this strain - examples in wild fowl & domestic fowl

H5N1 Influenza in Asia, 2004-2005

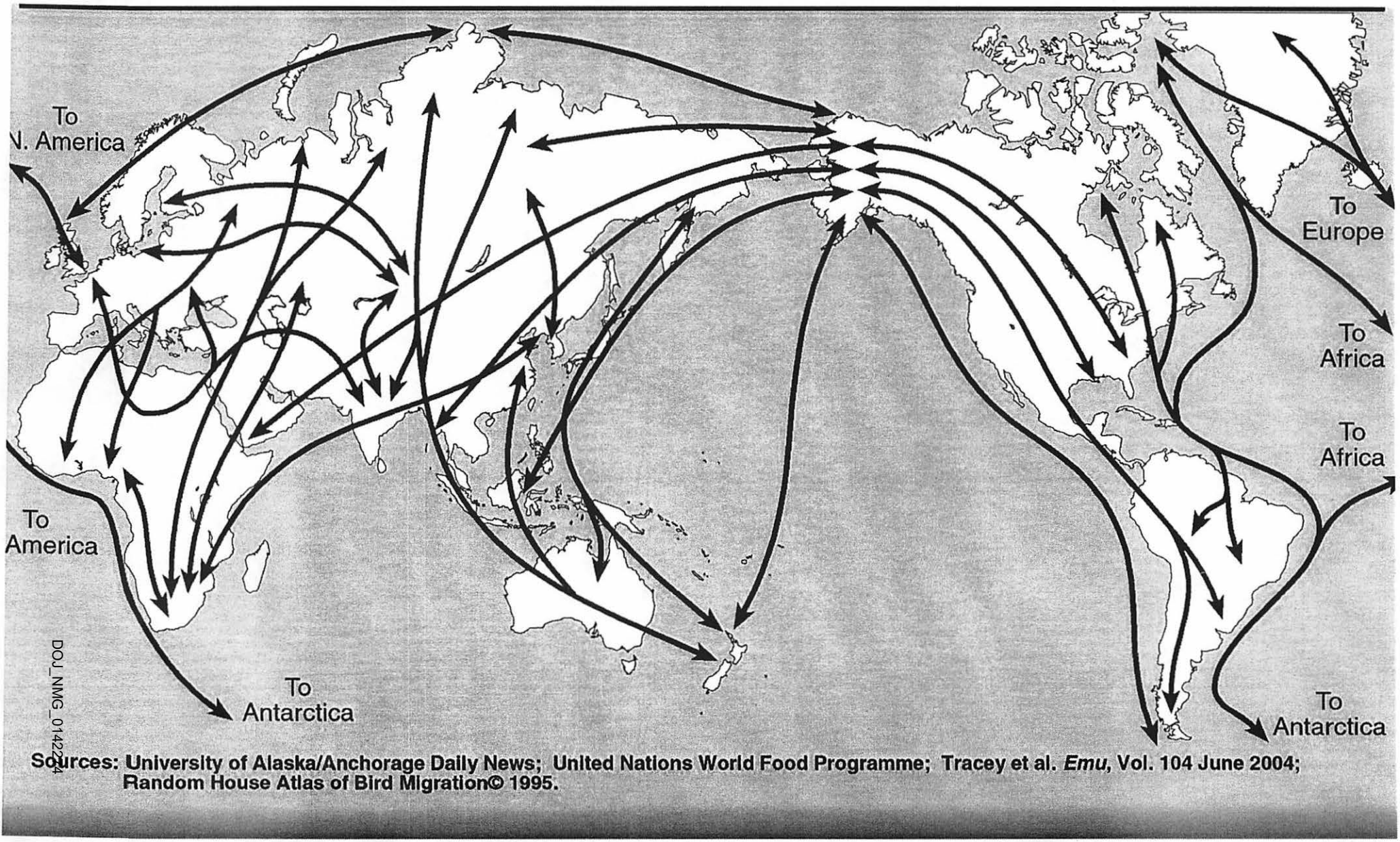


Source: WHO, 9/22/2005

Steps Toward a Pandemic

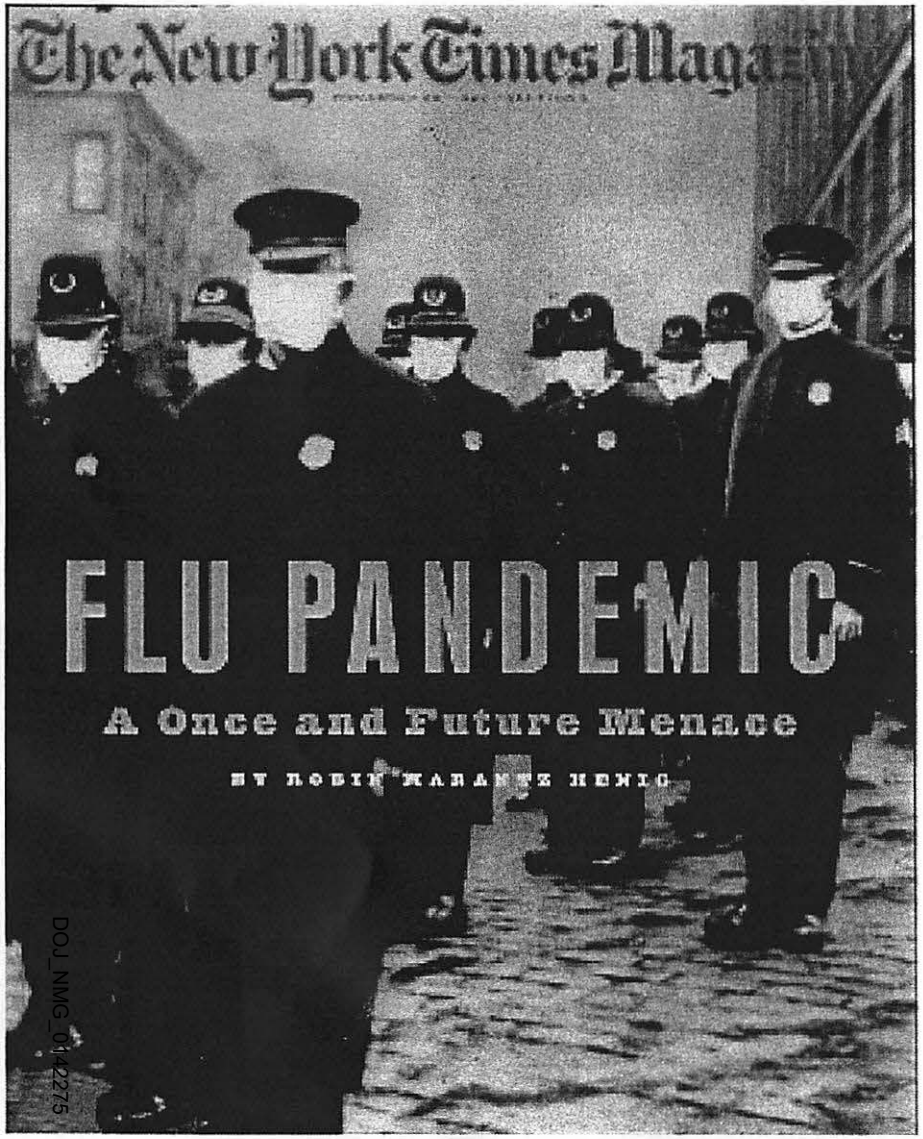
- ☑ Virus appears in birds in a restricted geographic setting
- ☑ Virus spreads to birds in a wider geographic setting
- ☑ Virus infects other mammals
- ☑ Virus jumps from bird to human inefficiently
- ☑ Virus more efficiently spreads from bird to human
- ☑ Inefficient human to human transmission of virus
- ☐ Efficient human to human transmission of virus

Migratory Bird Flyways



Sources: University of Alaska/Anchorage Daily News; United Nations World Food Programme; Tracey et al. *Emu*, Vol. 104 June 2004; Random House Atlas of Bird Migration© 1995.

The Influenza Pandemic of 1918-1919



- 25-30% of world's population (~500 million people) fell ill
- >40 million deaths worldwide; ~60 percent in people ages 20-45
- >500,000 deaths in United States; 196,000 in October, 1918 alone

Source: WHO, 1/2005

Demand for Medical Care in an Influenza Pandemic

	Low Estimate (1957 & 68 based)	High Estimate (1918 based)
Deaths	100 - 240,000	950,00 - 2 million
Hospitalizations	360 - 840,000	4 - 10 million
Illnesses	40 - 100 million	40 - 100 million

Source: Meltzer, CDC, unpublished data

HHS Pandemic Influenza Doctrine

Triggering event – Sustained human-to-human transmission anywhere in the world will be th triggering event to initiate a pandemic response by the U.S.

Containment – The U.S. will pursue a containment strategy where feasible – acting in concer with the World Health Organization and other nations, as appropriate.

Medical Countermeasures: Vaccines and Antiviral Drug Stockpiles and Surge Capacity

- Continue to develop and acquire pre-pandemic stockpiles of medical countermeasures
- Enable the development of sufficient manufacturing capacity for timely response to a pandemic to meet the Nation's needs

Coordination – HHS will continue to work with federal, state and local government partners and the private sector to coordinate pandemic influenza preparedness activities and to achiev interoperable response capabilities.

Community and Individual responsibility – An informed and responsive public is essential t minimizing the negative health effects of a pandemic.

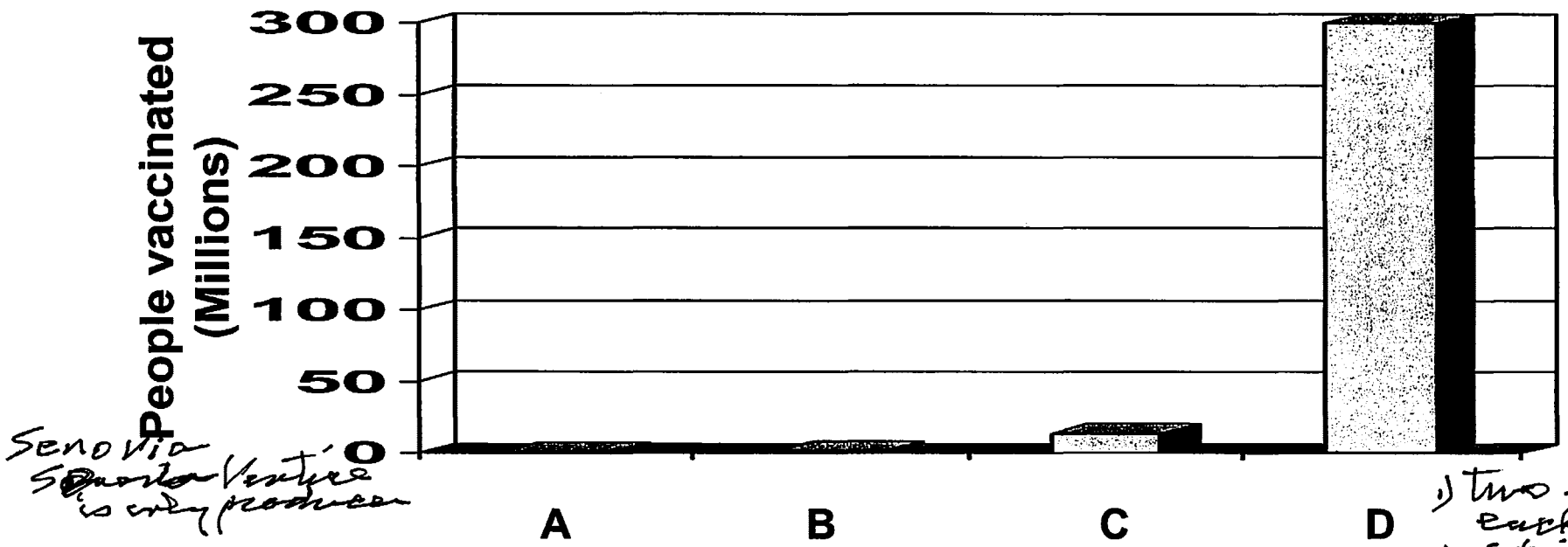
National Response Plan – An influenza pandemic may require activation of the National Response Plan. If this were to occur, HHS would continue to lead the public health and medic response in accord with provisions of Emergency Support Function #8 and the Biological Incident Annex.

Elements of Pandemic Preparedness and Response

- Surveillance and Epidemiologic Investigation
- Laboratory Diagnostics
- Community Disease Control and Prevention
  - Isolation/Quarantine
- Vaccine Supply, Distribution and Use
- Antiviral Supply, Distribution and Use
- Healthcare Capacity and Management
  - Clinical management guidelines
  - Infection Control
- Risk Communications

Estimated Current US Annual Domestic Production of Pandemic Influenza Vaccine: Supply, Capacity, and Need

(Assume 2 doses/person)



Sanofi via Aventis is only producer

1) two shots in each "course"
2) 6 times produced to go into each shot
3) quantity of vaccine that would have to be available

A: Current stockpile **(165,000 vaccine courses)**

B: Stockpile with current production **(1.8 million vaccine courses – December 05)**

C: Current annual domestic capacity **(14 million vaccine courses)**

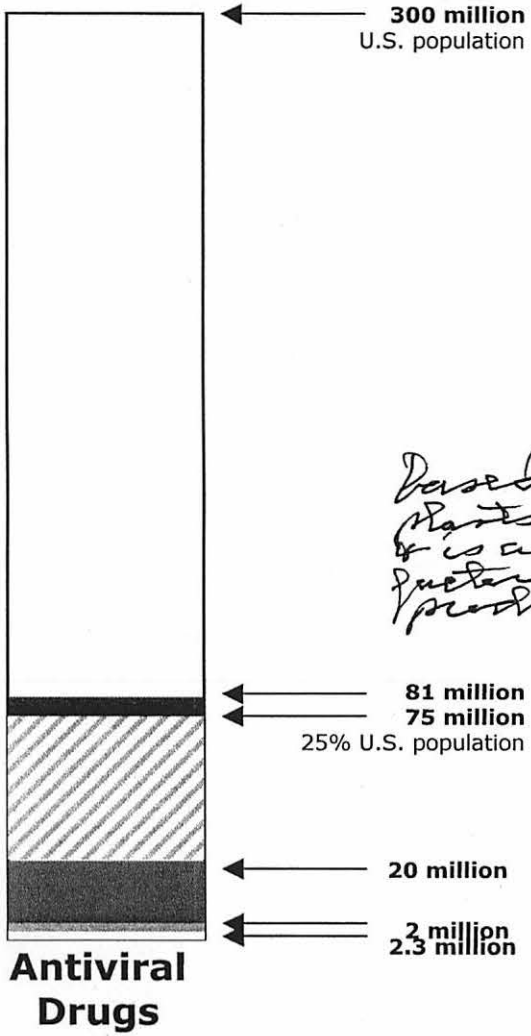
- **Assumes all capacity dedicated to pandemic vaccine**
- **Assumes NO annual influenza vaccine**

D: National need: two doses/person **(300 million vaccine courses)**

HHS Pandemic Vaccine Goals

- Acquire a stockpile of 20 million courses of vaccine against the most likely pandemic threat
- Create a domestic influenza vaccine manufacturing capacity sufficient to produce 300 million courses within 6 months of the onset of a pandemic
- Collaborate with industry immediately to develop dose-sparing techniques
- Collaborate with industry to develop broad spectrum influenza vaccine

Influenza Antiviral Drugs: Stockpile and Strategy

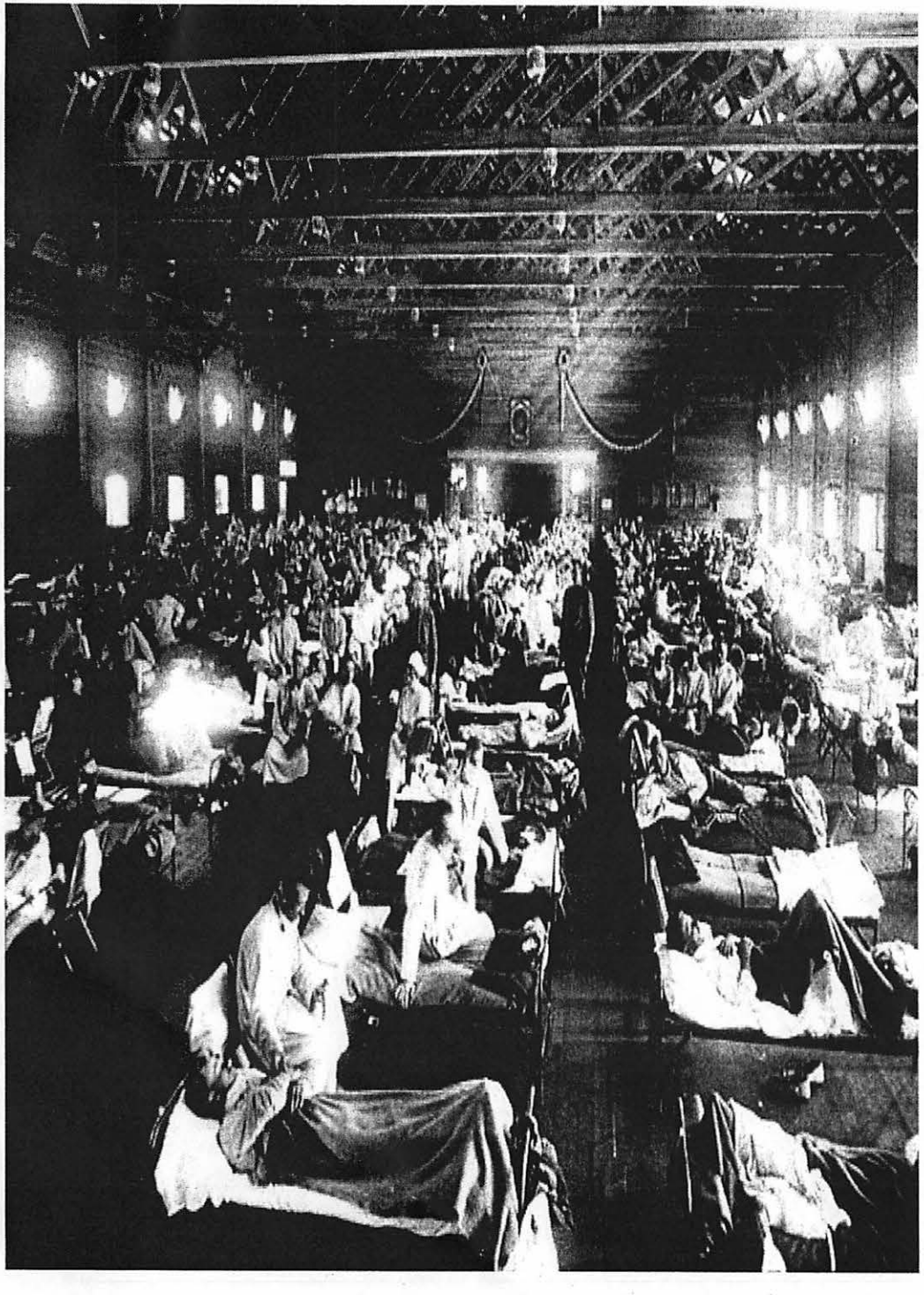


- **Goal: 81 million treatments**
  - **75 million (25% of US population)**
  - **6 million in reserve for outbreak management**
- **Current antiviral target:**
  - **20 million treatments**
  - **Tamiflu** – Roche is manufacturer factory in U.S
    - 2.3 million treatments in stockpile
    - 2 million treatments on order
  - **Relenza**
    - 84,000 treatments in stockpile

Based upon Roche's China plants & is a limiting factor on production

- **Collaborate with industry to develop and commercialize new antiviral drugs**

Must begin treatment within 48 hours of onset of symptoms



PUBLIC NOTICE

In view of the severity of the present

Epidemic of Influenza

and in order that all efforts may be concentrated on the stamping out of the disease, the local Board of Health, after consultation with Kingston Medical Society and the Mayor, has enacted that after Oct. 16th, and until further notice,

1. Theatres and Moving Picture Houses shall be closed and remain closed
2. Churches and Chapels of all denominations shall be closed and remain closed on Sundays.
3. All Schools, Public or Private, including Sunday Schools, shall close and remain closed.
4. Hospitals shall be closed to visitors.
5. No public shall be admitted to courts except those essential to the prosecution of the cases called.
6. The Board advises the public most strongly not to crowd into street cars and to avoid as much as possible any crowded train or an assembly of any kind.

Provisions have been made by the Kingston Medical Society whereby all cases applying for assistance will receive the same either by registered practitioners or by final year medical students acting under instructions. Therefore every case of illness should send in a call to a physician.

A. R. B. WILLIAMSON,
Medical Health Officer.

ROUTING AND TRANSMITTAL SLIP	DATE	September 28, 2005	
TO: (Name, office symbol, room number, Agency/Post)		Initials	Date
Kyle Sampson			
Ted Ullyot			
Neil Gorsuch			
Bill Mercer			

REMARKS:

See attached from Robert re: Pandemic Influenza

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions.

FROM: (Name, org. symbol, Agency/Post)	Room No. --Bldg.
Currie Gunn	Phone No. **202-514-9500**

EXAMINER ROUNDTABLE:
Discussion Summary

Roundtable Conducted
October 18, 2004, in Washington, DC

SUMMARY

Examiner Roundtable Discussion
Monday, October 18, 2004
Executive Office for U.S. Trustees
20 Massachusetts Avenue, NW
8th Floor Main Conference Room
Washington, DC 20530

Preface:

When the Enron and WorldCom corporations and related entities filed for chapter 11 bankruptcy protection within seven months of each other in 2001 and 2002, they were the largest bankruptcy cases in history. From the outset, there were allegations of massive accounting fraud and great uncertainty as to how far that fraud extended into the companies. In both cases, the U.S. Trustee believed that the appointment of an examiner to provide an exhaustive and independent review of the matters leading up to the insolvency was of critical importance to creditors, shareholders, and the public interest. In announcing court action to appoint an independent examiner, Attorney General Ashcroft said that "[t]he appointment will help protect . . . creditors and shareholders by bringing transparency to these cases and ensuring that issues of possible mismanagement and civil fraud are thoroughly investigated."

A number of issues relating to the appointment of the examiner and the conduct of the examination process arose during the Enron and WorldCom cases. There were divergent opinions as to the scope of the examiner's duties. There were also competing interests from different parties, including the debtors, their creditors, and various government agencies. Finally, the timing, content, and use of the reports raised issues.

The purpose of the Roundtable was to review selected issues that arose in the cases and to identify lessons learned that may inform future practices and procedures. There were five major topics of discussion at the meeting: the appointment and selection of an examiner; terms of appointment orders; the coordination of investigations with law enforcement and regulatory authorities; the examiner's interim and final reports; and the disclosure of information by the examiner outside of the reports.

The Roundtable discussion took place during a single five hour meeting. Former Attorney General Dick Thornburgh and Neal Batson, the examiners in WorldCom and Enron, respectively, were the lead participants.

This report was prepared by the Executive Office for U.S. Trustees (EOUST) which is solely responsible for its content.

Discussion Summary:

Appointment and Selection of an Examiner

The appointment of an examiner is not typical in a bankruptcy case. The Bankruptcy Code sets forth the basic standards for appointment and selection. Timing of an appointment, consultation with interested parties, and the efficiency of the selection process were discussed.

Roundtable Participants

Representatives of:
- WorldCom Examiner
- Enron Examiner
- Securities and Exchange Commission
- Department of Justice:
  - Office of the Deputy Attorney General
  - Criminal Division
  - Tax Division
  - United States Attorneys
  - United States Trustees

The appointments of the Enron and WorldCom examiners occurred at different times in the cases – the examiner in WorldCom was appointed soon after the filing, and the Enron examiner was appointed approximately six months into the case. Participants suggested that, in general, an earlier appointment is preferable to a later one, although there can be benefits to each. Early appointment may lessen statute of limitations problems in pursuing claims, increase the likelihood of greater witness recollection, insure the preservation of evidence, and provide an opportunity for greater communication and a more structured delineation of duties/priorities between investigating entities. Later appointment, however, may eliminate duplicative efforts by allowing the examiner to use information obtained from other investigations, and may reduce or eliminate concerns regarding the disclosure of information that could compromise law enforcement investigations.

In considering examiner candidates, the U.S. Trustee has a duty to consult with parties in interest. After a determination is made as to the needs of the case, candidates are considered and vetted through an initial conflicts process. This review eliminates many candidates, particularly in large cases. Once the list is refined, consultation with parties in interest is again undertaken.

Conflicts are a significant concern because bankruptcy cases generally involve a large number of stakeholders with diverse interests. One of the major challenges to the conflicts process is having adequate time to conduct a thorough review given the constraints imposed by the court and the urgency of the matters. It was the perception of many that law firms are refining their systems for vetting conflicts. Participants agreed that it is critical that the United States Trustee and the candidates have timely and sufficient information about the case and the role the examiner will fulfill. Beyond traditional conflicts analysis, complex cases also require careful consideration of issue conflicts that may impact a candidate's ability to carry out an independent investigation.

In the aftermath of Enron and WorldCom, the EOUST established a formal protocol regarding the appointment of examiners in publicly-held companies to provide for consultation with the SEC and law enforcement. It was also pointed out that the President's Corporate Fraud Task Force plays an important role in coordinating federal regulatory and criminal enforcement responses to corporate wrong-doing. Finally, to enhance the speed with which examiners and trustees may be appointed in large cases, the EOUST maintains a list of capable candidates who have indicated an interest in serving in the future.

Terms of Appointment Orders

The Enron and WorldCom cases presented unprecedented challenges in determining the terms of appointment orders due to the multiplicity of investigations. Issues discussed included the scope of the engagements; the division of duties; and restrictions on public statements.

The scope of the examinations in the Enron and WorldCom cases was quite different. Enron was focused on a discrete area, whereas WorldCom had a broad mandate. While a broad mandate provides greater latitude, it also requires judgment and focus by the examiner. Striking the appropriate balance is the challenge.

A discussion of the division of labor among all involved (e.g., the examiner, creditors' committee, investigators) at an early stage is critical. To the extent feasible, it was suggested that delineating specific points of demarcation between the various entities could be helpful.

The examiners felt that it was advantageous for the order of appointment to provide preempting civil investigatory authority, which could then be shared if appropriate. However, the participants noted that the sharing of information should be considered carefully in light of the typical confidentiality provisions in orders requiring the production of information to the examiners and the potential for a criminal defendant to take the position that the examiner is somehow a "de facto" agent of the Department of Justice.

There was a consensus that a prohibition against public statements by the examiner on a case, at least until interim or final reports are filed with the court, is appropriate. It allows the examination to continue without undue distraction.

Coordination of Investigations with Law Enforcement and Regulatory Authorities

At the time of the filing of both the Enron and WorldCom cases, investigations had already been commenced – both by the companies internally and by law enforcement and regulatory agencies. While the purpose of the examiners, as characterized by the courts, was to provide an independent review and neutral evaluation of the cases, the various investigations overlapped to the extent that they led to the same witnesses, documents, and other evidence.

Though it was noted that multiple investigations offer the ability to share information, they also present problems with regard to competing interests. The examiner's role to "tell the story" may get ahead of and adversely affect prosecutions, particularly with the issuance of interim reports.

There was discussion that the development of work plans and regular communication are critical to avoiding conflicts. Having someone on the examiner's staff who is experienced in working with the Department of Justice on criminal matters was recommended, and it was noted that the EOUST was a key player in facilitating dialogue among the parties and negotiating issues of concern.

Smaller reports on specific or targeted issues may be a practical solution to concerns of an examiner's published findings affecting an investigation. Sequencing could satisfy public expectations, yet avoid the problem of an examiner "opening the door too fast" and adversely affecting an investigation. It could also simultaneously address the issue of expiring statute of limitations on discovered causes of action. Finally, limiting the issues may encourage greater witness participation because there is less fear of investigatory disclosure than if questioning is broad or open ended.

An additional point that was raised was the need for prosecutors and regulators to have sufficient time to preview reports and address any material that may compromise ongoing investigations. In both Enron and WorlCom, this time was limited due to the reporting requirements established by the court.

Examiner's Interim and Final Reports

This discussion focused on the purpose of the reports; the potential impact on the bankruptcy estate (e.g., claims); and the value of the reports to debtors, creditors, the court, law enforcement, regulatory agencies, and the public.

It was noted that critical to a successful inquiry were the elements that were built into the appointment order (i.e., subpoena power, party-in-interest standing, requirement of debtor to cooperate and provide information, and waiver of the attorney-client privilege). However, all problems could not be foreseen. For example, in Enron, the examiner confronted

5th Amendment issues when he attempted to interview witnesses facing possible indictment for their role in the creation of Special Purpose Entities. Furthermore, particularly in WorldCom, reporting deadlines created significant challenges, although it was recognized that timely disclosure of the examiner's findings promoted public confidence in the bankruptcy proceedings.

A discussion was held relating to the role of the examiner in investigating potential claims held by or against the estate and the specific extent to which these claims should be reported by the examiner. Creditors believe these should be addressed by the appointed committees. Representatives of the debtor objected to the identification of claims against the estate, where those claims did not specifically deal with fraud or misrepresentation. The examiners viewed their duties as being duties to the court and not to any particular economic constituency. In the Enron case, Judge Gonzalez concurred with this position. These issues need to be anticipated early in the examination because they may shape its length and cost.

From a law enforcement perspective, it was believed that the examiners' reports were helpful and added value to the process. It was noted, however, that in large part that was because there were two highly qualified examiners with a solid understanding of criminal enforcement matters and a willingness to cooperate. If an examiner is not sensitive to law enforcement concerns, there could be significant issues and it could become necessary to seek court restrictions to avoid impeding criminal investigations.

Irrespective of what the reorganized debtors may do with the examiners' reports, it was generally thought that the goals the court envisioned were achieved. Further, the reports appear to have an extended value in that there has been considerable interest by scholars and universities in the examiners' reports and findings.

Disclosure of Information by the Examiners Outside of Reports

Some practical issues have arisen as a result of an examiner having considerable information gathered in a relatively short period of time and available in one location. Historically, the courts have been protective of examiners to inquiries by private parties since they are a fiduciary of the court. Conversely, though, when law enforcement or prosecutors have sought information, the courts have been split on when a protective order trumps a request by law enforcement.

It was suggested that the inclusion of language in the order of appointment precluding discovery from the examiner may promote a greater willingness for law enforcement to share information with the examiner since it would shield against private civil discovery at a later date. If not addressed up front, another option may be to address disclosure issues in the order terminating the services of the examiner.

A concern for the examiner is that he/she does not want to become the "document depository," particularly since there are issues of attorney-client privilege and the need for appropriate court approval on disclosure. A possible remedy may be to build into the closing order language on the debtor's privilege not extending to the examiner's access to documents or testimony.

It was the consensus that while there may be efficiency to an examiner having the authority to prosecute or object to claims, it is ultimately the debtor's or the appointing court's decision as to how to proceed.

Conclusion:

The examiners in Enron and WorldCom successfully carried out their mission and produced final reports that were of value to creditors, law enforcement agencies, and the public. Participants in the Roundtable identified a series of difficult issues that arose in these cases and that may be expected to arise in other complex chapter 11 cases involving allegations of wrong-doing. There was consensus that some of these issues can be identified early in the case and should be addressed by provisions in the order to appoint an examiner. Among the most important matters to be resolved early are: delineating the duties of the examiner from the activities of other parties; expressly providing that the examiner's investigation has primacy over the work of other non-government agencies; and limiting disclosure of the examiner's work product during and after the investigation to protect the integrity of the investigation and maximize the amount of information that the examiner will be able to obtain during the investigation.

Participants:

Neal Batson, Enron Examiner

Joseph F. Bianco, Senior Counsel to the Assistant Attorney General, Criminal Division

Ira Bodenstein, United States Trustee, Region 11

Monique Bourque, Chief Information Officer, Executive Office for U.S. Trustees

Peter Bresnan, Associate Director, Division of Enforcement, Securities & Exchange Commission

Richard E. Byrne, Chief, Criminal Enforcement Unit, EOUST

John R. Byrnes, Assistant U.S. Trustee, Roanoke, VA

Timothy J. Coleman, Senior Counsel to the Deputy Attorney General

Steven M. Collins, Counsel to the Enron Examiner (Alston & Bird)

Debera F. Conlon, Acting Assistant Director for Review and Oversight, EOUST

Dennis Connolly, Counsel to the Enron Examiner (Alston & Bird)

Roberta A. DeAngelis, Acting United States Trustee, Region 3

Steven Dillingham, Assistant Director for Research and Planning, EOUST

Lawrence A. Friedman, Director, EOUST

Joseph A. Guzinski, Attorney, Office of the U.S. Trustee

David A. Hubbert, Chief, Civil Trial Section (Eastern Region), Tax Division

David Jones, Chief, Tax and Bankruptcy Unit, Civil Division, Office of the U.S. Attorney (SDNY)

Steven J. Katzman, United States Trustee, Regions 15 and 16

Sara L. Kistler, Acting Deputy Director, EOUST

M. David Krohn, Counsel to the Enron Examiner (Alston & Bird)

W. Clarkson McDow, Jr., United States Trustee, Region 4

Jeffrey M. Miller, Associate Director, EOUST

Michael J. Missal, Counsel to the WorldCom Examiner (Kirkpatrick & Lockhart)

William T. Neary, United States Trustee, Regions 6 and 17

Richard Owens, Chief, Securities Fraud Unit, Office of the U.S. Attorney (SDNY)

Mark A. Redmiles, Civil Enforcement Coordinator, EOUST

Henry J. Riordan, Trial Attorney, Civil Trial Section (Northern Region), Tax Division

Wendell L. Taylor, Counsel to the Deputy Attorney General

Linda C. Thomsen, Deputy Director, Division of Enforcement, Securities & Exchange Commission

Dick Thornburgh, WorldCom Examiner

Mary Elizabeth Tom, Assistant U.S. Trustee, New York, NY

Stephen G. Topetzes, Counsel to the WorldCom Examiner (Kirkpatrick & Lockhart)

Felicia S. Turner, United States Trustee, Region 21

Donald F. Walton, Acting General Counsel, EOUST

Andrew Weissmann, Director, Enron Task Force *(Via phone)*

Lawrence West, Associate Director, Division of Enforcement, Securities & Exchange Commission

Clifford J. White III, Deputy Director, EOUST

Executive Summary

On November 17, 2003, Attorney General John Ashcroft announced the U.S. Department of Justice's Body Armor Safety Initiative in response to concerns from the law enforcement community regarding the effectiveness of body armor in use. These concerns followed the failure of a relatively new Zylon®-based[1] body armor vest worn by a Forest Hills, Pennsylvania, police officer. The Attorney General directed the National Institute of Justice (NIJ) to initiate an examination of Zylon®-based bullet-resistant armor (both new and used), to analyze upgrade kits provided by manufacturers to retrofit Zylon®-based bullet-resistant armors, and to review the existing program by which bullet-resistant armor is tested to determine if the process needs modification.

As part of the Body Armor Safety Initiative, NIJ has issued two status reports to the Attorney General containing results from the body armor studies.[2] The first two status reports highlighted the following findings:

- Ballistic-resistant material, including Zylon®, can degrade due to environmental factors, thus reducing the ballistic resistance safety margin that manufacturers build into their armor designs.
- The ultimate tensile strength[3] of single yarns removed from the rear panel of the Forest Hills armor was up to 30-percent lower than that of yarns from "new" armor supplied by the manufacturer. Artificially-aged armor of the same type that failed in the Forest Hills incident was ballistically tested, but no bullet penetrations occurred.[4]
- The upgrade kits tested did not appear to bring used armor up to the level of performance of new armor. However, used armors with upgrade kits performed better than the used armors alone.

NIJ has now completed ballistic and mechanical properties testing on 103 used Zylon®-containing body armors provided by law enforcement agencies across the United States. Sixty of these used armors (58%) were penetrated by at least one round during a six-shot test series. Of the armors that were not penetrated, 91% had backface deformations in excess of that allowed by the NIJ standard for new armor. Only four of the used Zylon®-containing armors met all performance criteria expected under the NIJ standard for new body armor compliance.

Although these results do not conclusively prove that all Zylon®-containing body armor models have performance problems, the results clearly show that **used Zylon®-containing body armor**

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[1] Zylon® (PBO fiber – poly-*p*-phenylene benzobisoxazole) is a high-strength organic fiber produced by Toyobo Co., Ltd. Zylon® is a registered trademark of Toyobo Co., Ltd.

[2] "Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities," March 11, 2004, and "Supplement I: Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities," December 27, 2004.

[3] Ultimate tensile strength is the maximum stress (force per unit area) that a material, in this case a Zylon® yarn, can withstand prior to failure. All Zylon® yarns were nominally 500 denier; *i.e.*, the yarns did not vary in linear density or effective cross-sectional area.

[4] NIJ continues to study the Forest Hills body armor penetration, to resolve the cause of that failure.

may not provide the intended level of ballistic resistance. In addition, the results imply that a visual inspection of body armor and its ballistic panels does not indicate whether a particular piece of Zylon®-containing body armor has maintained its ballistic performance.

Part of the Body Armor Safety Initiative entailed an applied research component that examined material properties of Zylon® in order to understand the causes of the ballistic failures. Zylon® fibers show a systematic loss in tensile strength, tensile strain, and ballistic performance correlated with the breakage of specific bonds in the chemical structure of the material.

Preliminary findings from the applied research effort indicate that:

- It is likely that the ballistic performance degradation in Zylon®-containing armors is closely related to the chemical changes in poly-*p*-phenylene benzobisoxazole (PBO), the chemical basis of Zylon® fiber. The breakage of one particular part of the PBO molecule, known as the oxazole ring, correlates with degradation of the mechanical properties of Zylon® fibers. The breakage in the oxazole ring can be monitored using an analysis technique known as Fourier transform infrared (FTIR) spectroscopy.
- Preliminary investigations into Zylon® degradation mechanisms have suggested that oxazole-ring breakage occurs as a result of exposure to both moisture and light.
- When there was no potential for external moisture to contact Zylon® yarns, there was no significant change in the tensile strength of these yarns. External moisture may be necessary to facilitate the degradation of Zylon® fibers.

Based on the direction from the Attorney General and recommendations from the law enforcement community, NIJ has examined its body armor compliance testing program. The current NIJ testing program is based on the ballistic resistance of new armor and does not take into account performance degradation in used armor. NIJ is concerned that Zylon® and other materials may be incorporated into body armor, with minimal understanding of performance degradation that may result from environmental exposures. NIJ's research indicates that its testing program should take into account the possibility of ballistic performance degradation over time.

NIJ intends to adopt interim changes to its body armor compliance testing program, to aid in ensuring that officers are protected by body armor that maintains its ballistic performance during its entire warranty period. These actions are set forth in detail in Section VI of this report. Under the NIJ 2005 Interim Requirements for Bullet-Resistant Body Armor, armor models containing PBO (the chemical basis of Zylon®) will not be compliant, unless their manufacturers can provide satisfactory evidence to NIJ that the models will maintain their ballistic performance over their declared warranty period.

All manufacturers will be required to submit information concerning materials used in the construction of any armor submitted for testing.

NIJ will recommend that those who purchase new bullet-resistant body armor select body armor models that comply with the NIJ 2005 Interim Requirements for Bullet-Resistant Body Armor. A list of models that comply with the requirements will be made available at http://www.justnet.org.

NIJ will also encourage manufacturers to adopt a quality-management system to ensure the consistent construction and performance of NIJ-compliant armor over its warranty period. In the

future, NIJ will issue advisories to the field regarding materials used in the construction of body armor that appear to create a risk of death or serious injury as a result of degraded ballistic performance. Any body armor model that contains any material listed in such an advisory will be deemed no longer NIJ-compliant unless and until the manufacturer satisfies NIJ that the model will maintain its ballistic performance over its declared warranty period. NIJ will continue its research and evaluation program to determine what additional modifications to the requirements of NIJ's compliance testing program may be appropriate, to understand better the degradation mechanisms affecting existing or new ballistic materials, and to develop test methods for the ongoing performance of body armor.

NIJ continues to encourage public safety officers to wear their Zylon® - containing armor until it can be replaced. Even armor that may have degraded ballistic performance is better than no armor.

NIJ 2005 Interim Requirements for Bullet-Resistant Body Armor

Effective Date
August 24, 2005

Purpose and Scope
These requirements modify and supplement National Institute of Justice (NIJ) Standard 0101.04 (Ballistic Resistance of Personal Body Armor). They are promulgated on an interim basis to address recent NIJ research findings that indicate that certain body armor models previously found by NIJ to be compliant with earlier NIJ requirements for ballistic resistance of new body armor (including NIJ Standard 0101.04) may not adequately maintain ballistic performance during their service life. In keeping with their interim character, these requirements rely in significant part on specific certifications from manufacturers of body armor. To help ensure the accuracy of the certifications, NIJ intends to implement a plan to conduct random or other assessments of the certifications and the evidence that underlies them. Also, in furtherance of these efforts, from time to time, NIJ may issue Body Armor Standard Advisory Notices, among other things to identify to the public body armor materials that, based on NIJ review, appear to create a risk of death or serious injury as a result of degraded ballistic performance. Such Advisory Notices will be made available at: https://vests.ojp.gov/index.jsp.

NIJ recommends that those who purchase new bullet-resistant body armor after the effective date hereof select body armor models that comply with these interim requirements. A list of models that comply with these requirements will be made available at: http://www.justnet.org. NIJ will no longer publish lists of models found by NIJ (prior to the effective date hereof) to be compliant with earlier NIJ requirements for ballistic resistance of new body armor (including NIJ Standard 0101.04).

NIJ's efforts to ensure the safety of public safety officers are ongoing; NIJ intends to promulgate future modifications to these interim requirements as appropriate in light of its continued research and comments from the law enforcement and manufacturing communities. Comments and suggestions should be directed to the Director, Office of Science and Technology, National Institute of Justice, Office of Justice Programs, U.S. Department of Justice, 810 Seventh Street, N.W., Washington, D.C. 20531.

Requirements
Any body armor model submitted by a manufacturer to the NIJ Voluntary Compliance Testing Program on or after the effective date hereof or otherwise not subject to the Transition Provision (below) shall be subject to the following requirements:

1. Satisfaction, as determined by NIJ, of all of the requirements of NIJ Standard 0101.04 (including Addendum B), except as such requirements may be modified hereby;

2. Either –

(a) Submission of evidence (*e.g.*, design drawings and specifications, lists of materials of construction of each component of the model, research, ballistic testing, descriptions of performance characteristics of critical components or materials, *etc.*) that demonstrates to the satisfaction of NIJ that the model will maintain ballistic performance (consistent with its originally declared threat level) over its declared warranty period; or

(b) Submission, by an officer of the manufacturer who has the authority to bind it, of a written certification, the sufficiency of which shall be determined by NIJ, that –

(1) The model contains no material listed in an NIJ Body Armor Standard Advisory Notice in effect at the time of submission;

(2) Lists the materials of construction of each component of the model;

(3) The officer, on behalf of the manufacturer –

(A) Reasonably believes that the model will maintain ballistic performance (consistent with its originally declared threat level) over its declared warranty period;

(B) Has objective evidence to support that belief; and

(C) Agrees to provide NIJ, promptly on demand, that evidence;

3. Submission, by an officer of the manufacturer who has the authority to bind it, of a written certification, the sufficiency of which shall be determined by NIJ, that labeling of armor shall be in accordance with NIJ Standard 0101.04, except that any references to such standard thereon shall instead be to the "NIJ 2005 Interim Requirements"; and

4. Submission, by an officer of the manufacturer who has the authority to bind it, of a written acknowledgment, the sufficiency of which shall be determined by NIJ, that –

(a) Recent NIJ research findings indicate that certain body armor models that were found by NIJ to be compliant with earlier NIJ requirements for ballistic resistance of new body armor (including NIJ Standard 0101.04) may not adequately maintain ballistic performance during their service life;

(b) NIJ recommends that those who purchase new bullet-resistant body armor select body armor models that comply with the NIJ 2005 Interim Requirements;

(c) NIJ will no longer publish lists of models found by NIJ to be compliant with earlier NIJ requirements for ballistic resistance of new body armor (including NIJ Standard 0101.04); and

(d) Any list or database of compliant body armor models published or sponsored by NIJ will include only models that are found by NIJ to comply with the NIJ 2005 Interim Requirements.

NIJ will issue to the manufacturer an NIJ Notice of Compliance upon determination that these Requirements have been satisfied.

Transition Provision

Any body armor model that was submitted by a manufacturer to NIJ and was found by NIJ to be compliant with NIJ Standard 0101.04 prior to the effective date hereof shall, if made by the same manufacturer, be deemed to comply with the NIJ 2005 Interim Requirements upon issuance to the manufacturer of an NIJ Notice of Compliance. To obtain an NIJ Notice of Compliance, the manufacturer shall submit, with respect to the body armor model –

1. Either –

   (a) The evidence described in Requirements ¶ 2(a); or

   (b) The certification described in Requirements ¶ 2(b)(1) & (2);

2. With respect to armor manufactured more than ten days after the date of the NIJ Notice of Compliance, the certification described in Requirements ¶ 3; and

3. The acknowledgment described in Requirements ¶ 4.

In the event the manufacturer submits a certification pursuant to this Transition Provision ¶ 1(b), the manufacturer also must submit to NIJ, within 90 days of the date of the NIJ Notice of Compliance, the certification described in Requirements ¶ 2(b)(3); if the manufacturer fails to submit this certification, the body armor model shall be deemed no longer to be in compliance with the NIJ 2005 Interim Requirements (and shall be removed from any NIJ list of models that comply with the Requirements) until the manufacturer submits it and NIJ issues a new NIJ Notice of Compliance.

Loss of Compliance Status

A body armor model that is the subject of an NIJ Notice of Compliance shall be deemed no longer to be in compliance with the NIJ 2005 Interim Requirements (and shall be removed from any NIJ list of models that comply with the Requirements) if –

1. NIJ issues an NIJ Body Armor Standard Advisory Notice that identifies a material contained in the model;

2. NIJ determines that any certification or acknowledgment submitted with respect to the model is insufficient or inaccurate;

3. The manufacturer fails to provide NIJ promptly on demand the evidence described in Requirements ¶ 2(b)(3); or

4. NIJ determines, at any time, that the evidence provided to NIJ as described in Requirements ¶ 2(b)(3) and/or in connection with the model is insufficient to demonstrate to the satisfaction of NIJ that the model will maintain its ballistic performance (consistent with its originally declared threat level) over its declared warranty period.

Once a body armor model loses compliance status under this provision, the model will remain out of compliance unless and until NIJ issues a new NIJ Notice of Compliance, following the submission of such evidence (*e.g.*, evidence described in Requirements ¶ 2(a)), documentation, information, or other material as NIJ may require.

Labeling after Loss of Compliance Status

Armor manufactured during a period in which the armor model does not comply (or is deemed not to comply) with the NIJ 2005 Interim Requirements shall not be labeled as compliant with them.

NIJ Body Armor Standard Advisory Notice #01-2005

EFFECTIVE DATE: AUGUST 24, 2005

SUBJECT: Poly-*p*-phenylene benzobisoxazole (PBO or Zylon®)

The National Institute of Justice (NIJ) hereby advises that it has identified poly-*p*-phenylene benzobisoxazole (commonly known as PBO or Zylon®) as a material that appears to create a risk of death or serious injury as a result of degraded ballistic performance when used in body armor. This is an NIJ Body Armor Standard Advisory Notice within the meaning of the NIJ 2005 Interim Requirements for Bullet-Resistant Body Armor (effective _____, 2005).

For Further Information, Contact:

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Supplementary Information:

Information about NIJ's 2005 Interim Requirements for Bullet-Resistant Body Armor can be found at http://www.justnet.org. NIJ's research and testing reports in response to the Attorney General's Body Armor Safety Initiative can be found at: https://vests.ojp.gov.

NIJ encourages public safety officers to continue to wear their Zylon®-containing armor until it is replaced. Wearing armor that may have degraded ballistic performance is better than not wearing any armor.

Talking Points
Third Status Report to the Attorney General on Body Armor Safety Initiative
Testing and Activities

- Bullet-resistant vests were introduced more than 30 years ago. Since then, they have saved the lives of more than 2,900 law enforcement officers. Research funded by the U.S. Department of Justice (DOJ) led to the introduction of soft body armor for law enforcement. DOJ continues to work to ensure the safety of officers who wear these vests.

- Through the National Institute of Justice (NIJ), DOJ has operated a voluntary body armor compliance testing program for the past 20 years to establish standards for the performance of bullet-resistant body armor.

- The body armor compliance testing program helps assess the ballistic-resistant performance (the ability of the armor to stop a bullet and reduce blunt trauma) of **new** armor models. The testing program does not address the performance of **used** armor (*i.e.*, armor that has been in service).

- Bullet-resistant armors are becoming lighter and more flexible as manufacturers use new materials and designs to offer enhanced ballistic protection with the greatest comfort for the officer.

- In 2003, a Forest Hills, Pennsylvania, police officer was shot and seriously injured when a bullet penetrated the front panel of his Second Chance Body Armor, Inc., Ultima® armor, an armor made of multiple layers of fabric woven from one of the newer materials—Zylon®. The incident was the first NIJ-confirmed case in which any NIJ-compliant body armor model failed to prevent penetration from a bullet it was designed to defeat.

- In response to the Forest Hills incident and concerns from the public safety community, Attorney General John Ashcroft established the Body Armor Safety Initiative to review the performance of bullet-resistant Zylon®-containing body armor and the compliance testing process for new armor models.

- Although testing to date has not revealed the cause of the Forest Hills penetration, it has revealed that the level of protection provided by Zylon®-containing armor decreases significantly over time as a result of exposure to light and external moisture.

- NIJ has tested more than 100 used Zylon® -containing armors from law enforcement agencies around the country. More than half (58%) experienced at

least one penetration during a six-shot ballistic testing series. Only 4 armor vests passed all tests within the limits of NIJ's standard for new body armor.

- Although these results do not conclusively prove that all Zylon®-containing body armor models have performance problems, the results clearly show that used Zylon®-containing body armor may not provide the intended level of ballistic resistance.

- Testing has also shown that the physical appearance of Zylon®-containing body armor cannot be relied upon as an indicator of ballistic performance.

- In response to these findings, DOJ will take the following steps:
  - NIJ will adopt interim changes to its body armor compliance testing program to aid in ensuring that officers are protected by body armor that maintains its ballistic performance during its entire warranty period. Under new NIJ 2005 Interim Requirements, models containing Zylon® will not be compliant, unless their manufacturers provide satisfactory evidence to NIJ that the models will maintain their ballistic performance over their declared warranty period.
  - NIJ will recommend that those who purchase new bullet-resistant body armor select body armor models that comply with the new 2005 Interim Requirements.
  - NIJ will expand its research program to provide a better understanding of degradation mechanisms of other ballistic materials and how they affect armor performance. NIJ will also continue its research to assist in developing nondestructive methods for testing the ongoing performance of body armor.
  - The Bureau of Justice Assistance (BJA), which administers the Bulletproof Vest Partnership (BVP) Program, will not make payments for new orders placed for any bullet-resistant body armor model that does not comply with NIJ's 2005 Interim Requirements.
  - In addition, DOJ will make available $33.6 million to distribute through the BVP Program to law enforcement to assist in the replacement of Zylon®-based body armor.

- **DOJ continues to strongly encourage public safety officers to wear their Zylon®-containing body armor until it is replaced.** Even armor that may have degraded ballistic performance is better than no armor.

- Helping to ensure the safety of public safety officers and the safety and performance of their equipment is a Department of Justice priority.

Q&A
Third Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities
August 24, 2005

1. **What is the Attorney General's Body Armor Safety Initiative?**

   On November 17, 2003, Attorney General John Ashcroft announced a body armor safety initiative in response to concerns from the law enforcement community regarding the effectiveness of bullet-resistant armor. These concerns followed the failure of a relatively new Zylon®-based body armor worn by a Forest Hills, Pennsylvania, police officer. Attorney General John Ashcroft directed the National Institute of Justice (NIJ) to initiate an examination of Zylon®-containing bullet-resistant armor (both new and used), to analyze upgrade kits provided by manufacturers to retrofit Zylon®-containing armors, and to review the existing process by which bullet-resistant armor is tested to determine if the process needs modification. To accomplish these goals, NIJ has worked in collaboration with its technical partners, the Office of Law Enforcement Standards (OLES) at the National Institute of Standards and Technology (NIST) and the National Law Enforcement and Corrections Technology Center (NLECTC) in Rockville, Maryland.

   NIJ has issued three status reports to the Attorney General containing results from its body armor studies. These reports are available at https://vests.ojp.gov/index.jsp.

2. **Thus far, what has the Department of Justice's research discovered concerning Zylon®-containing bullet-resistant armor?**

   - Used Zylon®-containing armor may not provide the intended level of ballistic protection.
   - Of 103 used Zylon®-containing armors tested by NIJ, 60 (58%) were penetrated by at least one round during a six-shot test series. Of those that passed penetration testing, 91% showed backface deformation in excess of that allowed by the NIJ standard for new armor. Only four armors met all performance criteria expected under the NIJ standard for new body armor compliance.
   - Zylon® yarns taken from used armor samples exhibited degraded tensile strength characteristics.
   - A visual inspection of body armor and its ballistic panels does not indicate whether a particular piece of Zylon®-containing body armor has maintained its ballistic performance.

- A sealed tube study confirmed that if PBO[1] is isolated from external sources of moisture there is no significant change in its properties.

Prior NIJ status reports included the following additional findings:

- Ballistic-resistant material, including Zylon®, can degrade due to environmental factors, thus reducing the ballistic resistance safety margin that manufacturers build into their armor designs.
- The ultimate tensile strength of single yarns removed from the rear panel of the Forest Hills armor was up to 30% lower than that of yarns from "new armor" supplied by the manufacturer. Artificially aged armors of the same type that failed in the Forest Hills incident were ballistically tested but no bullet penetrations occurred.[2]
- The "upgrade kits"[3] tested by NIJ did not appear to bring used armor up to the level of performance of new armor. However, used armors with upgrade kits performed better than the used armor alone.

3. **What is NIJ doing in response to these findings?**

- NIJ is taking the following steps:
  - NIJ intends to adopt new interim requirements for its body armor compliance testing program to aid in ensuring that officers are protected by body armor that maintains its ballistic performance during its entire warranty period. These actions are set forth in detail in Section VI of the *Third Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities*. Under the NIJ 2005 Interim Requirements for Bullet-Resistant Body Armor, armor models containing PBO or Zylon® will not be compliant, unless their manufacturers provide satisfactory evidence to NIJ that the models will maintain their ballistic performance over their declared warranty period. Also, manufacturers will be required to submit information concerning materials used in the construction of any armor submitted for compliance testing by NIJ.
  - In the future, NIJ will issue advisories to the field regarding materials used in the construction of body armor that appear to create a risk of death or serious injury as a result of degraded ballistic performance. Any body armor model that contains any material listed in such an advisory will be deemed no longer NIJ-

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1 PBO: PBO fiber – poly-*p*-phenylene benzobisoxazole, the chemical basis for Zylon®.

2 NIJ continues to study the Forest Hills body armor penetration to resolve the cause of that failure.

3 Upgrade kits were provided by the body armor manufacturer, Second Chance, to retrofit Zylon®-based bullet-resistant armors.

compliant unless and until the manufacturer satisfies NIJ that the model will maintain its ballistic performance over its declared warranty period.

- NIJ is expanding its research program to provide a better understanding of degradation mechanisms of other ballistic materials and how they affect armor performance. NIJ will also continue its research to assist in developing nondestructive methods for testing the ongoing performance of body armor.

4. **Why is NIJ adopting interim changes to its compliance testing process?**

There are limited data concerning the ongoing performance of ballistic-resistant materials and associated armor systems currently in widespread use in the United States. Also, there is no accepted test protocol to evaluate the performance of used body armor over a period of years of typical law enforcement use. Future testing and research will support the development of a comprehensive and scientifically-rigorous compliance testing process to help assure officers that their armor will continue to protect them over the armor's full warranty period.

5. **Does this mean that NIJ will no longer be testing Zylon®-containing body armor?**

Zylon®-containing armor models will be eligible for NIJ compliance testing if the manufacturer can provide satisfactory evidence to NIJ that the armor model will maintain the intended level of ballistic performance throughout the warranty period.

6. **What specific Zylon®-containing body armor models have been tested in the Body Armor Safety Initiative?**

A complete list of all body armor models tested (and the results) is contained in the *Third Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities*, which can be found at https://vests.ojp.gov/index.jsp.

7. **What about the testing of body armor that does not contain Zylon®?**

The Body Armor Safety Initiative focused on Zylon®-based body armor. Future phases of this initiative will examine other commonly used ballistic-resistant materials.

8. **My Zylon®-containing armor is not a model that was tested as part of the Body Armor Safety Initiative. Should I replace it?**

While current testing results do not conclusively prove that all Zylon®-containing body armor models have performance issues, the results clearly show that used Zylon®-containing body armor may not provide the intended level of ballistic resistance. In considering whether to replace body armor, NIJ's research findings should be carefully reviewed, since there were performance variations among the Zylon®-containing armors that were tested.

9. **How long is newly purchased Zylon®-containing body armor safe to use?**

   Based upon the results of NIJ's research, there is no clear correlation between armor age and ballistic performance. The research indicates that Zylon®-containing armor that is more than two years old may demonstrate significant ballistic degradation. As the armor samples that were tested did not include a significant number of armors that were less than two years old, the performance of newer armors cannot be predicted.

10. **I have closely followed all of the care instructions provided by the manufacturer of my armor and my vest looks like new. Does this mean that purchasing replacement armor may not be necessary?**

    Based on NIJ's findings, there appears to be no correlation between the appearance of Zylon®-containing armor and ballistic performance in NIJ's testing. The results imply that a visual inspection of the armor and its ballistic panels does not indicate whether a particular piece of Zylon®-containing body armor will perform acceptably. Nonetheless, users are strongly urged to follow all care instructions for their armor.

11. **Are there other lightweight ballistic armors available that I can purchase?**

    The Department of Justice cannot recommend any specific body armor model for purchase. NIJ is replacing the list of armor compliant with NIJ Standard 0101.04 with a new database of armor compliant with the NIJ 2005 Interim Requirements. A database of compliant armor will be maintained at http://www.justnet.org.

12. **When will further test results be forthcoming?**

    NIJ is conducting its scientific examination as quickly as possible. Further status reports to the Attorney General will be posted on the Bulletproof Vest Partnership Program website (https://vests.ojp.gov/index.jsp). Additional reports on body armor testing and research results will be provided to law enforcement as soon as possible after the test data have been obtained.

13. **In light of these current research findings, is the Department of Justice establishing any new or additional funding assistance for the purchase of replacement body armor?**

    Funding provided by the Department of Justice for body armor purchases is coordinated and administered through the Office of Justice Programs' Bureau of Justice Assistance's Bulletproof Vest Partnership (BVP) Program. To better meet the vest replacement needs of America's law enforcement agencies this year, the Department will make available $10 million, in addition to the $23.6 million available through the FY 2005 BVP Program, for bullet-resistant body armor. For information regarding this special BVP

solicitation visit: http://www.ojp.usdoj.gov/BJA/grant/bulletproof.html. More details about the BVP program may be found at: https://vests.ojp.gov/index.jsp.

14. **What is the Department of Justice doing to keep law enforcement officers informed about the latest developments in the ongoing analysis and study of armors?**

A new web resource entitled "Body Armor Safety Initiative" has been incorporated into the Internet-based Bulletproof Vest Partnership Program application at https://vests.ojp.gov/index.jsp, with links and information on official government and industry statements, the Vest Safety Initiative Summit, current evaluation activities, and FAQ's. Additionally, BVP applicants are now alerted whenever they select armor that contains Zylon® in their BVP application. For additional information, including the database of body armor models that comply with the NIJ 2005 Interim Requirements, see http://www.justnet.org.

15. **My body armor contains Zylon®. Should I stop wearing it?**

Absolutely not. NIJ urges officers to continue to wear the armor that is issued or authorized by their agencies. An officer's risk of fatality is 14 times greater when not wearing body armor. Since bullet-resistant vests were introduced more than 30 years ago, they have saved 2,900 lives and officer homicides have decreased by two-thirds. Even armor that may have degraded ballistic performance is better than no armor.

NIJ will continue to provide timely results on our ongoing examination of Zylon®-based armors to assist in future decisions.

U.S. Department of Justice

Office of Justice Programs

Bureau of Justice Statistics

Washington, D.C. 20531

JAN 0 5 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE ACTING DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL

THROUGH: Cybele K. Daley
Acting Assistant Attorney General
Office of Justice Programs

FROM: Lawrence A. Greenfeld
Director, Bureau of Justice Statistics

SUBJECT: **Advance Notification of BJS Publication**

PURPOSE: To provide the Attorney General with advance copies and notification of the pending publication of **Felony Defendants in Large Urban Counties, 2002** (NCJ 210818), by Thomas Cohen and Brian Reaves of BJS.

DISCUSSION: **Felony Defendants in Large Urban Counties, 2002** presents data collected from a representative sample of felony cases filed in the Nation's 75 largest counties during May 2002. The cases are tracked for up to one year to provide a complete overview of the processing of felony defendants from filing to disposition and sentencing. Data collected include current arrest charges, demographic characteristics, prior arrests and convictions, criminal justice status at arrest, type of pretrial release or detention, bail amount, court appearance record, adjudication outcome, and sentence received if convicted. This periodic report has been published biennially since 1990. Highlights for 2002 include the following:

• Since 1990, defendants charged with a drug or property offense have comprised about two-thirds of felony cases in the 75 largest counties. Since 1994, drug defendants have comprised the largest group, ranging from 35% to 37%. Property defendants have accounted for 29% to 31% of defendants during this time. From 1990 to 2002 the percentage of felony defendants charged with a violent offense has ranged from 24% to 27%.

• An estimated 56,146 felony cases were filed in the State courts of the Nation's 75 largest counties during May 2002. About a fourth of defendants were charged with a violent offense, usually assault (12.7%) or robbery (5.4%). About 1 in 40 defendants were charged with murder (0.8%) or rape (1.8%).

• Non-Hispanic blacks comprised more than half of the defendants charged with murder (58%), robbery (54%), a weapons offense (54%), or drug trafficking (53%). Non-Hispanic whites were nearly half of those charged with a driving-related felony (46%).

• At the time of arrest 32% of defendants had an active criminal justice status, such as probation (15%), release pending disposition of a prior case (10%), or parole (5%).

• Seventy-six percent of all defendants had been arrested previously, with 50% having at least five prior arrest charges. Fifty-nine percent of defendants had at least one prior conviction.

• An estimated 62% of felony defendants in the 75 largest counties were released prior to the final disposition of their case. Defendants were most likely to be released on commercial surety bond (41% of all releases), followed by release on personal recognizance (23% of all releases).

• An estimated 33% of released defendants committed one or more types of pretrial misconduct such as failing to make a court appearance or being rearrested for a new crime.

• Fifty-seven percent of defendants were convicted of a felony and 11% of a misdemeanor. Nearly all convictions (95%) obtained during the 1-year study period were the result of a guilty plea.

• Three-fourths of all sentences for felony convictions were either to prison (38%) or jail (37%). Nearly all convicted defendants who did not receive an incarceration sentence were placed on probation.

• The felony conviction rate reached a high of 61% in 1994 and then fell to 52% in 1998 and 2000. In 2002, the felony conviction rate rose to 57%. The incarceration rate for defendants convicted of a felony rose from a low of 68% in 1994 to a new high of 75% in 2002.

DISSEMINATION: The text and data tabulations will be made available on the Internet for instantaneous dissemination upon release. When printed, this report will be distributed to criminal justice practitioners, policymakers, and others who have indicated an interest in this subject.

TIMETABLE: BJS will make this publication available 30 days from the date of this memorandum.

If we may provide additional information about this document, please call 616-3281.

cc Steven R. Schlesinger, Director, Statistics Division Administrative Office of the U.S. Courts
Thomas R. Kane, Assistant Director, Bureau of Prisons
Michael Battle, Director, Executive Office for United States Attorneys
Maryvictoria Pyne, Chief , FBI Criminal Justice Information Service Div., Communications Unit
Frank Shults, Senior Advisor, Office of the Deputy Attorney General

cc: Kyle Sampson, OAG

Uttam Dhillon, ODAG

Assistant Attorney General, OLP

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Director, COPS

Nancy Ayers, OCOM/OJP

Felony Defendants in Large Urban Counties, 2002

The State Court Processing Statistics (SCPS) program, initiated by BJS in 1988, entails data collection on the processing of felony cases by State courts in the 75 largest counties. Together, these counties account for about half of all reported serious violent crimes in the U.S., and about two-fifths of all reported serious property crimes. The data collection involves the development of a representative sample of felony arrestees in the 75 largest counties whose cases are then tracked for up to one year in order to determine the outcome of decision-making at each phase of the justice system. SCPS provides comprehensive case processing data on felony defendants from arrest through sentencing, including defendant demographics, criminal history, pretrial release and bail decisions, failure to appear and rearrest rates while on release, adjudication outcome, and type and length of sentence received if convicted. The SCPS data collection is conducted every two years, sampling felony cases filed in May of even-numbered years. It also serves as a platform for targeted studies of special populations such as the processing of waived juvenile defendants and domestic violence defendants. It results in the biennial production of the report "Felony Defendants in Large Urban Counties." The publication of this report is not mandated by statute.

The following questions are examples of questions that may be answered with SCPS data.

1. What proportion of felony defendants are charged with crimes of violence or drug-related crimes? Among felony cases filed in May 2002 in the 75 largest counties, 24% involved a violent offense. About half of these were assault cases. Approximately 2% of all felony defendants were charged with rape and about 1% with murder. Drug offenses (36%) comprised the largest percentage of cases. Nearly half of drug defendants were charged with trafficking. The other two major categories of felony charges were property offenses (30% of defendants) and public-order offenses (10%).

2. How many felony defendants are "repeat offenders"? A majority (59%) of felony defendants had at least one previous conviction. Twenty-four percent had five or more prior convictions. Forty-three percent of defendants had at least one prior felony conviction, including 29% who had more than one. Eleven percent of defendants had a prior conviction for a violent felony.

3. How many felony defendants are released from custody before their case is heard, and how many of these fail to appear in court or are rearrested while in a release status? An estimated 62% of felony defendants were released prior to the disposition of their case, ranging from 8% of murder defendants to 80% of fraud defendants. Approximately a third of released defendants failed to comply with the terms of their pretrial release. Twenty-two percent of released defendants failed to appear in court as scheduled and 18% were arrested for a new offense, including 12% for a new felony.

4. What is the probability of conviction for felony defendants? Among those felony defendants whose cases were adjudicated within the one-year tracking period (88% of cases), 68% were convicted. This included a 57% felony conviction rate (the remainder were convicted

of misdemeanors). Felony conviction rates were highest for defendants originally charged with murder (80%), a driving-related offense (73%), motor vehicle theft (68%), burglary (66%), or drug trafficking (64%). They were lowest for assault (41%) defendants.

5. What is the typical sentence for a convicted felon? Seventy-two percent of convictions resulted in a sentence to incarceration (prison or jail). A majority of defendants convicted of murder (95%), robbery (73%), or rape (64%) were sentenced to prison. These defendants also received the longest median prison sentences: 40 years for murder, 10 years for rape, and 6 years for robbery.

6. What are the pretrial release, felony conviction, and sentencing trends for felony defendants processed in State courts from 1990 - 2002? From 1990 - 2002, the percentage of defendants released prior to case disposition ranged from 62% to 64%. The felony conviction rates reached a high of 61% of defendants in the 1994 study, fell to 52% in 1998 and 2000, and rose to 57% in 2002. The incarceration rate for defendants convicted of a felony rose from a low of 68% in 1994 to a new high of 75% in 2002. From 1990 - 1994, felony convictions were more likely to result in a prison than a jail sentence; afterwards, felony convictions resulted in nearly equal rates of prison and jail incarcerations.

U.S. Department of Justice
Office of Justice Programs

Bureau of Justice Statistics

State Court Processing Statistics

Felony Defendants in Large Urban Counties, 2002

Arrest charges

Demographic characteristics

Criminal history

Pretrial release and detention

Adjudication

Sentencing

U.S. Department of Justice
Office of Justice Programs
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Alberto R. Gonzales
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http//www.ojp.usdoj.gov

Bureau of Justice Statistics

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World Wide Web site:
http://www.ojp.usdoj.gov/bjs

For information contact
National Criminal Justice Reference Service
1-800-851-3420

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics

Felony Defendants in Large Urban Counties, 2002

Thomas H. Cohen, J.D., Ph.D.

and

Brian A. Reaves, Ph.D.

BJS Statisticians

February 2006, NCJ 210818

Contents

U.S. Department of Justice
Bureau of Justice Statistics

Maureen A. Henneberg
Acting Deputy Director

Thomas H. Cohen and Brian Reaves, BJS statisticians, prepared this report. Carolyn C. Williams edited the report.

The data were collected and processed by the Pretrial Services Resource Center under the supervision of Jolanta Juszkiewicz. Carma Hogue of the Economic Statistical Methods and Procedures Division, U.S. Census Bureau, assisted with sample design.

Data presented in this report may be obtained from the National Archive of Criminal Justice Data at the University of Michigan, 1-800-999-0960. The report and data are available on the Internet at: http://www.ojp.usdoj.gov/bjs

Highlights

Trends in processing of felony defendants, 1990-2002

Since 1990, defendants charged with a drug or property offense have comprised about two-thirds of felony cases in the 75 largest counties. Since 1994, drug defendants have comprised the largest group, ranging from 35% to 37%. Property defendants have accounted for 29% to 31% of defendants during this time. From 1990 to 2002 the percentage of felony defendants charged with a violent offense has ranged from 24% to 27%.

The proportion of defendants over age 40 has risen from 10% in 1990, to 21% in 2000 and 2002. Since 1996, about a third of defendants have been under age 25, a smaller proportion than from 1990 to 1994, when about two-fifths of defendants were this young.

The percentage of female defendants increased from 14% in 1990 to 18% in 1998 and has remained stable since then. After reaching a peak of 50% in 1996, the percentage of non-Hispanic black defendants declined to 43% in 2002. During this time, the percentage of non-Hispanic white defendants increased from 23% to 31%.

The percentage of defendants with an active criminal justice status at the time of arrest declined to a new low of 32% in 2002, compared to a high of 38% from 1990 through 1994.

The percentage of defendants with one or more prior felony arrests rose to 64% in 2002, continuing an upward trend that began after 1992 when 55% had a felony arrest record. The percentage with a felony conviction record has also increased — from 36% in 1990 to 43% in 2002.

From 1990 to 2002 the percentage of felony defendants released prior to case disposition remained fairly consistent, ranging from 62% to 64%. From 1990 to 1996 release on personal recognizance (ROR) was the most common type of pretrial release, accounting for 38% to 41% of releases, compared to 29% to 31% for surety bond. In 1998 surety bond was the most frequently used type of release, and by 2002, surety bond accounted for 41% of releases compared to 23% for ROR.

From 1990 to 2002 the percentage of released defendants charged with any type of pretrial misconduct was fairly consistent, ranging from 31% to 34%. Likewise, failure-to-appear rates varied only slightly, ranging from 22% to 24%.

After reaching a high of 61% in the 1994 study, the felony conviction rate fell to 52% in both 1998 and 2000. This decline was reversed in 2002 when 57% of defendants were convicted of a felony. Overall conviction rates have followed a similar pattern, peaking in 1994 at 72%, dropping to 64% by 2000, then rising to 68% in 2002.

After reaching a low of 68% in 1994, the incarceration rate for defendants convicted of a felony rose for the fifth straight year to a new high of 75% in 2002. In 2002 prison and jail sentences occurred with relatively equal frequency, as they did in 1996 and 1998. In other years felony convictions were somewhat more likely to result in a prison sentence than a jail sentence.

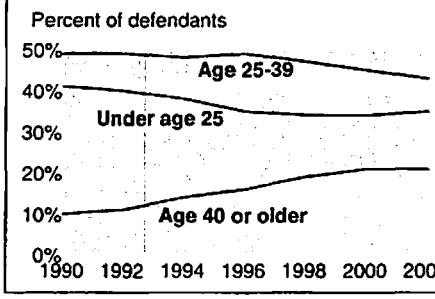
Felony defendants in large urban counties, 2002

Arrest charges

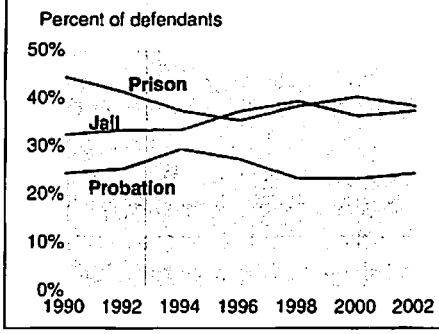
An estimated 56,146 felony cases were filed in the State courts of the Nation's 75 largest counties during May 2002. About a fourth of defendants were charged with a violent offense, usually assault (12.7%) or robbery (5.4%). About 1 in 40 defendants were charged with murder (0.8%) or rape (1.8%).

Two-thirds of defendants were charged with either a drug (36%) or property (30%) offense. Nearly half of drug defendants, 17% of defendants overall, were charged with drug trafficking. A majority of property defendants were charged with larceny/theft (8.8% of all defendants) or burglary (8.1%). About 10% of defendants were charged with a public-order offense. A majority of these charges were driving-related (3.2%) or weapons-related (2.7%).

Age at arrest, felony defendants in the 75 largest counties, 1990-2002



Most severe sentence received by defendants convicted of a felony in the 75 largest counties, 1990-2002



Demographic characteristics

Eighty-two percent of defendants were male, including 90% or more of those charged with rape (99%), a weapons offense (96%), murder (93%), or robbery (90%). Women accounted for about half of the defendants charged with fraud (49%) and about a third of those charged with forgery (35%).

Non-Hispanic blacks comprised more than half of the defendants charged with murder (58%), robbery (54%), a weapons offense (54%), or drug trafficking (53%). Non-Hispanic whites were nearly half of those charged with a driving-related felony (46%).

Half of defendants were under age 30. Eighteen percent were under age 21, including 36% of those charged with robbery and 28% of those charged with murder. Two percent of defendants were under age 18, including 9% of robbery defendants and 8% of murder defendants.

Criminal history

At the time of arrest 32% of defendants had an active criminal justice status, such as probation (15%), release pending disposition of a prior case (10%), or parole (5%). Forty-five percent of motor vehicle theft defendants and 40% of burglary defendants had a criminal justice status when arrested.

Seventy-six percent of all defendants had been arrested previously, with 50% having at least five prior arrest charges. Sixty-four percent of defendants had a felony arrest record. Fifty-nine percent of defendants had at least one prior conviction, including 43% with one or more felony convictions.

Pretrial release and detention

Thirty-eight percent of all defendants were detained until the court disposed of their case, including 6% who were denied bail. Murder defendants (92%) were the most likely to be detained. A majority of defendants charged with robbery (58%), motor vehicle theft (56%), or burglary (51%) were also detained until case disposition.

Defendants with an active criminal justice status (57%) were nearly twice as likely to be detained until case disposition as those without such a status (31%). Defendants on parole (69%) were the most likely to be detained.

Defendants were most likely to be released on commercial surety bond (41% of all releases), followed by release on personal recognizance (23%). The next most common types of pretrial release were conditional release (18%), deposit bond (10%), and unsecured bond (5%).

An estimated 33% of released defendants committed one or more types of pretrial misconduct while in a release status. Twenty-two percent failed to appear in court as scheduled. Eighteen percent were arrested for a new offense, including 12% for a felony.

Adjudication

About a fourth of defendants had their case adjudicated within 1 month of arrest, and nearly half within 3 months. At the end of the 1-year study period, 87% of all cases had been adjudicated.

Sixty-eight percent of the cases adjudicated within 1 year resulted in a conviction. Fifty-seven percent of defendants were convicted of a felony, and 11% of a misdemeanor. Felony conviction rates were higher for those originally charged with murder (80%), followed by driving-related offenses (73%), motor vehicle theft (68%), burglary (66%), and drug trafficking (64%). Assault (41%) defendants had the lowest felony conviction rate.

Nearly all (95%) convictions obtained during the 1-year study period were the result of a guilty plea. About 5 in 6 guilty pleas were to a felony.

Eighty-five percent of trials resulted in a guilty verdict, including 88% of bench trials and 80% of jury trials.

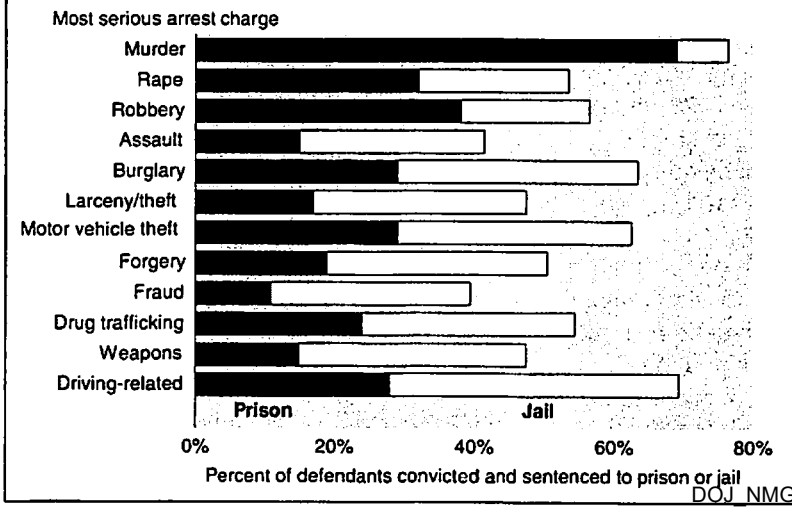
Sentencing

About two-thirds of convicted defendants were sentenced within 1 day of adjudication. Three-fourths of all sentences for felony convictions were either to prison (38%) or jail (37%). Ninety-five percent of those convicted of murder were sentenced to prison. A large majority of robbery (73%) and rape (64%) convictions also resulted in prison sentences. Nearly all convicted defendants who did not receive an incarceration sentence were placed on probation.

Fifty-eight percent of those with multiple prior felony convictions were sentenced to prison following a felony conviction in the current case, compared to 22% of those with no prior felony convictions.

The mean prison sentence for violent felony convictions was about 10 years and the median was 5 years. For nonviolent felonies the mean was about 3 years and the median 2 years. Murder (40 years) and rape (10 years) convictions carried the longest median prison sentences. Nearly 2 in 5 convicted murderers received a life sentence.

Probability of being convicted and sentenced to incarceration for felony defendants in the 75 largest counties, 2002



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Since 1988, the Bureau of Justice Statistics (BJS) has sponsored a biennial data collection on the processing of felony defendants in the State courts of the Nation's 75 most populous counties. Previously known as the National Pretrial Reporting Program, this data collection series was renamed the State Court Processing Statistics (SCPS) program in 1994 to better reflect the wide range of data elements collected.

The SCPS program collects data on the demographic characteristics, criminal history, pretrial processing, adjudication, and sentencing of felony defendants. The SCPS data do not include Federal defendants. The reader should refer to the annual BJS *Compendium of Federal Justice Statistics* for information on the processing of Federal defendants.

The 2002 SCPS collected data for 15,358 felony cases filed during May 2002 in 40 large counties. These cases, which were tracked for up to 1 year, were part of a 2-stage sample that was representative of the estimated 56,146 felony cases filed in the Nation's 75 most populous counties during that month. A small number of cases (93 weighted) were omitted from analysis as they could not be classified into 1 of the 4 major crime categories (violent, property, drug, and public-order offenses).

In 2002 the 75 largest counties accounted for 37% of the U.S. population. According to the FBI's Uniform Crime Reports program for 2002, these jurisdictions accounted for 50% of all reported serious violent crimes in the United States, including 61% of robberies, 51% of murders and nonnegligent manslaughters, 47% of aggravated assaults, and 36% of forcible rapes.

These counties accounted for 42% of all reported serious property crimes, including 57% of motor vehicle thefts, 40% of larceny/thefts, and 39% of burglaries.

Arrest charges

During May 2002 about a fourth of the felony defendants in the 75 largest counties were charged with a violent offense (24.4%) (table 1). About half of those charged with a violent felony, 12.7% of defendants overall, faced assault charges, and about a fifth, 5.4% of defendants overall, were charged with robbery. Murder defendants comprised 3.5% of the defendants charged with a violent felony, and 0.8% of all felony defendants. Rape defendants accounted for 7.3% of the defendants charged with a violent felony, and 1.8% of all felony defendants. (See *Methodology* for the specific crimes included in each offense category.)

For about 3 in 8 defendants, the most serious arrest charge was a drug offense (35.8%). Nearly half (48%) of drug defendants were charged with drug trafficking. Overall, defendants were more likely to be charged with drug trafficking (17.1%) or other drug offenses (18.6%) than any other type of offense (figure 1).

About 3 in 10 felony defendants were charged with a property offense (30.3%). More than a fourth of property defendants, 8.8% of defendants overall, were charged with larceny/theft offenses, and about a fourth, 8.1% overall, were charged with burglary.

Defendants charged with a public-order offense comprised 9.6% of all defendants. About 6 in 10 public-order defendants faced a weapons (2.7%) or driving-related (3.2%) charge.

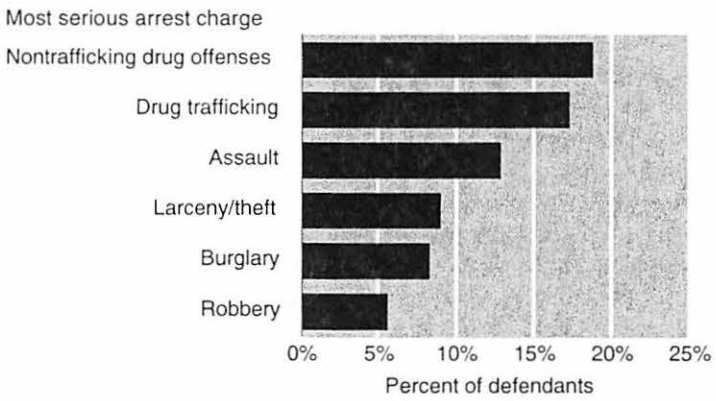
The percentage of felony defendants in the 75 largest counties facing a drug-related charge (35.8%) was about the same as in 2000 (36.8%), but significantly higher than the low of 30% in 1992 (figure 2). The percentage of property defendants in 2002 (30.3%) was relatively unchanged compared to 2000 (29.5%) and lower since a high of 34.7% in 1992. The percentage of defendants charged with a violent offense in 2002 (24.4%) was about the same as in 2000 (24.9%), and slightly lower than the high of 26.5% in 1992.

Table 1. Felony defendants, by most serious arrest charge, 2002

Most serious arrest charge	Felony defendants in the 75 largest counties	
	Number	Percent
All offenses	56,146	100.0%
Violent offenses	13,682	24.4%
Murder	474	0.8
Rape	1,002	1.8
Robbery	3,036	5.4
Assault	7,122	12.7
Other violent	2,049	3.6
Property offenses	17,021	30.3%
Burglary	4,544	8.1
Larceny/theft	4,929	8.8
Motor vehicle theft	1,869	3.3
Forgery	1,734	3.1
Fraud	1,727	3.1
Other property	2,218	4.0
Drug offenses	20,073	35.8%
Trafficking	9,618	17.1
Other drug	10,455	18.6
Public-order offenses	5,370	9.6%
Weapons	1,501	2.7
Driving-related	1,788	3.2
Other public-order	2,081	3.7

Note: Data for the specific arrest charge were available for all cases. Detail may not add to total because of rounding.

Most frequently charged offenses of felony defendants in the 75 largest counties, 2002



See *Methodology* for specific crimes included in each offense category.

Figure 1

Most serious arrest charge of felony defendants in the 75 largest counties, 1990 to 2002

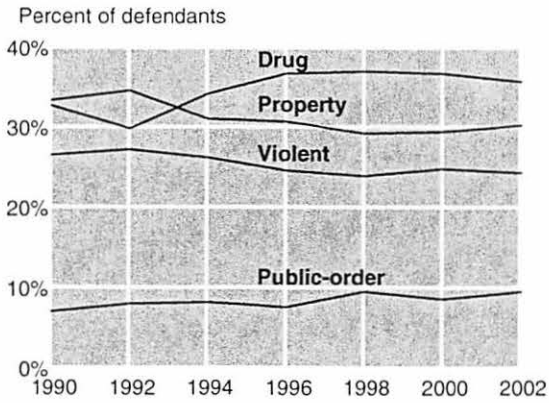


Figure 2

More than half of all felony defendants (58%) faced at least one additional charge, and 40% were charged with at least one additional felony (table 2). About 7 in 10 defendants charged with drug trafficking (72%), robbery (71%), or rape (71%) had been charged with one or more additional offenses. More than three-fifths of defendants whose most serious arrest charge was murder (65%), burglary (65%), weapons (64%), and assault (62%) were also charged with one or more additional offenses.

A majority of rape (65%), murder (61%), robbery (59%), and drug trafficking (58%) defendants faced at least one additional felony charge. About half of defendants charged with fraud (52%) or burglary (51%) faced one or more additional felony charges. More than two-fifths of forgery (46%), weapons (43%), and assault (42%) defendants faced multiple felony charges.

Table 2. Level of second most serious charge of felony defendants, by most serious arrest charge, 2002

Most serious arrest charge	Number of defendants	Percent of felony defendants in the 75 largest counties				
				Most serious additional charge		
		Total	No other charges	Total	Felony	Misdemeanor
All offenses	56,147	100%	42%	58%	40%	18%
Violent offenses	13,683	100%	36%	64%	48%	16%
Murder	475	100	35	65	61	4
Rape	1,002	100	29	71	65	6
Robbery	3,036	100	29	71	59	12
Assault	7,123	100	38	62	42	20
Other violent	2,048	100	41	59	41	18
Property offenses	17,021	100%	46%	54%	42%	13%
Burglary	4,544	100	35	65	51	14
Larceny/theft	4,930	100	49	51	40	10
Motor vehicle theft	1,869	100	53	47	33	14
Forgery	1,734	100	42	58	46	13
Fraud	1,727	100	42	58	52	7
Other property	2,218	100	57	43	22	21
Drug offenses	20,073	100%	42%	58%	38%	20%
Trafficking	9,618	100	28	72	58	14
Other drug	10,455	100	54	46	20	26
Public-order offenses	5,370	100%	48%	52%	27%	26%
Weapons	1,501	100	36	64	43	21
Driving-related	1,788	100	43	57	27	30
Other public-order	2,081	100	60	40	15	25

Note: Data for the most serious arrest charge and the next most serious arrest charge were available for all cases. Detail may not add to total because of rounding.

Demographic characteristics

Forty-three percent of the felony defendants in the 75 largest counties were non-Hispanic blacks, 31% were non-Hispanic whites, 24% were Hispanics of any race, and 2% were non-Hispanic members of some other race (table 3). Non-Hispanic blacks comprised a majority of the defendants charged with murder (58%), a weapons offense (54%), robbery (54%), or drug trafficking (53%) (figure 3). The smallest percentage of black defendants was found among those charged with a driving-related offense (22%) or motor vehicle theft (27%).

Non-Hispanic whites accounted for the largest percentage among defendants facing driving-related charges (46%). This was about 3 times the percentage accounted for by whites among defendants charged with murder (15%) or a weapons offense (18%), and more than twice the percentage of whites charged with robbery (21%) or drug trafficking (21%).

Hispanics were more prevalent among defendants charged with motor vehicle theft (35%) or a driving-related offense (30%) than among those charged with fraud (15%), forgery (17%), or larceny/theft (19%).

Table 3. Race and Hispanic origin of felony defendants, by most serious arrest charge, 2002

Most serious arrest charge	Number of defendants	Percent of felony defendants in the 75 largest counties				
		Total	Black non-Hispanic	White non-Hispanic	Other non-Hispanic	Hispanic, any race
All offenses	55,432	100%	43%	31%	2%	24%
Violent offenses	13,455	100%	44%	28%	2%	26%
Murder	470	100	58	15	1	26
Rape	995	100	42	32	2	24
Robbery	3,001	100	54	21	2	23
Assault	6,991	100	42	27	2	29
Other violent	1,999	100	32	41	3	25
Property offenses	16,848	100%	42%	34%	3%	22%
Burglary	4,511	100	38	34	3	25
Larceny/theft	4,891	100	46	32	2	19
Motor vehicle theft	1,853	100	27	33	5	35
Forgery	1,717	100	46	34	3	17
Fraud	1,705	100	47	35	4	15
Other property	2,175	100	45	37	1	18
Drug offenses	19,841	100%	46%	29%	2%	24%
Trafficking	9,501	100	53	21	2	25
Other drug	10,341	100	39	36	1	24
Public-order offenses	5,288	100%	38%	35%	1%	26%
Weapons	1,488	100	54	18	--	28
Driving-related	1,774	100	22	46	2	30
Other public-order	2,025	100	39	38	1	21

Note: Data on both race and Hispanic origin of defendants were available for 99% of all cases. According to the U.S. Census Bureau data for 2002, the overall percentage of the population of the 75 largest counties was 53% white non-Hispanic, 15% black non-Hispanic, 9% other race non-Hispanic, and 23% Hispanics of any race. Detail may not add to total because of rounding.
-- Less than .5%

Most serious arrest charge of felony defendants, by race and Hispanic origin, 2002

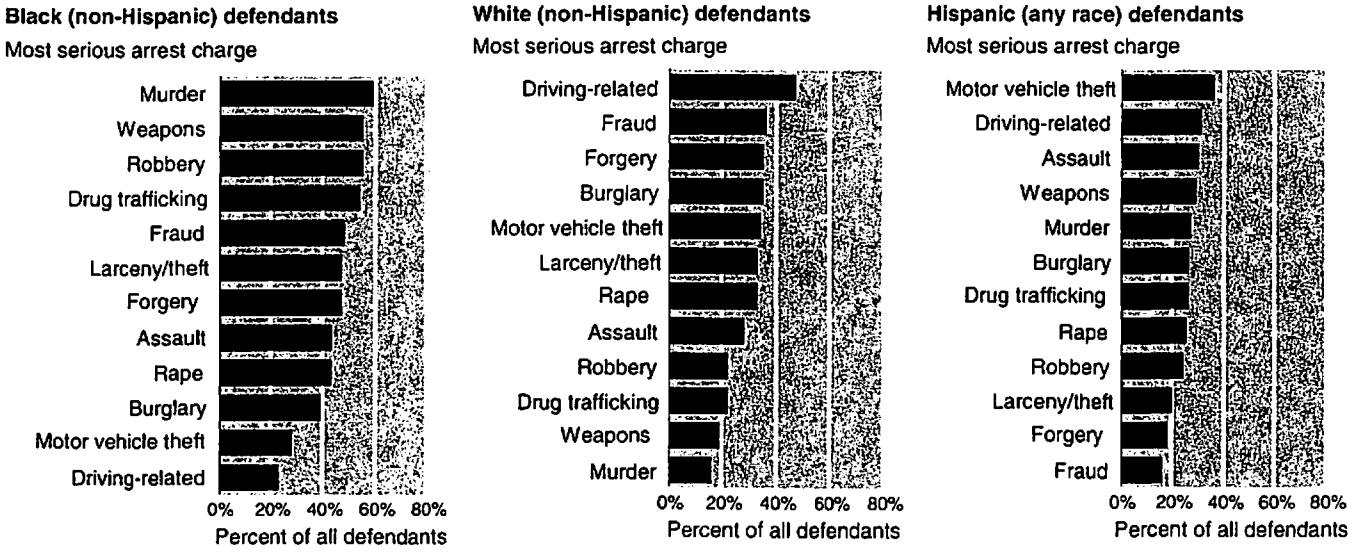


Figure 3

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Overall, 82% of felony defendants in the 75 largest counties were male (table 4). Men comprised at least 9 out of 10 defendants charged with rape (99%), weapons offenses (96%), murder (93%), and robbery (90%). Women accounted for 18% of defendants, including 49% of those charged with fraud and 35% of those charged with forgery.

The average age of defendants at the time of arrest was 31 years (table 5). By specific offense the average age ranged from 27 years for robbery defendants to 36 for those charged with a driving-related offense.

Nearly a tenth of robbery (9%) and murder (8%) defendants were under age 18. An estimated 21% of defendants were 40 or older, including about a third of those charged with a driving-related offense (35%). Defendants charged with a weapons offense (10%), robbery (11%), motor vehicle theft (11%), or murder (12%) were the least likely to be 40 or older.

Table 4. Gender of felony defendants, by most serious arrest charge, 2002

Most serious arrest charge	Number of defendants	Percent of felony defendants in the 75 largest counties		
		Total	Male	Female
All offenses	56,123	100%	82%	18%
Violent offenses	13,675	100%	86%	14%
Murder	475	100	93	7
Rape	1,002	100	99	1
Robbery	3,032	100	90	10
Assault	7,119	100	83	17
Other violent	2,049	100	82	18
Property offenses	17,015	100%	76%	24%
Burglary	4,540	100	87	13
Larceny/theft	4,927	100	71	29
Motor vehicle theft	1,869	100	87	13
Forgery	1,734	100	65	35
Fraud	1,727	100	51	49
Other property	2,218	100	84	16
Drug offenses	20,063	100%	83%	17%
Trafficking	9,608	100	86	14
Other drug	10,455	100	80	20
Public-order offenses	5,370	100%	86%	14%
Weapons	1,501	100	96	4
Driving-related	1,788	100	89	11
Other public-order	2,081	100	77	23

Note: Data on gender of defendants were available for 99.9% of all cases.

Table 5. Age at arrest of felony defendants, by most serious arrest charge, 2002

Most serious arrest charge	Number of defendants	Percent of felony defendants in the 75 largest counties								Average age at arrest
		Total	Under 18	18-20	21-24	25-29	30-34	35-39	40 or older	
All offenses	55,958	100%	2%	16%	17%	16%	14%	13%	21%	31 yrs.
Violent offenses	13,599	100%	4%	18%	19%	15%	13%	12%	19%	30 yrs.
Murder	475	100	8	20	20	21	11	9	12	28
Rape	998	100	3	16	16	11	13	14	27	33
Robbery	3,037	100	9	26	19	13	11	10	11	27
Assault	7,058	100	2	15	20	16	13	13	21	31
Other violent	2,034	100	2	14	15	16	16	15	22	32
Property offenses	16,985	100%	2%	18%	16%	15%	15%	14%	20%	31 yrs.
Burglary	4,545	100	4	22	18	14	13	12	18	29
Larceny/theft	4,927	100	2	16	13	13	13	16	26	32
Motor vehicle theft	1,858	100	2	23	19	16	14	13	11	28
Forgery	1,726	100	--	9	20	18	19	13	21	31
Fraud	1,723	100	1	8	13	19	20	15	25	33
Other property	2,206	100	3	23	15	16	14	12	17	29
Drug offenses	20,017	100%	2%	14%	18%	16%	14%	13%	23%	31 yrs.
Trafficking	9,586	100	2	17	20	17	14	11	18	30
Other drug	10,433	100	2	11	16	15	15	15	27	33
Public-order offenses	5,357	100%	1%	10%	16%	16%	17%	15%	25%	33 yrs.
Weapons	1,495	100	3	22	22	18	15	9	10	28
Driving-related	1,788	100	--	3	13	12	19	18	35	36
Other public-order	2,074	100	1	8	13	18	16	17	26	33

Note: Data on age of defendants were available for 99.7% of all cases. Detail may not add to total because of rounding.
--Less than .5%.

Overall, 35% of defendants were under age 25 (figure 4). More than half of robbery defendants (55%) were under age 25, as were more than two-fifths of defendants charged with murder (48%), a weapons offense (48%), vehicle theft (45%), or burglary (43%). Defendants charged with a driving-related offense (16%) or fraud (21%) were the least likely to be under age 25.

An estimated 18% of defendants were under the age of 21 at the time of arrest. Nearly 3 in 8 robbery defendants (36%) were under age 21, as were about a fourth of those charged with murder (28%), vehicle theft (26%), a weapons offense (25%), or burglary (25%). Defendants charged with a driving-related offense (3%), fraud (9%), or forgery (9%) were the least likely to be this young.

Males formed a higher percentage of defendants under the age of 18 (90%) than in the 25 or older age categories (table 6). A majority of the defendants under age 18 were black (55%), compared to less than half in each of the other age groups.

Felony defendants under age 25 and age 21 in the 75 largest counties, by most serious arrest charge, 2002

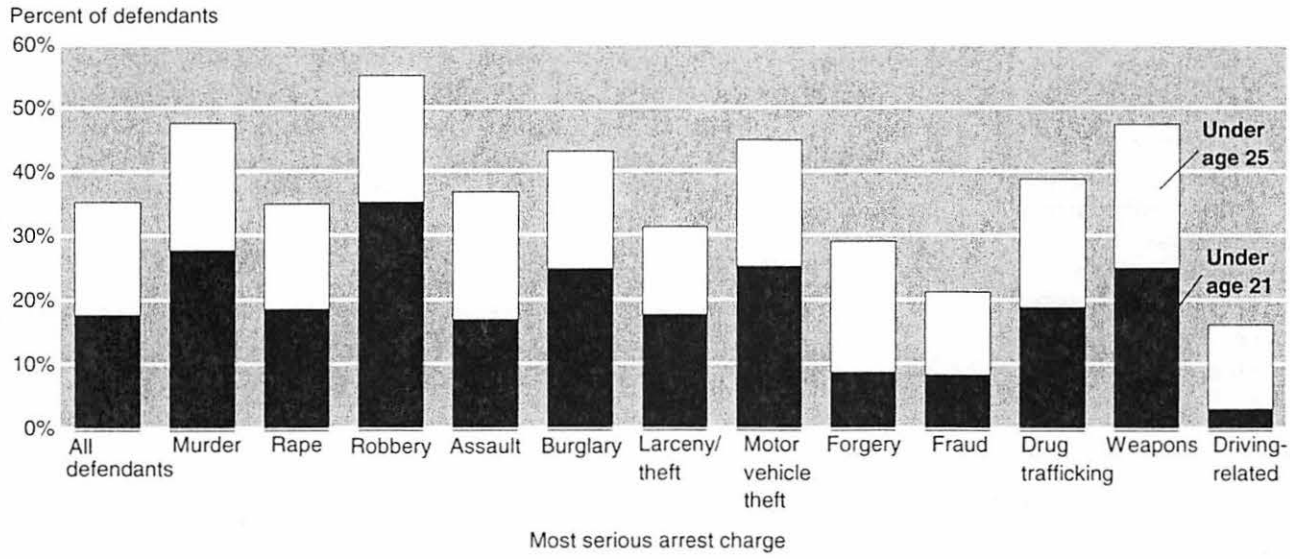

Figure 4

Table 6. Gender and race/ethnicity of felony defendants, by age at arrest, 2002

Age at arrest	Number of defendants	Percent of felony defendants in the 75 largest counties			Number of defendants	Percent of felony defendants in the 75 largest counties				
		Total	Male	Female		Total	Black, non-Hispanic	White, non-Hispanic	Other, non-Hispanic	Hispanic, any race
All ages	55,936	100%	82%	18%	55,344	100%	43%	31%	2%	24%
Under 18	1,394	100%	90%	10%	1,376	100%	55%	18%	1%	27%
18-20	8,736	100	87	13	8,635	100	44	26	2	27
21-24	9,601	100	85	15	9,508	100	43	27	2	28
25-29	8,780	100	81	19	8,706	100	42	26	3	29
30-34	8,042	100	78	22	7,981	100	39	35	2	25
35-39	7,447	100	78	22	7,358	100	41	36	2	20
40 or older	11,936	100	80	20	11,780	100	47	35	2	17

Note: Data on defendant age and gender were available for 99.6% of all cases.
Data on defendant age and race/ethnicity were available for 99% of all cases.
Detail may not add to total because of rounding.

Black males comprised the largest proportion of defendants in each age group (figure 5). This effect was most pronounced in the under-age-18 category in which black males (50%) accounted for more than 3 times the percentage of white males (15%), and twice the percentage of Hispanic males (25%). It was less pronounced in the age 25 to 39 categories, where black males accounted for a proportion of defendants closer to that accounted for by Hispanic and white males.

Hispanic females comprised less than 5% of defendants in each age group. Black females constituted a similar percentage to white females in all age categories, and neither accounted for more than 10% of the defendants in any single age category.

Race and gender of felony defendants in the 75 largest counties, by age at arrest, 2002

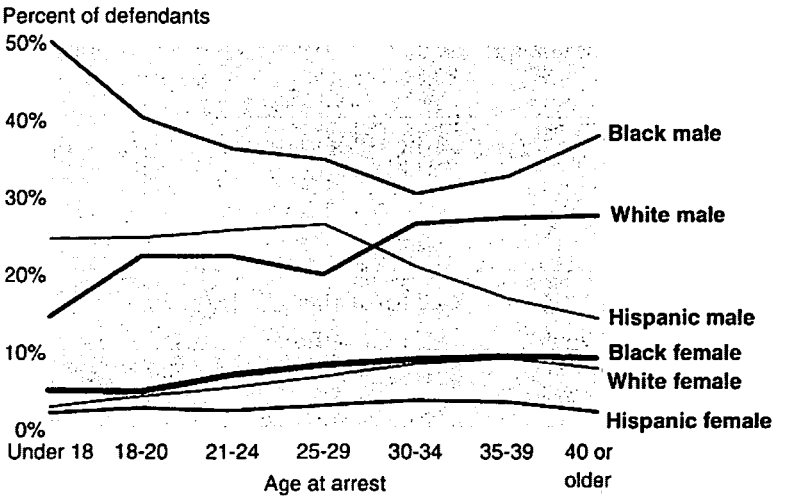

Figure 5

Criminal justice status at time of arrest

Thirty-two percent of felony defendants had an active criminal justice status at the time of their arrest on the current felony charge (table 7). Among defendants charged with a violent offense, 27% had an active criminal justice status, ranging from 35% of robbery defendants to 21% of rape defendants.

Thirty-seven percent of property defendants had an active criminal justice status, including 45% of defendants charged with motor vehicle theft and 40% of those charged with burglary. Among property defendants, those charged with fraud (22%) were the least likely to have had an active criminal justice status at the time of arrest.

Overall 31% of drug defendants had an active criminal justice status. Those charged with drug trafficking were equally likely as those charged with other drug offenses to have had a criminal justice status.

Thirty-three percent of public-order defendants had an active criminal justice status at the time of the current arrest. This included 29% of those charged with a weapons offense, 33% of those charged with a driving-related offense, and 35% of those charged with other public-order offenses.

Some defendants with a criminal justice status had more than one type of status. When just the most serious criminal justice status is considered, 15% of defendants were on probation, 10% had been released pending disposition of a previous case, and 5% were on parole at the time of the current arrest. Allowing for multiple types of criminal justice status, 5% of defendants were on parole, 16% were on probation, and 11% had been released pending case disposition.

Table 7. Criminal justice status of felony defendants at time of arrest, by most serious arrest charge, 2002

Most serious current arrest charge	Number of defendants	Percent of felony defendants in the 75 largest counties with an active criminal justice status at the time of arrest					
		Total	Probation	Pretrial release	Parole	In custody	Other
All offenses	33,290	32%	15%	10%	5%	1%	1%
Violent offenses	7,999	27%	12%	9%	4%	1%	1%
Murder	349	27	15	2	6	2	1
Rape	551	21	9	8	2	1	1
Robbery	1,731	35	14	13	6	2	1
Assault	4,083	27	12	9	4	1	1
Other violent	1,289	24	12	7	3	1	--
Property offenses	10,101	37%	18%	10%	6%	2%	1%
Burglary	2,730	40	21	11	6	1	--
Larceny/theft	2,961	36	17	10	6	1	1
Motor vehicle theft	1,178	45	24	9	11	2	--
Forgery	948	37	16	12	3	4	2
Fraud	1,024	22	9	8	3	2	0
Other property	1,261	37	20	13	3	1	--
Drug offenses	12,194	31%	14%	10%	6%	1%	1%
Trafficking	5,266	31	12	12	5	1	1
Other drug	6,927	31	16	8	6	--	1
Public-order offenses	2,996	33%	16%	9%	6%	2%	1%
Weapons	852	29	19	6	4	0	--
Driving-related	967	33	18	11	3	1	--
Other public-order	1,179	35	12	9	9	4	1

Note: Data on criminal justice status at time of arrest were available for 59% of all cases. Data were not available for the following counties: Jefferson (AL), Contra Costa (CA), Riverside (CA), San Bernardino (CA), San Diego (CA), Santa Clara (CA), Broward (FL), Miami-Dade (FL), Palm Beach (FL), Macomb (MI), Essex (NJ), Bronx (NY), Kings (NY), Nassau (NY), Westchester (NY), Franklin (OH), Fairfax (VA). Some defendants with a criminal justice status had more than one type of status. For those cases, the status indicated is the most serious. Detail may not add to total because of rounding.
--Less than 0.5%.

The percentage of defendants on parole at the time of their current felony arrest ranged from 9% of those charged with motor vehicle theft to 2% of those charged with rape (figure 6). Other offenses with at least 6% of the defendants on parole at the time of arrest included murder (7%), burglary (6%) and drug trafficking (6%).

Nearly a fourth of defendants charged with motor vehicle theft (24%) or burglary (23%) were on probation at the time of arrest. This was about twice the percentage of defendants charged with rape (11%) or fraud (11%) on probation at the time of arrest.

About 1 in 6 defendants charged with drug trafficking (18%) or robbery (17%) were on release pending disposition of a prior case when they were arrested on the current felony charge. These defendants were more than 3 times as likely as those charged with murder (5%) to have had such a status at the time of the current arrest.

Criminal justice status of felony defendants in the 75 largest counties, 2002

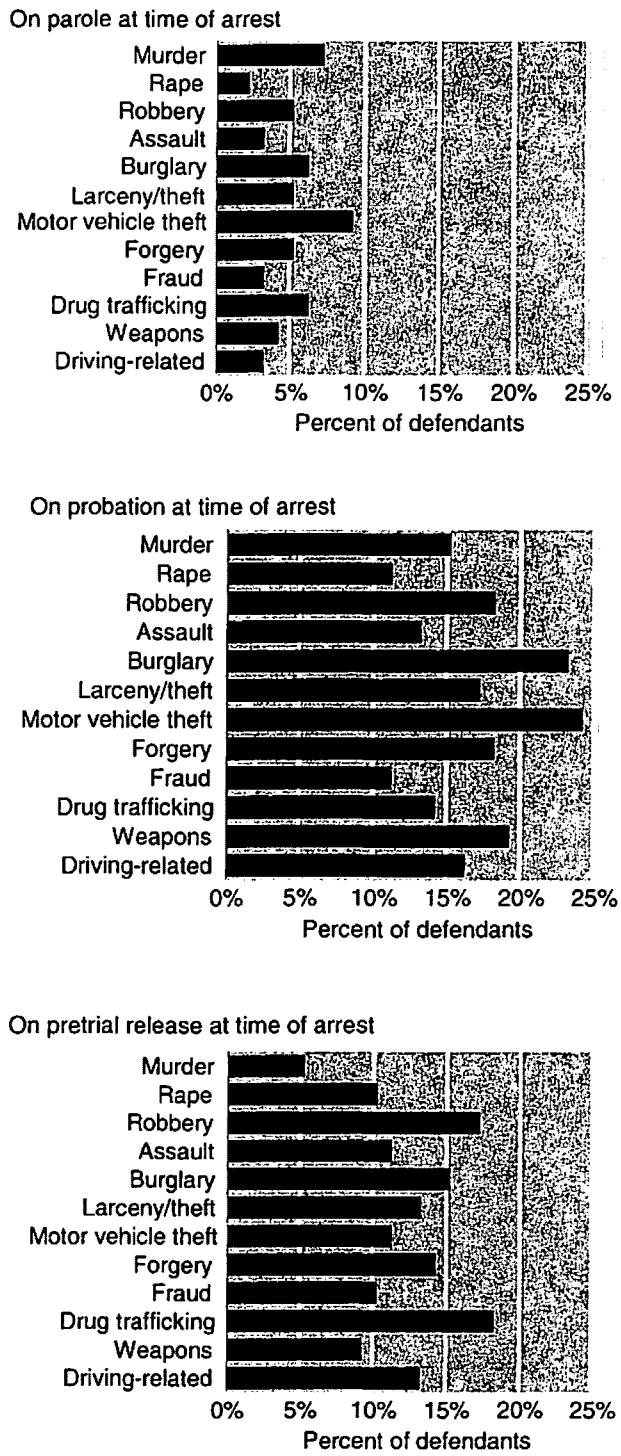

Figure 6

Prior arrests

Seventy-six percent of all defendants had at least one prior felony or misdemeanor arrest (table 8). Defendants whose most serious current arrest charge was for a public-order (80%) or drug (79%) offense were more likely to have been previously arrested than those charged with a property (75%) or violent (72%) offense.

Among defendants charged with a violent offense, robbery (78%) and assault (74%) defendants were more likely to have an arrest record than those charged with rape (61%).

About 4 in 5 property defendants charged with motor vehicle theft (80%) or burglary (79%) had been arrested previously. This was true for about 3 in 4 defendants charged with forgery (75%) or larceny/theft (74%). Defendants charged with fraud (60%) were the least likely, among property defendants, to have one or more prior arrests.

Among public-order defendants, defendants charged with a driving-related felony (83%) were more likely to have an arrest record than those facing weapon charges (75%).

Among defendants with an arrest record, about 7 in 8 had more than one prior arrest charge, and a majority had at least five. Overall, 69% of defendants had two or more prior arrest charges, and 50% had five or more. Over half of defendants charged with motor vehicle theft (55%), a driving-related offense (54%), burglary (53%), or murder (52%) had five or more prior arrest charges. About a third of defendants charged with rape (32%) or fraud (32%) had five or more prior arrest charges.

An estimated 31% of defendants had 10 or more prior arrest charges. This included 35% of defendants charged with murder, burglary, or motor vehicle theft.

Table 8. Number of prior arrest charges of felony defendants, by most serious current arrest charge, 2002

Most serious current arrest charge	Number of defendants	Percent of felony defendants in the 75 largest counties						
		Total	Without prior arrest	With prior arrest				
				Total	Number of prior arrest charges			
					1	2-4	5-9	10 or more
All offenses	51,110	100%	24%	76%	9%	19%	19%	31%
Violent offenses	12,096	100%	28%	72%	9%	19%	17%	28%
Murder	421	100	28	72	5	14	17	35
Rape	856	100	39	61	13	17	16	16
Robbery	2,480	100	22	78	9	18	17	34
Assault	6,414	100	26	74	9	20	17	28
Other violent	1,925	100	36	64	10	20	14	20
Property offenses	15,769	100%	25%	75%	9%	17%	18%	32%
Burglary	4,274	100	21	79	8	17	18	35
Larceny/theft	4,513	100	26	74	7	15	17	34
Motor vehicle theft	1,783	100	20	80	10	15	20	35
Forgery	1,525	100	25	75	10	19	19	26
Fraud	1,597	100	40	60	11	19	14	18
Other property	2,077	100	24	76	9	19	17	31
Drug offenses	18,334	100%	21%	79%	8%	19%	20%	31%
Trafficking	8,221	100	22	78	8	19	19	32
Other drug	10,113	100	20	80	9	20	21	30
Public-order offenses	4,911	100%	20%	80%	9%	19%	19%	32%
Weapons	1,306	100	25	75	10	20	16	30
Driving-related	1,703	100	17	83	8	21	20	34
Other public-order	1,902	100	20	80	10	17	21	32

Note: Data on whether a defendant had any prior arrests were available for 91% of all cases.
Data on the number of prior arrest charges were available for 91% of all cases.
Kings (NY) and Bronx (NY) counties did not provide prior arrest data.
Detail may not add to total because of rounding.

About two-thirds of the defendants under age 18 had no previous arrests (figure 7). This proportion dropped to about two-fifths among defendants age 18 to 20, to just under a fourth among those aged 21 to 29, and about a sixth among those age 30 to 49. Nearly 1 in 4 defendants age 50 or older had no arrest record.

Approximately a fourth of the defendants age 18 to 20 had five or more prior arrests. This proportion rose to about two-fifths in the 21-to-24 age range, about half in the 25-to-29 age range, and around three-fifths in the 30-to-49 age range. In the latter age range, defendants were approximately 4 times as likely to have five or more prior arrests as no prior arrests.

Among defendants with an arrest record, about 4 in 5 had been arrested at least once for a felony. Overall, 64% of defendants had a felony arrest record (table 9). About half of all defendants had multiple prior felony arrest charges, including 30% with five or more.

Number of prior arrest charges of felony defendants in the 75 largest counties, by age of arrest, 2002

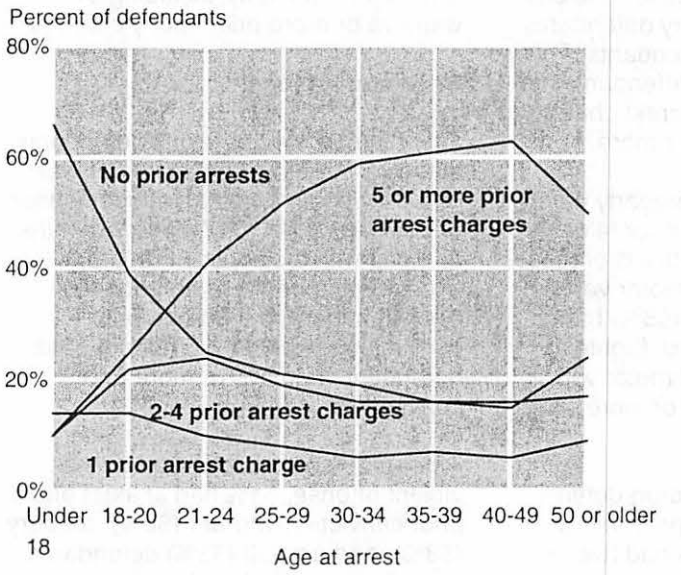

Figure 7

Table 9. Number of prior felony arrest charges of felony defendants, by most serious current arrest charge, 2002

Most serious current arrest charge	Number of defendants	Percent of felony defendants in the 75 largest counties								
			Without prior felony arrest			With prior felony arrest				
							Number of prior felony charges			
		Total	Total	Non-felony arrests	No prior arrests	Total	1	2-4	5-9	10 or more
All offenses	51,110	100%	36%	13%	24%	64%	12%	22%	16%	14%
Violent offenses	12,096	100%	41%	13%	28%	59%	12%	20%	14%	13%
Murder	421	100	36	8	28	64	8	21	17	19
Rape	856	100	57	19	39	43	9	16	10	8
Robbery	2,480	100	30	9	22	70	11	25	19	15
Assault	6,414	100	40	14	26	60	13	20	14	13
Other violent	1,925	100	51	15	36	49	13	18	10	8
Property offenses	15,769	100%	37%	12%	25%	63%	11%	20%	16%	16%
Burglary	4,274	100	32	11	21	68	11	22	18	18
Larceny/theft	4,513	100	38	12	26	62	10	19	15	17
Motor vehicle theft	1,783	100	29	9	20	71	13	23	17	18
Forgery	1,525	100	39	15	25	61	12	20	16	13
Fraud	1,597	100	57	17	40	43	10	15	9	9
Other property	2,077	100	36	12	24	64	11	21	15	17
Drug offenses	18,334	100%	33%	12%	21%	67%	12%	23%	17%	14%
Trafficking	8,221	100	33	11	22	67	12	23	17	16
Other drug	10,113	100	33	13	20	67	13	24	17	13
Public-order offenses	4,911	100%	36%	16%	20%	64%	11%	22%	16%	15%
Weapons	1,306	100	36	11	25	64	10	25	15	14
Driving-related	1,703	100	39	22	17	61	10	22	15	14
Other public-order	1,902	100	34	15	20	66	13	20	17	16

Note: Data on whether a defendant had any prior felony arrests and the number of prior felony arrests were available for 91% of all cases. Kings (NY) and Bronx (NY) counties did not provide prior arrest data.
Detail may not add to total because of rounding.

About 3 in 5 of the defendants facing a current charge for a violent felony had been previously arrested for a felony, including 70% of robbery defendants and 64% of murder defendants. Thirty-six percent of murder defendants had 5 or more prior felony arrest charges, including 19% with 10 or more.

Sixty-three percent of property defendants had one or more prior felony arrests. More than two-thirds of those currently charged with motor vehicle theft (71%) or burglary (68%) had a prior felony arrest record. Eighteen percent of burglary and motor vehicle theft defendants had 10 or more prior felony arrest charges.

Sixty-seven percent of drug defendants had at least one prior felony arrest charge, and 31% had five or more.

Sixty-four percent of public-order defendants had been previously arrested for a felony, including 31% with five or more prior felony charges.

Prior convictions

Fifty-nine percent of felony defendants in the 75 largest counties had at least one prior conviction for a misdemeanor or a felony (table 10). Nearly four-fifths of those with a conviction record, accounting for 46% of defendants overall, had more than one prior conviction. Twenty-four percent of all defendants had five or more prior convictions.

Among defendants charged with a violent offense, 51% had at least one prior conviction. Murder (56%), robbery (53%), and assault (53%) defendants were the most likely to have a conviction record and rape defendants (39%) the least.

Fifty-nine percent of property defendants had been convicted previously, including 64% of burglary and motor vehicle theft defendants. Fifty-one percent of burglary and motor vehicle theft defendants also had multiple prior convictions.

Sixty-three percent of drug defendants had at least one prior conviction. Half had two or more, and a fourth had at least five.

Among public-order defendants, 65% had a conviction record, and 27% had five or more. Nearly three-fourths of the defendants facing driving-related charges (73%) had at least one prior conviction of some type, and about three-fifths had multiple prior convictions.

Table 10. Number of prior convictions of felony defendants, by most serious current arrest charge, 2002

Most serious current arrest charge	Number of defendants	Percent of felony defendants in the 75 largest counties						
		Total	Without prior conviction	With prior conviction				
				Total	Number of prior convictions			
					1	2-4	5-9	10 or more
All offenses	54,420	100%	41%	59%	13%	22%	15%	9%
Violent offenses	13,222	100%	49%	51%	12%	19%	13%	6%
Murder	463	100	44	56	11	28	11	6
Rape	981	100	61	39	12	17	6	5
Robbery	2,958	100	47	53	11	19	14	9
Assault	6,856	100	47	53	13	19	14	6
Other violent	1,966	100	54	46	11	18	12	5
Property offenses	16,437	100%	41%	59%	12%	21%	15%	11%
Burglary	4,412	100	36	64	12	23	14	14
Larceny/theft	4,798	100	42	58	10	19	17	12
Motor vehicle theft	1,790	100	36	64	12	23	21	7
Forgery	1,656	100	44	56	14	24	12	7
Fraud	1,637	100	55	45	13	17	10	6
Other property	2,144	100	42	58	13	21	13	11
Drug offenses	19,547	100%	37%	63%	13%	25%	16%	9%
Trafficking	9,376	100	39	61	12	24	16	9
Other drug	10,170	100	35	65	14	26	17	9
Public-order offenses	5,214	100%	35%	65%	13%	25%	16%	11%
Weapons	1,465	100	45	55	13	22	13	7
Driving-related	1,723	100	27	73	14	28	18	13
Other public-order	2,028	100	34	66	13	25	16	12

Note: Data on number of prior convictions were available for 97% of all cases.
Detail may not add to total because of rounding.

Nearly 3 in 4 defendants with a conviction record, 43% of defendants overall, had at least one prior conviction for a felony (table 11).

Thirty-five percent of defendants whose current charge was for a violent felony had previously been convicted of a felony. Murder (42%) and robbery (41%) defendants were about twice as likely as rape defendants (21%) to have a felony conviction record. Thirty-six percent of assault defendants had a prior felony conviction.

Forty-three percent of property defendants had a felony conviction record, including 50% of those charged with motor vehicle theft and 47% of those charged with burglary. Defendants charged with fraud (27%) were the least likely to have a prior felony conviction.

Forty-seven percent of the defendants whose most serious current arrest charge was for a drug offense had been previously convicted of a felony. There was no variation by type of drug offense.

About two-thirds of the defendants with a felony conviction record, 29% of defendants overall, had multiple prior felony convictions. Nine percent of all defendants had five or more prior felony convictions.

By specific offense, defendants charged with motor vehicle theft (33%), burglary (32%), driving related offenses (32%), or drug trafficking (31%) were more than twice as likely to have multiple prior felony convictions as defendants charged with rape (13%).

Table 11. Number of prior felony convictions of felony defendants, by most serious current arrest charge, 2002

		Percent of felony defendants in the 75 largest counties								
			Without prior felony conviction			With prior felony conviction				
							Number of prior felony convictions			
Most serious current arrest charge	Number of defendants	Total	Total	Nonfelony only	No prior convictions	Total	1	2-4	5-9	10 or more
All offenses	54,420	100%	57%	16%	41%	43%	14%	20%	7%	2%
Violent offenses	13,222	100%	65%	16%	49%	35%	13%	16%	5%	1%
Murder	463	100	58	14	44	42	14	22	5	2
Rape	980	100	79	18	61	21	7	8	4	1
Robbery	2,958	100	59	12	47	41	15	19	7	1
Assault	6,856	100	64	17	47	36	13	15	5	1
Other violent	1,966	100	70	16	54	30	11	14	4	1
Property offenses	16,437	100%	57%	16%	41%	43%	14%	18%	8%	3%
Burglary	4,413	100	53	16	36	47	15	20	9	3
Larceny/theft	4,798	100	58	15	42	42	13	17	8	4
Motor vehicle theft	1,790	100	50	14	36	50	17	24	9	--
Forgery	1,656	100	62	18	43	38	16	16	5	2
Fraud	1,637	100	73	19	55	27	10	11	4	2
Other property	2,144	100	58	16	42	42	14	19	7	3
Drug offenses	19,547	100%	53%	16%	37%	47%	15%	23%	7%	2%
Trafficking	9,376	100	53	14	39	47	15	22	7	2
Other drug	10,169	100	53	18	35	47	15	23	7	2
Public-order offenses	5,214	100%	54%	19%	35%	46%	14%	22%	8%	2%
Weapons	1,465	100	59	14	45	41	13	22	4	2
Driving-related	1,723	100	54	27	27	46	14	19	10	3
Other public-order	2,028	100	49	16	34	51	15	24	9	3

Note: Data on number of prior felony convictions were available for 97% of all cases.
Detail may not add to total because of rounding.
--Less than 0.5%.

Ninety percent of defendants under age 18 at the time of the current arrest had no prior adult convictions (figure 8). Seven percent of these defendants had been previously convicted of at least one felony. In the 18-to-20 age range, 66% of defendants had no prior convictions, while 20% had at least one prior felony conviction.

A majority of the defendants age 21 or older had a conviction record, and defendants ages 25 to 49 were more likely to have a felony conviction record than no prior convictions. About half of defendants age 30 to 49 had a felony conviction record.

For about a fourth of the defendants with a prior felony conviction, 11% of defendants overall, their criminal history included at least one conviction for a violent felony (table 12). Fourteen percent of the defendants currently charged with a violent offense had a prior conviction for a violent felony.

Most serious prior conviction of felony defendants in the 75 largest counties, by age at arrest, 2002

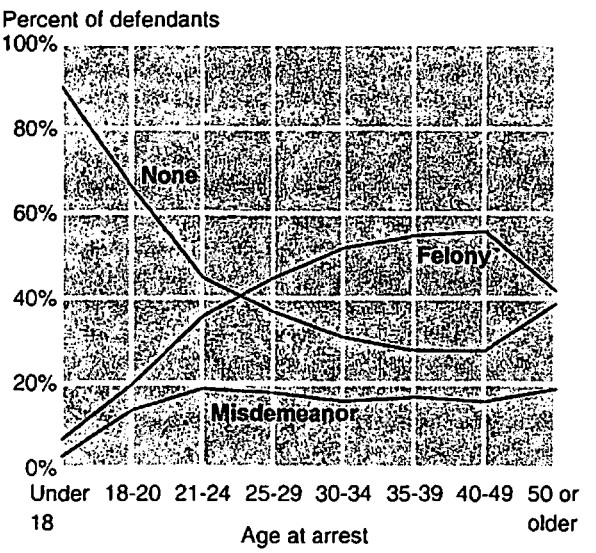

Figure 8

Table 12. Most serious prior conviction of felony defendants, by most serious current arrest charge, 2002

Most serious current arrest charge	Number of defendants	Percent of felony defendants in the 75 largest counties						
		Total	Without prior conviction	Most serious prior conviction				
				Total	Felony			Misdemeanor
					Total	Violent	Nonviolent	
All offenses	53,168	100%	42%	58%	41%	11%	30%	17%
Violent offenses	12,932	100%	50%	50%	34%	14%	19%	16%
Murder	450	100	45	55	40	21	20	15
Rape	963	100	62	38	19	11	9	19
Robbery	2,822	100	49	51	39	15	24	12
Assault	6,760	100	48	52	35	16	19	18
Other violent	1,939	100	55	45	29	9	20	17
Property offenses	16,231	100%	42%	58%	42%	9%	32%	16%
Burglary	4,334	100	37	63	46	10	36	17
Larceny/theft	4,728	100	43	57	41	9	32	16
Motor vehicle theft	1,786	100	36	64	50	11	39	14
Forgery	1,630	100	44	56	37	7	30	18
Fraud	1,629	100	55	45	26	5	21	19
Other property	2,127	100	42	58	42	11	30	16
Drug offenses	18,896	100%	38%	62%	45%	9%	36%	17%
Trafficking	8,751	100	42	58	43	9	34	16
Other drug	10,143	100	35	65	47	9	38	18
Public-order offenses	5,109	100%	35%	65%	45%	15%	30%	19%
Weapons	1,430	100	46	54	39	15	24	15
Driving-related	1,706	100	28	72	45	12	34	27
Other public-order	1,976	100	35	65	49	19	30	16

Note: Data on the most serious prior violent and nonviolent felony conviction were available for 95% of all cases.
Detail may not add to total because of rounding.

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By specific arrest charge, the percentage of defendants previously convicted of a violent felony ranged from 21% of murder defendants to 5% of defendants charged with fraud (figure 9).

For 39% of motor vehicle theft defendants, the most serious prior conviction was a nonviolent felony. This was also the case for 36% of defendants charged with burglary, and 34% of those charged with drug trafficking or a driving-related offense.

Defendants charged with a driving-related offense (27%) were much more likely than other defendants to have a conviction record that consisted only of misdemeanors.

Most serious prior conviction of felony defendants in the 75 largest counties, 2002

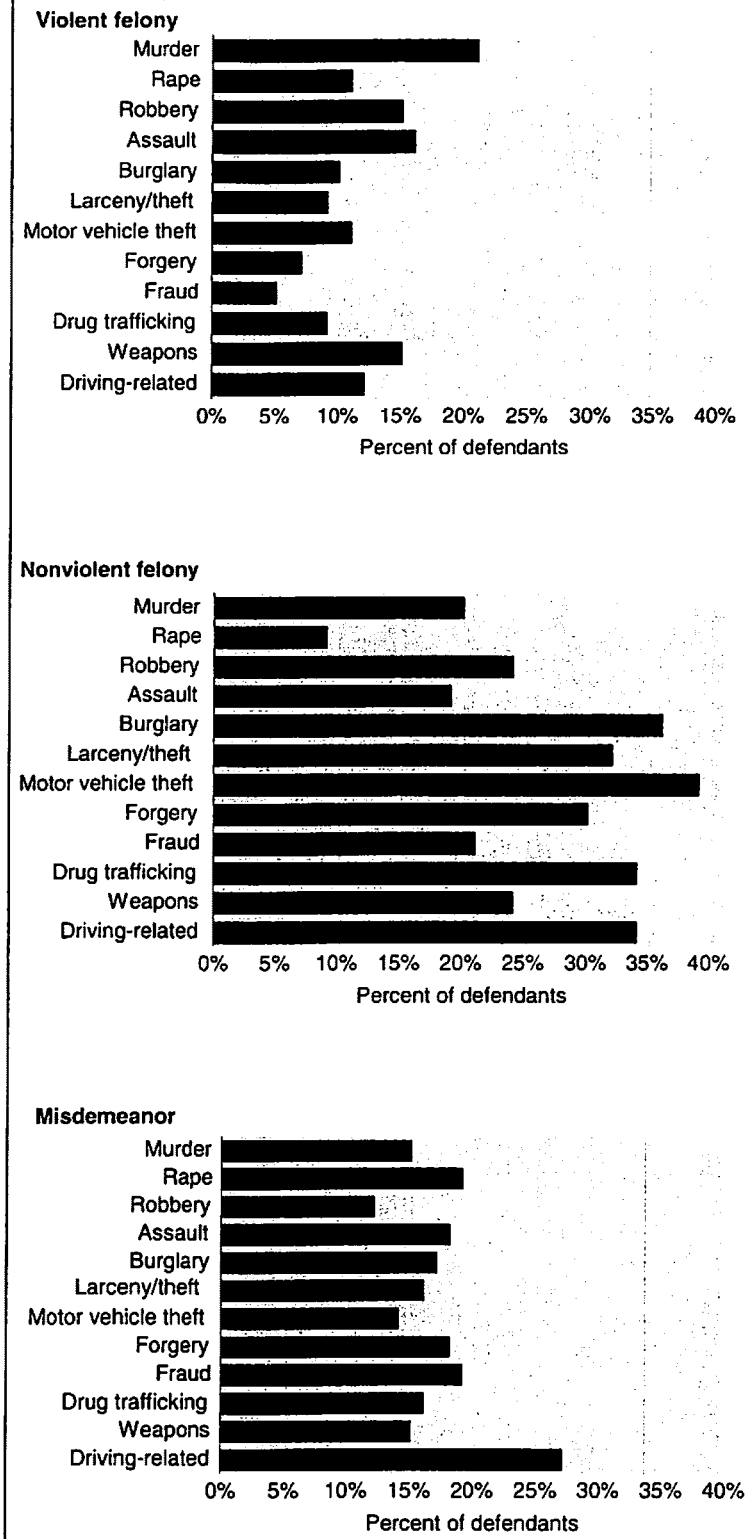


Figure 9

Rates of release and detention

An estimated 62% of felony defendants in the 75 largest counties were released prior to the final disposition of their case (table 13). By general offense category, defendants charged with a violent offense (55%) were less likely to be released than those whose most serious arrest charge was a public-order (68%) or drug (66%) offense.

Within the violent offense category, release rates varied greatly. Just 8% of murder defendants were released compared to 62% of those charged with assault. Fifty-five percent of rape defendants and 42% of robbery defendants were released before the court disposed of their case.

Among defendants charged with a property offense, under half of those charged with burglary (49%) or motor vehicle theft (44%) were released prior to case disposition. Higher proportions of those charged with fraud (80%), forgery (64%), or larceny/theft (64%) were released.

About two-thirds of drug defendants charged with drug trafficking (65%) or with other drug offenses (68%) were released prior to the disposition of their case. Among public-order defendants, at least two-thirds of those charged with a driving-related (70%), weapons (68%), or public-order offense (67%) were released.

Among the 38% of defendants who were detained in jail until case disposition, about 5 in 6 had a bail amount set but did not post the money required to secure release. Detained murder defendants were the exception to this rule; a slight majority of them, 49% of murder defendants overall, were ordered held without bail (figure 10). Overall, 6% of felony defendants in the 75 largest counties were denied bail.

Table 13. Felony defendants released before or detained until case disposition, by most serious arrest charge, 2002

Most serious arrest charge	Number of defendants	Percent of defendants in the 75 largest counties: Total	Released before case disposition	Detained until case disposition
All offenses	54,120	100%	62%	38%
Violent offenses	13,198	100%	55%	45%
Murder	465	100	8	92
Rape	957	100	55	45
Robbery	2,952	100	42	58
Assault	6,862	100	62	38
Other violent	1,964	100	64	36
Property offenses	16,301	100%	61%	39%
Burglary	4,400	100	49	51
Larceny/theft	4,715	100	64	36
Motor vehicle theft	1,816	100	44	56
Forgery	1,626	100	64	36
Fraud	1,632	100	80	20
Other property	2,112	100	74	26
Drug offenses	19,581	100%	66%	34%
Trafficking	9,399	100	65	35
Other drug	10,182	100	68	32
Public-order offenses	5,040	100%	68%	32%
Weapons	1,459	100	68	32
Driving-related	1,707	100	70	30
Other public-order	1,875	100	67	33

Note: Data on detention/release outcome were available for 97% of all cases. Detail may not add to total because of rounding.

Pretrial detention of felony defendants in the 75 largest counties, by most serious arrest charge, 2002

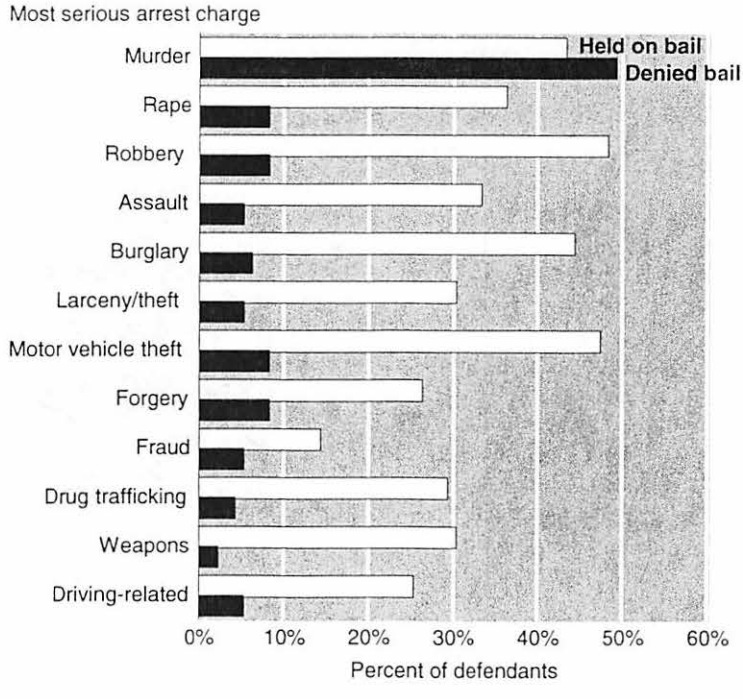


Figure 10

A slight majority of the defendants released prior to case disposition, 34% of defendants overall, were released under financial conditions that required the posting of bail (see *Methodology* for definitions related to pretrial release) (table 14). The most common type of release was surety bond (26% of all defendants and 41% of released defendants), which involves the services of a commercial bail bond agent (figure 11).

Other types of financial release were deposit bond (6% of all defendants and 10% of released defendants), full cash bond (2% and 3%), and property bond (less than 1%). All of these types of bonds are posted directly with the court without the use of a bail bond agent.

Less than half of released defendants, 28% of defendants overall, were released under nonfinancial conditions not requiring the posting of bail (table 14).

Release on personal recognizance (14% of all defendants and 23% of released defendants) and conditional release (11% of all defendants and 18% of released defendants), were the types of nonfinancial release used most often.

A small number of defendants were released prior to case disposition as the result of an emergency release used to relieve jail crowding. Such releases did not involve the use of any of the release types mentioned above.

Pretrial release of felony defendants in the 75 largest counties, 2002

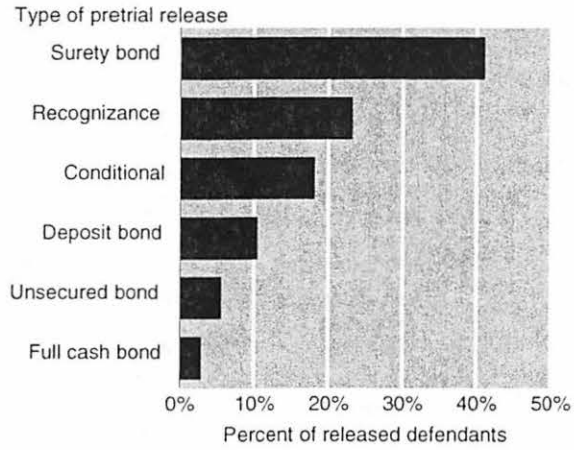


Figure 11

Table 14. Type of pretrial release or detention of felony defendants, by most serious arrest charge, 2002

	Percent of felony defendants in the 75 largest counties											
	Released before case disposition										Detained until case disposition	
	Financial release					Nonfinancial release						
Most serious arrest charge	Total financial	Surety bond	Deposit bond	Full cash bond	Property bond	Total non-financial	Recog-nizance	Con-ditional	Un-secured	Emer-gency release	Held on bail	Denied bail
All offenses	34%	26%	6%	2%	--%	28%	14%	11%	3%	--%	32%	6%
Violent offenses	37%	26%	9%	2%	1%	18%	8%	8%	1%	0%	37%	8%
Murder	3	3	0	0	0	4	2	2	1	0	43	49
Rape	43	33	7	2	2	11	6	4	2	--	36	9
Robbery	27	17	7	2	1	15	7	8	--	0	50	8
Assault	43	28	12	2	1	19	8	10	1	--	33	5
Other violent	40	34	3	3	1	24	12	9	3	0	30	6
Property offenses	30%	24%	4%	1%	1%	30%	16%	11%	3%	--%	34%	6%
Burglary	28	23	4	1	--	20	9	10	2	0	46	6
Larceny/theft	33	26	5	2	1	31	14	12	5	--	31	5
Motor vehicle theft	23	22	1	--	0	21	8	12	1	0	47	8
Forgery	29	25	3	1	--	34	18	14	2	1	27	9
Fraud	33	28	3	2	1	47	31	11	5	--	14	5
Other property	30	20	8	1	--	45	30	10	5	--	22	3
Drug offenses	34%	26%	6%	2%	--%	33%	16%	12%	4%	--%	29%	5%
Trafficking	39	27	9	2	1	26	13	9	4	0	31	4
Other drug	29	25	3	1	--	38	18	15	5	--	28	5
Public-order offenses	41%	31%	7%	2%	--%	28%	15%	11%	2%	--%	28%	4%
Weapons	44	26	15	2	0	24	14	7	3	1	30	2
Driving-related	42	35	4	3	0	28	14	13	2	0	26	4
Other public-order	38	32	4	1	--	29	16	11	2	--	27	6

Note: Data on specific type of pretrial release or detention were available for 90% of all cases. Detail may not add to total because of rounding.
--Less than 0.5%.

Bail amounts

Overall, 66% of felony defendants had a bail amount set by the court, and were required to post all or part of that amount to secure release while their case was pending. The remainder were granted nonfinancial release (28%), ordered held without bail (6%), or were part of an emergency release (less than 0.5%). More than half of those with a bail amount had it set at $10,000 or more, and a fifth had it set at $50,000 or more (table 15).

Among defendants with a bail amount set, those charged with a violent offense (35%) were about twice as likely as other defendants to have it set at $50,000 or more. About 5 in 6 murder defendants (83%) with a bail amount had it set at $50,000 or more, as did more than two-fifths of rape (44%) and robbery (41%) defendants.

Among property defendants with a bail amount set, those charged with burglary (20%) or motor vehicle theft (20%) were the most likely to have bail set at $50,000 or more. Defendants charged with drug trafficking (22%) were nearly twice as likely to have bail set at $50,000 or more as other drug defendants (12%). Among public-order defendants 20% of those charged with a weapons offense and 17% of those charged with a driving-related offense had bail set at $50,000.

Overall, defendants who were detained until case disposition had a median bail amount 5 times that of defendants who secured release ($25,000 versus $5,000) (table 16). The mean bail amount for detained defendants ($83,300) was more than 5 times that of defendants who secured release ($15,200).

Detained murder defendants had the highest median ($250,000) and mean ($620,900) bail amounts. Overall, the median bail amount for murder defendants was $250,000 and the mean was $574,900.

Table 15. Bail amount set for felony defendants, by most serious arrest charge, 2002

Most serious arrest charge	Number of defendants	Percent of felony defendants in the 75 largest counties with a bail amount of — Under $5,000	$5,000-$9,999	$10,000-$24,999	$25,000-$49,999	$50,000 or more
All offenses	31,894	25%	18%	22%	13%	21%
Violent offenses	8,888	19%	15%	17%	13%	35%
Murder	198	10	2	6	0	83
Rape	704	9	13	18	16	44
Robbery	1,999	14	8	17	19	41
Assault	4,728	23	19	17	12	30
Other violent	1,258	22	15	20	12	32
Property offenses	9,248	29%	19%	25%	13%	15%
Burglary	2,910	17	18	26	19	20
Larceny/theft	2,683	38	16	25	9	12
Motor vehicle theft	1,173	15	21	28	15	20
Forgery	834	37	25	24	6	8
Fraud	674	40	21	20	9	10
Other property	977	36	17	22	11	14
Drug offenses	10,668	26%	19%	24%	13%	17%
Trafficking	5,910	24	17	22	16	22
Other drug	4,758	29	23	27	9	12
Public-order offenses	3,090	27%	22%	22%	14%	16%
Weapons	992	18	22	20	20	20
Driving-related	1,023	27	20	26	10	17
Other public-order	1,074	34	22	21	12	11

Note: Data on bail amount were available for 95% of all defendants for whom a bail amount was set. Table excludes defendants given nonfinancial release.

Table 16. Median and mean bail amounts set for felony defendants, by pretrial release/detention outcome and most serious arrest charge, 2002

Most serious arrest charge	Felony defendants in the 75 largest counties — Median bail amount Total	Released	Detained	Mean bail amount Total	Released	Detained
All offenses	$10,000	$5,000	$25,000	$48,400	$15,200	$83,300
Violent offenses	$20,000	$7,500	$50,000	$90,800	$21,300	$156,900
Murder	250,000	35,000	250,000	574,900	50,300	620,900
Rape	25,000	20,000	75,000	145,300	33,300	268,700
Robbery	30,000	10,000	50,000	72,500	21,500	97,500
Assault	10,500	5,000	50,000	73,400	21,000	136,700
Other violent	15,000	5,000	50,000	78,700	15,000	158,600
Property offenses	$10,000	$5,000	$15,000	$30,000	$9,900	$47,100
Burglary	15,000	6,000	25,000	33,600	11,500	47,000
Larceny/theft	5,000	3,500	15,000	28,200	8,000	48,100
Motor vehicle theft	12,000	5,000	20,000	34,700	8,400	46,400
Forgery	5,000	5,000	8,000	21,700	8,100	36,600
Fraud	5,000	4,800	15,000	27,600	13,900	59,000
Other property	6,000	5,000	15,000	27,800	10,400	50,000
Drug offenses	$10,000	$5,000	$20,000	$34,900	$15,900	$59,200
Trafficking	15,000	7,500	25,000	42,900	16,300	76,800
Other drug	7,500	5,000	15,000	25,000	15,400	37,200
Public-order offenses	$10,000	$5,000	$25,000	$27,400	$10,600	$51,100
Weapons	10,000	5,000	30,000	34,400	13,400	63,700
Driving-related	10,000	5,000	25,000	24,900	9,600	48,000
Other public-order	5,000	5,000	15,000	23,400	9,000	42,500

Note: Data on bail amount were available for 95% of all defendants for whom a bail amount was set. Bail amounts have been rounded to the nearest hundred dollars. Table excludes defendants given nonfinancial release.

Overall, about half (51%) of defendants who were required to post bail to secure release did so. Among defendants with a bail set at under $5,000, 74% posted the amount needed for release, as did 67% of those with a bail amount of $5,000 to $9,999 (figure 12). In contrast, just 16% of the defendants with bail set at $50,000 or more, and 38% of those with a bail amount of $25,000 to $49,999 met the financial conditions required for release.

Among defendants given financial release, the median and mean bail amounts were slightly higher for those released on surety bond ($7,000, $17,500) than for those released on deposit bond ($5,000, $8,500). Defendants released on full cash bond posted a median of $1,500 and a mean of $5,700 to secure release.

Type of release bond	Bail amount Median	Mean
Surety	$7,000	$17,500
Deposit	5,000	8,500
Full cash	1,500	5,700
Property	10,000	27,500
Unsecured	$10,000	$11,100

Unlike those released on full cash bond, defendants released on deposit bond generally posted 10% of the full bail amount with the court to secure release. However, they remained liable to the court for the full bail amount if they violated the terms of release.

Those released on surety bond paid a similar fee to a bail bond agent, who assumed liability to the court for the full bail amount if the defendant violated the terms of release.

Defendants released on an unsecured bond had a median bail amount of $10,000 and a mean bail amount of $11,100. These defendants did not have to post any of this amount, but like those on financial release, they were liable for the full bail amount if they violated the terms of release.

Probability of release for felony defendants in the 75 largest counties, by bail amount set, 2002

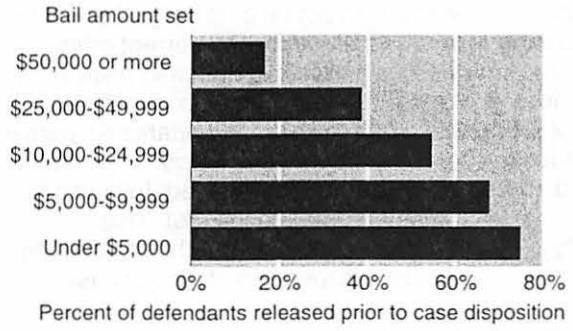


Figure 12

Time from arrest to release

Among defendants released prior to case disposition, 48% were released within 1 day of arrest, and 73% within 1 week (table 17). Nearly all releases during the 1-year study occurred within a month of arrest (90%).

By general offense category, less than half of the defendants charged with a drug (44%) or violent (43%) offense were released within 1 day of arrest. A majority of those charged with a public-order (56%) or property (55%) offense were released this quickly.

Just 14% of released murder defendants were released within 1 day of arrest, compared to 66% of those released after being charged with fraud, 64% of those charged with a driving-related offense and 61% of those charged with larceny/theft. After 1 month, just 31% of murder defendant releases had occurred, compared to nearly all of the releases of other defendants.

Table 17. Time from arrest to release for felony defendants released before case disposition, by most serious arrest charge, 2002

Most serious arrest charge	Released felony defendants in the 75 largest counties: Number of defendants	Percent who were released within — 1 day	1 week	1 month
All offenses	32,029	48%	73%	90%
Violent offenses	6,953	43%	69%	87%
Murder	35	14	14	31
Rape	502	43	67	85
Robbery	1,200	35	62	82
Assault	4,020	42	71	89
Other violent	1,196	54	72	89
Property offenses	9,360	55%	76%	92%
Burglary	1,987	44	70	88
Larceny/theft	2,890	61	83	94
Motor vehicle theft	771	54	73	89
Forgery	996	53	74	94
Fraud	1,233	66	80	93
Other property	1,485	52	73	92
Drug offenses	12,431	44%	72%	90%
Trafficking	5,818	42	70	88
Other drug	6,613	46	74	92
Public-order offenses	3,285	56%	79%	94%
Weapons	953	48	77	92
Driving-related	1,146	64	84	97
Other public-order	1,188	54	76	92

Note: Data on time from arrest to release were available for 95% of all cases. Release data were collected for 1 year.

When differences among offense types are held constant, defendants released under nonfinancial terms generally took longer to secure their release than those who were released under financial conditions. Among defendants who were released under financial conditions, the amount of time from arrest to pretrial release tended to increase as the bail amount did.

Criminal history and probability of release

Court decisions about bail and pretrial release are primarily based on the judgment of whether a defendant will appear in court as scheduled and whether there is potential danger to the community from crimes that a defendant may commit if released. Many States have established specific criteria to be considered by the courts when setting release conditions.

The SCPS data illustrate how release rates vary with some of these factors. For example, 69% of the defendants without an active criminal justice status when arrested for the current offense were released prior to case disposition, compared to 43% of those with such a status (table 18). Defendants on parole (31%) at the time of arrest were the least likely to be released, followed by those on probation (44%). This compared with 54% of those released pending disposition of a prior case.

Seventy-seven percent of the defendants with no prior arrests were released, compared to 57% of those who had been previously arrested. Among defendants with an arrest record, those who had never missed a court appearance (65%) had a higher probability of being released than those who had failed to appear at least once during a previous case (49%).

About three-fourths of defendants without a prior conviction (76%) were released prior to disposition of the current case, compared to about half of those with a conviction record (52%). Among defendants with a conviction record, release rates ranged from 63% for those with a single prior conviction to 44% for those with five or more.

Less than half of the defendants with one or more prior felony convictions (48%) were released prior to disposition of the current case, compared to about two-thirds of those whose prior convictions involved only misdemeanors (65%). Those with a prior conviction for a violent felony (44%) had a slightly lower release rate than those whose most serious prior conviction was for a nonviolent felony (48%).

Table 18. Percent of felony defendants who were released prior to case disposition, by criminal history, 2002

	Felony defendants in the 75 largest counties						
		Released prior to case disposition			Detained until case disposition		
Criminal history	Number of defendants	Total released	Financial release	Non-financial release	Total	Held on bail	Denied bail
Criminal justice status							
Any type	13,711	43%	25%	18%	57%	46%	11%
On parole	2,652	31	19	12	69	57	12
On probation	7,271	44	24	20	56	46	10
On pretrial release*	3,197	54	35	19	46	35	12
None	36,084	69	37	32	31	28	3
Court appearance history							
With prior arrest(s)	37,736	57%	32%	25%	43%	37%	7%
With prior failure to appear	15,723	49	24	25	51	44	8
Made all prior appearances	17,031	65	40	25	35	29	6
No prior arrests	11,454	77	44	33	23	19	4
Number of prior convictions							
With prior conviction(s)	31,097	52%	29%	23%	48%	41%	7%
5 or more	12,536	44	26	18	56	48	8
2-4	11,852	56	31	24	44	38	7
1	6,563	63	33	30	37	31	6
None	21,376	76	41	35	24	20	4
Most serious prior conviction							
Any type of felony	22,452	48%	28%	20%	52%	45%	8%
Violent felony	5,586	44	28	16	56	47	8
Nonviolent felony	15,616	48	28	20	52	44	8
Misdemeanor	8,645	65	34	31	35	30	5

Note: Criminal justice status statistics were not available for several counties in the SCPS sample. Detail may not add to total because of rounding.

*Includes all defendants who were released prior to case disposition and did not have an open bench warrant for failure-to-appear.

Conduct of released defendants

Among defendants who were released prior to case disposition, 33% committed some type of misconduct while in a release status (table 19). This may have been in the form of a failure to appear in court, an arrest for a new offense, or some other violation of release conditions that resulted in the revocation of that release by the court.

By original offense category the proportion of defendants charged with pretrial misconduct was highest for drug defendants (40%) and lowest for those released after being charged with a violent offense (22%). Thirty-four percent of defendants charged with a property and 29% of defendants charged with a public-order offense committed some type of pretrial misconduct.

By specific arrest offense, rates of pretrial misconduct were lower among defendants released after being charged with rape (16%), assault (21%), murder (23%), or fraud (23%) than among those released after being charged with motor vehicle theft (38%), drug trafficking (38%), or burglary (39%).

Failure to appear in court

Seventy-eight percent of the defendants who were released prior to case disposition made all scheduled court appearances. Bench warrants for failing to appear in court were issued for the remaining 22% (table 20).

Released drug defendants (29%) had the highest failure-to-appear rate followed by property (21%) and public-order (19%) defendants. Twelve percent of defendants charged with a violent offense failed to appear in court as scheduled, ranging from 15% of robbery defendants to 0% of murder defendants and 9% of rape defendants.

Over a fourth of the defendants who failed to appear in court, 6% of all defendants, were still fugitives at the end of the 1-year study period. The remainder were returned to the court (either voluntarily or not) before the end of the study.

Defendants released after being charged with a drug offense (8%) were more likely to be a fugitive after 1 year than defendants released after being charged with a property (5%), public-order (5%) or violent (4%) offense. No released murder defendants were in a fugitive status at the end of the 1-year study period.

Table 19. Released felony defendants committing misconduct, by most serious arrest charge, 2002

Most serious arrest charge	Released felony defendants in the 75 largest counties: Number	Percent with misconduct
All offenses	33,593	33%
Violent offenses	7,282	22%
Murder	35	23
Rape	528	16
Robbery	1,244	28
Assault	4,222	21
Other violent	1,254	24
Property offenses	9,879	34%
Burglary	2,138	39
Larceny/theft	3,023	30
Motor vehicle theft	802	38
Forgery	1,033	33
Fraud	1,313	23
Other property	1,572	41
Drug offenses	12,983	40%
Trafficking	6,108	38
Other drug	6,875	41
Public-order offenses	3,449	29%
Weapons	998	27
Driving-related	1,192	30
Other public-order	1,259	30

Note: Types of misconduct included failure to appear in court, rearrest for a new offense, or a technical violation of release conditions that resulted in the revocation of pretrial release. Data were collected for up to 1 year.

Table 20. Released felony defendants who failed to make a scheduled court appearance, by most serious arrest charge, 2002

Most serious arrest charge	Number of defendants	Percent of released felony defendants in the 75 largest counties who — Made all court appearances	Failed to appear in court: Total	Returned to court	Remained a fugitive
All offenses	33,341	78%	22%	16%	6%
Violent offenses	7,225	88%	12%	8%	4%
Murder	35	100	0	0	0
Rape	527	91	9	7	1
Robbery	1,231	85	15	11	4
Assault	4,195	89	11	8	4
Other violent	1,237	89	11	7	4
Property offenses	9,814	79%	21%	16%	5%
Burglary	2,121	78	22	16	5
Larceny/theft	3,002	81	19	14	5
Motor vehicle theft	798	80	20	18	2
Forgery	1,028	78	22	16	6
Fraud	1,296	84	16	11	5
Other property	1,569	71	29	22	7
Drug offenses	12,869	71%	29%	21%	8%
Trafficking	6,052	74	26	19	7
Other drug	6,817	69	31	22	9
Public-order offenses	3,433	81%	19%	13%	5%
Weapons	994	82	18	12	6
Driving-related	1,192	81	19	13	5
Other public-order	1,246	81	19	14	5

Note: Data on the court appearance record for the current case were available for 99% of cases involving a defendant released prior to case disposition. All defendants who failed to appear in court and were not returned to the court during the 1-year study period are counted as fugitives. Some of these defendants may have been returned to the court at a later date. Detail may not add to total because of rounding.

Rearrest for a new offense

Overall, 18% of released defendants were rearrested for a new offense allegedly committed while they awaited disposition of their original case (table 21). About two-thirds of these defendants, 12% of all released defendants, were charged with a new felony. By specific original arrest charge, released burglary (24%), murder (23%), motor vehicle theft (23%), and drug (21%) defendants had higher pretrial rearrest rates than defendants originally charged with rape (8%) or fraud (10%).

Twenty-three percent of defendants released after originally being charged with murder were rearrested for a new felony while in a release status (figure 13). This was the case for 18% of defendants released after being charged with burglary or motor vehicle theft.

Table 21. Released felony defendants who were rearrested prior to case disposition, by most serious arrest charge, 2002

Most serious arrest charge	Number of defendants	Percent of released felony defendants in the 75 largest counties				
		Total	Not rearrested	Rearrested		
				Total	Felony	Misdemeanor
All offenses	32,708	100%	82%	18%	12%	6%
Violent offenses	7,080	100%	87%	13%	8%	5%
Murder	35	100	77	23	23	0
Rape	523	100	92	8	7	2
Robbery	1,231	100	84	16	11	5
Assault	4,080	100	87	13	8	5
Other violent	1,210	100	86	14	8	5
Property offenses	9,592	100%	81%	19%	14%	5%
Burglary	2,101	100	76	24	18	6
Larceny/theft	2,927	100	84	16	11	5
Motor vehicle theft	793	100	77	23	18	4
Forgery	989	100	84	16	12	4
Fraud	1,257	100	90	10	7	2
Other property	1,527	100	76	24	16	8
Drug offenses	12,698	100%	79%	21%	15%	7%
Trafficking	5,991	100	79	21	15	6
Other drug	6,707	100	79	21	14	7
Public-order offenses	3,338	100%	84%	16%	10%	6%
Weapons	967	100	84	16	11	5
Driving-related	1,151	100	85	15	9	6
Other public-order	1,220	100	84	16	9	7

Note: Rearrest data were available for 97% of released defendants. Rearrest data were collected for 1 year. Rearrests occurring after the end of this 1-year study period are not included in the table. Information on rearrests occurring in jurisdictions other than the one granting the pretrial release was not always available. Detail may not add to total because of rounding.

Misconduct prior to case disposition by released felony defendants in the 75 largest counties, 2002

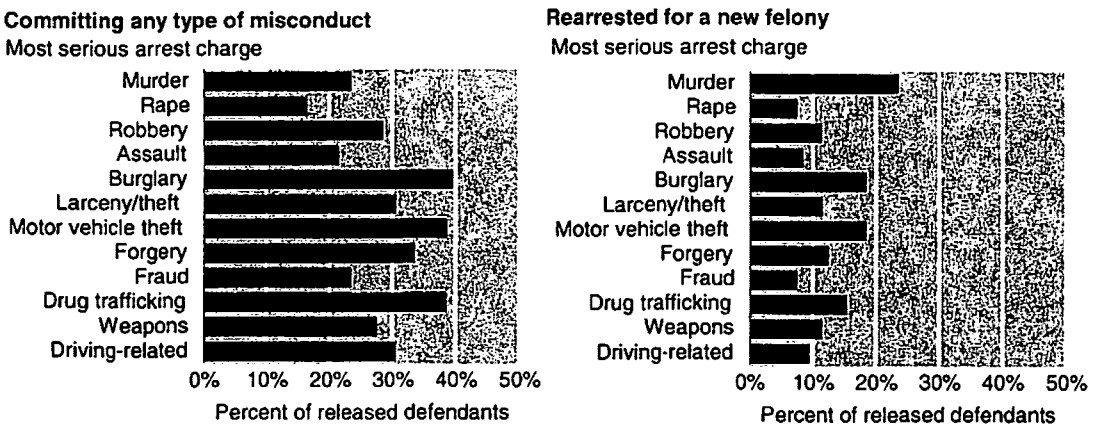


Figure 13

Time from arrest to adjudication

For 48% of felony defendants in the 75 largest counties, adjudication of their case occurred within 3 months of arrest, and 69% of cases were adjudicated within 6 months (table 22). By the end of the 1-year study period, 87% of all cases had been adjudicated.

While the overall median time from arrest to adjudication was 98 days, it was nearly twice this long for rape defendants (186 days), and nearly 4 times this long for murder defendants (361 days). Defendants charged with motor vehicle theft had the shortest median time from arrest to adjudication (50 days).

At the end of the 1-year study period, 50% of murder defendants were awaiting adjudication of their case, compared to 27% of rape defendants, and no more than 21% of the defendants in any other offense category.

Excluding those charged with murder (for which the median for released defendants could not be calculated), the median time from arrest to adjudication was shorter for detained defendants than for those released (figure 14).

For most charged offenses, the median time from arrest to adjudication was nearly 3 months longer for defendants released after being charged than for those detained. The difference was about 3½ months for drug trafficking defendants, and 1½ months for rape defendants. Overall, the median time from arrest to adjudication was 136 days for released defendants compared to 51 days for those detained.

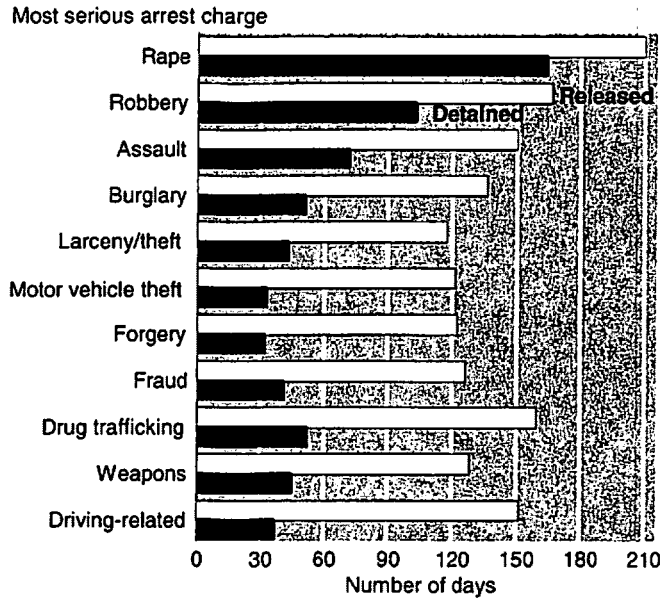
Excluding murder, the longest median time from arrest to adjudication among released defendants was for those charged with rape (209 days), followed by those charged with robbery (165 days), drug trafficking (158 days), or a driving-related offense (150 days). In contrast, detained defendants charged with motor vehicle theft (32 days) or forgery (31 days) had their cases adjudicated in about a month.

Table 22. Time from arrest to adjudication for felony defendants, by most serious arrest charge, 2002

Most serious arrest charge	Felony defendants in the 75 largest counties: Number of defendants	Median time	Cumulative percent of cases adjudicated within — 1 week	1 month	3 months	6 months	1 year
All offenses	55,213	98 days	6%	24%	48%	69%	87%
Violent offenses	13,469	131 days	3%	16%	37%	60%	82%
Murder	469	361	0	2	4	20	50
Rape	981	186	2	11	24	49	73
Robbery	2,972	125	4	18	38	63	86
Assault	7,038	117	3	19	41	65	85
Other violent	2,013	135	3	12	36	57	79
Property offenses	16,699	82 days	4%	25%	52%	74%	89%
Burglary	4,470	85	4	26	52	75	91
Larceny/theft	4,837	77	4	23	55	75	90
Motor vehicle theft	1,842	50	6	39	63	82	94
Forgery	1,685	70	5	27	56	76	89
Fraud	1,694	100	5	20	46	68	87
Other property	2,174	121	3	19	41	64	83
Drug offenses	19,787	86 days	8%	28%	51%	71%	87%
Trafficking	9,512	114	7	22	44	66	85
Other drug	10,275	62	10	34	58	75	90
Public-order offenses	5,258	98 days	5%	24%	48%	70%	87%
Weapons	1,470	105	2	24	47	71	86
Driving-related	1,750	107	4	21	45	68	88
Other public-order	2,038	89	8	27	51	71	88

Note: Data on time from arrest to adjudication were available for 98% of all cases.
The median time from arrest to adjudication includes cases still pending at the end of the study. Knowing the exact times for these cases would not change the medians reported.
Murder cases were tracked for 2 years. All other cases were tracked for 1 year.

Median time from arrest to adjudication for felony defendants in the 75 largest counties, by pretrial detention-release outcome, 2002



Note: Murder defendants are excluded because their median time from arrest to adjudication exceeded the 1-year study period, and could not be calculated.

Figure 14

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Table 23. Adjudication outcome for felony defendants, by most serious arrest charge, 2002

Most serious arrest charge	Number of defendants	Percent of felony defendants in the 75 largest counties										
		Convicted							Not convicted			
		Total convicted	Felony			Misdemeanor			Total	Dismissed	Acquitted	Other outcome*
			Total	Plea	Trial	Total	Plea	Trial				
All offenses	49,349	68%	57%	54%	3%	11%	11%	--%	25%	24%	1%	7%
Violent offenses	11,535	60%	48%	43%	5%	11%	11%	1%	35%	33%	2%	5%
Murder	385	81	80	41	39	1	0	1	17	13	4	2
Rape	760	67	59	53	6	8	8	0	26	24	2	6
Robbery	2,628	66	58	53	6	8	8	--	32	31	1	2
Assault	6,097	55	41	38	3	14	13	1	38	36	2	6
Other violent	1,664	57	47	42	5	10	10	--	35	34	1	7
Property offenses	15,328	72%	59%	56%	3%	13%	12%	--%	22%	22%	--%	6%
Burglary	4,165	75	66	63	3	9	9	--	21	20	1	4
Larceny/theft	4,460	69	54	50	4	15	14	1	24	24	--	7
Motor vehicle theft	1,767	74	68	65	3	5	5	0	20	19	1	7
Forgery	1,558	76	57	55	3	19	19	0	18	17	1	6
Fraud	1,516	70	59	56	3	11	11	1	18	18	0	11
Other property	1,862	67	50	49	1	17	17	--	29	28	1	4
Drug offenses	17,749	69%	60%	57%	3%	8%	8%	--%	21%	20%	1%	11%
Trafficking	8,239	76	64	60	4	12	11	--	20	19	1	5
Other drug	9,510	63	57	55	2	6	6	--	22	21	--	16
Public-order offenses	4,737	73%	59%	56%	3%	14%	14%	--%	22%	21%	1%	5%
Weapons	1,310	67	56	53	4	11	10	1	28	25	3	5
Driving-related	1,581	87	73	71	2	14	13	--	10	10	0	3
Other public-order	1,847	65	49	46	3	17	17	0	28	28	1	6

Note: Twelve percent of all cases were still pending adjudication at the end of the 1-year study period, and are excluded from the table. Data on adjudication outcome were available for 98% of those cases that had been adjudicated. Detail may not add to total because of rounding.
--Less than 0.5%.
*Includes diversion and deferred adjudication. Murder defendants were followed for an additional year.

Adjudication outcome

Sixty-eight percent of the defendants whose cases were adjudicated within 1 year of arrest were convicted (table 23). A majority of these convictions were for a felony, with 57% of defendants eventually convicted of a felony.

Defendants originally charged with a violent offense (60%) were less likely to be convicted of a felony or a misdemeanor, than those originally charged with a drug (69%), property (72%), or public-order (73%) offense. By specific type of arrest offense, the proportion of defendants convicted ranged from 87% of those charged with a driving-related felony to 55% of those charged with assault.

More than three-fifths of the defendants whose most serious arrest charge was murder (80%), a driving-related offense (73%), motor vehicle theft (68%), burglary (66%), or drug trafficking (64%) were convicted of a felony. A majority of defendants charged with rape (59%), fraud (59%), robbery (58%), forgery (57%), weapons (56%), and larceny/theft (54%) also received a felony conviction. The lowest felony conviction rate was for assault (41%) defendants.

In most cases where the defendant was not convicted, it was because the charges against the defendant were dismissed. An estimated 24% of all cases ended in this way. Defendants charged with assault (36%) were about 3 times as likely to have their case dismissed as those charged with a driving-related offense (10%) or murder (13%).

About 7% of cases had other outcomes such as diversion or deferred adjudication.

Eighty-one percent of the defendants who were detained until case disposition were eventually convicted of some offense, compared to 60% of those released pending disposition (table 24). Nearly three-fourths of detained defendants (72%) were convicted of a felony, compared to about half of released defendants (48%).

Table 24. Adjudication outcome for felony defendants, by detention-release outcome and most serious arrest charge, 2002

Most serious arrest charge	Number of defendants	Convicted	
		Total	Felony
Released defendants			
All offenses	28,134	60%	48%
Violent offenses	5,837	46%	32%
Property offenses	8,443	64	49
Drug offenses	10,936	61	54
Public-order offenses	2,918	69	55
Detained defendants			
All offenses	19,474	81%	72%
Violent offenses	5,298	76%	68%
Property offenses	6,280	83	75
Drug offenses	6,374	82	73
Public-order offenses	1,522	82	72

To some extent adjudication outcome was related to the number and type of the original arrest charges filed. Seventy-four percent of defendants who originally were charged with more than one felony eventually were convicted of some offense, compared to 64% of the defendants who had no additional felony charges (table 25).

Sixty-five percent of defendants whose original arrest charges included more than one felony eventually were convicted of a felony compared to 52% of those with no additional felony charges. Among the defendants who had no additional felony charges, those who were charged with one or more misdemeanors (44%), were less likely to be convicted of a felony than those who had no additional charges of any type (55%).

Defendants with only one felony charge, but one or more additional misdemeanor charges, were more likely than other defendants to be eventually convicted of a misdemeanor (20%). This almost always was the result of pleading guilty to a misdemeanor charge instead of the original felony charge.

Overall, nearly two-thirds of defendants entered a guilty plea at some point, with 54% pleading guilty to a felony, and 11% to a misdemeanor.

Defendants charged with a driving-related offense had the highest overall plea rate (83%) and the highest felony plea rate (71%) (figure 15). A majority of the defendants in each offense category except murder (41%) and assault (50%) eventually pleaded guilty to either a felony or a misdemeanor.

A majority of the defendants charged with motor vehicle theft (65%), burglary (63%), drug trafficking (60%), fraud (56%), forgery (54%), rape (53%), a weapons offense (53%), or robbery (52%) pleaded guilty to a felony. About two-fifths of murder (41%) and assault (38%) defendants entered a felony guilty plea.

Plea rate for felony defendants in the 75 largest counties, by most serious arrest charge, 2002

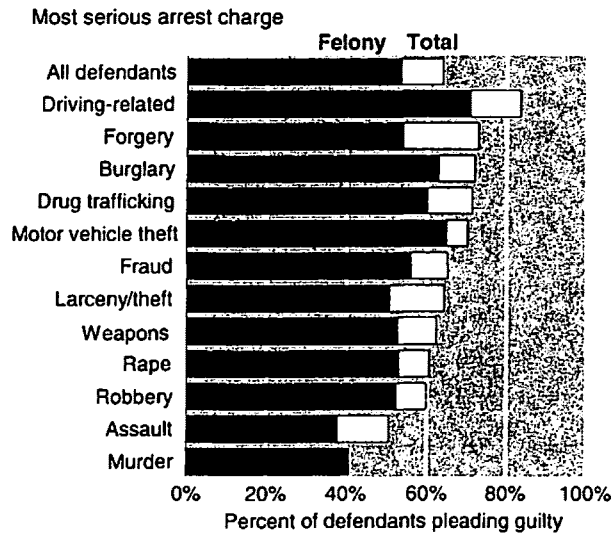


Figure 15

Table 25. Adjudication outcome for felony defendants, by number and type of arrest charges, 2002

Additional charges filed	Number of defendants	Percent of felony defendants in the 75 largest counties: Convicted: Total convicted	Convicted: Felony: Total	Convicted: Felony: Plea	Convicted: Felony: Trial	Convicted: Misdemeanor: Total	Convicted: Misdemeanor: Plea	Convicted: Misdemeanor: Trial	Not convicted: Total	Not convicted: Dismissed	Not convicted: Acquitted	Other outcome*
Additional felony	19,637	74%	65%	61%	4%	9%	8%	--%	22%	21%	1%	4%
No additional felony	29,710	64	52	49	3	13	12	--	27	26	1	9
Misdemeanor(s) only	8,794	64	44	42	2	20	19	1	27	27	1	9
No additional charges	20,917	64	55	52	3	9	9	--	26	26	1	10

Note: Twelve percent of all cases were still pending adjudication at the end of the 1-year study period.
Data on adjudication outcome were available for 98% of those cases that had been adjudicated.
--Less than 0.5%.
*Includes diversion and deferred adjudication.

An estimated 5% of the cases went to trial. Sixty-one percent of these trials were bench trials, decided by a judge, and 39% were jury trials. An estimated 85% of all trials ended with a guilty verdict, and 15% with an acquittal. Bench trials (88%) were somewhat more likely to result in a conviction than jury trials (80%). Seventy-nine percent of bench trials and 71% of jury trials resulted in a felony conviction.

Type of trial	Percent of trials resulting in a conviction		
	Total	Felony	Misdemeanor
Total	85%	76%	9%
Bench	88	79	9
Jury	80	71	9

Forty-four percent of defendants facing murder charges went to trial, compared to no more than 9% of defendants charged with other offenses (figure 16).

Regardless of adjudication method, a majority of convicted defendants were convicted of the same felony offense as the original arrest charge. Among defendants arrested for murder and later convicted, 74% were convicted of murder (table 26). The corresponding percentages for other violent offenses were as follows: robbery (65%), assault (59%), and rape (54%).

Trial rates for felony defendants in the 75 largest counties, by most serious arrest charge, 2002

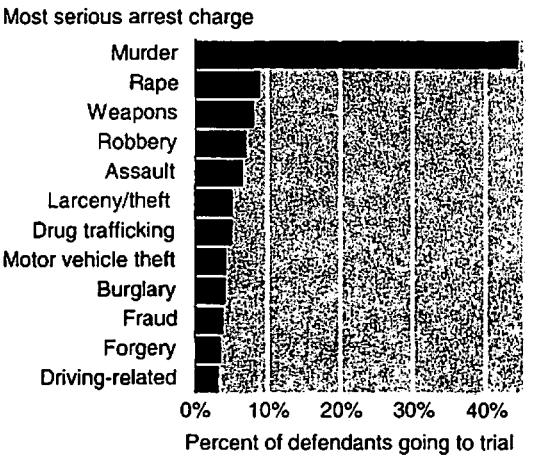


Figure 16

Table 26. Conviction offense of defendants arrested for a violent offense and subsequently convicted, by most serious arrest charge, 2002

Most serious arrest charge	Number of defendants	Percent of felony defendants in the 75 largest counties convicted of —									
				Violent felony						Non-violent felony	Misdemeanor
		Total	Total felony	Total violent	Murder	Rape	Robbery	Assault	Other		
Murder	314	100%	99%	91%	**74%**	0%	3%	5%	9%	8%	1%
Rape	513	100	88	85	0	**54**	0	4	27	2	13
Robbery	1,733	100	88	71	0	0	**65**	5	1	17	12
Assault	3,361	100	74	64	0	0	1	**59**	5	10	26

Note: Data on conviction offense were available for 100% of cases involving defendants who had been convicted.
Detail may not add to total because of rounding.
--Less than 0.5%.

Table 27. Conviction offense of defendants arrested for a nonviolent offense and subsequently convicted, by most serious arrest charge, 2002

Most serious arrest charge	Number of defendants	Percent of felony defendants in the 75 largest counties convicted of —												
				Nonviolent felony									Violent felony	Misdemeanor
		Total felony	Total non-violent	Burglary	Larceny/theft	Motor vehicle theft	Forgery	Fraud	Drug trafficking	Weapons	Driving-related	Other		
Burglary	3,127	87%	87%	**69%**	8%	3%	2%	1%	--%	0%	0%	4%	1%	13%
Larceny/theft	3,083	79	79	1	**66**	2	3	2	--	0	--	3	0	21
Motor vehicle theft	1,302	93	92	1	1	**82**	1	1	1	--	1	4	1	7
Forgery	1,177	75	75	1	2	0	**67**	2	0	--	--	3	0	25
Fraud	1,063	84	84	--	4	--	7	**67**	0	0	--	5	0	16
Drug trafficking	6,223	85	84	--	--	--	--	--	**73**	1	--	10	--	15
Weapons	874	84	83	1	--	--	0	0	0	**78**	2	1	1	16
Driving-related	1,369	84	81	0	0	--	1	--	--	0	**80**	0	3	16

Note: Data on conviction offense were available for 100% of cases involving defendants who had been convicted.
Detail may not add to total because of rounding.
--Less than 0.5%.

Among defendants originally charged with a property offense and later convicted, the percentages whose conviction offense corresponded with their most serious arrest charge were as follows: motor vehicle theft (82%), burglary (69%), forgery (67%), fraud (67%), and larceny/theft (66%) (table 27).

The conviction offense corresponded with the most serious arrest charge for 80% of defendants convicted after being charged with a driving-related offense, 78% of weapons defendants, and 73% of drug trafficking defendants.

For most offenses a smaller percentage of defendants were in each felony conviction category than were in the original distribution by arrest charge (tables 1 and 28). The biggest drop was in the violent felony category, which accounted for about 24% of all defendants by arrest charge, but 15% by conviction charge.

Much of this change can be accounted for by the fact that about 13% of all defendants were originally facing felony assault charges, but just 7% of all convictions were for such an offense. Overall, 16% of convicted defendants were convicted at the misdemeanor level.

A majority of the defendants whose most serious arrest charge was for a driving-related offense (69%), motor vehicle theft (60%), murder (60%), drug trafficking (55%), a weapons offense (52%), burglary (52%), or forgery (51%) were eventually convicted of that same offense (figure 17). This was true for slightly less than half of the defendants originally charged with fraud (47%), larceny/theft (46%), or robbery (43%). Thirty-seven percent of defendants charged with rape and 33% of defendants charged with felony assault were eventually convicted of the same offense.

Table 28. Felony defendants, by conviction offense, 2002

Most serious conviction offense	Felony defendants in the 75 largest counties	
	Number	Percent
All offenses	33,544	100.0%
All felonies	28,127	83.8%
Violent offenses	4,968	14.8%
Murder	231	0.7
Rape	285	0.8
Robbery	1,202	3.6
Assault	2,217	6.6
Other violent	1,033	3.1
Property offenses	9,522	28.4%
Burglary	2,382	7.1
Larceny/theft	2,571	7.7
Motor vehicle theft	1,350	4.0
Forgery	1,120	3.3
Fraud	884	2.6
Other property	1,215	3.6
Drug offenses	10,327	30.8%
Trafficking	4,662	13.9
Other drug	5,665	16.9
Public-order offenses	3,273	9.8%
Weapons	912	2.7
Driving-related	1,281	3.8
Other public-order	1,081	3.2
Other felonies	36	0.1%
Misdemeanors	5,418	16.2%

Note: Data on conviction offense were available for 100% of cases involving defendants who had been convicted.

Conviction probabilities for felony defendants in the 75 largest counties, by most serious arrest charge, 2002

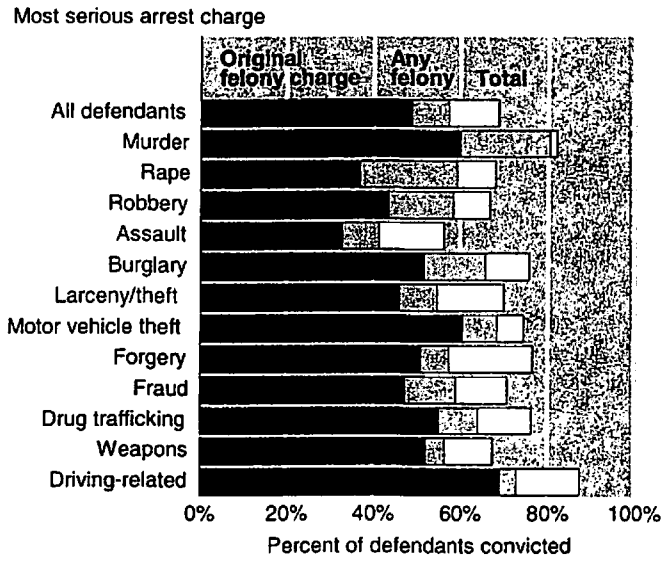


Figure 17

Case processing statistics

Among the approximately 47,000 cases with a known adjudication date and outcome that occurred within 1 year of arrest, about 30,000 were disposed by a guilty plea (figure 18). About a fourth of pleas occurred within 1 month of arrest and more than half within 3 months of arrest.

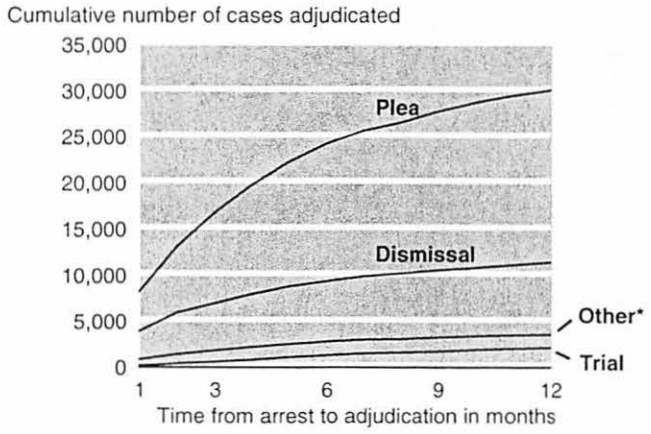
The next most common type of adjudication, dismissal of the charges against the defendant, occurred in about 11,400 cases. About one-third (34%) of all dismissals occurred within the first month after arrest and 61% within 3 months.

Trials occurred in about 2,100 cases. About 8% of trials were completed within a month of arrest and 25% within 3 months of arrest.

Guilty pleas accounted for 95% of the estimated 31,772 convictions obtained within 1 year of arrest (figure 19). This included about 25,400 felony pleas and about 4,600 misdemeanor pleas. Twenty-seven percent of the felony pleas occurred within 1 month of arrest, and 55% were obtained within 3 months of arrest. Twenty-eight percent of the misdemeanor pleas were obtained within 1 month of arrest, and 58% within 3 months.

Of the approximately 1,700 trial convictions obtained within 1 year, nearly all were for a felony, with an estimated 181 trials resulting in a misdemeanor conviction. About a third of all trial convictions occurred within 3 months of arrest, and nearly three-fifths within 6 months of arrest.

Method of adjudication of felony cases filed in May 2002 and disposed within 1 year in the 75 largest counties



*Includes diversion and deferred adjudication.

Figure 18

Method of conviction of felony cases filed in May 2002 and disposed within 1 year in the 75 largest counties

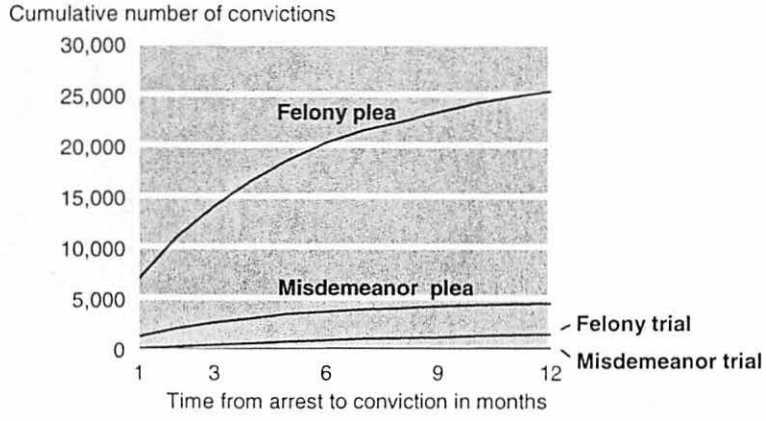


Figure 19

Time from conviction to sentencing

About 2 in 3 convicted defendants were sentenced within 1 day of adjudication (table 29). Defendants convicted of a misdemeanor (82%) were more likely to be sentenced this quickly than those convicted of a felony (62%).

Sentencing after a felony conviction occurred within 1 day in 68% of the cases where the conviction was for a drug offense. Sixty percent of the defendants convicted of property and public-order offenses, and 53% of those convicted of a violent offense were sentenced this quickly.

By specific conviction offense, less than half of defendants convicted of rape (42%) or murder (48%) were sentenced within 1 day of conviction. A majority of the defendants convicted of other felonies were sentenced within a day, including 77% of those convicted of drug offenses other than trafficking. Eighty-two percent of defendants convicted of a misdemeanor were sentenced this quickly.

Seventy-six percent of defendants convicted of a felony received their sentence within 30 days, as did 86% of those convicted of a misdemeanor. Ninety percent of defendants convicted of a felony and 92% of those convicted of a misdemeanor were sentenced within 60 days.

Table 29. Time from conviction to sentencing for convicted defendants, by most serious conviction offense, 2002

Most serious conviction offense	Number of defendants	Percent of convicted defendants in the 75 largest counties who were sentenced within — Total	0-1 day	2-30 days	31-60 days	61 days or more
All offenses	31,583	100%	65%	13%	13%	10%
All felonies	26,567	100%	62%	14%	14%	10%
Violent offenses	4,683	100%	53%	16%	19%	12%
Murder	209	100	48	18	19	14
Rape	257	100	42	15	19	25
Robbery	1,117	100	57	16	17	10
Assault	2,144	100	54	18	18	10
Other violent	958	100	48	13	23	15
Property offenses	9,053	100%	60%	17%	14%	10%
Burglary	2,264	100	59	19	15	7
Larceny/theft	2,476	100	66	14	12	8
Motor vehicle theft	1,316	100	60	19	9	12
Forgery	1,046	100	55	20	13	12
Fraud	818	100	58	12	19	11
Other property	1,135	100	56	16	16	12
Drug offenses	9,681	100%	68%	11%	12%	10%
Trafficking	4,295	100	56	15	16	12
Other drug	5,386	100	77	8	8	8
Public-order offenses	3,124	100%	60%	15%	14%	11%
Weapons	864	100	52	17	17	14
Driving-related	1,226	100	62	15	13	9
Other public-order	1,036	100	65	14	12	10
Misdemeanors	5,016	100%	82%	4%	7%	8%

Note: Data on time from conviction to sentencing were available for 94% of convicted defendants. Total for all felonies includes cases that could not be classified into 1 of the 4 major offense categories. Detail may not add to total because of rounding.

Type and length of sentence

Seventy-two percent of convicted defendants were sentenced to incarceration in a State prison or local jail (table 30). Seventy-five percent of defendants convicted of a felony were sentenced to incarceration, compared to 60% of those convicted of a misdemeanor. About half of incarceration sentences following a felony conviction, 38% of felony sentences overall, were to State prison.

Nearly all convictions for murder (95%) resulted in a prison sentence, as did a majority of robbery (73%), and rape (64%) convictions. Over two-fifths of defendants convicted of burglary (48%) and motor vehicle theft (43%) were sentenced to prison. Nearly two-fifths of defendants convicted of a driving related offense (39%), burglary (38%), or drug trafficking (37%) received a prison sentence. About a third of defendants convicted of forgery (35%), larceny/theft (33%), and weapons offenses (32%) were sentenced to prison.

Nearly all incarceration sentences for misdemeanor convictions, 58% of all misdemeanor sentences, were to jail.

Among defendants who were convicted but not sentenced to incarceration, 96% of those convicted of a felony and 64% of those convicted of a misdemeanor received a probation term. Probation sentences may have included a fine, restitution, community service, treatment, or other conditions.

Overall, 25% of convicted defendants received a sentence to probation without any incarceration. This included 24% of those convicted of a felony and 26% of those convicted of a misdemeanor. About two-fifths of defendants convicted of fraud (37%) or drug offenses other than trafficking (42%) were sentenced to probation without incarceration.

Overall, 3% of convicted defendants were not sentenced to a term of incarceration or probation but received a sentence that included fines, community service, treatment, or other court-ordered conditions. This included 14% of those convicted of a misdemeanor. These conditions are included in an "other" sentence category.

Table 30. Most severe type of sentence received by convicted defendants, by most serious conviction offense, 2002

Most serious conviction offense	Number of defendants	Percent of convicted defendants in the 75 largest counties sentenced to —						
			Incarceration			Nonincarceration		
		Total	Total	Prison	Jail	Total	Probation	Other
All offenses	31,801	100%	72%	32%	40%	28%	25%	3%
All felonies	26,758	100%	75%	38%	37%	25%	24%	1%
Violent offenses	4,718	100%	85%	50%	35%	15%	14%	--%
Murder	211	100	97	95	2	3	3	0
Rape	261	100	89	64	25	11	11	0
Robbery	1,128	100	92	73	19	8	8	--
Assault	2,155	100	85	38	47	15	14	1
Other violent	963	100	74	37	37	26	25	--
Property offenses	9,137	100%	78%	37%	41%	22%	21%	1%
Burglary	2,284	100	88	48	40	12	12	--
Larceny/theft	2,494	100	72	33	39	28	26	2
Motor vehicle theft	1,323	100	86	43	44	14	13	1
Forgery	1,053	100	73	35	38	27	26	1
Fraud	825	100	60	16	45	40	37	3
Other property	1,158	100	77	34	43	23	22	1
Drug offenses	9,718	100%	66%	33%	33%	34%	33%	1%
Trafficking	4,304	100	76	37	39	24	23	1
Other drug	5,414	100	57	30	28	43	42	1
Public-order offenses	3,160	100%	77%	38%	40%	23%	21%	1%
Weapons	868	100	75	32	43	25	24	1
Driving-related	1,249	100	84	39	44	16	15	1
Other public-order	1,042	100	72	40	32	28	26	2
Misdemeanors	5,043	100%	60%	2%	58%	40%	26%	14%

Note: Data on type of sentence were available for 95% of convicted defendants. Sentences to incarceration that were wholly suspended are included under probation. Nine percent of prison sentences and 68% of jail sentences included a probation term. Sentences to incarceration or probation may have included a fine, restitution, community service, treatment, or other court-ordered conditions. Other sentences may include fines, community service, restitution, and treatment. Total for all felonies includes cases that could not be classified into 1 of the 4 major offense categories. Detail may not add to total because of rounding.
--Less than 0.5%.

Among persons arrested and charged with a felony by the prosecutor, murder defendants (69%) had the highest probability of eventually being convicted and sentenced to prison (figure 20). This was about twice the probability for defendants charged with robbery (38%) or rape (32%). Twenty-nine percent of defendants originally charged with burglary, motor vehicle theft, or a driving-related offense were eventually convicted and sentenced to prison. An estimated 1 in 4 drug trafficking defendants were convicted and sentenced to prison. Defendants originally charged with fraud (11%) were the least likely to eventually be sentenced to prison.

Defendants originally charged with a driving-related offense (41%) were the most likely to be eventually convicted and receive a jail sentence. About a third of defendants charged with burglary (34%), motor vehicle theft (33%), a weapons offense (32%), or forgery (31%) were convicted and sentenced to jail.

A majority of defendants originally charged with murder (76%), a driving-related offense (69%), burglary (63%), motor vehicle theft (62%), robbery (56%), or drug trafficking (54%) were eventually convicted and sentenced to either prison or jail. This was the case for about half of rape or forgery defendants.

About 2 in 5 defendants originally charged with assault (41%) or fraud (39%) were eventually convicted and sentenced to incarceration.

Probability of being convicted and sentenced to incarceration for felony defendants in the 75 largest counties, 2002

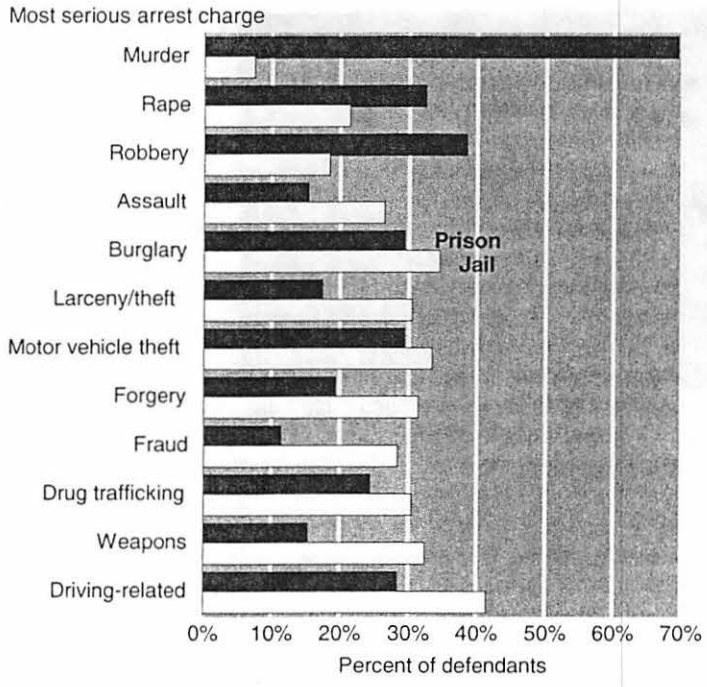


Figure 20

Median prison sentence received by defendants convicted of a felony in the 75 largest counties, 2002

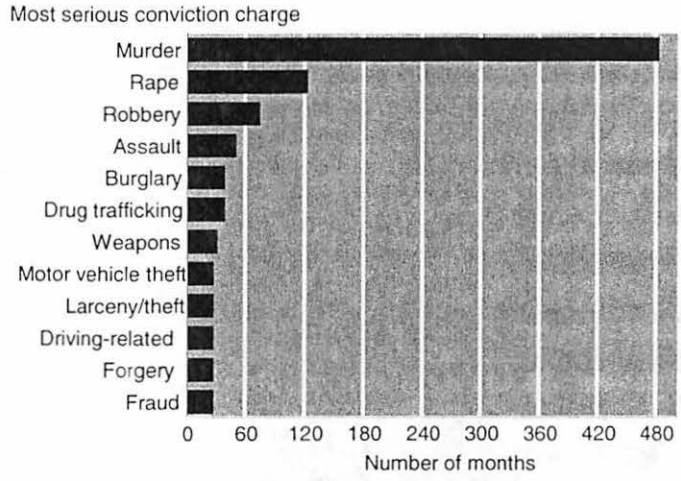


Figure 21

Among defendants convicted of a felony and sentenced to prison, the mean sentence was 63 months and the median was 32 months (table 31). By general conviction offense category, defendants convicted of a violent felony received the longest prison sentences (a mean of 135 months and a median of 60 months), and those convicted of a public-order felony the shortest (a mean of 34 months and a median of 24 months).

By specific conviction offense, murderers received the longest prison terms, a mean of 510 months and a median of 480 months. Next were defendants convicted of rape with a mean prison sentence of 201 months, and a median of 120 months.

Median prison sentences for other felony convictions included 72 months for robbery, 48 months for assault, and 36 months for burglary or drug trafficking (figure 21).

Table 31. Length of prison sentence received by defendants convicted of a felony, by most serious conviction offense, 2002

Most serious felony conviction offense	Felony defendants in the 75 largest counties convicted of a felony and sentenced to prison									
	Number of defendants	Number of months		Percent receiving a maximum sentence length in months of —						
		Mean	Median	Total	1-24	25-48	49-72	73-120	Over 120*	Life
All offenses	10,113	63 mo	32 mo	100%	46%	25%	11%	9%	8%	1%
Violent offenses	2,352	135 mo	60 mo	100%	22%	20%	15%	18%	19%	5%
Murder	202	510	480	100	0	1	2	9	49	38
Rape	166	201	120	100	7	16	11	29	27	10
Robbery	821	112	72	100	17	20	14	22	25	1
Assault	812	78	48	100	31	27	17	15	9	1
Other violent	353	74	48	100	35	18	23	14	10	1
Property offenses	3,364	42 mo	24 mo	100%	55%	23%	9%	7%	5%	0%
Burglary	1,089	56	36	100	43	26	9	13	8	0
Larceny/theft	824	33	24	100	65	23	7	1	5	0
Motor vehicle theft	565	36	24	100	56	23	13	5	3	0
Forgery	365	48	24	100	56	19	15	5	6	0
Fraud	129	40	24	100	55	20	12	10	3	0
Other property	391	27	18	100	71	20	4	4	1	0
Drug offenses	3,196	43 mo	30 mo	100%	49%	29%	12%	6%	4%	--%
Trafficking	1,598	58	36	100	31	37	17	10	6	1
Other drug	1,599	29	18	100	67	21	7	3	2	0
Public-order offenses	1,192	34 mo	24 mo	100%	58%	26%	9%	5%	2%	0%
Weapons	281	42	28	100	48	34	8	5	4	0
Driving-related	491	36	24	100	53	26	14	5	1	0
Other public-order	420	28	23	100	70	21	2	5	2	0

Note: Data on length of prison sentence were available for 100% of all cases in which a defendant received a prison sentence. Nine percent of prison sentences included a probation term and 11% included a fine. Total for all offenses includes cases that could not be classified into 1 of the 4 major offense categories. Detail may not add to total because of rounding.
--Less than 0.5%.
*Excludes life sentences.

Thirty-eight percent of all murder convictions resulted in a life sentence, compared to 10% of rape defendants and a maximum of 1% of the defendants convicted of any other offense.

In addition to those receiving life sentences, 49% of the defendants convicted of murder were sentenced to more than 10 years in prison. Defendants convicted of rape (27%) or robbery (25%) were the next most likely to receive a prison term this long.

For defendants convicted of a felony and subsequently sentenced to jail, the mean jail term was 6 months and the median was 5 months (table 32). Misdemeanor convictions resulted in a mean jail term of 5 months and a median of 3 months.

Excluding murder and rape (for which few convictions resulted in a jail sentence), defendants sentenced to jail for robbery received the longest average sentence (a mean of 11 months and a median of 12 months).

An estimated 62% of felony jail sentences were for a period of greater than 3 months. Jail sentences following convictions for violent felonies (72%) were more likely to be for more than 3 months than those for property (63%), drug (59%), or public-order (53%) felonies.

Forty-six percent of jail sentences following misdemeanor convictions were for more than 3 months.

Table 32. Length of jail sentence received by convicted defendants, by most serious conviction offense, 2002

Most serious conviction offense	Felony defendants in the 75 largest counties sentenced to jail									
	Number of defendants	Number of months		Percent receiving a maximum sentence in months of —						
		Mean	Median	Total	1 or less	2-3	4-6	7-9	10-12	Over 12
All offenses	12,646	6 mo	5 mo	100%	24%	18%	27%	8%	20%	3%
All felonies	9,772	6 mo	6 mo	100%	20%	18%	29%	9%	20%	3%
Violent offenses	1,654	8 mo	6 mo	100%	15%	13%	30%	9%	28%	5%
Robbery	208	11	12	100	4	11	21	8	40	17
Assault	1,019	7	6	100	17	13	32	10	26	3
Other violent	359	7	6	100	14	13	32	7	28	6
Property offenses	3,715	6 mo	6 mo	100%	17%	20%	30%	10%	20%	3%
Burglary	911	7	6	100	14	17	32	10	26	2
Larceny/theft	974	6	5	100	19	24	23	10	21	4
Motor vehicle theft	575	7	6	100	9	21	35	17	15	2
Forgery	397	6	6	100	11	24	40	9	13	3
Fraud	365	5	3	100	39	12	24	9	11	5
Other property	495	6	5	100	19	18	33	6	21	2
Drug offenses	3,147	6 mo	4 mo	100%	22%	19%	30%	9%	17%	3%
Trafficking	1,646	7	6	100	18	15	34	8	21	4
Other drug	1,501	5	4	100	27	23	26	10	12	1
Public-order offenses	1,249	5 mo	4 mo	100%	31%	16%	22%	9%	20%	2%
Weapons	372	5	4	100	27	21	20	10	20	1
Driving-related	549	5	4	100	37	10	23	7	20	2
Other public-order	327	6	4	100	26	20	22	11	17	3
Misdemeanors	2,874	5 mo	3 mo	100%	37%	17%	20%	3%	20%	3%

Note: Data on length of jail sentence were available for 99% of all cases in which a defendant received a jail sentence. Table excludes portions of sentences that were suspended. Sixty-eight percent of jail sentences included a probation term and 20% included a fine. Murder and rape have been excluded from the detail because few of murder and rape convictions resulted in a jail sentence. The total for violent offenses, however, does include these cases. Detail may not add to total because of rounding.
--Less than 0.5%.

For defendants sentenced to probation without incarceration for a felony, the median sentence length was 36 months, compared to 12 months for a misdemeanor (table 33). Three percent of defendants convicted of a felony were given a probation term of greater than 5 years, including 7% of those sentenced for a violent felony.

Some probation sentences were supplemented by one or more special court-ordered conditions. For example, 16% of the defendants who received a probation sentence were required to perform a specified number of hours of community service work (table 34).

Thirteen percent of offenders sentenced to probation were required to pay restitution, including 32% of those convicted for a property-related felony. Twenty-eight percent of probation sentences included a requirement that the defendant enter a treatment program, including 49% of those convicted for drug offenses.

Table 33. Length of probation sentence received by convicted defendants, by most serious conviction offense, 2002

Most serious conviction offense	Felony defendants in the 75 largest counties sentenced to probation									
	Number of defendants	Number of months		Percent receiving a sentence in months of —						
		Mean	Median	Total	1-12	13-24	25-36	37-48	49-60	Over 60
All offenses	7,755	32 mo	36 mo	100%	20%	24%	39%	3%	11%	3%
All felonies	6,483	35 mo	36 mo	100%	15%	25%	42%	3%	13%	3%
Violent offenses	663	40	36	100	13	25	29	3	23	7
Property offenses	1,909	35	36	100	15	29	32	5	15	3
Drug offenses	3,245	34	36	100	12	21	54	3	9	2
Public-order offenses	661	33	24	100	26	31	24	0	14	6
Misdemeanors	1,272	20 mo	12 mo	100%	50%	20%	27%	1%	2%	0%

Note: Data on length of probation sentence were available for 99% of all cases in which the most severe type of sentence a defendant received was probation. Twenty-four percent of those sentenced to probation also received a fine.
Total for felonies includes cases that could not be classified into 1 of the 4 felony offense categories.
Detail may not add to total because of rounding.
--Less than 0.5%.

Table 34. Conditions of probation sentence received most often by convicted defendants, by most serious conviction offense, 2002

Most serious conviction offense	Felony defendants in the 75 largest counties sentenced to probation			
	Number of defendants	Percent whose sentence to probation included:		
		Community service	Restitution	Treatment
All offenses	7,754	16%	13%	28%
All felonies	6,483	16%	13%	30%
Violent offenses	662	22	15	22
Property offenses	1,909	19	32	9
Drug offenses	3,245	14	2	49
Public-order offenses	662	11	7	8
Misdemeanors	1,271	14%	16%	15%

Note: Total for felonies includes cases that could not be classified into 1 of the 4 felony offense categories. A defendant may have received more than one type of probation condition. Not all defendants sentenced to probation received probation conditions.
Detail may not add to total because of rounding.
--Less than 0.5%.

Prior record and felony sentencing

For defendants convicted of a felony on their current charge, the probability of receiving a sentence to incarceration was highest if they had multiple prior felony convictions (85%) (table 35). Seventy-five percent of defendants with just one prior felony conviction and 70% of those with only prior misdemeanor convictions were also sentenced to incarceration following a felony conviction in the current case.

Overall, defendants with no prior convictions of any type (65%) were the least likely to receive a sentence to incarceration for a felony conviction, although 81% of them received such a sentence when the conviction was for a violent felony.

Defendants with no prior felony convictions and whose current conviction was for a drug offense were the least likely among defendants convicted of a felony to be sentenced to incarceration.

Fifty-eight percent of the defendants with more than one prior felony conviction were sentenced to prison for a new felony conviction. This included 75% of those whose current conviction was for a violent felony.

Forty-one percent of the defendants with a single prior felony conviction were sentenced to prison following a felony conviction in the current case, including a majority of those convicted of a violent felony (56%).

Overall, nearly a fourth of defendants without a prior felony conviction received a prison sentence for a felony conviction in the current case. However, about two-fifths of such defendants received a prison sentence when the current conviction was for a violent felony.

A majority of property (58%) and public-order (51%) offenders with a prior conviction record consisting solely of misdemeanors received a jail sentence.

About 2 in 5 drug offenders with a prior conviction record consisting solely of misdemeanors (45%) or with no prior convictions of any kind (40%) received a probation sentence.

Table 35. Most severe type of sentence received by defendants convicted of a felony, by prior conviction record, 2002

Prior conviction record and most serious current felony conviction	Number of defendants	Percent of defendants in the 75 largest counties convicted of a felony and sentenced to —						
			Incarceration			Nonincarceration		
		Total	Total	Prison	Jail	Total	Probation	Other
More than 1 prior felony conviction								
All offenses	8,848	100%	85%	58%	27%	15%	15%	--%
Violent offenses	1,112	100	93	75	18	7	7	1
Property offenses	3,087	100	90	59	31	10	10	--
Drug offenses	3,536	100	78	54	24	22	22	--
Public-order offenses	1,109	100	85	53	32	15	15	--
1 prior felony conviction								
All offenses	4,302	100%	75%	41%	34%	25%	24%	1%
Violent offenses	637	100	86	56	30	14	14	0
Property offenses	1,445	100	82	41	41	18	17	--
Drug offenses	1,653	100	63	32	31	37	36	1
Public-order offenses	559	100	83	50	33	17	15	2
Prior misdemeanor convictions only								
All offenses	4,505	100%	70%	23%	47%	30%	29%	1%
Violent offenses	767	100	84	41	44	16	15	1
Property offenses	1,533	100	77	19	58	23	21	1
Drug offenses	1,543	100	54	18	36	46	45	1
Public-order offenses	658	100	75	24	51	25	25	0
No prior convictions								
All offenses	8,342	100%	65%	22%	43%	35%	33%	2%
Violent offenses	2,033	100	81	39	42	19	19	--
Property offenses	2,796	100	61	18	43	39	36	3
Drug offenses	2,772	100	58	16	42	42	40	2
Public-order offenses	730	100	64	19	45	36	32	4

Note: Data on prior conviction record and type of sentence were available for 92% of all convicted defendants. Sentences to incarceration may have also included a probation term. Sentences to incarceration or probation may have included a fine, restitution, community service, treatment, or other court-ordered conditions. Other sentences may include fines, community service, restitution, and treatment.
Detail may not add to total because of rounding.
--Less than 0.5%.

Defendants convicted of a violent felony were much more likely to be sentenced to prison than jail or probation if they had at least one prior felony conviction (figure 22). Incarceration was also likely for those without prior felony convictions, with jail and prison having similar probabilities.

Among defendants convicted of a nonviolent felony, a prison sentence was only slightly more likely than a jail sentence for those with one prior felony conviction, but much more likely if they had multiple prior felony convictions. For those with a prior conviction record that consisted of only misdemeanors, jail was the most probable sentence. Probation and jail sentences had similar probabilities of being used if the defendant had no prior convictions of any type.

Type of sentence received for a felony conviction in the 75 largest counties, by prior conviction record, 2002

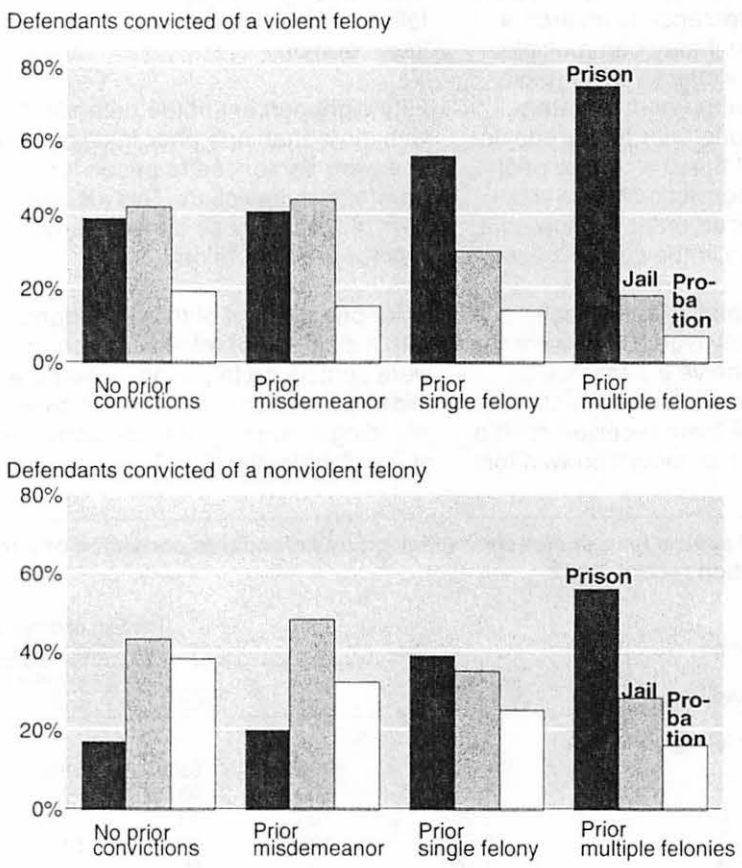


Figure 22

Methodology

The SCPS sample was designed and selected by U.S. Census Bureau staff. It is a 2-stage stratified sample, with 40 of the 75 most populous counties selected at stage one and a systematic sample of State court felony filings (defendants) within each county selected at stage two. The 40 counties were divided into 4 first-stage strata based on court filing information. Ten counties were included in the sample with certainty because of their large number of court filings. The remaining counties were allocated to the three noncertainty strata based on the variance of felony court dispositions.

SCPS first-stage design

	Number of counties		
Stratum	Sample	Universe	Weight
One	10	10	1.00
Two	10	18	1.80
Three	10	22	2.20
Four	10	25	2.50

The second-stage sampling (filings) was designed to represent all defendants who had felony cases filed with the court during the month of May 2002. The participating jurisdictions provided data for every felony case filed on selected days during that month. Depending on the first-stage stratum in which it had been placed, each jurisdiction provided filings data for 5, 10, or 20 randomly selected business days in May 2002. Data from jurisdictions that were not required to provide a full month of filings were weighted to represent the full month (see Appendix table A).

SCPS second-stage design

Stratum	Number of days of filings provided	Weight
One	5	4.0
Two	10	2.0
Three	10	2.0
Four	20	1.0

The 2002 SCPS collected data for 15,358 felony cases filed during May 2002 in 40 large counties. These cases, which were tracked for up to 1 year, were part of a sample that was representative of the estimated 56,146 felony cases filed in the Nation's 75 most populous counties during that month. Ninety-three cases (weighted) were omitted from analysis because they could not be classified into one of the four major crime categories (violent, property, drug, public order).

This report is based on data collected from the following counties: Alabama (Jefferson); Arizona (Maricopa, Pima); California (Alameda, Contra Costa, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Mateo, Santa Clara); Florida (Broward, Miami-Dade, Palm Beach, Pinellas); Georgia (Fulton); Hawaii (Honolulu); Illinois (Cook); Indiana (Marion); Maryland (Baltimore, Montgomery); Michigan (Macomb, Wayne); New Jersey (Essex); New York (Bronx, Kings, Nassau, Westchester); Ohio (Franklin); Pennsylvania (Montgomery, Philadelphia); Tennessee (Shelby); Texas (Dallas, El Paso, Harris, Tarrant, Travis); Utah (Salt Lake City); Virginia (Fairfax).

Because the data came from a sample, a sampling error is associated with each reported number. In general, if the difference between two numbers is greater than twice the standard error for that difference, we can say that we are 95% confident of a real difference and that the apparent difference is not simply the result of using a sample rather than the entire population.

Offense categories

Felony offenses were classified into 18 categories for this report. These were further classified into the four major crime categories of violent, property, drug, and public-order. The following listings are a representative summary of the crimes in each category; however, these lists are not meant to be exhaustive. All offenses, except for murder, include attempts and conspiracies to commit.

Violent offenses

Murder — Includes homicide, nonnegligent manslaughter, and voluntary homicide. Excludes attempted murder (classified as felony assault), negligent homicide, involuntary homicide, or vehicular manslaughter, which are classified as *other violent offenses.*

Rape — Includes forcible intercourse, sodomy, or penetration with a foreign object. Does not include statutory rape or nonforcible acts with a minor or someone unable to give legal consent, nonviolent sexual offenses, or commercialized sex offenses.

Robbery — Includes unlawful taking of anything of value by force or threat of force. Includes armed, unarmed, and aggravated robbery, car-jacking, armed burglary, and armed mugging.

Assault — Includes aggravated assault, aggravated battery, attempted murder, assault with a deadly weapon, felony assault or battery on a law enforcement officer, and other felony assaults. Does not include extortion, coercion, or intimidation.

Other violent offenses — Includes vehicular manslaughter, involuntary manslaughter, negligent or reckless homicide, nonviolent or non-forcible sexual assault, kidnapping, unlawful imprisonment, child or spouse abuse, cruelty to a child, reckless endangerment, hit-and-run with bodily injury, intimidation, and extortion.

Property offenses

Burglary — Includes any type of entry into a residence, industry, or business with or without the use of force with the intent to commit a felony or theft. Does not include possession of burglary tools, trespassing, or unlawful entry for which the intent is not known.

Larceny/theft — Includes grand theft, grand larceny, and any other felony theft, including burglary from an automobile, theft of rental property, and mail theft. Does not include motor vehicle theft, receiving or buying stolen property, fraud, forgery, or deceit.

Motor vehicle theft — Includes auto theft, conversion of an automobile, receiving and transferring an automobile, unauthorized use of a vehicle, possession of a stolen vehicle, larceny or taking of an automobile.

Forgery — Includes forging of a driver's license, official seals, notes, money orders, credit or access cards or names of such cards or any other documents with fraudulent intent, uttering a forged instrument, counterfeiting, forgery.

Fraud — Includes possession and passing of worthless checks or money orders, possession of false documents or identification, embezzlement, obtaining money by false pretenses, credit card fraud, welfare fraud, Medicare fraud, insurance claim fraud, fraud, swindling, stealing a thing of value by deceit, larceny by check.

Other property offenses — Includes receiving or buying stolen property, arson, reckless burning, damage to property, criminal mischief, vandalism, criminal trespassing, possession of burglary tools, and unlawful entry for which the interest is unknown.

Drug offenses

Drug trafficking — Includes trafficking, sales, distribution, possession with intent to distribute or sell, manufacturing, and smuggling of controlled substances. Does not include possession of controlled substances.

Other drug offenses — Includes possession of controlled substances, prescription violations, possession of drug paraphernalia, and other drug law violations.

Public-order offenses

Weapons — Includes the unlawful sale, distribution, manufacture, alteration, transportation, possession, or use of a deadly weapon or accessory.

Driving-related — Includes driving under the influence of drugs or alcohol, driving with a suspended or revoked license, and any other felony in the motor vehicle code.

Other public-order offenses — Includes flight/escape, parole or probation violations, prison contraband, habitual offender, obstruction of justice, rioting, libel, slander, treason, perjury, prostitution, pandering, bribery, and tax law violations.

Terms related to pretrial release

Released defendant — Includes any defendant who was released from custody prior to the disposition of his or her case by the court. Includes defendants who were detained for some period of time before being released and defendants who were returned to custody after being released because of a violation of the conditions of pretrial release. The terms "on pretrial release" and "released pending disposition" are both used in this report to refer to all released defendants.

Detained defendant — Includes any defendant who remained in custody from the time of arrest until the disposition of his or her case by the court. This report also refers to detained defendants as "not released."

Failure to appear — Occurs when a court issues a bench warrant for a defendant's arrest because he or she missed a scheduled court appearance.

Types of financial release

Surety bond — A bail bond company signs a promissory note to the court for the full bail amount and charges the defendant a fee for the service (usually 10% of the full bail amount). If the defendant fails to appear, the bond company is liable to the court for the full bail amount. Frequently the bond company requires collateral from the defendant in addition to the fee.

Deposit bond — The defendant deposits a percentage (usually 10%) of the full bail amount with the court. The percentage of the bail is returned after the disposition of the case, but the court often retains a small portion for administrative costs. If the defendant fails to appear in court, he or she is liable to the court for the full bail amount.

Full cash bond — The defendant posts the full bail amount in cash with the court. If the defendant makes all court appearances, the cash is returned. If the defendant fails to appear in court, the bond is forfeited.

Property bond — Involves an agreement made by a defendant as a condition of pretrial release requiring that property valued at the full bail amount be posted as an assurance of his or her appearance in court. If the defendant fails to appear in court, the property is forfeited. Also known as "collateral bond."

Types of nonfinancial release

Release on recognizance (ROR) — The court releases the defendant on a signed agreement that he or she will appear in court as required. In this report, the ROR category includes citation releases in which arrestees are released pending their first court appearance on a written order issued by law enforcement or jail personnel.

Unsecured bond — The defendant pays no money to the court but is liable for the full amount of bail should he or she fail to appear in court.

Conditional release — Defendants are released under specified conditions. Monitoring or supervision, if required, is usually done by a pretrial services agency. In some cases, such as those involving a third-party custodian or drug monitoring and treatment, another agency may be involved in the supervision of the defendant. Conditional release sometimes includes an unsecured bond.

Other type of release

Emergency release — Defendants are released in response to a court order placing limits on a jail's population.

Appendix

Appendix table A. Population, sampling weights, and number of cases, by SCPS jurisdiction, 2002

County (State)	Population	Sampling weights			Number of cases	
		Filings	County	Total	Unweighted	Weighted
Total					15,358	56,146
Jefferson (AL)	659,400	2	2.20	4.40	207	911
Maricopa (AZ)	3,293,600	4	1.00	4.00	451	1,804
Pima (AZ)	877,500	1	2.50	2.50	512	1,280
Alameda (CA)	1,463,900	2	2.20	4.40	335	1,474
Contra Costa (CA)	988,600	1	2.50	2.50	248	620
Los Angeles (CA)	9,763,800	4	1.00	4.00	1,015	4,060
Orange (CA)	2,927,900	2	1.80	3.60	568	2,045
Riverside (CA)	1,694,600	2	1.80	3.60	598	2,153
San Bernardino (CA)	1,808,900	2	1.80	3.60	516	1,858
San Diego (CA)	2,896,100	4	1.00	4.00	325	1,300
San Mateo (CA)	701,300	1	2.50	2.50	172	430
Santa Clara (CA)	1,674,600	2	1.80	3.60	359	1,292
Broward (FL)	1,704,100	4	1.00	4.00	203	812
Miami-Dade (FL)	2,314,200	4	1.00	4.00	599	2,396
Palm Beach (FL)	1,187,500	2	1.80	3.60	326	1,174
Pinellas (FL)	924,800	2	1.80	3.60	412	1,483
Fulton (GA)	817,500	4	1.00	4.00	169	676
Honolulu (HI)	886,200	1	2.50	2.50	153	383
Cook (IL)	5,364,200	4	1.00	4.00	866	3,464
Marion (IN)	862,500	2	1.80	3.60	496	1,786
Baltimore (MD)	768,600	1	2.50	2.50	306	765
Montgomery (MD)	906,000	1	2.50	2.50	311	778
Macomb (MI)	808,000	1	2.50	2.50	333	833
Wayne (MI)	2,040,200	4	1.00	4.00	273	1,092
Essex (NJ)	796,400	2	1.80	3.60	509	1,832
Bronx (NY)	1,358,900	2	2.20	4.40	507	2,231
Kings (NY)	2,484,800	2	2.20	4.40	301	1,324
Nassau (NY)	1,339,500	1	2.50	2.50	274	685
Westchester (NY)	937,900	1	2.50	2.50	297	743
Franklin (OH)	1,082,200	2	2.20	4.40	251	1,104
Montgomery (PA)	764,500	2	2.20	4.40	90	396
Philadelphia (PA)	1,486,700	2	1.80	3.60	943	3,395
Shelby (TN)	901,700	2	1.80	3.60	320	1,152
Dallas (TX)	2,272,700	4	1.00	4.00	210	840
El Paso (TX)	693,600	1	2.50	2.50	318	795
Harris (TX)	3,539,600	4	1.00	4.00	480	1,920
Tarrant (TX)	1,525,200	2	2.20	4.40	442	1,945
Travis (TX)	845,600	2	2.20	4.40	228	1,003
Salt Lake (UT)	917,400	2	2.20	4.40	221	972
Fairfax (VA)	992,400	2	2.20	4.40	214	942

Note: In some of the 40 counties included in the 2002 SCPS study, prosecutors did not screen out any felony arrests before filing charges. In these counties, the SCPS sample cases are representative of all felony cases received by prosecutors and any cases subsequently screened out by the prosecutor are included in the SCPS dismissal category. In other counties, all felony arrests were reviewed by prosecutors before the decision to file felony charges was made. In these jurisdictions, the SCPS sample cases do not include those in which a person was arrested for a felony but felony charges were not filed. Weights are rounded to the second decimal place. Populations are Census Bureau figures for July 1, 2002.

Appendix table B. Most serious arrest charge of felony defendants, by SCPS jurisdiction, 2002

County (State)	Percent of felony defendants within categories of most serious arrest charge				
	Total	Violent offenses	Property offenses	Drug offenses	Public-order offenses
Total	100%	25%	30%	35%	10%
Jefferson (AL)	100%	15%	39%	36%	10%
Maricopa (AZ)	100	19	32	41	8
Pima (AZ)	100	26	23	38	12
Alameda (CA)	100	13	42	41	4
Contra Costa (CA)	100	21	33	38	9
Los Angeles (CA)	100	24	32	35	9
Orange (CA)	100	16	24	55	5
Riverside (CA)	100	21	27	41	10
San Bernardino (CA)	100%	24%	34%	30%	12%
San Diego (CA)	100	17	34	40	9
San Mateo (CA)	100	16	35	40	9
Santa Clara (CA)	100	24	22	48	6
Broward (FL)	100	25	26	42	7
Miami-Dade (FL)	100	27	34	29	10
Palm Beach (FL)	100	30	36	22	11
Pinellas (FL)	100	31	31	25	13
Fulton (GA)	100%	36%	26%	34%	4%
Honolulu (HI)	100	24	46	29	1
Cook (IL)	100	11	22	57	10
Marion (IN)	100	27	33	28	12
Baltimore (MD)	100	35	42	20	3
Montgomery (MD)	100	27	48	25	1
Macomb (MI)	100	23	30	31	17
Wayne (MI)	100	19	34	29	19
Essex (NJ)	100%	28%	20%	42%	10%
Bronx (NY)	100	30	21	42	8
Kings (NY)	100	40	21	28	11
Nassau (NY)	100	22	33	22	23
Westchester (NY)	100	25	40	21	14
Franklin (OH)	100	24	36	30	10
Montgomery (PA)	100	29	34	26	11
Philadelphia (PA)	100	40	25	28	6
Shelby (TN)	100%	20%	44%	28%	9%
Dallas (TX)	100	31	36	22	10
El Paso (TX)	100	39	16	38	7
Harris (TX)	100	21	22	41	15
Tarrant (TX)	100	23	34	32	10
Travis (TX)	100	17	25	48	11
Salt Lake (UT)	100	23	38	32	7
Fairfax (VA)	100	17	52	19	12

Note: Detail may not add to 100% because of rounding.

Appendix table C. Gender and age of felony defendants, by SCPS jurisdiction, 2002

	Percent of felony defendants							
	Gender			Age at arrest				
County (State)	Total	Male	Female	Total	Under 21	21-29	30-39	40 or older
Total	100%	82%	18%	100%	18%	33%	28%	21%
Jefferson (AL)	100%	81%	19%	100%	13%	37%	25%	25%
Maricopa (AZ)	100	81	19	100	19	36	28	17
Pima (AZ)	100	83	17	100	19	33	28	20
Alameda (CA)	100	73	27	100	16	27	30	27
Contra Costa (CA)	100	81	19	100	15	31	35	20
Los Angeles (CA)	100	82	18	100	15	35	28	22
Orange (CA)	100	84	16	100	18	35	33	14
Riverside (CA)	100	80	20	100	12	38	30	20
San Bernardino (CA)	100%	81%	19%	100%	14%	31%	34%	21%
San Diego (CA)	100	79	21	100	12	35	30	22
San Mateo (CA)	100	82	18	100	17	27	30	27
Santa Clara (CA)	100	84	16	100	18	42	22	18
Broward (FL)	100	82	18	100	21	33	23	23
Miami-Dade (FL)	100	79	21	100	19	27	30	24
Palm Beach (FL)	100	82	18	100	18	33	28	21
Pinellas (FL)	100	79	21	100	15	29	29	27
Fulton (GA)	100%	86%	14%	100%	19%	36%	21%	25%
Honolulu (HI)	100	78	22	100	6	31	29	34
Cook (IL)	100	83	17	100	19	30	25	25
Marion (IN)	100	83	17	100	15	35	30	20
Baltimore (MD)	100	80	20	100	20	29	29	22
Montgomery (MD)	100	86	14	100	26	32	23	19
Macomb (MI)	100	82	18	100	16	27	31	26
Wayne (MI)	100	84	16	100	18	32	24	26
Essex (NJ)	100%	84%	16%	100%	20%	36%	27%	18%
Bronx (NY)	100	85	15	100	23	32	27	17
Kings (NY)	100	90	10	100	29	35	22	15
Nassau (NY)	100	85	15	100	20	28	34	18
Westchester (NY)	100	82	18	100	25	29	27	19
Franklin (OH)	100	84	16	100	17	32	32	19
Montgomery (PA)	100	80	20	100	21	37	27	16
Philadelphia (PA)	100	83	17	100	23	34	22	21
Shelby (TN)	100%	87%	13%	100%	19%	40%	23%	18%
Dallas (TX)	100	81	19	100	19	28	34	20
El Paso (TX)	100	82	18	100	25	34	22	19
Harris (TX)	100	81	19	100	18	32	27	23
Tarrant (TX)	100	75	25	100	14	33	30	24
Travis (TX)	100	78	22	100	20	32	28	20
Salt Lake (UT)	100	80	20	100	15	33	26	26
Fairfax (VA)	100	85	15	100	20	27	30	23

Note: Detail may not add to 100% because of rounding.

Appendix table D. Race and Hispanic/Latino origin, by SCPS jurisdiction, 2002

County (State)	Percent of felony defendants				
	Total	Black, non-Hispanic	White, non-Hispanic	Other, non-Hispanic	Hispanic or Latino, any race
Total	100%	42%	31%	2%	24%
Jefferson (AL)	100%	64%	36%	--%	0%
Maricopa (AZ)	100	12	47	3	38
Pima (AZ)	100	13	47	1	40
Alameda (CA)	100	60	20	2	17
Contra Costa (CA)	100	35	46	3	16
Los Angeles (CA)	100	33	18	2	46
Orange (CA)	100	6	44	4	46
Riverside (CA)	100	12	41	3	44
San Bernardino (CA)	100%	21%	35%	1%	43%
San Diego (CA)	100	20	42	5	34
San Mateo (CA)	100	24	34	10	31
Santa Clara (CA)	100	13	28	11	48
Broward (FL)	100	55	40	0	5
Miami-Dade (FL)	100	48	17	0	35
Palm Beach (FL)	100	44	42	0	14
Pinellas (FL)	100	34	64	--	2
Fulton (GA)	100%	87%	12%	0%	1%
Honolulu (HI)	100	10	22	65	3
Cook (IL)	100	72	18	--	9
Marion (IN)	100	54	43	0	3
Baltimore (MD)	100	45	51	2	1
Montgomery (MD)	100	56	27	5	12
Macomb (MI)	100	33	66	--	--
Wayne (MI)	100	76	23	0	1
Essex (NJ)	100%	79%	6%	--%	15%
Bronx (NY)	100	41	5	0	54
Kings (NY)	100	57	11	1	31
Nassau (NY)	100	42	46	--	12
Westchester (NY)	100	49	40	0	11
Franklin (OH)	100	66	32	--	2
Montgomery (PA)	100	54	43	1	2
Philadelphia (PA)	100	71	19	--	10
Shelby (TN)	100%	87%	13%	0%	--%
Dallas (TX)	100	50	30	0	20
El Paso (TX)	100	5	10	0	84
Harris (TX)	100	47	26	1	25
Tarrant (TX)	100	34	50	--	15
Travis (TX)	100	44	32	0	24
Salt Lake (UT)	100	5	66	5	23
Fairfax (VA)	100	36	43	5	16

Appendix table E. Felony defendants released before or detained until case disposition, by SCPS jurisdiction, 2002

	Percent of felony defendants												
	Released before case disposition										Detained until case disposition		
			Financial release					Nonfinancial release					
County (State)	Total	Total financial	Surety bond	Deposit bond	Full cash bond	Property bond	Total non-financial	Recog-nizance	Condi-tional	Un-secured bond	Total	Held on bail	Denied bail
Total	62%	35%	25%	7%	2%	1%	28%	14%	11%	3%	38%	32%	6%
Jefferson (AL)	87%	36%	33%	0%	2%	1%	51%	2%	47%	1%	13%	...%	...%
Maricopa (AZ)	54	16	14	0	2	--	37	16	21	--	46	21	26
Pima (AZ)	61	7	5	0	2	0	54	30	24	0	39	39	0
Alameda (CA)	48	22	20	0	1	0	27	23	4	0	52	20	31
Contra Costa (CA)	38	16	15	0	--	0	22	21	1	0	62	62	--
Los Angeles (CA)	41	18	18	0	0	0	23	23	--	0	59	58	1
Orange (CA)	48	16	16	0	--	0	32	29	2	0	52	52	--
Riverside (CA)	45	31	29	0	1	0	14	8	7	0	55	54	2
San Bernardino (CA)	53%	27%	26%	0%	1%	0%	26%	20%	4%	3%	47%	45%	1%
San Diego (CA)	42	...	...	...	...	...	...	...	...	...	58	...	...
San Mateo (CA)	36	21	20	0	1	0	15	3	12	0	64	47	17
Santa Clara (CA)	58	33	31	0	--	1	25	7	18	0	42	29	13
Broward (FL)	75	64	57	0	7	0	11	2	9	0	25	20	5
Miami-Dade (FL)	71	48	48	0	1	--	23	3	19	0	29	22	7
Palm Beach (FL)	67	36	32	0	4	0	31	5	26	0	33	23	10
Pinellas (FL)	65	33	30	0	3	--	33	4	28	0	35	29	6
Fulton (GA)	77%	52%	50%	0%	1%	2%	25%	16%	9%	0%	23%	10%	12%
Honolulu (HI)	66	35	31	0	4	0	31	1	31	0	34	33	1
Cook (IL)	58	20	0	20	--	0	38	0	13	25	42	41	1
Marion (IN)	81	30	29	0	2	0	49	45	4	0	19	14	4
Baltimore (MD)	81	53	47	0	1	5	28	25	1	2	19	13	6
Montgomery (MD)	73	37	8	4	4	22	36	14	14	8	27	22	5
Macomb (MI)	62	47	23	23	2	0	15	1	--	14	38	36	2
Wayne (MI)	73	27	--	25	1	0	44	--	39	5	27	22	4
Essex (NJ)	76%	72%	22%	33%	17%	0%	5%	4%	1%	0%	24%	24%	0%
Bronx (NY)	70	15	15	0	--	0	55	45	10	0	30	26	4
Kings (NY)	76	28	21	0	6	0	48	38	10	0	24	20	4
Nassau (NY)	73	41	...	...	...	...	32	...	...	...	27	27	1
Westchester (NY)	...	...	...	...	...	...	...	...	...	...	...	...	...
Franklin (OH)	69	41	31	10	0	0	28	15	5	8	31	30	--
Montgomery (PA)	71	22	12	6	5	0	49	49	0	0	29	29	0
Philadelphia (PA)	79	49	0	48	0	--	31	12	12	7	21	15	5
Shelby (TN)	64%	47%	47%	0%	0%	0%	17%	9%	8%	0%	36%	36%	0%
Dallas (TX)	59	54	52	--	1	0	5	--	3	1	41	40	1
El Paso (TX)	75	67	66	0	1	0	9	--	8	1	25	19	5
Harris (TX)	41	41	39	0	2	0	1	0	1	0	59	43	16
Tarrant (TX)	71	70	69	0	1	0	0	0	0	0	29	28	2
Travis (TX)	51	24	21	0	3	0	27	7	19	1	49	46	3
Salt Lake (UT)	61	26	26	0	0	0	36	--	35	0	39	22	16
Fairfax (VA)	83	58	56	0	2	0	25	0	--	24	17	11	5

Note: In the following jurisdictions, a percentage of defendants were released as part of an emergency measure to relieve jail overcrowding: San Mateo (CA), 1%; Marion (IN), 2%; Wayne (MI), 2%; Travis (TX), 1%.
Detail may not add to 100% because of rounding.
--Less than 0.5%.
. . . Data on specific type of release was not reported by these jurisdictions.

Appendix table F. Failure-to-appear and rearrest rates of defendants released prior to case disposition, by SCPS jurisdiction, 2002

	Percent of released felony defendants who					
	Failed to appear in court			Were rearrested:		
County (State)	Total	Returned to court	Remained a fugitive	Total	Felony	Misde-meanor
Total	21%	15%	6%	18%	12%	6%
Jefferson (AL)	31%	25%	6%	24%	18%	6%
Maricopa (AZ)	29	21	7	36	24	12
Pima (AZ)	9	7	2	6	6	0
Alameda (CA)	40	26	14	8	4	4
Contra Costa (CA)	15	15	0	38	28	10
Los Angeles (CA)	31	26	6	17	10	7
Orange (CA)	33	24	9	41	31	10
Riverside (CA)	28	22	5	32	26	6
San Bernardino (CA)	30%	22%	8%	33%	29%	4%
San Diego (CA)	19	17	2	25	19	6
San Mateo (CA)	25	20	5	13	8	5
Santa Clara (CA)	33	21	12	21	11	10
Broward (FL)	17	14	3	23	16	7
Miami-Dade (FL)	13	11	1	14	12	3
Palm Beach (FL)	18	12	6	15	8	7
Pinellas (FL)	10	6	4	13	10	3
Fulton (GA)	16%	14%	2%	39%	24%	15%
Honolulu (HI)	13	13	0	22	16	6
Cook (IL)	15	10	5	3	3	0
Marion (IN)	35	28	7	26	16	10
Baltimore (MD)	14	11	2	14	7	7
Montgomery (MD)	15	11	4	8	4	4
Macomb (MI)	11	8	2	16	16	1
Wayne (MI)	26	15	11	8	6	2
Essex (NJ)	47%	21%	26%	33%	27%	6%
Bronx (NY)	19	17	3	22	11	11
Kings (NY)	13	11	2	15	9	6
Nassau (NY)	13	9	5	17	9	8
Westchester (NY)	. . .	. . .	. . .	. . .	. . .	. . .
Franklin (OH)	30	22	8	28	22	6
Montgomery (PA)	18	13	5	14	7	7
Philadelphia (PA)	21	13	8	13	10	3
Shelby (TN)	20%	18%	2%	24%	12%	12%
Dallas (TX)	17	14	3	7	6	1
El Paso (TX)	3	2	1	18	8	10
Harris (TX)	8	8	1	7	4	3
Tarrant (TX)	9	6	2	11	7	4
Travis (TX)	22	16	6	12	6	6
Salt Lake (UT)	43	38	5	9	5	4
Fairfax (VA)	12	7	4	15	10	5

Note: All defendants who failed to appear in court and were not returned to the court during the 1-year study period are counted as fugitives. Some of these defendants may have been returned to the court at a later date. Rearrest data were collected for 1 year. Rearrests occurring after the end of this 1-year study period are not included in the table. Information on rearrests occurring in jurisdictions other than the one granting the pretrial release was not always available. Detail may not add to total because of rounding.
-- Less than 0.5%.
. . .Data were not reported by the jurisdiction.

Appendix table G. Adjudication outcome for felony defendants, by SCPS jurisdiction, 2002

	Percent of felony defendants							
		Adjudication outcome						
		Convicted			Not convicted			
County (State)	Adjudicated within 1 year	Total	Felony	Misde-meanor	Total	Dismissed	Acquitted	Other outcome*
Total	87%	68%	57%	11%	25%	24%	1%	7%
Jefferson (AL)	80%	64%	63%	2%	26%	26%	0%	10%
Maricopa (AZ)	86	78	74	4	20	20	--	2
Pima (AZ)	98	53	51	2	47	46	1	0
Alameda (CA)	91	79	69	10	14	15	0	7
Contra Costa (CA)	85	91	78	13	5	4	1	5
Los Angeles (CA)	96	85	82	3	11	10	1	4
Orange (CA)	90	83	75	8	6	5	--	11
Riverside (CA)	93	87	77	10	6	6	--	7
San Bernardino (CA)	95%	89%	86%	3%	8%	8%	0%	3%
San Diego (CA)	96	93	86	7	4	4	0	3
San Mateo (CA)	94	90	75	15	7	8	0	2
Santa Clara (CA)	90	82	75	7	7	7	0	12
Broward (FL)	84	42	41	1	35	33	2	24
Miami-Dade (FL)	82	39	38	2	41	41	--	19
Palm Beach (FL)	91	52	40	12	29	28	1	19
Pinellas (FL)	91	50	41	8	22	23	0	28
Fulton (GA)	56%	44%	35%	9%	53%	53%	0%	3%
Honolulu (HI)	78	94	89	5	3	3	0	3
Cook (IL)	86	60	59	1	40	38	1	0
Marion (IN)	75	68	62	6	32	29	2	1
Baltimore (MD)	92	52	38	14	35	34	1	13
Montgomery (MD)	92	59	40	19	33	33	1	8
Macomb (MI)	95	84	70	14	14	13	1	2
Wayne (MI)	94	68	63	5	20	18	2	12
Essex (NJ)	75%	61%	34%	28%	36%	37%	1%	3%
Bronx (NY)	88	68	29	39	32	31	--	0
Kings (NY)	90	56	41	15	44	43	--	0
Nassau (NY)	80	89	40	49	11	11	0	0
Westchester (NY)	. . .	84	34	51	16	15	--	0
Franklin (OH)	76	70	44	26	28	28	0	2
Montgomery (PA)	89	86	56	31	9	9	0	5
Philadelphia (PA)	77	39	32	7	59	54	5	2
Shelby (TN)	82%	69%	32%	37%	27%	27%	0%	3%
Dallas (TX)	83	83	80	3	17	15	2	0
El Paso (TX)	81	37	31	6	38	38	1	25
Harris (TX)	96	64	56	8	18	18	0	18
Tarrant (TX)	79	57	56	1	14	14	1	28
Travis (TX)	84	73	72	1	17	18	0	9
Salt Lake (UT)	93	78	48	29	19	18	1	3
Fairfax (VA)	95	55	28	26	44	43	1	1

Note: Detail may not add to 100% because of rounding.
--Less than 0.5%.
*Includes diversion and deferred adjudication.
. . . Data were not reported by the jurisdiction.

Appendix table H. Most severe type of sentence received by defendants convicted of a felony, by SCPS jurisdiction, 2002

	Percent of felony defendants					
	Incarceration			Nonincarceration		
County (State)	Total	Prison	Jail	Total	Probation	Other*
Total	74%	37%	37%	26%	25%	1%
Jefferson (AL)	40%	38%	2%	60%	60%	0%
Maricopa (AZ)	58	36	22	42	42	--
Pima (AZ)	52	34	18	48	48	--
Alameda (CA)	88	12	77	12	12	0
Contra Costa (CA)	95	30	65	5	5	0
Los Angeles (CA)	85	39	46	15	14	1
Orange (CA)	74	29	46	26	25	1
Riverside (CA)	86	36	50	14	14	0
San Bernardino (CA)	88%	40%	48%	12%	12%	0%
San Diego (CA)	84	33	51	16	16	--
San Mateo (CA)	79	23	56	21	21	0
Santa Clara (CA)	77	26	51	23	23	0
Broward (FL)	65	28	37	35	35	0
Miami-Dade (FL)	82	24	58	18	18	1
Palm Beach (FL)	82	14	68	18	17	1
Pinellas (FL)	74	34	40	26	25	1
Fulton (GA)	52%	39%	12%	48%	48%	0%
Honolulu (HI)	84	30	54	16	16	0
Cook (IL)	55	44	10	45	38	7
Marion (IN)	71	52	19	29	29	0
Baltimore (MD)	64	42	22	36	36	0
Montgomery (MD)	63	27	36	38	38	0
Macomb (MI)	61	11	49	39	34	5
Wayne (MI)	52	24	28	48	48	0
Essex (NJ)	61%	42%	20%	39%	38%	1%
Bronx (NY)	65	54	11	35	31	4
Kings (NY)	57	44	13	43	39	4
Nassau (NY)	83	36	47	17	13	4
Westchester (NY)	64	28	36	36	30	6
Franklin (OH)	86	56	30	14	13	1
Montgomery (PA)	70	30	40	30	30	0
Philadelphia (PA)	67	23	44	33	32	--
Shelby (TN)	81%	61%	20%	19%	19%	0%
Dallas (TX)	60	30	30	40	40	0
El Paso (TX)	61	46	15	39	39	0
Harris (TX)	96	81	15	4	4	0
Tarrant (TX)	87	65	22	13	13	0
Travis (TX)	76	59	18	24	23	1
Salt Lake (UT)	75	35	40	25	24	1
Fairfax (VA)	56	50	6	44	44	0

Note: Defendants receiving incarceration sentences that were wholly suspended are included under probation. Sentences to incarceration may have also included a probation term. Sentences to incarceration or probation may have included a fine, restitution, community service, treatment or other court-ordered condition. Other sentences included, fines, restitution, community service or treatment oriented punishment. Detail may not add to 100% because of rounding.
--Less than 0.5%.

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics

Washington, DC 20531

Felony Defendants in Large Urban Counties, 2002

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December 15, 2005

Dear Ladies/Gentlemen:

I want to express my appreciation for the time each of you devoted to our meeting this past Tuesday. The issue of in-court cameras is not only very important to Court TV, but also, we believe, to the American public, as attested to by the overwhelming number of states which now permit cameras in their courtrooms.

In this connection, I thought each of you might be interested in the enclosed material, which Court TV distributes to judges in order to help them become familiar with the process, and set up, when camera access to a trial is granted.

Of course, if there is any further information I can furnish, I would be delighted to do so, and, once again, I thank you for your time and hospitality.

Sincerely,

Douglas P. Jacobs

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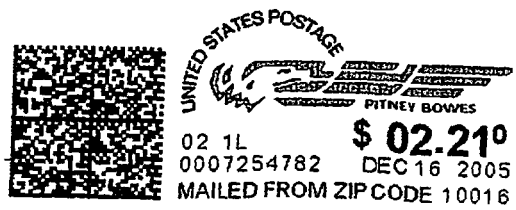
cc: Rick Valentine, Esq.



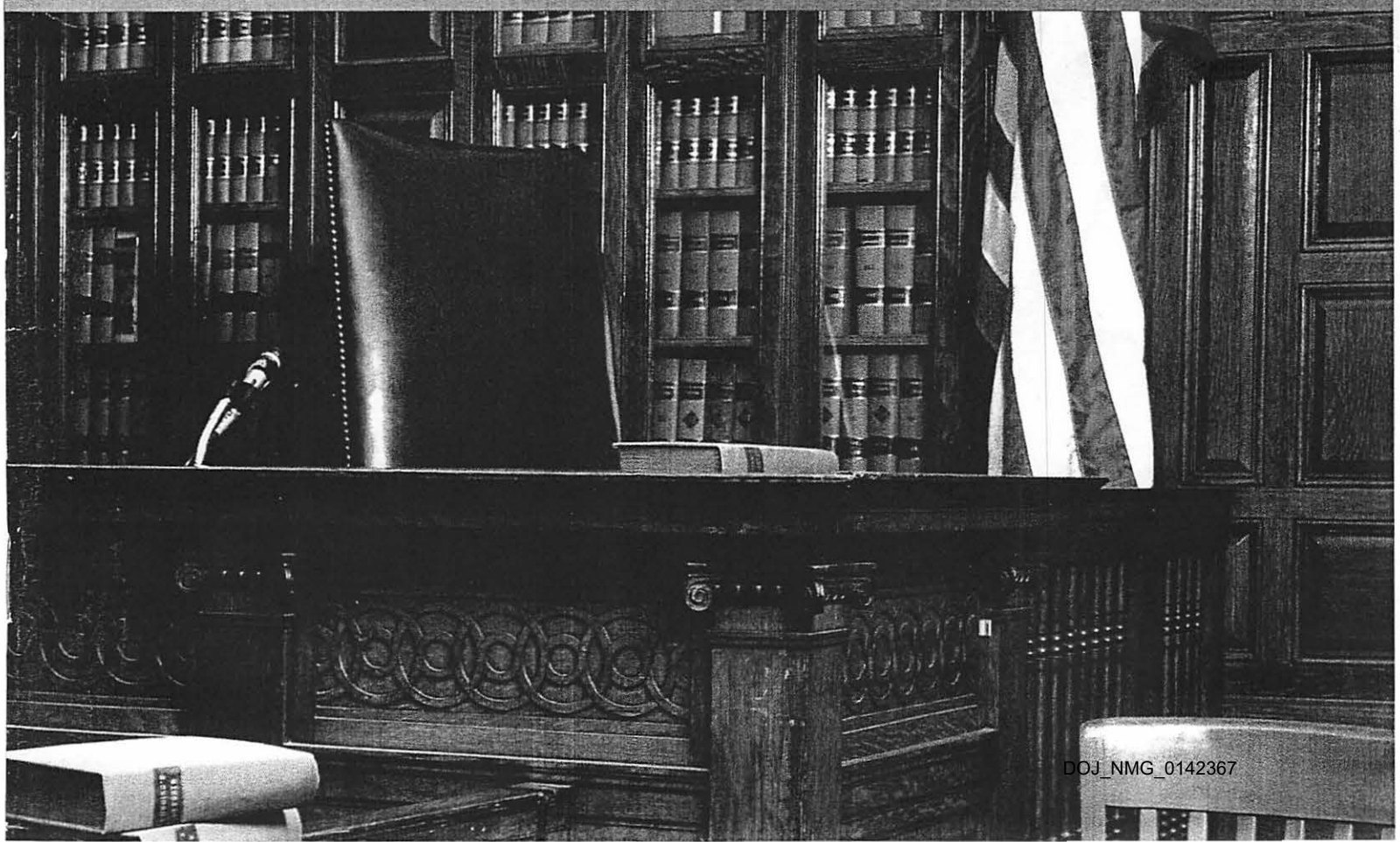
U.S. DEPARTMENT OF JUSTICE

DEC 20 2005

MAIN MAILROOM

Neil Gorsuch, Principal Deputy
Associate Attorney General
U.S. Department of Justice
950 Constitution Avenue, N.W.
Washington, D.C. 20530

JUDGING CAMERAS IN THE COURTROOM



CAMERAS IN THE COURTROOM: THE LESSONS OF EXPERIENCE

"The life of the law has not been logic: It has been experience."

Oliver Wendell Holmes Jr.

Court TV has televised more than 850 trials since its beginning in 1991. The vast majority of participants at all levels in these trials have reported that their experience with cameras was positive. The apprehensions of some judges and lawyers about televising trials are simply not borne out by the data.

IN COURT TV'S YEARS OF TELEVISING JUDICIAL PROCEEDINGS:

- No verdict has ever been overturned or even challenged because of the presence of cameras. We believe that there has not been a single instance in the last 25 years in which television coverage has resulted in a case being overturned.

- Television cameras do not disrupt the proceedings. As one California judge wrote us: "After the first five minutes we didn't even notice the camera in the courtroom."

- Judges who permit cameras in their courtrooms often allow cameras to return for subsequent cases. A judge from Oregon noted, "This is the second time I've had the good fortune to work with Court TV, and both have been very, very positive experiences."

- Full television coverage of trials usually increases respect for the judiciary. From a San Diego judge, "Based on mail and phone calls, I think many people learned more of the criminal justice system in this manner."

- Opening trials to television cameras better informs the public about the judicial system. More than 80 percent of Americans derive most of their news from television.

- Televised trials illuminate important issues. Racial problems, drug abuse, child neglect, mental health, domestic violence, gun control, drunk driving, and many other societal concerns are explored during court proceedings.

"Thank you for the professional presentation on Court TV. . . . It was a pleasure to have you in our Court, and I appreciate the manner in which you conducted the taping of the trial."

J. Randall Wyatt, Jr., Judge, Criminal Court, Division II, Nashville, Tennessee

"We also thank you and your colleagues for the professional and dignified manner in which you conducted yourselves during the trial."

Deborah G. Tyner, Circuit Judge for the Sixth Judicial Circuit of Michigan

"Having cameras in the courtroom was a great experience. I will spread the word to all my colleagues."

Hon. Philip Hubbard, Kent, Washington

Judges or lawyers with questions are invited to contact
Court TV's General Counsel
212-973-2800

Courtroom Television Network, LLC

600 Third Avenue

New York, NY 10016

New York Times
September 3, 2003

THE NEW YORK TIMES **OP-ED** *WEDNESDAY, SEPTEMBER 3, 2003*

The Case for TV

By Henry Schleiff

Both Kobe Bryant and Scott Peterson face not only serious criminal charges but also an onslaught of publicity. In the case of Mr. Bryant, the basketball star charged with sexual assault, so far cameras have been allowed in the courtroom. In the case of Mr. Peterson, charged with murdering his pregnant wife, the judge has closed next month's preliminary hearing to cameras.

Justice televised is justice improved (most of the time).

Trials and most judicial proceedings are meant to be public, of course, and cameras make it possible for more citizens to see them. But there are limits. If a judge determines that cameras would be inappropriate in a particular case, that decision should not be subject to appeal. The judge presides over the courtroom, and he or she must have the ultimate discretion to determine what is in the public interest — even if that decision goes against the interests of the electronic media.

That said, cameras should be routinely permitted in the courtroom, as are reporters for the print media. A judge should have to explain the reasoning for imposing a ban. At present, all 50 states allow cameras in some courts. Thirty-eight allow them in criminal courts. The federal government permits them only in certain appellate courts, but there is a growing consensus that having cameras in courtrooms serves the public interest.

Under no circumstances, however, should cameras be allowed in the jury room. Given the variety and popularity of reality TV today, I can easily envision a midseason replacement series on one of the networks called "Live From the Jury Room." Such a series might be good for Nielsen ratings, but it would be bad for our system of justice.

That's because jury deliberations are meant to be private. Juries must be free to make independent judgments of guilt or innocence, free from having to explain the evolution of their thinking, and free from concerns that their discussions could expose them to threats — or worse — from those who disagree with them.

The camera should be used to make more accessible those elements of government that are truly meant to be public, like trials, not to invade those elements that are properly private, like jury deliberations. The beauty of the camera is that it can expand the courtroom and enable the public to freely observe the functioning of the judicial branch of government, as was intended by the founders. □

Henry Schleiff is chairman and chief executive of Court TV.

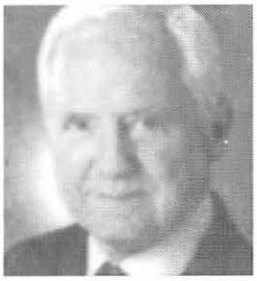
The Dallas Morning News Monday, March 1, 2004

VIEWPOINTS

Television should catch messiness, as well as majesty, of trials

Imagine the public uproar if Congress decided not to allow TV coverage of the president's State of the Union speech. What if the barons of the Senate and House decided the president's address would become less political and more substantive if the legislators alone were allowed to hear it? The public would get its information from the opposing spin doctors who always hold forth on television before and after the speech.

Unthinkable? Not in some of the nation's trial courts, where a few judges are adopting a similarly bad idea. They are decreeing that television will be permitted to broadcast only the lawyers' opening statements and closing arguments plus the jury's verdict – and none of the testimony in between.



Fred Graham

It is a disturbing trend because the public is being denied the right to see what its government is doing. Instead, the people are being relegated to the spin of the advocates, a sort of "Justice Lite" that implies they are being permitted to see the judicial system in operation on television, when in reality they aren't. Some judges are being less than straightforward by giving the impression they are upholding the voting public's desire to see trials on television, when viewers aren't being permitted to see the essence of every trial, the testimony.

This judicial sleight of hand can boomerang against the justice system, as it did in the recent trial of multimillionaire Robert Durst in Galveston. He admitted shooting a neighbor and throwing the chopped-up body into Galveston Bay, but he said he acted in self-defense. Mr. Durst was acquitted, and because the public had been permitted to see only the lawyers' arguments and none of the testimony on television, Texas justice was ridiculed as clueless by people around the world.

A similar public misunderstanding grew out of the 2002 trial of a San Francisco couple whose dog mauled a neighbor to death. Because TV viewers had been exposed to only the lawyers' spin and not the testimony, the public didn't learn about the callous insensitivity of the dog owners, and there was wide public criticism when the defendants were sentenced to long prison terms.

Thankfully, the judicial trend toward "Justice Lite" has been confined largely to Texas and California. There are obvious – though not uplifting – reasons for that.

Texas is the only state in which the state Supreme Court has failed to decide whether TV cameras will be allowed in criminal trials and, if so, what the rules will be. Each trial judge is left to invent his own rules for dealing with broadcasters asking for camera access and with the defendant's lawyer, who generally is seeking as little exposure as possible. A growing number of Texas judges are "splitting the baby" by allowing the public to see the legal arguments but not the evidence. The best antidote to that would be for the Texas Supreme Court to issue a rule requiring judges to admit cameras to all portions of trials unless there has been a showing that some specific harm will result.

The problem in California grows out of a schizophrenic judicial reaction to the unruly O.J. Simpson trial, which was televised and widely considered a disaster for the judicial system. On the one hand, an increasing number of trial judges seem to have become fearful that if they permit cameras in their courtrooms, an unseemly Simpson-type proceeding may be shown to the world. On the other hand, the California Judicial Council reviewed the camera issue in the wake of the Simpson case and gave its blessing to the value of television in courts. It concluded that TV coverage of trials should continue, except in unusual circumstances, as a way of "maintaining public trust and confidence in the judicial system" and "promoting public access to the judicial system."

Increasingly, California judges are responding to those conflicting considerations by adopting "Justice Lite" – allowing TV coverage of the lawyers' orations but excluding cameras from the more free-wheeling testimony of witnesses, when justice can appear messy and a judge who fails to control the courtroom can look inept. At a time when more than 80 percent of Americans are getting most of their information from television, that is thin gruel indeed.

The fact is that no trial in the United States has been overturned in more than 40 years because a TV camera was in the court. Yet last month, the Los Angeles judge presiding over the murder trial of actor Robert Blake decreed that cameras will be allowed only during the attorneys' opening and closing remarks, not the testimony, in order to "protect the defendant's right to a fair trial." When Mr. Blake's lawyer attempted to rise to say his client wanted the trial to be televised, the judge cut him off.

Fred Graham is chief anchor and managing editor of Court TV.

July 21, 1993

RESULTS OF JUDICIAL QUESTIONNAIRE (1991-1993) PREPARED FOR THE COURTROOM TELEVISION NETWORK (COURT TV)

Since its launch on July 1, 1991 Court TV has covered 229 civil and criminal trials in 28 states, in both federal and state courts. A brief, two-page survey regarding Court TV's presence and the conduct of its staff in their courtrooms was mailed to the 180 judges who presided over those cases.

On July 19, 1993 we prepared a master tally of the questionnaires returned by the 130 judges who responded. The results include responses from 19 federal judges (of the 23) who presided over cases covered by Court TV during the first two years of the U.S. experiment with cameras in federal civil trials.

The principal finding of the survey is that the presence of Court TV's cameras in courtrooms has not impeded the judicial process according to the unanimous opinion of the 129* judges who responded to this question. In fact, this was a strongly held view of many judges, as evidenced by the comment of a Wisconsin judge, "I am completely satisfied that the presence of Court TV did not affect the trial in any material manner, and certainly did not affect the manner in which the jury performed its important function." A number of respondents referred to the cameras as "unobtrusive" and several remarked they "forgot the camera was there." A Michigan judge echoed a frequent comment when he wrote "Everyone got use to them quickly, eventually they were hardly noticed."

Eighty-five judges (65%) thought the presence of Court TV's cameras, and its reporting, "Helped convey the events of the trial in a way that contributed to public understanding of the legal system." The remaining judges indicated they were "not sure" about the educational impact of Court TV's coverage or declined to answer the question, citing lack of access to the network's telecasts as the reason for these responses.

* One judge declined to answer the question, writing instead that the matter was "under study."

Nearly all respondents (97%) found that Court TV's personnel were courteous, were respectful of the court process, and were dressed appropriately.

Below are some random comments from both state and federal judges about Court TV and its operation in the courtroom.

"I believe the public scrutiny adds to the fairness of the proceeding and assures the even handed administration of justice."

State Court of Fulton County (GA)

"You have covered three trials in my session. My experience with Court TV has been excellent to outstanding in every way. In the past, the public only saw 30-second bites of trials. With Court TV the public sees and feels what the entire trial is about. The courts belong to the public, and the public has the right to see what we do."

Middlesex County Superior Court (MA)

"It was a pleasure working with your people, and I think it's great that the public are getting to see the real world of courtrooms -- a far cry from P. Mason and L.A. Law."

United States District Court
Eastern District of Pennsylvania

"The personnel conducted themselves in an exemplary manner."

New York City Civil Court (NY)

"You were extremely professional and courteous. You should be commended for the service."

Maricopa County Superior Court (AZ)

"Based on mail and phone calls I think many people learned more of the criminal justice system in this manner."

San Diego Superior Court (CA)

"I was worried that court personnel would "play" to the camera. This did not happen. After 30 minutes everyone forgot the camera's were there."

Third Judicial Circuit for Dixie County (FL)

"Anything which reveals that we do, in a reasonably complete way, is of benefit to the public and, therefore, the Court.

New York Supreme Court (NY)

"Overall it was a very positive experience in a very high profile trial. Your staff was very respectful and unquestionably objective in their presentation. They were quite courteous."

Circuit Court Criminal Division, Broward County (FL)

"Unlike local tv which tends to come and go during the course of the trial, the continued presence of the Court TV camera had a beneficial effect. It brought a sense of dignity to the proceedings. Unfortunately, the local tv news emphasis encourages the attorneys to act out for a sound bite. Your organization does not do that."

District Court (VT)

"If anything, the broader public scrutiny causes all parties to adhere more closely to the dictates of the law and the rules of professional conduct."

Los Angeles Superior Court (CA)

"In a very short period of time, we all ceased to be aware of their presence (even those of us with acting aspirations). From the comments that I have received, the full presentation of the trial, rather that the usual bit reporting of the normal news report, gave the results uncontroversial authenticity."

Hamilton County Court of Common Pleas (OH)

"All personnel were most courteous and willing to cooperate in any way. Exceptional rapport and understanding of the process."

Wake County Superior Court (NC)

"Televising the entire trial duplicates and expands the right of the public to attend trials."

Pasadena Superior Court (CA)

"It permitted the public as a whole to see all the testimony and evidence; not just a summary. This permits a better understanding of jury verdicts."

Richland County Circuit Court (SC)

"The camera was not intrusive. Having it there I think kept everyone on their toes."

Los Angeles Municipal Court (CA)

# # #

COURT TV
COURTROOM TELEVISION NETWORK

JUDICIAL QUESTIONNAIRE

JUDGE'S NAME MASTER TALLY - 130 Responses July 1993

COURT

1. Overall, were the COURT TV personnel you and your staff encountered:

a. Courteous Yes 129 (99%) No 0 No response: 1 (1%)

Comments, if any:

b. Respectful of the court and the process:

Yes 127 (97%) No 0 No response: 3 (3%)

Comments, if any:

c. Dressed appropriately:

Yes 124 (95%) No 1 (1%) No response: 5 (4%)

Comments, if any:

2. Do you feel the presence of our cameras impeded the fairness of the process

Yes 0 No 129 (99%) No Response: 1 (1%)

Comments, if any:

600 Third Avenue, New York, NY 10016
Phone: (212) 973-2800 • Fax: (212) 973-3355

3. **Do you think the presence of our cameras and, to the extent you are aware of it, COURT TV's reporting, helped convey the events of the trial in a way that contributed to public understanding of the legal system?**

Yes 85 (65%) No 2 (2%) Not sure: 25 (19%) No response: 18 (13%)

Comments, if any: _____

_____

_____

4. **Did COURT TV's reporters or camera people do anything that you feel they should not have done?**

Yes 9 (7%) No 115 (88%) No response: 6 (5%)

Comments, if any: _____

_____

_____

Signed _____ **Date** _____

COURT TV
COURTROOM TELEVISION NETWORK

JUDICIAL QUESTIONNAIRE

JUDGE'S NAME MASTER TALLY - 130 Responses July 1993

COURT

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Signed _____ Date _____

Department of Justice

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*******FACT SHEET*******

ATTORNEY GENERAL ALBERTO R. GONZALES DELIVERS REMARKS REGARDING THE WAR ON TERROR AT THE COUNCIL ON FOREIGN RELATIONS

Progress in the War on Terrorism

The prevention of terrorist attacks and the prosecution of the war on terrorism remain the top priorities of the Department of Justice. In the past year alone, there have been significant convictions in terrorism cases from Virginia to Texas, following a track record of success over the past four years in previous cases such as John Walker Lindh, Zacarias Moussaoui and Richard Reid, among others.

Notable cases resolved in 2005 include:

Ahmed Omar Abu Ali: On November 22, 2005 in the Eastern District of Virginia, a federal jury convicted Ahmed Omar Abu Ali on all counts of a superseding indictment charging him with terrorism offenses. The jury found Ali, a 24-year-old Virginia man, guilty of conspiracy to provide material support and resources to a designated foreign terrorist organization (al Qaeda); providing material support and resources to al Qaeda; conspiracy to provide material support to terrorists; providing material support to terrorists; contribution of services to al Qaeda; receipt of funds and services from al Qaeda; conspiracy to assassinate the President of the United States; conspiracy to commit air piracy; and conspiracy to destroy aircraft. Ali faces a mandatory minimum sentence of 20 years in prison and a maximum sentence of life in prison. Sentencing is scheduled for February 17, 2006.

Uzair Paracha: On November 23, 2005, a federal jury in the Southern District of New York convicted Uzair Paracha, a Pakistani national with permanent resident alien status in the United States, on charges of providing material support to al Qaeda. Evidence at trial proved that Paracha agreed with his father and two al Qaeda members to provide support to al Qaeda by, among other things, trying to help an al Qaeda member re-enter the United States to commit a terrorist act. Paracha faces a maximum sentence of 75 years in prison. Sentencing is scheduled for March 3, 2006.

Hemant Lakhani: On April 27, 2005 in the District of New Jersey, a federal jury convicted a British national, Hemant Lakhani, on charges of attempting to sell shoulder-fired missiles to

what he thought was a terrorist group intent on shooting down U.S. airliners. Lakhani was arrested following an undercover sting operation involving agents from several nations. Lakhani was sentenced in September 2005 to 47 years in prison.

Ali Al-Timimi: On April 26, 2005 in the Eastern District of Virginia, Ali Al-Timimi was convicted on all 10 charges brought against him in connection with the "Virginia Jihad" case. Al-Timimi, a spiritual leader at a mosque in Northern Virginia, encouraged other individuals at a meeting to go to Pakistan to receive military training from Lashkar-e-Taibi, a designated foreign terrorist group, in order to fight U.S. troops in Afghanistan. Al-Timimi was sentenced to life in prison.

Zacarias Moussaoui: On April 24, 2005 in the Eastern District of Virginia, Zacarias Moussaoui pleaded guilty to six charges against him related to his participation in the September 11th conspiracy. Moussaoui faces a maximum penalty of death.

Eric Robert Rudolph: On April 13, 2005 in the Northern District of Georgia and the Northern District of Alabama, Eric Robert Rudolph pleaded guilty to charges related to deadly bombings in Birmingham, Alabama, and in the Atlanta area, including the bombing at the 1996 Olympics. He has been sentenced to life in prison. Rudolph provided the government with information about 250 pounds of explosives that he had hidden in the Western North Carolina area. As a result of Rudolph's information, the government was able to locate and safely detonate the explosives.

'INFOCOM': On April 12, 2005 in the Northern District of Texas, a federal jury convicted Bayan Elashi, Basman Elashi, Ghassan Elashi and the Infocom Corporation on charges of conspiracy to deal in the property of a specially designated terrorist and money laundering. The activities were related to Infocom, an Internet service provider believed to be a front for Hamas.

Mohammed Ali Hasan Al-Moayad and Mohammed Zayed: On March 10, 2005 a federal jury in the Eastern District of New York convicted Mohammed Ali Hasan Al-Moayad, a Yemeni cleric, and Mohammed Zayed on charges of providing, and conspiring to provide material support and resources to al Qaeda and Hamas. Al-Moayad was sentenced to 75 years in prison; Zayed was sentenced to 45 years in prison.

Rafil Dhafir: On February 10, 2005 in the Northern District of New York, a federal jury convicted Rafil Dhafir on charges of participating in a conspiracy to unlawfully send money to Iraq, in violation of U.S. sanctions, and money laundering. Dhafir was sentenced to 22 years in prison.

Lynne Stewart, et al: On February 10, 2005, a federal jury in the Southern District of New York convicted attorney Lynne Stewart, Mohammed Yousry, Ahmed Abdel Sattar and Yassir al-Sirri on charges including providing, and concealing the provision of, material support or resources to terrorists. The four defendants were associates of Sheikh Abdel-Rahman, leader of the terrorist organization Islamic Group (IG). Rahman is serving a life sentence for his role in terrorist activity, including the 1993 bombing of the World Trade Center.

05-641

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THE WHITE HOUSE **BULLETIN**

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SUBJECT: TODAY'S BRIEFING

DATE: THURSDAY, DECEMBER 1, 2005

OFF THE WIRES:

- **Consumer Spending, Personal Income Rise For October.** The Department of Commerce reported this morning that consumer spending rose 0.2 percent in October, in line with economists' expectations, while personal income rose 0.4 percent, slightly below the 0.5 percent expected. The price index for personal consumption, which excludes food and energy costs and is closely watched at the fed, rose 0.1 percent in October, down from a 0.2 percent rise in September. October's year-over-year growth was 1.8 percent, compared to 2.0 percent for September.

- **ISM Manufacturing Index Down Slightly, But Still Registering Growth.** The Institute For Supply Management's Manufacturing Index came in at 58.1 in November, down from a 59.1 reading in October. Any reading about 50 indicates an expansion of the manufacturing sector and November's reading is the 30th consecutive month of expansion. Norbert Ore, chair of the Index's survey committee, said, "The New Orders and Production indexes continue to drive the sector. While energy costs and supply interruptions remain a concern, purchasers are satisfied in general with current business conditions."

- **Jobless Claims Drop.** The Department Of Labor reported this morning that first-time claims for US jobless benefits dropped 17,000 last week to 320,000, in line with Wall Street's expectations. The four-week moving average fell 1,250 to 322,500.

- **Rise In Home Prices Slows.** The average cost of a single family home rose 12 percent the twelve months ending September 30, the Office of Federal Housing Enterprise Oversight. The previous reading, for the twelve months ending June 30, showed a 14 percent rise in average home prices.

IN THE WHITE HOUSE AND AROUND TOWN:

- **White House Investigates Reports Military Paid Iraqi Press For Favorable Stories.** The White House said today it is "very concerned" about reports the US military is paying Iraqi newspapers to print favorable stories about the war and the rebuilding effort. Press Secretary Scott McClellan told reporters, "We are seeking more information from the Pentagon." McClellan said Joint Chiefs Chairman Peter Pace indicated the story "was news to him as well."

  Pace Says Military Has Done Poor Job Of Explaining War Effort. Meanwhile, Pace said today the military has done an inadequate job of explaining what is going on in Iraq and the political and military progress there. Speaking at the National Defense University at Fort McNair, Pace also said, however, that the war against terrorism will be a long one. Pace said of the suggestion the US would be better off leaving Iraq now, "There is no option other than victory. You need to get out and read what our enemies have said. ... Their goal is to destroy our way of life."

  Lynch Says US Operations On Syrian Border Resulting In Fewer Terrorist Attacks In Iraq. Gen. Mark Lynch said today US and Iraqi operations along the Syrian border have resulted in a significant decrease in suicide bombings. Lunch said there were 23 attacks in November, the lowest level in seven

months. He also said that while exact figures are not available, US forces have also recorded a reduction in car bombs and roadside bombs compared with October. Lynch added that for the month there was a 34 percent reduction in overall casualties. Lynch said the main entry point for foreign fighters has been shut down, adding that at least 96 percent of suicide bombers in Iraq are from outside the country. Lynch also said US and Iraqi forces discovered 301 weapons caches in November, the largest number captured in a single month this year, and that at least 117 members of al Qaeda have been killed or captured in 2005. Lynch said Abu Musab al-Zarqawi is "struggling because we've taken away a lot of his leadership, we've taken away a lot of his munitions, he's struggling because we've denied him safe havens across Iraq."

Kerry Says Bush At Odds With Generals. Sen. John Kerry told NBC television this morning his major problem with President Bush's speech yesterday is that "it doesn't recognize the realities on the ground which his own generals, General Casey, have laid bare to the United States Congress and the American people. The fact is General Casey has said that the large presence of American troops in Iraq gives credence to the notion of occupation and, in fact, delays the willingness and the ability of the Iraqi troops to stand up. And I think until the President really acknowledges that that large presence is part of the problem and begins to set a benchmark process for transferring responsibility to the Iraqis, we're going to continue with more of the same, and I think that's the greatest problem. And the other problem is we're not doing what we ought to be doing with respect to the political reconciliation. No gun, no soldier is going to end the insurgency in Iraq. The insurgency has to be dealt with through a political reconciliation." NBC's Matt Lauer said that in his speech, Bush addressed key points Kerry made on November 10 and that "it doesn't seem that you have all that much disagreement on the big items on that list." Kerry responded, "Actually, we do have a disagreement. Number one, I want to set a target for the transfer of authority. For instance, we ought to be able to say that within the next two months or three months we're going to transfer the responsibility for the control of Baghdad to Iraqi troops, or by such and such a time it is our goal. You don't have to set a specific target that's going to be adhered to no matter what. There are obviously variations on what happens."

Guerrillas Fire On US Installations But Quickly Disperse. Guerrillas fired mortars at several US bases and government offices in Ramadi today before dispersing, residents and police said. There were no immediate reports of death or injury, and US officers said the attacks may have been little more than a propaganda stunt. The insurgents left behind posters and graffiti saying they were members of al Qaeda in Iraq and claiming responsibility for shooting down a US drone. There were no reports that such an aircraft was shot down, however.

Interior Ministry's Chief Human Rights Investigator Fired. An official speaking on condition of anonymity said Interior Minister Bayan Jabr has fired Nouri al-Nouri, the ministry's chief inspector for corruption cases and human rights violations, on orders from Prime Minister Ibrahim al-Jaafari. Details were not immediately available.

- **Bush Marks World AIDS Day.** President Bush marked World AIDS Day in an address at the White House this morning, saying, "Today, with people around the world, not just here in America, but all around the world, 40 million – we turn our thoughts to the more than 40 million men, women, and children who are living with HIV. That's what World AIDS Day is all about. And on World AIDS Day, we renew our commitment to turn the tide against this disease."

  Bush said that in Africa, the "pandemic threatens the stability and the future of whole societies" and in Asia, HIV/AIDS "is a challenge that grows daily and must be confronted directly." Bush added, "Here in the United States, over a million of our citizens face this chronic condition. At the start of this century, AIDS causes suffering from remote villages of Africa to the heart of America's big cities. This danger is multiplied by indifference and complacency. This danger will be overcome by compassion, honesty, and decisive action. I believe America has a unique ability, and a special calling, to fight this disease. We are blessed with great scientific knowledge. We're a generous country that has always reached out to feed the hungry, and rescue captives, and care for the sick. We are guided by the conviction of our founding -- that the Author of Life has endowed every life with matchless value." Bush said the federal government currently provides "more than $17 billion a year to help people in America living with HIV/AIDS – including funding that brings life-saving drugs and treatment to hundreds of thousands of low-income Americans." Nevertheless, Bush said, "America still sees an estimated 40,000 new infections each year. This is not inevitable -- and it's not acceptable." Bush said that outside America's borders, the US continues to support the Global Fund, "which is helping nations purchase medicines and treat tuberculosis, the deadly

infection that often accompanies AIDS. We are also supporting our partners through the Emergency Plan for AIDS Relief, the largest initiative in history to combat a specific disease. This effort is designed to support and strengthen the AIDS-fighting strategies of many nations, including 15 heavily afflicted nations in Africa, Asia, and the Caribbean. In May 2003, we committed $15 billion over five years to meet specific goals: to support treatment for two million people; support prevention for seven million people; support care for 10 million people."

Bush also announced today a "New Partners Initiative," under which "we will further reach out to our faith-based and community organizations that provide much of the health care in the developing world, and make sure they have access to an American assistance. By identifying and supporting these organizations, we will reach more people, more effectively, and save more lives." The President continued, "Americans have always stood for human dignity when history calls. When the nations of Europe lay in rubble after World War II, America helped build a brighter future with the Marshall Plan. When the developing world looked for help and inspiration, we sent the Peace Corps to lay new foundations for friendship. And now, as millions afflicted with AIDS reach out for help, the American people are once again responding. On this World AIDS Day, we are proud to stand with our friends and partners in this urgent struggle. And every life we help to save makes us proud to be Americans."

- **US Aid To Afghanistan Expected To Reach $5.5 Billion Over Five Years.** Afghan Finance Minister Anwar ul-Haq Ahadi said today he expects US development assistance to his country to be approximately $5.5 billion over the next five years. Ahadi made the assessment as the two countries signed a memorandum of understanding on aid agreements that outline plans for American support for programs in education, health care, economic development and political development. US Ambassador Ronald Neumann said at the signing ceremony in Kabul, "Supporting a prosperous and democratic Afghanistan is vitally important to all branches of the United States government and to the American people."

- **House GOP Preparing Tax Reconciliation Bill For Action Next Week.** House GOP leaders are expected next week to try and finish some major business items left undone prior to the Thanksgiving recess. At the top of the list for December floor action are bills on border security and tax relief. According to a Ways and Means Committee document, the tax relief bill will contain the following provisions:

One-Year Extension of Provisions Expiring in 2005:

1. Exempt personal tax credits, such as the dependent care, HOPE and Lifetime Learning credits, from the AMT.
2. State and local sales tax deduction.
3. Research and experimentation tax credit. In addition to the extension, the credit is enhanced by providing an alternative method for calculating the credit.
4. Above-the-line deduction for higher education expenses.
5. Above-the-line deduction for out-of-pocket teacher classroom expenses.
6. Authority to issue Qualified Zone Academy Bonds (QZABs) for school modernization, equipment and teacher training in high-poverty areas.
7. Enhanced charitable deduction for computer donations to schools and public libraries.
8. Work Opportunity Tax Credit (WOTC) for hiring individuals who face barriers to employment. In addition to the extension, the age limit for eligible food stamp recipients is increased from 25 to 35.
9. Welfare-to-Work Tax Credit for hiring individuals who have received public assistance for an extended period of time.
10. Incentives for business activity on Indian reservations
    a. Wage tax credit for employment on Indian reservations.
    b. Accelerated depreciation for business investment on Indian reservations.
11. Fifteen-year depreciation period for restaurants and leasehold improvements.
12. Availability of Archer MSAs (Medical Savings Accounts).
13. Suspension of limit on percentage depletion for oil and gas produced from marginal wells.
14. Tax incentives to revitalize the District of Columbia.
15. Possession tax credit for American Samoa.
16. Excise tax for enforcing mental health parity rules.

Two-Year Extension of Certain Expiring Provisions:

1. "Savers credit" for lower income workers who contribute to retirement savings accounts.

2. Higher expensing limit and phase-out threshold under section 179 (i.e., small business expensing).
3. Expensing of brownfield remediation costs. In addition to the extension, the definition of a contaminated site is expanded to include sites contaminated by petroleum products.
4. Active financing exception under Subpart F so that domestic manufacturers and U.S.-based financial service firms can price their products competitively. In addition to the extension, certain cross-border payments of dividends, interest, rents, and royalties between related foreign subsidiaries are also exempted from Subpart F.
5. Reduced tax rates on capital gains and dividends.

Miscellaneous Provisions:

1. Application of the active trade or business test on an affiliated group basis. The provision simplifies the application of this test by applying the same standard regardless of whether a business is owned by a holding company or owned directly.
2. Clarification of tax treatment for environmental cleanup "settlement funds." The provision treats these funds as governmentally owned (i.e., not subject to tax) if certain standards and requirements are met.
3. Capital gains treatment for self-created musical works that are sold by the artist. Under current law, such sales are taxed as regular income.
4. Reduction of the threshold for application of the tonnage tax from 10,000 pounds under current law to 6,000 deadweight tons.
5. Repeal of the current-law requirement that veterans must have served before 1977 to be eligible for affordable mortgages financed with State-issued qualified veterans' mortgage bonds.
6. Codification and extension of IRS rules that govern the tax treatment of the "Permanent University Fund." This Fund is used to finance the activities of certain State universities.

- **Bush Signs Bill Authorizing Rosa Parks Statue At Capitol.** President Bush signed a bill today authorizing a statue of Rosa Parks in the Capitol's Statuary Hall. At a signing ceremony that included members of Parks' family, Bush said of the woman who would not give up her seat on a bus in Montgomery, Alabama in 1955, "By refusing to give in, Rosa Parks called America back to its founding promise of equality and justice for everyone." Parks will be the first black woman to be represented in the hall, where many states have status honoring important figures in their history.

- **Americans To Press Iraqi Government To Cut Back On Personal Security Details.** Military sources in Iraq have told U.S.News and the Bulletin about a burgeoning security problem they now hope to fix: There are 12,000 personal bodyguards employed by various people in the current Iraqi transitional government, according to a U.S. officer. One Iraqi official alone has 1,600 people in his personal security detail, the source said. To make matters worse, some American military leaders say some of these virtual militias of bodyguards don't always follow the rules. And because most Iraqis cannot differentiate between the bodyguards and the regular security forces, the unregulated security details are giving the real army and police a bad name. American military officials in Iraq briefed top commanders about the problem this week. They say they hope to push forward a plan to reform and shrink the size of the security details after the December 15 election. -- *Bulletin exclusive from U.S. News*

- **Regional Editorial Boards Largely Unimpressed With Bush Speech.** A survey of editorials in large regional dailies across the nation suggest President Bush has a lot of selling to do on the war in Iraq, at least with editorial writers. Editorials' complaints varied from question about the accuracy of many of the statements made by President Bush in his speech and asserted in the plan released yesterday, to complaints about a lack of a timetable for withdrawal, to questions about whether the US should be in Iraq at all.

  Minneapolis Star Tribune: "President Bush gave an impassioned and rosy speech on the way forward in Iraq at the U.S. Naval Academy Wednesday. It's just too bad that the picture he painted of today's Iraq was an illusion, and most of his assertions about the future were wrongheaded."

  St. Louis Post-Dispatch: "The war in Iraq is not vital to U.S. interests. The war on terror is no more likely to be won or lost in Iraq than the Cold War was to be won or lost in Vietnam. The sooner we can develop a plan to get out of Iraq, rebuild our military and refocus our resources and attention on the terrorists behind Sept. 11, the closer we'll be to real victory."

  The ***Chicago Sun-Times*** did not have an editorial on the speech, but did feature a political cartoon showing Bush saying "stay the course" next to a field of soldiers' graves.

Baltimore Sun: Referring to Bush's assessment of the situation in his speech, "It would be great, if it were believable. ... For the record, the Iraqi insurgency is not in its last throes. The country is deteriorating into a vicious civil conflict, and the United States has only bad choices ahead. The man at the helm seems blind to that, intent as he is on chasing after a pipe-dream vision of success."

Seattle Post-Intelligencer: "President Bush played his Iraqi cards, the worn ones he always puts on the table. His speech Wednesday offered a few traces of cause for optimism. ... The president promises to 'stay the course.' But we still don't know when, how or if Iraqis will be left alone to perform the essential task of democracy: determining their own course."

St. Petersburg Times: "Bush offered precious little Wednesday other than an optimistic assessment and a stubborn determination to stay the course. That is not enough for impatient members of Congress and Americans who have lost faith in this president and are tired of generalities about a war with no definable end."

Des Moines Register. "We've heard it all before. If Wednesday's stage-managed speech at the Naval Academy was meant to restore President Bush's credibility on Iraq, it won't work unless he follows up with something more concrete — namely, a timetable. ... Bush cannot ask Americans to be infinitely patient with an open-ended commitment of blood and treasure without letting them in on how long it will take to prepare the Iraqis to defend themselves."

Akron Beacon-Journal. Bush's speech "was ultimately discouraging. His resolve was once again impressive. Still, it isn't enough to tell stories of modest progress. The imperative doesn't involve charting the number of steps forward compared to the steps back. The overall pace of achievement must be accelerated, the clock so plainly ticking. Americans should expect to see a White House doing all that it can to meet its objective. That wasn't part of the president's address."

While most editorial boards were negative, a number of editorial pages adopted a wait-and-see attitude:

Milwaukee Journal Sentinel: Bush "gave the American people his most detailed strategy yet to defeat terrorism in Iraq and establish a stable, progressive government there. But the strategy is absent one key detail: a flexible timetable for withdrawal. Moreover, even absent a timetable, there are reasonable doubts about whether it can succeed. Hard work and good luck will be needed if the far-reaching goals are to be reached." After laying out a series of suggested strategic moves, the Journal-Sentinel concludes, "If these and other steps can be taken, we're hopeful that next year could see what all Americans want to see in Iraq: a turnaround."

Denver Post: (referring the plan released yesterday), "The document is a familiar recap of U.S. policy and White House optimism, but there is more detail than in previous statements, and it sets welcome benchmarks that will allow both the public and Washington decisionmakers to assess the effort. ... Americans and Iraqi allies are both looking for an end to the conflict. We hope the president realizes that patience is growing thin."

Cleveland Plain Dealer: "Bush's conclusion - that conditions on the ground and not timetables set by Washington will determine when the troops will come home - remains valid. Having dismantled the mechanisms of fear that once allowed Iraq to function, no matter how imperfectly, it is incumbent upon this nation to leave it with at least the framework on which to build a democratic state. ... This victory, if it is to be won, demands American patience. And that's a fast-disappearing attribute that only marked progress will restore."

Some papers did take a positive view of Bush's performance. For example:

Chicago Tribune: "President Bush traveled to the U.S. Naval Academy on Wednesday to defend his handling of the war. This time he armed himself with something more than bravado. He came with a strategy and specifics about Iraq's accelerating progress toward victory."

Miami Herald: "President Bush's speech at the U.S. Naval Academy yesterday marks a welcome change in the way the administration tries to make its case for the war in Iraq. Instead of attacking critics, Mr. Bush acknowledged the need for a healthy debate about the war. Instead of the shopworn slogan, 'stay the course,' Mr. Bush in his speech and an accompanying 35-page document outlined a broad strategy that includes political, economic and military objectives. The president seemed to be more candid, as well, about the difficulties that lie ahead, which are considerable."

- **Republicans Gleeful That Pelosi Is Calling For Fast Troop Withdrawal.** Republican strategists are delighted that House Democratic Leader Nancy Pelosi has called for fast U.S. withdrawal from Iraq. The

California liberal yesterday endorsed the plan offered by pro-defense Democrat John Murtha of Pennsylvania, whose break with the administration over Iraq has encouraged other Democrats to more boldly criticize the President's policy. GOP insiders argue that Pelosi is perceived by middle-of-the-road voters as overly partisan and out of the mainstream. Her endorsement of the pullout will only hurt that cause, the theory goes. Pelosi's problem is that "she only knows 'no,'" Republican pollster Frank Luntz told U.S. News and the Bulletin. "She's not intriguing. She's not compelling. She's just angry." And she's a very poor spokesman for the Democratic party, says Luntz. On the other hand, Senate Democratic Leader Harry Reid of Nevada makes a good impression on voters because he seems reasonable, mild-mannered, and relatively non-partisan. "He talks about disappointment and frustration [with Bush]," Luntz says, arguing that this approach is far more popular with voters than the politics of rage and obstruction. -- *Bulletin exclusive from U.S. News*

- **Media Focus On Cheney's Sound Bites Hurt His Public Image.** There's a bit of good news for Vice President Dick Cheney about his image, which has taken a battering lately because he is associated with everything that's gone wrong in Iraq: The more swing voters hear Cheney talk, the more sense he makes to them. Private GOP focus groups find that when voters are placed in a room and shown an entire Cheney speech, they are impressed with his intellect, his articulateness and his views. It's the sound bites that get him in trouble, because television editors generally boil down his statements to the most provocative and conservative few seconds they can find. The trouble for the veep is that his full speeches are almost never carried in their entirety. "Cheney in 'long form' is as effective as he ever was," says a prominent GOP consultant. "but in sound bites, he loses his 'oomph.' "– *Bulletin exclusive from U.S. News*

- **Bush Looking To Mend Hill Fences With Holiday Parties.** GOP insiders say President Bush has a perfect opportunity to start improving his fortunes on Capitol Hill in the next few weeks. They say Bush can mend some fences with GOP legislators if he turns on the charm at the White House holiday parties, which are a fixture of the capital's social circuit in mid-December. Look for Bush to make nice as he spreads holiday cheer amid the endless platters of boiled shrimp, lamb chops, and London broil traditionally served in the beautifully decorated East Room -- along with free-flowing beer and wine. (The President doesn't drink alcohol but plenty of senators and House members do.) Insiders predict he will buttonhole legislators and make the argument that they need to hold together or lose any prospect of passing major legislation in 2006 – which would enable Democrats to label the GOP as the do-nothing party in the mid-term elections. "Bush needs to reach out and say, 'join me,'" says a prominent Republican who advises congressional conservatives. And making his pitch in the convivial Christmas atmosphere could make him all the more effective. – *Bulletin exclusive from U.S. News*

- **GAO Finds Medicaid Overpaying For Medicines.** A GAO report requested by the House Energy and Commerce Committee concludes that Medicaid is significantly overpaying for prescription medicines. After surveying five states practices -- Mississippi, Montana, Pennsylvania, South Carolina and Utah – GAO concluded, "State payments for brand-name drugs exceeded the average manufacturers price by 12 percent, on average; exceeded the 'Best Price' by 36 percent, on average; and exceeded the Federal Supply Schedule price by 73 percent, on average." In 1990, expenditures for medicines were $4.6 billion, comprising 7 percent of total medical care expenditures. By 2003, expenditures for medicines rose to $33.8 billion, comprising 13 percent of total medical care expenditures.

- **Democrats To Probe Alito's Vanguard Decision.** Senate Judiciary Committee Democrats are stepping up their probe of Supreme Court nominee Samuel Alito's holdings in Vanguard funds amid conflicting explanations on why he didn't recuse himself from a Vanguard case in 2002. "We're going to dig into it further," said a key aide to a Senate Democrat on the committee. "His excuses just don't add up." Critics do not believe that Alito profited from his involvement in the case, and in fact suggest his ruling was against the financial firm. But they want to find out why he didn't live up to his promise during his 1990 appeals court confirmation to recuse himself on cases involving the firm. They concede that it's not an issue that will likely thwart his confirmation. Alito holds several Vanguard funds. Democrats say that when they first raised the issue, the White House said that a "computer glitch" failed to alert Alito to the conflict. But Democrats say that it was no secret that the 2002 case Alito decided involved Vanguard. Later, he said that his promise was too broad. "Which is it? We want to find out why he didn't do as he promised," said the aide. -- *Bulletin exclusive from U.S. News*

- **Congress Studying Presidential Tax Reform Panel's Ideas.** While few lawmakers are publicly endorsing the widespread changes proposed last month by the President's bipartisan tax reform panel, lawmakers and Treasury officials say that they are seriously studying it for tips to add to next year's tax package. Many of the headline issues, such as ending the mortgage write-off, are being ignored, but other ideas like a flat or consumption tax are getting a thorough review as the White House and Congress consider election-year changes to the tax code. Douglas Holtz-Eakin, outgoing head of the Congressional Budget Office, today said that the report was the first major case made for a consumption-based tax. "I think that's important," he said without indicating his support for it. In an interview with reporters, however, he noted that unlike some past tax reform plans, the latest wasn't generating a lot of support or even interest outside the beltway. "It didn't exactly fly off the shelves," he said. But the consumption tax plan and possible adjustments to the alternative minimum tax are being considered by lawmakers, according to leadership aides. -- *Bulletin exclusive from U.S. News*

- **Departing CBO Head Still Calling For Social Security Overhaul.** As he prepares to depart as director of the Congressional Budget Office, Douglas Holtz-Eakin is lamenting the failure of the administration to reform Social Security, which he believes is a must if the rest of the federal budget is to be fixed. "Nothing happened," he said of the President's year-long effort. "That's really frustrating," he said in a roundtable interview with reporters today. Holtz-Eakin, who leaves this month, said that when compared to cutting the deficit or reforming Medicare and Medicaid, making changes to Social Security is easy. One of his suggestions: Make Social Security pay for itself. "Put the thing on a cash flow basis," he said. Minus such a radical change, he suggested that lawmakers and the administration stop kicking reform down the road just because it's currently in the black. "More time is not going to solve these problems," he said. "I think the key is now." But he conceded that making the system pay for itself would probably mean spending cuts and tax increases. -- *Bulletin exclusive from U.S. News*

- **Political Notes.** ***President.*** **DNC Chairman Howard Dean**, in an interview on The Tonight Show With Jay Leno last night, was asked whether he would run for president in 2008. Dean said, "I've sworn that I -- not sworn, but I said that as long I took this job as the DNC chair, my job is to fix the party, and not to run." Told he sounded like he would like to run again, Dean replied, "I'd like to make a big change in the White House. Whether I'm there or not is not so important." ... David Yepsen writes today in the Des Moines Register that Iowans "have to be wary of Dean" and his plans to shake up the primary calendar because he's "not always had nice things to say about the Iowa caucuses, and his actions must be watched to see if he's looking to pay back Iowa and New Hampshire for his 2004 losses there." ... John DiStaso writes in the New Hampshire Union Leader today that both Massachusetts **Gov. Mitt Romney** (R) and New York **Gov. George Pataki** (R) will be visiting the state over the next few weeks. ... **Sen. Hillary Clinton** (D) is kicking off a two-week, six-city tour across the nation tomorrow, the New York Post reports, including stops in Chicago and Denver.

  Governors. Conservative activist **Len Munsil** (R) will step from his post at the Center for Arizona Policy to explore a gubernatorial bid, the AP reports this morning. ... California **Gov. Arnold Schwarzenegger** (R) has hired a former Democratic Party activist and high-ranking aide for ousted Gov. Gray Davis (D) as his new chief of staff, the LA Times reports today. ... The Rockford Register Star reports this morning that Illinois **state Treasurer Judy Baar Topinka** (R) yesterday entered that state's gubernatorial race, "pledging to return honesty, credibility and fiscal responsibility to state government." The Chicago Tribune adds that ex-Gov. **Jim Edgar** (R) will chair her campaign. ... The AP reports this morning that Oregon **state sen. Vicki Walker** (D) says it is "highly likely" she will launch a primary challenge to **Gov. Ted Kulongoski** (D), but said she would not do so if former Gov. **John Kitzhaber** (D) decided to enter the race.

  Senate. The Washington Post reports this morning that President Bush helped Maryland Senate candidate **Michael Steele** (R) raise $500k at a fundraiser yesterday, but coverage in local papers, including the Washington Post and the Baltimore Sun, focused on how that sum compared poorly to other candidates' fundraising and how Bush's support for **Steele** may be problematic in the heavily Democratic state.

  House. The Oklahoman reports this morning that former state Rep. **Bill Graves** (R) has entered the **OK5** open-seat race, saying he is a conservative "and will remain so" in Washington. ... The

Pittsburgh Post-Gazette reports this morning that broadcaster **Stan Savran** (D), who had been heavily courted by the DCCC, has decided not to challenge **PA18 Rep. Tim Murphy** (R).

LAST LAUGHS:

Late Night Political Humor.

Jay Leno: "A little reminder for all you lobbyists, oil executives and defense contractors out there, only 26 more shopping days to buy a Congressman before Christmas. So remember that."

Jay Leno: "As you may have heard by now, California Congressman Duke Cunningham has resigned from office after admitting he broke the law by taking $2.4 million in bribes. Isn't that ironic? The only time you're sure a politician is telling the truth is when he's admitting he's a crook."

Jay Leno: "Imagine being considered too unethical for Congress? That's like a rat hair getting kicked out of a hot dog."

Jay Leno: "Well, many in Washington are saying they're very disappointed in Cunningham because he broke the most important rule of all in Congress: never admit guilt. D'oh!"

Jay Leno: "One of the bribes that Cunningham took was a yacht. Somebody gave him a yacht, and he called it 'The Dukester.' How stupid do you have to be to take a bribe with your name on it? It's got your name on it!"

Jay Leno: "You make $160,000 a year. You have a big yacht, a Rolls Royce. Hello?"

Jay Leno: "And President Bush was at the Mexican border yesterday. Apparently, his poll numbers are so low, I think he was trying to make a run for it."

Jay Leno: "Actually, he was giving a speech on illegal immigration. He's getting tough, cracking down. He said that people that cross the border illegally will be sent back to their own countries. You know what that means? Maybe our troops are coming home!"

Jay Leno: "And today at the U.S. Naval Academy, President Bush released the White House strategy for winning the war in Iraq. Nice to know they didn't rush into that one, huh? 2 1/2 years later. What do you think? Maybe stuck in the copy machine? Paper jam, possibly?"

Jay Leno: "No, in his speech, President Bush said 'we need to rebuild Iraq, we need to provide the people with hope, and give them jobs. And hey, if it works there, maybe we'll try it in New Orleans.' What do you think? Yeah!"

Jay Leno: "Right after he finished the speech, the rebuttal was given by the Democratic leader, Barbra Streisand."

Jay Leno: "No, actually, the rebuttal was given by John Kerry. And then John Kerry asked for more time to give a rebuttal to his own rebuttal."

Jay Leno: "And 'The L.A. Times' reporting that the United States -- this is unbelievable. We are now paying Iraqi newspapers, we're giving them money to run stories secretly written by us about all the wonderful things the United States is doing in Iraq. You know, like establishing freedom of the press. You know."

Jay Leno: "Big controversy in Washington over the Christmas tree. You know, we are so politically correct. For years it was called what? 'The Christmas tree.' But in recent years, we had to call it 'the holiday tree.' Well, now, Dennis Hastert, Speaker of the House, he wants to call it the Christmas tree again. And everybody has their own idea about what it should be called. Like President Bush, show the chart. President Bush wants to call it 'that big pointy greeny thingy with the shiny objects.' Vice President Cheney wants to call it 'one of those things we knock down to get oil.' Rumsfeld, he wanted to call it 'the divert attention away from the Iraq war tree.' You see the name they went with? Show the name they went with. 'Spruce Willis."

David Letterman: "I think this is good news. The White House released a 35-page plan entitled 'Our National Strategy For Victory In Iraq.' 35 pages. It is called 'Our National Strategy For Victory In Iraq.' President Bush refuses to set a timetable for reading it."

David Letterman: Top Ten New Strategies for Victory in Iraq:

"10. Make an even larger 'Mission Accomplished' sign.
9. Encourage Iraqis to settle their feud like Dave and Oprah.
8. Put that go-getter Michael Brown in charge.
7. Launch new slogan, it's not 'Iraq' it's 'Weraq'.
6. Just do whatever he did when he captured Osama.
5. A little more vacation time at the ranch to clear his head.
4. Pack on a quick thirty pounds and trade places with Jeb.
3. Wait, you mean it ain't going well?
2. Boost morale by doing his hilarious locked door gag.
1. Place Saddam back in power and tell him, 'It's your problem, dude.'"

REMARKS BY THE PRESIDENT ON THE WAR ON TERROR

United States Naval Academy
Annapolis, Maryland
November 30, 2005

THE PRESIDENT: Thank you. Thanks, please be seated. Please be seated. Thanks for the warm welcome. It's good to be back at the Naval Academy. I'm pleased to provide a convenient excuse for you to miss class.

This is the first year that every class of midshipmen at this Academy arrived after the attacks of September the 11th, 2001. Each of you has volunteered to wear our nation's uniform in a time of war -- knowing all the risks and dangers that accompany military service. Our citizens are grateful for your devotion to duty -- and America is proud of the men and women of the United States Naval Academy.

I thank Admiral Rempt for his invitation for me to come and give this speech. I appreciate Admiral Mike Mullen. I'm traveling today with a man who's done a fine job as the Secretary of Defense -- Secretary of Defense Donald Rumsfeld. Navy aviator, Don Rumsfeld. I'm proud that the Governor of the great state of Maryland, Bob Ehrlich, and his wife, Kendel, is with us. Thanks for being here, Governor.

I so appreciate that members of the United States Congress have joined us, starting with the Chairman of the Senate Armed Services Committee, Senator John Warner of the state of Virginia. Former Secretary of the United States Navy, I might add. Chairman of the House Permanent Select Committee on Intelligence, Congressman Pete Hoekstra. From the state of Arizona, Congressman John Shadegg. And from the state of Indiana, Congressman Mike Pence. I'm honored you all came, thanks for being here.

I appreciate the Mayor of the city of Annapolis, Mayor Ellen Moyer, joining us. I want to thank all the state and local officials. I want to thank the faculty members here. Thank you all for letting me come by.

Six months ago, I came here to address the graduating class of 2005. I spoke to them about the importance of their service in the first war of the 21st century -- the global war on terror. I told the class of 2005 that four years at this Academy had prepared them morally, mentally and physically for the challenges ahead. And now they're meeting those challenges as officers in the United States Navy and Marine Corps.

Some of your former classmates are training with Navy SEAL teams that will storm terrorist safe houses in lightning raids. Others are preparing to lead Marine rifle platoons that will hunt the enemy in the mountains of Afghanistan and the streets of Iraqi cities. Others are training as naval aviators who will fly combat missions over the skies of Afghanistan and Iraq and elsewhere. Still others are training as sailors and submariners who will deliver the combat power of the United States to the farthest regions of the

world -- and deliver compassionate assistance to those suffering from natural disasters. Whatever their chosen mission, every graduate of the class of 2005 is bringing honor to the uniform -- and helping to bring us victory in the war on terror.

In the years ahead, you'll join them in the fight. Your service is needed, because our nation is engaged in a war that is being fought on many fronts -- from the streets of Western cities, to the mountains of Afghanistan, the islands of Southeast Asia and the Horn of Africa. This war is going to take many turns, and the enemy must be defeated on every battlefield. Yet the terrorists have made it clear that Iraq is the central front in their war against humanity, and so we must recognize Iraq as the central front in the war on terror.

As we fight the enemy in Iraq, every man and woman who volunteers to defend our nation deserves an unwavering commitment to the mission -- and a clear strategy for victory. A clear strategy begins with a clear understanding of the enemy we face. The enemy in Iraq is a combination of rejectionists, Saddamists and terrorists. The rejectionists are by far the largest group. These are ordinary Iraqis, mostly Sunni Arabs, who miss the privileged status they had under the regime of Saddam Hussein -- and they reject an Iraq in which they are no longer the dominant group.

Not all Sunnis fall into the rejectionist camp. Of those that do, most are not actively fighting us -- but some give aid and comfort to the enemy. Many Sunnis boycotted the January elections -- yet as democracy takes hold in Iraq, they are recognizing that opting out of the democratic process has hurt their interests. And today, those who advocate violent opposition are being increasingly isolated by Sunnis who choose peaceful participation in the democratic process. Sunnis voted in the recent constitutional referendum in large numbers – and Sunni coalitions have formed to compete in next month's elections -- or, this month's elections. We believe that, over time, most rejectionists will be persuaded to support a democratic Iraq led by a federal government that is a strong enough government to protect minority rights.

The second group that makes up the enemy in Iraq is smaller, but more determined. It contains former regime loyalists who held positions of power under Saddam Hussein -- people who still harbor dreams of returning to power. These hard-core Saddamists are trying to foment anti-democratic sentiment amongst the larger Sunni community. They lack popular support and therefore cannot stop Iraq's democratic progress. And over time, they can be marginalized and defeated by the Iraqi people and the security forces of a free Iraq.

The third group is the smallest, but the most lethal: the terrorists affiliated with or inspired by al Qaeda . Many are foreigners who are coming to fight freedom's progress in Iraq. This group includes terrorists from Saudi Arabia, and Syria, and Iran, and Egypt, and Sudan, and Yemen, and Libya, and other countries. Our commanders believe they're responsible for most of the suicide bombings, and the beheadings, and the other atrocities we see on our television.

They're led by a brutal terrorist named Zarqawi -- al Qaeda's chief of operations in Iraq -- who has pledged his allegiance to Osama bin Laden. Their objective is to drive the United States and coalition forces out of Iraq, and use the vacuum that would be created by an American retreat to gain control of that country. They would then use Iraq as a base from which to launch attacks against America, and overthrow moderate governments in the Middle East, and try to establish a totalitarian Islamic empire that reaches from Indonesia to Spain. That's their stated objective. That's what their leadership has said.

These terrorists have nothing to offer the Iraqi people. All they have is the capacity and the willingness to kill the innocent and create chaos for the cameras. They are trying to shake our will to achieve their stated objectives. They will fail. America's will is strong. And they will fail because the will to power is no match for the universal desire to live in liberty.

The terrorists in Iraq share the same ideology as the terrorists who struck the United States on September the 11th. Those terrorists share the same ideology with those who blew up commuters in London and Madrid, murdered tourists in Bali, workers in Riyadh, and guests at a wedding in Amman, Jordan. Just last week, they massacred Iraqi children and their parents at a toy give-away outside an Iraqi hospital.

This is an enemy without conscience -- and they cannot be appeased. If we were not fighting and destroying this enemy in Iraq, they would not be idle. They would be plotting and killing Americans across the world and within our own borders. By fighting these terrorists in Iraq, Americans in uniform are defeating a direct threat to the American people. Against this adversary, there is only one effective response: We will never back down. We will never give in. And we will never accept anything less than complete victory.

To achieve victory over such enemies, we are pursuing a comprehensive strategy in Iraq. Americans should have a clear understanding of this strategy -- how we look at the war, how we see the enemy, how we define victory, and what we're doing to achieve it. So today, we're releasing a document called the "National Strategy for Victory in Iraq." This is an unclassified version of the strategy we've been pursuing in Iraq, and it is posted on the White House website -- whitehouse.gov. I urge all Americans to read it.

Our strategy in Iraq has three elements. On the political side, we know that free societies are peaceful societies, so we're helping the Iraqis build a free society with inclusive democratic institutions that will protect the interests of all Iraqis. We're working with the Iraqis to help them engage those who can be persuaded to join the new Iraq – and to marginalize those who never will. On the security side, coalition and Iraqi security forces are on the offensive against the enemy, cleaning out areas controlled by the terrorists and Saddam loyalists, leaving Iraqi forces to hold territory taken from the enemy, and following up with targeted reconstruction to help Iraqis rebuild their lives.

As we fight the terrorists, we're working to build capable and effective Iraqi security forces, so they can take the lead in the fight – and eventually take responsibility for the safety and security of their citizens without major foreign assistance.

And on the economic side, we're helping the Iraqis rebuild their infrastructure, reform their economy, and build the prosperity that will give all Iraqis a stake in a free and peaceful Iraq. In doing all this we have involved the United Nations, other international organizations, our coalition partners, and supportive regional states in helping Iraqis build their future.

In the days ahead, I'll be discussing the various pillars of our strategy in Iraq. Today, I want to speak in depth about one aspect of this strategy that will be critical to victory in Iraq -- and that's the training of Iraqi security forces. To defeat the terrorists and marginalize the Saddamists and rejectionists, Iraqis need strong military and police forces. Iraqi troops bring knowledge and capabilities to the fight that coalition forces cannot.

Iraqis know their people, they know their language, and they know their culture -- and they know who the terrorists are. Iraqi forces are earning the trust of their countrymen -- who are willing to help them in the fight against the enemy. As the Iraqi forces grow in number, they're helping to keep a better hold on the cities taken from the enemy. And as the Iraqi forces grow more capable, they are increasingly taking the lead in the fight against the terrorists. Our goal is to train enough Iraqi forces so they can carry the fight -- and this will take time and patience. And it's worth the time, and it's worth the effort -- because Iraqis and Americans share a common enemy, and when that enemy is defeated in Iraq, Americans will be safer here at home.

The training of the Iraqi security forces is an enormous task, and it always hasn't gone smoothly. We all remember the reports of some Iraqi security forces running from the fight more than a year ago. Yet in the past year, Iraqi forces have made real progress. At this time last year, there were only a handful of Iraqi battalions ready for combat. Now, there are over 120 Iraqi Army and Police combat battalions in the fight against the terrorists -- typically comprised of between 350 and 800 Iraqi forces. Of these, about 80 Iraqi battalions are fighting side-by-side with coalition forces, and about 40 others are taking the lead in the fight. Most of these 40 battalions are controlling their own battle space, and conducting their own operations against the terrorists with some coalition support -- and they're helping to turn the tide of this struggle in freedom's favor. America and our troops are proud to stand with the brave Iraqi fighters.

The progress of the Iraqi forces is especially clear when the recent anti-terrorist operations in Tal Afar are compared with last year's assault in Fallujah. In Fallujah, the assault was led by nine coalition battalions made up primarily of United States Marines and Army – with six Iraqi battalions supporting them. The Iraqis fought and sustained casualties. Yet in most situations, the Iraqi role was limited to protecting the flanks of

coalition forces, and securing ground that had already been cleared by our troops. This year in TAL Afar, it was a very different story.
The assault was primarily led by Iraqi security forces -- 11 Iraqi battalions, backed by five coalition battalions providing support. Many Iraqi units conducted their own anti-terrorist operations and controlled their own battle space -- hunting for enemy fighters and securing neighborhoods block-by-block. To consolidate their military success, Iraqi units stayed behind to help maintain law and order – and reconstruction projects have been started to improve infrastructure and create jobs and provide hope.

One of the Iraqi soldiers who fought in TAL Afar was a private named Tarek Hazem. This brave Iraqi fighter says, "We're not afraid. We're here to protect our country. All we feel is motivated to kill the terrorists." Iraqi forces not only cleared the city, they held it. And because of the skill and courage of the Iraqi forces, the citizens of TAL Afar were able to vote in October's constitutional referendum.

As Iraqi forces increasingly take the lead in the fight against the terrorists, they're also taking control of more and more Iraqi territory. At this moment, over 30 Iraqi Army battalions have assumed primary control of their own areas of responsibility. In Baghdad, Iraqi battalions have taken over major sectors of the capital – including some of the city's toughest neighborhoods. Last year, the area around Baghdad's Haifa Street was so thick with terrorists that it earned the nickname "Purple Heart Boulevard." Then Iraqi forces took responsibility for this dangerous neighborhood -- and attacks are now down.

Our coalition has handed over roughly 90 square miles of Baghdad province to Iraqi security forces. Iraqi battalions have taken over responsibility for areas in South-Central Iraq, sectors of Southeast Iraq, sectors of Western Iraq, and sectors of North-Central Iraq. As Iraqi forces take responsibility for more of their own territory, coalition forces can concentrate on training Iraqis and hunting down high-value targets, like the terrorist Zarqawi and his associates.

We're also transferring forward operating bases to Iraqi control. Over a dozen bases in Iraq have been handed over to the Iraqi government -- including Saddam Hussein's former palace in Tikrit, which has served as the coalition headquarters in one of Iraq's most dangerous regions. From many of these bases, the Iraqi security forces are planning and executing operations against the terrorists -- and bringing security and pride to the Iraqi people.

Progress by the Iraqi security forces has come, in part, because we learned from our earlier experiences and made changes in the way we help train Iraqi troops. When our coalition first arrived, we began the process of creating an Iraqi Army to defend the country from external threats, and an Iraqi Civil Defense Corps to help provide the security within Iraq's borders. The civil defense forces did not have sufficient firepower or training -- they proved to be no match for an enemy armed with machine guns, rocket-propelled grenades, and mortars. So the approach was adjusted. Working with Iraq's leaders, we moved the civil defense forces into the Iraqi Army, we changed the way

they're trained and equipped, and we focused the Army's mission on defeating those fighting against a free Iraq, whether internal or external.

Now, all Iraqi Army recruits receive about the same length of basic training as new recruits in the U.S. Army -- a five-week core course, followed by an additional three-to-seven weeks of specialized training. With coalition help, Iraqis have established schools for the Iraqi military services, an Iraqi military academy, a non-commissioned officer academy, a military police school, a bomb disposal school -- and NATO has established an Iraqi Joint Staff College. There's also an increased focus on leadership training, with professional development courses for Iraqi squad leaders and platoon sergeants and warrant officers and sergeants-major. A new generation of Iraqi officers is being trained, leaders who will lead their forces with skill -- so they can defeat the terrorists and secure their freedom.

Similar changes have taken place in the training of the Iraqi police. When our coalition first arrived, Iraqi police recruits spent too much time of their training in classroom lectures -- and they received limited training in the use of small arms. This did not adequately prepare the fight they would face. And so we changed the way the Iraqi police are trained. Now, police recruits spend more of their time outside the classroom with intensive hands-on training in anti-terrorism operations and real-world survival skills.

Iraq has now six basic police academies, and one in Jordan, that together produce over 3,500 new police officers every ten weeks. The Baghdad police academy has simulation models where Iraqis train to stop IED attacks and operate roadblocks. And because Iraqi police are not just facing common criminals, they are getting live-fire training with the AK-47s.

As more and more skilled Iraqi security forces have come online, there's been another important change in the way new Iraqi recruits are trained. When the training effort began, nearly all the trainers came from coalition countries. Today, the vast majority of Iraqi police and army recruits are being taught by Iraqi instructors. By training the trainers, we're helping Iraqis create an institutional capability that will allow the Iraqi forces to continue to develop and grow long after coalition forces have left Iraq.

As the training has improved, so has the quality of the recruits being trained. Even though the terrorists are targeting Iraqi police and army recruits, there is no shortage of Iraqis who are willing to risk their lives to secure the future of a free Iraq.

The efforts to include more Sunnis in the future of Iraq were given a significant boost earlier this year. More than 60 influential Sunni clerics issued a fatwa calling on young Sunnis to join the Iraqi security forces, "for the sake of preserving the souls, property and honor" of the Iraqi people. These religious leaders are helping to make the Iraqi security forces a truly national institution -- one that is able to serve, protect and defend all the Iraqi people.

Some critics dismiss this progress and point to the fact that only one Iraqi battalion has achieved complete independence from the coalition. To achieve complete independence, an Iraqi battalion must do more than fight the enemy on its own -- it must also have the ability to provide its own support elements, including logistics, airlift, intelligence, and command and control through their ministries. Not every Iraqi unit has to meet this level of capability in order for the Iraqi security forces to take the lead in the fight against the enemy. As a matter of fact, there are some battalions from NATO militaries that would not be able to meet this standard. The facts are that Iraqi units are growing more independent and more capable; they are defending their new democracy with courage and determination. They're in the fight today, and they will be in the fight for freedom tomorrow.

We're also helping Iraqis build the institutions they need to support their own forces. For example, a national depot has been established north of Baghdad that is responsible for supplying the logistical needs of the ten divisions of the Iraqi Army. Regional support units and base support units have been created across the country with the mission of supplying their own war fighters. Iraqis now have a small Air Force, that recently conducted its first combat airlift operations – bringing Iraqi troops to the front in TAL Afar. The new Iraqi Navy is now helping protect the vital ports of Basra and Umm Qasr. An Iraqi military intelligence school has been established to produce skilled Iraqi intelligence analysts and collectors. By taking all these steps, we're helping the Iraqi security forces become self-supporting so they can take the fight to the enemy, and so they can sustain themselves in the fight.

Over the past two and a half years, we've faced some setbacks in standing up a capable Iraqi security force -- and their performance is still uneven in some areas. Yet many of those forces have made real gains over the past year -- and Iraqi soldiers take pride in their progress. An Iraqi first lieutenant named Shoqutt describes the transformation of his unit this way: "I really think we've turned the corner here. At first, the whole country didn't take us seriously. Now things are different. Our guys are hungry to demonstrate their skill and to show the world."

Our troops in Iraq see the gains that Iraqis are making. Lieutenant Colonel Todd Wood of Richmond Hill, Georgia, is training Iraqi forces in Saddam Hussein's hometown of Tikrit. He says this about the Iraqi units he is working with: "They're pretty much ready to go it on their own ... What they're doing now would have been impossible a year ago ... These guys are patriots, willing to go out knowing the insurgents would like nothing better than to kill them and their families ... They're getting better, and they'll keep getting better."

Our commanders on the ground see the gains the Iraqis are making. General Marty Dempsey is the commander of the Multinational Security Transition Command. Here's what he says about the transformation of the Iraqi security forces: "It's beyond description. They are far better equipped, far better trained" than they once were. The Iraqis, General Dempsey says, are "increasingly in control of their future and their own

security _ the Iraqi security forces are regaining control of the country."

As the Iraqi security forces stand up, their confidence is growing and they are taking on tougher and more important missions on their own. As the Iraqi security forces stand up, the confidence of the Iraqi people is growing -- and Iraqis are providing the vital intelligence needed to track down the terrorists. And as the Iraqi security forces stand up, coalition forces can stand down -- and when our mission of defeating the terrorists in Iraq is complete, our troops will return home to a proud nation.

This is a goal our Iraqi allies share. An Iraqi Army Sergeant named Abbass Abdul Jabar puts it this way: "We have to help the coalition forces as much as we can to give them a chance to go home. These guys have been helping us. [Now] we have to protect our own families." America will help the Iraqis so they can protect their families and secure their free nation. We will stay as long as necessary to complete the mission. If our military leaders tell me we need more troops, I will send them.

For example, we have increased our force levels in Iraq to 160,000 – up from 137,000 -- in preparation for the December elections. My commanders tell me that as Iraqi forces become more capable, the mission of our forces in Iraq will continue to change. We will continue to shift from providing security and conducting operations against the enemy nationwide, to conducting more specialized operations targeted at the most dangerous terrorists. We will increasingly move out of Iraqi cities, reduce the number of bases from which we operate, and conduct fewer patrols and convoys.

As the Iraqi forces gain experience and the political process advances, we will be able to decrease our troop levels in Iraq without losing our capability to defeat the terrorists. These decisions about troop levels will be driven by the conditions on the ground in Iraq and the good judgment of our commanders -- not by artificial timetables set by politicians in Washington.

Some are calling for a deadline for withdrawal. Many advocating an artificial timetable for withdrawing our troops are sincere -- but I believe they're sincerely wrong. Pulling our troops out before they've achieved their purpose is not a plan for victory. As Democratic Senator Joe Lieberman said recently, setting an artificial timetable would "discourage our troops because it seems to be heading for the door. It will encourage the terrorists, it will confuse the Iraqi people."

Senator Lieberman is right. Setting an artificial deadline to withdraw would send a message across the world that America is a weak and an unreliable ally. Setting an artificial deadline to withdraw would send a signal to our enemies -- that if they wait long enough, America will cut and run and abandon its friends. And setting an artificial deadline to withdraw would vindicate the terrorists' tactics of beheadings and suicide bombings and mass murder -- and invite new attacks on America. To all who wear the uniform, I make you this pledge: America will not run in the face of car bombers and assassins so long as I am your Commander-in-Chief.

And as we train Iraqis to take more responsibility in the battle with the terrorists, we're also helping them build a democracy that is worthy of their sacrifice. And in just over two-and-a-half years, the Iraqi people have made incredible progress on the road to lasting freedom. Iraqis have gone from living under the boot of a brutal tyrant, to liberation, free elections, and a democratic constitution -- and in 15 days they will go to the polls to elect a fully constitutional government that will lead them for the next four years.

With each ballot cast, the Iraqi people have sent a clear message to the terrorists: Iraqis will not be intimidated. The Iraqi people will determine the destiny of their country. The future of Iraq belongs to freedom. Despite the costs, the pain, and the danger, Iraqis are showing courage and are moving forward to build a free society and a lasting democracy in the heart of the Middle East -- and the United States of America will help them succeed.

Some critics continue to assert that we have no plan in Iraq except to, "stay the course." If by "stay the course," they mean we will not allow the terrorists to break our will, they are right. If by "stay the course," they mean we will not permit al Qaeda to turn Iraq into what Afghanistan was under the Taliban -- a safe haven for terrorism and a launching pad for attacks on America -- they are right, as well. If by "stay the course" they mean that we're not learning from our experiences, or adjusting our tactics to meet the challenges on the ground, then they're flat wrong. As our top commander in Iraq, General Casey, has said, "Our commanders on the ground are continuously adapting and adjusting, not only to what the enemy does, but also to try to out-think the enemy and get ahead of him." Our strategy in Iraq is clear, our tactics are flexible and dynamic; we have changed them as conditions required and they are bringing us victory against a brutal enemy.

Victory in Iraq will demand the continued determination and resolve of the American people. It will also demand the strength and personal courage of the men and women who wear our nation's uniform. And as the future officers of the United States Navy and Marine Corps, you're preparing to join this fight. You do so at a time when there is a vigorous debate about the war in Iraq. I know that for our men and women in uniform, this debate can be unsettling -- when you're risking your life to accomplish a mission, the last thing you want to hear is that mission being questioned in our nation's capital. I want you to know that while there may be a lot of heated rhetoric in Washington, D.C., one thing is not in dispute: The American people stand behind you.

And we should not fear the debate in Washington. It's one of the great strengths of our democracy that we can discuss our differences openly and honestly -- even at times of war. Your service makes that freedom possible. And today, because of the men and women in our military, people are expressing their opinions freely in the streets of Baghdad, as well.

Most Americans want two things in Iraq: They want to see our troops win, and they want

to see our troops come home as soon as possible. And those are my goals as well. I will settle for nothing less than complete victory. In World War II, victory came when the Empire of Japan surrendered on the deck of the USS Missouri. In Iraq, there will not be a signing ceremony on the deck of a battleship. Victory will come when the terrorists and Saddamists can no longer threaten Iraq's democracy, when the Iraqi security forces can provide for the safety of their own citizens, and when Iraq is not a safe haven for terrorists to plot new attacks on our nation.

As we make progress toward victory, Iraqis will take more responsibility for their security, and fewer U.S. forces will be needed to complete the mission. America will not abandon Iraq. We will not turn that country over to the terrorists and put the American people at risk. Iraq will be a free nation and a strong ally in the Middle East -- and this will add to the security of the American people.

In the short run, we're going to bring justice to our enemies. In the long run, the best way to ensure the security of our own citizens is to spread the hope of freedom across the broader Middle East. We've seen freedom conquer evil and secure the peace before. In World War II, free nations came together to fight the ideology of fascism, and freedom prevailed -- and today Germany and Japan are democracies and they are allies in securing the peace. In the Cold War, freedom defeated the ideology of communism and led to a democratic movement that freed the nations of Eastern and Central Europe from Soviet domination – and today these nations are allies in the war on terror.

Today in the Middle East freedom is once again contending with an ideology that seeks to sow anger and hatred and despair. And like fascism and communism before, the hateful ideologies that use terror will be defeated by the unstoppable power of freedom, and as democracy spreads in the Middle East, these countries will become allies in the cause of peace.

Advancing the cause of freedom and democracy in the Middle East begins with ensuring the success of a free Iraq. Freedom's victory in that country will inspire democratic reformers from Damascus to Tehran, and spread hope across a troubled region, and lift a terrible threat from the lives of our citizens. By strengthening Iraqi democracy, we will gain a partner in the cause of peace and moderation in the Muslim world, and an ally in the worldwide struggle against -- against the terrorists. Advancing the ideal of democracy and self-government is the mission that created our nation -- and now it is the calling of a new generation of Americans. We will meet the challenge of our time. We will answer history's call with confidence -- because we know that freedom is the destiny of every man, woman and child on this earth.

Before our mission in Iraq is accomplished, there will be tough days ahead. A time of war is a time of sacrifice, and we've lost some very fine men and women in this war on terror. Many of you know comrades and classmates who left our shores to defend freedom and who did not live to make the journey home. We pray for the military families who mourn the loss of loves ones. We hold them in our hearts -- and we honor

the memory of every fallen soldier, sailor, airman, Coast Guardsman, and Marine.

One of those fallen heroes is a Marine Corporal named Jeff Starr, who was killed fighting the terrorists in Ramadi earlier this year. After he died, a letter was found on his laptop computer. Here's what he wrote, he said, "[I]f you're reading this, then I've died in Iraq. I don't regret going. Everybody dies, but few get to do it for something as important as freedom. It may seem confusing why we are in Iraq, it's not to me. I'm here helping these people, so they can live the way we live. Not [to] have to worry about tyrants or vicious dictators_. Others have died for my freedom, now this is my mark."

There is only one way to honor the sacrifice of Corporal Starr and his fallen comrades -- and that is to take up their mantle, carry on their fight, and complete their mission.

We will take the fight to the terrorists. We will help the Iraqi people lay the foundations of a strong democracy that can govern itself, sustain itself, and defend itself. And by laying the foundations of freedom in Iraq, we will lay the foundation of peace for generations to come.

You all are the ones who will help accomplish all this. Our freedom and our way of life are in your hands -- and they're in the best of hands. I want to thank you for your service in the cause of freedom. I want to thank you for wearing the uniform. May God bless you all, and may God continue to bless the United States of America.

END

WHITE HOUSE FACT SHEET
Securing America Through Immigration Reform
November 28, 2005

On November 28, 2005, President Bush outlined the Strategy To Enhance America's Homeland Security Through Comprehensive Immigration Reform. Addressing the Customs and Border Protection agents stationed in southern Arizona, the President discussed the strategy to secure the border, prevent illegal crossings, and strengthen enforcement of immigration laws. The President also proposed to take pressure off the border by creating a Temporary Worker Program that meets the economy's demands while rejecting amnesty for those who break America's laws.

Securing The Border Is Essential To Securing The Homeland: Since he took office, the President has increased funding for border security by 60 percent. Border agents have apprehended and sent home more than 4.5 million people coming into the country illegally - including about 350,000 with criminal records. The U.S. border must be open to trade and tourism - and closed to criminals, drug dealers, and terrorists.

The President Will Work With Congress To Pass And Sign Into Law Comprehensive Immigration Reform: Comprehensive immigration reform is a top priority for the Administration. Already, Congress is making great strides and has a chance to move forward on a strategy to enforce immigration laws, secure America, and uphold the Nation's deepest values. The President will continue working with Congress so that he can sign a comprehensive immigration reform bill into law in 2006.

The President's Strategy For Comprehensive Immigration Reform: Comprehensive Immigration Reform Begins With Securing The Border. To secure the border, the President is pursuing a three-part plan.

- **First, The U.S. Will Return Every Illegal Entrant Caught Crossing The Southwest Border—With No Exceptions:** More than 85 percent of apprehended illegal immigrants are from Mexico, and most are immediately escorted back across the border within 24 hours. To prevent them from trying to cross again, the Federal government is using interior repatriation whereby Mexican illegal entrants are returned to their hometowns, making it more difficult for them to attempt another crossing. This approach is showing great promise. In a West Arizona desert pilot program, nearly 35,000 illegal immigrants were returned to Mexico through interior repatriation, and only about 8 percent turned up trying to cross the border in that sector again. The Administration is working to expand interior repatriation to ensure that when those who violate the country's immigration laws are sent home, they stay home.

    - **The Administration Is Ending The Practice Of "Catch And Release."** Because detention facilities lack bed space, most non-Mexican illegal

immigrants apprehended are released and directed to return for a court appearance. However, 75 percent fail to show. Last year, only 30,000 of the 160,000 non-Mexicans caught coming across our Southwest border were sent home. Addressing this problem, the President has signed legislation increasing the number of beds in detention facilities by more than 10 percent over the next year. The Federal government is also using "expedited removal" to detain, place into streamlined judicial proceedings, and deport non-Mexican illegal immigrants in an average of 32 days - almost three times faster than the usual procedure. Last year, more than 20,000 non-Mexicans caught crossing the border between Laredo and Tucson were deported using expedited removal. The use of expedited removal is now being expanded across the entire Southwest border. When illegal immigrants know they will be caught and sent home, they will be less likely to cross illegally in the first place.

- **The Administration Is Taking Further Steps To Accelerate The Removal Process.** The U.S. is pressing foreign governments to take back their citizens more promptly, while streamlining bureaucracy and increasing the number of flights carrying illegal immigrants home. Testing these steps, "Operation Texas Hold 'Em" along the Rio Grande Valley of the Texas Border recently resulted in Brazilian illegal immigration dropping by 90 percent in the Rio Grande Valley - and by 50 percent across the entire border. These efforts are helping change a policy of "catch and release" to a policy of "catch and return."

- **Second, The Administration Will Work With Congress To Reform Immigration Laws:** The President is seeking to eliminate senseless rules that require the government to release illegal immigrants if their home countries do not take them back in a set period of time. Among those the government has been forced to release are murderers, rapists, child molesters, and other violent criminals. The President is also working with Congress to address the cycle of endless litigation that clogs immigration courts, rewards illegal behavior, and delays justice for immigrants with legitimate claims. Lawsuits and red tape must not stand in the way of protecting the American people.

- **Third, The Federal Government Will Act To Stop People From Illegally Crossing The Border In The First Place:** The Administration is increasing manpower, technology, and infrastructure at the Nation's borders, and integrating these resources in innovative ways.

  - **Increasing Manpower.** Since 2001, 1,900 Border Patrol agents have been added, and the President has signed legislation allowing the addition of another 1,000 agents in the year ahead. When the hiring is completed, the Border Patrol will have been enlarged by about 3,000 agents - from about 9,500 when the President took office to about 12,500

next year. This is an increase of more than 30 percent.

- **Deploying New Technology.** The Administration is giving Border Patrol agents the tools to expand their reach and effectiveness including unmanned aerial vehicles (UAVs) and infrared cameras. In Tucson, agents using UAVs to patrol the border have improved their interception of illegal immigrants and drugs on the border. Legislation signed by the President is providing $139 million to further upgrade technology and bring a more unified, systematic approach to border enforcement.

- **Constructing Physical Barriers To Entry.** The President has signed legislation providing $70 million to install and improve protective infrastructure across the border. In rural areas, the government is constructing new patrol roads to give agents better access to the border and new vehicle barriers to keep illegal immigrants from driving across. In urban areas, the government is expanding fencing to shut down human smuggling corridors. The Administration recently authorized the completion of a 14-mile barrier near San Diego. Once held up by litigation, this project is vital to helping border agents do their jobs and make those who live near the border more secure.

Comprehensive Immigration Reform Requires Improved Enforcement Of Immigration Laws Within The United States: Catching and deporting illegal immigrants along the border is only part of protecting the American people. Our immigration laws must be enforced throughout America.

- **The Federal Government Is Improving Worksite Enforcement.** The President has signed legislation that more than doubles the resources dedicated to worksite enforcement. The government is placing a special focus on enforcement at critical infrastructure. This year, Operation Rollback - the largest worksite enforcement case in American history resulted in the arrest of hundreds of illegal immigrants, criminal convictions against a dozen employers, and a multi-million dollar payment from one of America's largest businesses. Worksite enforcement is critical to the success of immigration reform.

  - **To Help Businesses Comply With Immigration Laws, The Government Is Addressing Document Fraud.** Even the most diligent employers find it difficult to spot forged employment documents and verify workers' legal status. So the Administration is expanding the Basic Pilot program enabling businesses to screen the employment eligibility of new hires against Federal records. Since 2001, this program has expanded from only six states to now being available nationwide. The Administration will work with Congress to continue to improve employment verification.

- **The President Has Committed The Resources Necessary To Enforce Immigration Laws.** Since 2001, the Administration has increased funding for interior enforcement by 44 percent; increased the number of immigration and customs investigators by 14 percent; and new funding will allow for an additional 400 immigration enforcement agents and 250 criminal investigators. These skilled officers are getting results. In Arizona alone, 2,300 people have been prosecuted for smuggling drugs, guns, and illegal immigrants across the border. Operation Community Shield has resulted in the arrest of nearly 1,400 illegal immigrant gang members - including hundreds of members of violent gangs like "MS-13." Since the creation of the Department of Homeland Security (DHS), agents have apprehended nearly 27,000 illegal immigrant fugitives.

As Part Of Comprehensive Immigration Reform, The President Has Proposed The Creation Of A New Temporary Worker Program. To match foreign workers with American employers for jobs that no American is willing to take, temporary workers will be able to register for legal status for a fixed time period and then be required to return home. This plan meets the needs of a growing economy, allows honest workers to provide for their families while respecting the law, and relieves pressure on the border. By reducing the flow of illegal immigrants, law enforcement can focus on those who mean this country harm. To improve worksite enforcement, the plan creates tamper-proof I.D. cards for every legal temporary worker.

- **A Temporary Worker Program Would Not Provide Amnesty.** The program does not create an automatic path to citizenship or provide amnesty. The President opposes amnesty because rewarding those who break the law would encourage more illegal entrants and increase pressure on the border. A Temporary Worker Program, by contrast, would promote legal immigration and decrease pressure on the border. The President supports increasing the annual number of green cards, but for the sake of justice and security, the President will not sign an immigration bill that includes amnesty.

By Reforming Immigration Laws, The United States Will Preserve The Promise Of America. Immigrants play a vital role in strengthening American democracy. This is a land in which foreigners who respect the laws are welcomed as contributors to American culture - not feared as threats. The United States has been strengthened by generations of immigrants who became Americans through patience, hard work, and assimilation. Like generations of immigrants that have come before them, every new citizen has an obligation to learn this Nation's customs and values. At the same time, America will fulfill its obligation to give each citizen a chance to realize the American dream. By enforcing immigration laws, the Federal government is protecting the promise of a tolerant, welcoming America and preserving opportunity for all.

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COUNCIL ON FOREIGN RELATIONS MEETING
The Harold Pratt House in New York, NY
December 1, 2005; 5:30 p.m. – 7:00 p.m.
Sampson/Jennifer Korn

I. PURPOSE

The purpose of this event is for you to address members of the Council on Foreign Relations (CFR) and explain and defend the Administration's approach to the War on Terror.

II. BACKGROUND

Based in New York with a Washington, D.C. office, the Council is a nonpartisan and independent membership organization founded in 1921. The Council is dedicated to producing and disseminating ideas so that individuals and corporate members, policymakers and interested citizens can better understand the world and the foreign policy choices facing the United States and other governments. Throughout the year, it holds a variety of meetings at which world leaders, government officials, academics, and other foreign-policy specialists discuss and debate world affairs. The Council is also home to a highly regarded think tank, whose fellows conduct research on international subjects ranging from national security to children's education. The Council is also the publisher of a variety of reports and books in addition to "Foreign Affairs," the leading journal of global politics.

Each year, the Council organizes more than 200 events for members across the country. Past government officials who have addressed the Council include Vice President Dick Cheney, Secretary of Defense Donald Rumsfeld, former Secretary of State Colin Powell, former President Bill Clinton, and former Secretary of State Madeleine Albright.

III. PARTICIPANTS

Richard Haass, President, Council on Foreign Relations
Peter G. Peterson, Chairman of the Council on Foreign Relations

Neil Gorsuch, Department of Justice and member of Council on Foreign Relations

IV. PRESS PLAN

Open Press

V. SEQUENCE OF EVENTS

- 5:30 You arrive at reception in the Greenberg Room

- 6:00 You are escorted to Peterson Hall and are introduced by Peter Peterson
- 6:02 You deliver remarks
- 6:30 Peter Peterson introduces and moderates the question and answer session
- 7:00 Meeting concludes

VI. REMARKS

Prepared by Speechwriting

VII. ATTACHMENTS

1. Biography of Peter G. Peterson, Chairman of the Council on Foreign Relations
2. Biography of Richard N. Haass, President of the Council on Foreign Relations
3. List of Attendees
4. General DOJ Q&As
5. President's Remarks on the War on Terror
6. Fact Sheet: President's Immigration Policy

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U.S. Department of Justice

Office of Justice Programs

Bureau of Justice Statistics

Washington, D.C. 20531

AUG 2 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 8/4/06

THROUGH: Regina B. Schofield
Assistant Attorney General
Office of Justice Programs

FROM: Jeffrey L. Sedgwick
Director, Bureau of Justice Statistics

SUBJECT: **Advance Notification of BJS Publication**

PURPOSE: To provide the Attorney General with advance copies and notification of the pending publication of **Federal Criminal Justice Trends, 2003** (NCJ 205331), by Mark Motivans of BJS.

DISCUSSION: **Federal Criminal Justice Trends, 2003** presents data on Federal criminal justice trends from 1994-2003. This report summarizes the activities of agencies at each stage of the Federal criminal case process. It includes 10-year trend statistics on the number arrested (with detail on drug offenses); number and disposition of suspects investigated by U.S. attorneys; number of persons detained prior to trial; number of defendants in cases filed, convicted, and sentenced; and number of offenders under Federal correctional supervision (incarceration, supervised release, probation, and parole). Highlights include the following:

• **From 1994 to 2003 the number of suspects/defendants increased steadily across the stages of the Federal criminal justice system:**

Stage	Number of suspects/ defendants processed 1994	2003
Suspects investigated	99,251	130,078
Suspects arrested and booked	80,730	131,064
Defendants charged	62,327	92,085
Defendants convicted	50,701	75,805
Defendants sentenced to prison	33,022	57,629

• **Growth in immigration and weapons offenders**
The 10-year average annual increase was greatest for immigration (ranging from 14% for arrests to 25% for prison sentences imposed) and weapon offenses (ranging from 10% for prosecution to 11% for matters investigated by U.S. attorneys).

• **Southwest United States produced a disproportionate share of suspects and defendants processed**
Five of 94 Federal judicial districts (Southern District of California, District of Arizona, District of New Mexico and Southern and Western Districts of Texas) comprised 31% of all suspects arrested and booked, 19% of suspects investigated, 23% of defendants in cases filed in U.S. district court, and 28% of offenders sentenced to prison (1994-2003).

• **Greater likelihood of suspects prosecuted, defendants convicted, and offenders sentenced to prison**
The percent of suspects prosecuted (of matters concluded by U.S. attorneys) increased from 54% in 1994 to 62% in 2003.

DISSEMINATION: The text and data tabulations will be made available on the Internet for instantaneous dissemination at the time of the press release. When printed, this report will be distributed to criminal justice practitioners, policymakers, and others who have indicated an interest in this subject. We have consulted with the OJP Office of Communications, and they have made preliminary plans to issue a press release.

TIMETABLE: The press release is anticipated for Sunday, August 27, 2006, at 4:30 p.m. EDT. BJS will begin distributing this publication at that time.

If we may provide additional information about this document, please contact 616-3282.

cc Steven R. Schlesinger, Director, Statistics Division, Administrative Office of the U.S. Courts
Thomas R. Kane, Assistant Director, Bureau of Prisons
Michael Battle, Director, Executive Office for United States Attorneys
Maryvictoria Pyne, Chief , FBI Criminal Justice Information Service Div., Communications Unit
Frank Shults, Senior Advisor, Office of the Deputy Attorney General

cc: Kyle Sampson, OAG

Robyn Thiemann, ODAG

Assistant Attorney General, OLP

Assistant Attorney General, OLA

Director, PAO

Director, COPS

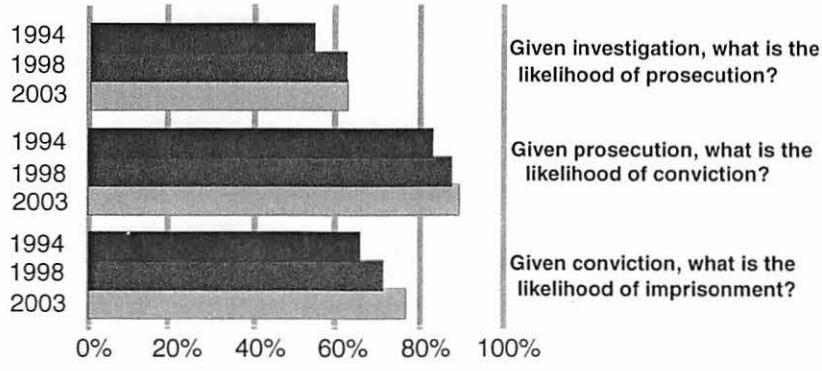
Q & A's for Federal Criminal Justice Trends, 2003

Federal Criminal Justice Trends, 2003 is the first in a new series designed to track trends in the Federal justice system. BJS uses data received from eight Federal justice agencies to describe the enforcement of several thousand Federal statutes in the U.S. Criminal Code. Publication of this report, while not mandated by statute, serves as a uniform reference volume on Federal criminal case processing trends.

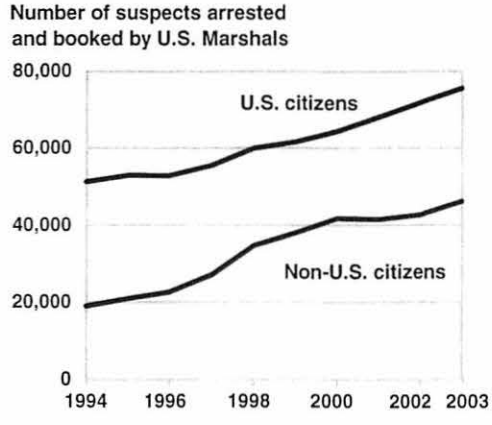
Q. What are significant findings from this report?

A. The number of suspects/defendants processed in the Federal criminal justice system increased to record levels. Over 130,000 suspects were investigated by U.S. attorneys in 2003 up from 99,000 in 1994. Federal legislation and Justice's enforcement initiatives addressing the problem of illegal immigration resulted in immigration being the offense with the greatest 10-year average increase across case processing stages (14% average yearly increase in immigration arrests and 25% increase in prison sentences imposed). The number of drug offenders sentenced to prison increased a yearly average of 6% and weapon offenders increased 10% over this period.

From 1994-2003 suspects had a greater likelihood of being prosecuted, defendants convicted, and offenders sentenced to prison.

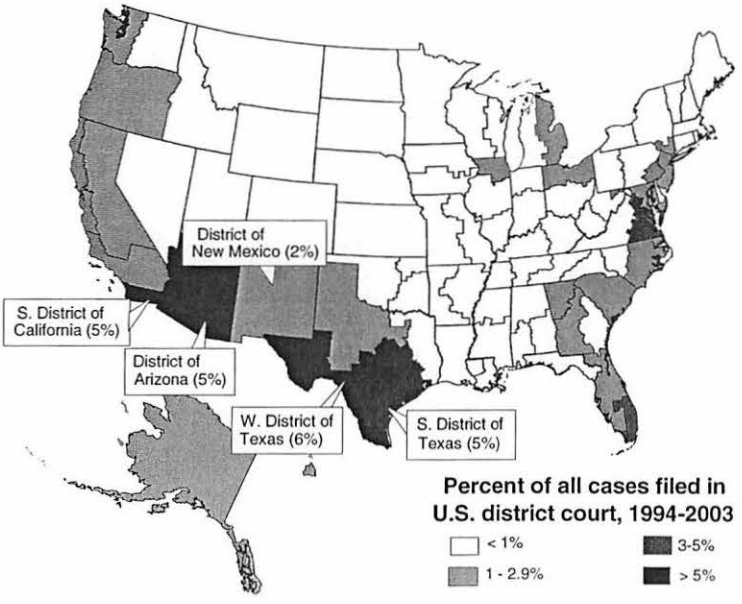


The number of non-U.S. citizens in the Federal criminal justice system steadily increased from 1994-2003. Thirty-eight percent of suspects arrested and booked by the U.S. Marshals Service (USMS) in 2003 were non-citizens compared to 27% in 1994. Of the 152,459 prisoners in custody of the Federal Bureau of Prisons, 28% were non-U.S. citizens.



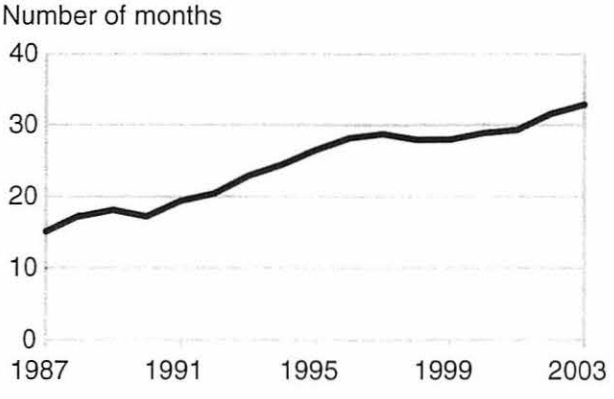
Q: How were Federal criminal cases distributed across the U.S. over this period?
A: From 1994-2003 a notable share of suspects and defendants were processed in the Southwest. Five Federal judicial districts (Southern District of California, District of Arizona, District of New Mexico and Southern and Western Districts of Texas) comprised 31% of all suspects arrested and booked, 20% of suspects investigated, 23% of defendants in cases filed in U.S. district court, and 28% of offenders sentenced to prison (1994-2003).

Five out of 94 Federal judicial districts comprised 23% of all criminal cases filed in U.S. district court from 1994-2003



Q. How much time did inmates released from prison serve (on average)?
A: During 2003, 40,780 prisoners were released for the first time from Federal prison after commitment by a U.S. district court. The average time served for all offenses was 33 months. Average time served by Federal offenders increased from 25 months for those released in 1994 to 33 months for offenders released in 2003.

Time served of offenders released from prison



OASG CORRESPONDENCE ROUTING AND ACTION

From: Jeffrey Sedgwick	Date: 8/4/2006	Due Date: 8/9/2006	Workflow ID: 1042762
Subject: Memo providing advance copies and notification of the pending BJS publication entitled - Federal Criminal Justice Trends - 2003			
Reviewer: Andi Bottner		Due Back for Processing to Exec Sec: 8/8/2006	
Instructions: **Please review and provide written comments.**			
From: Andi Bottner	To: **Neil Gorsuch/Greg Katsas**		Date:
Comments: Interesting immigration #'s. Looks OK. 8/4/06			
From:	To: **Neil Gorsuch/Greg Katsas**		Date:
Comments:			

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 08/02/2006 **WORKFLOW ID:** 1042762
DATE RECEIVED: 08/03/2006 **DUE DATE:** 08/09/2006

FROM: The Honorable Jeffrey L. Sedgwick
Director
Office of Justice Programs
Bureau of Justice Statistics
Washington, DC 20531

TO: AG (cc indicated for BOP Kane, EOUSA Battle, FBI Pyne, ODAG Shults, Thiemann, OAG Sampson, OLP, OLA, PAO, COPS)

MAIL TYPE: Information Memorandum

SUBJECT: Memo providing advance copies and notification of the pending BJS publication entitled, Federal Criminal Justice Trends, 2003. (NCJ205331)

DATE ASSIGNED 08/04/2006

ACTION COMPONENT & ACTION REQUESTED
For ASG initialing on Information Memorandum. Return to ES for forwarding to the AG and DAG.
Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

1033178

U.S. Department of Justice

Office of Justice Programs

Bureau of Justice Statistics

Washington, D.C. 20531

JUL 12 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 7/28/06

THROUGH: Regina B. Schofield
Assistant Attorney General
Office of Justice Programs

FROM: Jeffrey L. Sedgwick
Director, Bureau of Justice Statistics

SUBJECT: **Advance Notification of BJS Publication**

PURPOSE: To provide the Attorney General with advance copies and notification of the pending publication of **Prosecutors in State Courts, 2005** (NCJ 213799), by Steven W. Perry of BJS.

DISCUSSION: **Prosecutors in State Courts, 2005** presents findings from the 2005 National Survey of Prosecutors, the latest in a series of data collections from among the Nation's 2,300 State court prosecutors' offices that tried felony cases in State courts of general jurisdiction. This study provides information on the number of staff, annual budget, and felony cases closed for each office. Information is also available on the use of DNA evidence, computer-related crimes, and terrorism cases prosecuted. Other survey data include special categories of felony offenses prosecuted, types of non-felony cases handled, number of felony convictions, number of juvenile cases proceeded against in criminal court, and work-related threats or assaults against office staff. Highlights include the following:

• At least two-thirds of the State court prosecutors had litigated a computer-related crime such as credit card fraud (80%), identity theft (69%), or transmission of child pornography (67%).

• Nearly all the prosecutors' offices (98%) reported their State had a domestic violence statute; 28% of the offices maintained a domestic violence prosecution unit.

• A quarter (24%) of the offices participated in a State or local task force for homeland security; one-third reported an office member attended training on homeland security issues.

• Most prosecutors (95%) relied on State operated forensic laboratories to perform DNA analysis, with about a third (34%) also using privately operated DNA labs.

• Two-thirds of prosecutors' offices had prosecuted a juvenile case in criminal court during 2005. A third of the offices had a designated attorney for these special cases.

• In 2005, nearly 40% of the prosecutors considered their office a community prosecution site actively involving law enforcement and the community to improve public safety.

COORDINATION: The Bureau of Justice Statistics coordinated with the following entities, who performed data collection and processing, pre-testing, non-response, and/or reviewed the report: the National Opinion Research Center (NORC) at the University of Chicago, the National District Attorneys Association (NDAA), the Prosecutor Coordinator Offices in each State, and the Office of Research & Evaluation for the American Prosecutors Research Institute.

DISSEMINATION: The text and data tabulations will be made available on the Internet for instantaneous dissemination upon release. When printed, this report will be distributed to criminal justice practitioners, policymakers, and others who have indicated an interest in this subject.

TIMETABLE: BJS will make this publication available in late July, in preparation for the National District Attorneys Association Summer Conference in Santa Fe, New Mexico, July 30 – August 2, 2006.

If we may provide additional information about this document, please contact 307-3813.

cc Steven R. Schlesinger, Director, Statistics Division, Administrative Office of the U.S. Courts
Thomas R. Kane, Assistant Director, Bureau of Prisons
Michael Battle, Director, Executive Office for United States Attorneys
Maryvictoria Pyne, Chief, FBI Criminal Justice Information Service Div., Communications Unit
Frank Shults, Senior Advisor, Office of the Deputy Attorney General

cc: Kyle Sampson, OAG

Office of the Deputy Attorney General

Assistant Attorney General, OLP

Assistant Attorney General, OLA

Director, PAO

Director, COPS

OASG CORRESPONDENCE ROUTING AND ACTION

From: Jeffrey L. Sedgwick	Date: 7/17/2006	Due Date: 7/20/2006	Workflow ID: 1033178
Subject: Memo providing advance copies and notification of the pending BJS publication entitled, Prosecutors in State Courts, 2005.			
Review: Jeffrey Senger		Due Back for processing to Exec Secy: **7/18/2006**	
Instructions: **Please review and provide written comments.**			

From: Jeffrey Senger	To: **Neil M. Gorsuch**	Date: 7/26/06

Comments:

Looks okay.
Jeff

From: **Neil M. Gorsuch**	To: **Robert D. McCallum, Jr.**	Date:

Comments:

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/12/2006 **WORKFLOW ID:** 1033178
DATE RECEIVED: 07/14/2006 **DUE DATE:** 07/20/2006

FROM: The Honorable Jeffrey L. Sedgwick
Director
Bureau of Justice Statistics
Washington, DC 20531

TO: AG (cc indicated for BOP Kane, EOUSA Battle, FBI Payne, ODAG, Shults, OAG Sampson, OLP, OLA, PAO, COPS)

MAIL TYPE: Information Memorandum

SUBJECT: Memo providing advance copies and notification of the pending BJS publication entitled, Prosecutors in State Courts, 2005 (NCJ213799).

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
07/17/2006	For ASG initialing on Information Memorandum. Return to ES for forwarding to the AG and DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

1034908

U.S. Department of Justice

Office of Justice Programs

Bureau of Justice Statistics

Washington, D.C. 20531

JUL [redacted] 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 7/28/06

THROUGH: Regina B. Schofield
Assistant Attorney General
Office of Justice Programs

FROM: Jeffrey L. Sedgwick
Director, Bureau of Justice Statistics

SUBJECT: **BJS Statistical Release Report, July 2006**

This memorandum contains three sections:

1) Publications
2) Statistical tables and web content that are not printed
3) Recently released materials.

Each section is sequenced by expected release date.

Final release dates are determined by receipt and verification of final data.

Publications:

Press release:
Yes [blank means No]

Bureau of Justice Statistics Publications Collection CD-ROM, as of December 31, 2005

(P. Middleton) Contains all of the BJS publications that are available electronically and were published before December 31, 2005. Linked lists of titles are presented alphabetically, chronologically, and topically for use with a web browser. Materials are presented in Portable Document Format (PDF), ASCII text, or spreadsheet formats. Expected release date around 07/15/2006.

National Corrections Reporting Program, 2002 CD-ROM
(T. Hughes, A. Beck) Presents data on admissions, releases, and parole outcomes of persons in the Nation's State prisons and parole systems, including demographic characteristics, offenses, sentence length, type of admission, time to be served, method of release, and actual time served of inmates exiting prison and parole. In 2002, 39 States reported data. Included on the CD-ROM are ASCII files that require the use of specific statistical software packages, a code book, statistical software setup files, and explanatory notes. Expected release date around 07/15/2006.

Improving Criminal History Records for Background Checks, 2005
(G. Ramker) Describes the achievements of the National Criminal History Improvement Program (NCHIP), its authorizing legislation and program history. This annual Bulletin summarizes NCHIP-funded criminal record improvement efforts, including improved accessibility of records, full participation in the Interstate Identification Index, the automation of records and fingerprint data, and improvements in the National Instant Criminal Background Check, National Sex Offender Registry, and domestic violence and protection order systems. The report provides examples of projects aimed at enhancing the involvement of the courts and system integration in improving disposition reporting. The report also discusses the Bureau of Justice Statistics' efforts to improve performance measurement including the development and use of a Records Quality Index. Expected release around 07/21/2006.

Prosecutors in State Courts, 2005
(S. Perry) Presents findings from the 2005 National Survey of Prosecutors, the latest in a series of data collections from among the Nation's 2,300 State court prosecutors' offices that tried felony cases in State courts of general jurisdiction. This study provides information on the number of staff, annual budget, and felony cases closed for each office. Information is also available on the use of DNA evidence, computer-related crimes, and terrorism cases prosecuted. Other survey data include special categories of felony offenses prosecuted, types of nonfelony cases handled, number of felony convictions, number of juvenile cases proceeded against in criminal court, and work-related threats or assaults against office staff. Expected release date around 07/30/2006.

Yes **Sexual Violence Reported by Correctional Authorities, 2005**
(A. Beck, P. Harrison) Presents data from the Survey on Sexual Violence, 2005, an administrative records collection of incidents of inmate-on-inmate and staff-on-inmate sexual violence reported to correctional authorities. The report provides counts of sexual violence, by type, for adult prisons, jails, and other adult correctional facilities. The report provides an indepth analysis of substantiated incidents, including where the incidents occur, time of day, number and characteristics of victims and perpetrators, nature of the injuries, impact on the victims and sanctions imposed on the perpetrators.

The appendix tables include counts of sexual violence, by type, for all State systems, the Federal Bureau of Prisons, and all sampled jail jurisdictions. The report also includes an update on BJS activities related to implementation of the data collections required under the Prison Rape Elimination Act of 2003 (Public Law 108-79). Expected release around 07/30/2006.

Federal Law Enforcement Officers, 2004

(B. Reaves) Reports the results of a biennial census of Federal agencies employing personnel with arrest and firearms authority. Using agency classifications, the report presents the number of officers working in the areas of police patrol and response, criminal investigation and enforcement, security and protection, court operations, and corrections, by agency and State, as of September 2004. Data on gender and race of officers are also included. Expected release date around 07/31/2006.

Yes **Violent Felons in Large Urban Counties**

(B. Reaves) Presents data collected from a representative sample of felony cases that resulted in a felony conviction for a violent offense in 40 of the Nation's 75 largest counties. The study tracks cases for up to 1 year from the date of filing through final disposition. Defendants convicted of murder, rape, robbery, assault or other violent felony are described in terms of demographic characteristics (gender, race, Hispanic origin, age), prior arrests and convictions, criminal justice status at time of arrest, type of pretrial release or detention, type of adjudication, and sentence received. Expected release around 08/06/2006.

Background Checks for Firearm Transfers, 2005

(M. Hickman, D. Adams) Describes background checks for firearm transfers conducted in 2005. This annual report provides the number of applications checked by State points of contact, estimates of the number of applications checked by local agencies, the number of applications rejected, the reasons for rejection, and estimates of applications and rejections conducted by each type of approval system. It also provides information about appeals of rejected applications and arrests for falsified applications. The Firearm Inquiry Statistics Program is an ongoing data collection effort focusing on the procedures and statistics related to background checks in selected States. Expected release around 08/15/2006.

Black Victims of Violent Crime, 1993-2004

(E. Harrell) Presents findings about violent crime experienced by non-Hispanic blacks. Data on nonfatal violent victimization (rape/sexual assault, robbery, aggravated and simple assault) are drawn from the National Crime Victimization Survey. Data on homicides are drawn from the FBI Uniform Crime Reporting Program's Supplementary

Homicide Reports. Comparisons are made with the victimization experience of other racial/ethnic groups. Findings include 1993-2004 violent victimization rates by victim characteristics. Also examined are crime characteristics, including weapon use, police reporting and police response to violent crime incidents. Trends in violent victimization are also discussed. Expected release date around 08/15/2006.

Compendium of Federal Justice Statistics, 2004
(M. Motivans) Presents national-level statistics describing characteristics of persons processed and the distribution of case processing outcomes at each major stage of the Federal criminal justice system. This annual report includes data on investigations by U.S. attorneys, prosecutions and declinations, pretrial release and detention, convictions and acquittals, and sentencing and appeals. This report also provides statistics on fugitive investigations by the U.S. Marshals Service. Electronic only. Expected release around 08/15/2006.

Yes **Drug Use and Dependence, State and Federal Prisoners, 2004**
(C. Mumola) Presents data from the 2004 Survey of Inmates in State and Federal Correctional Facilities on prisoners' prior use, dependence, and abuse of illegal drugs. Tables include trends in the levels of drug use, type of drugs used, and treatment reported by State and Federal prisoners since the last national survey was conducted in 1997. The report also presents measures of dependence and abuse by gender, race, Hispanic origin, and age. It provides data on the levels of prior drug use (with an indepth look at methamphetamine use), dependence, and abuse by selected characteristics, such as family background, criminal record, type of drug used, and offense. Expected release date around 08/15/2006.

Yes **HIV in Prisons, 2004**
(L. Maruschak) Reports the number of female and male prisoners who were HIV positive or AIDS active, the number of AIDS-related deaths in State and Federal prisons, a profile of those inmates who died, and a comparison of AIDS rates for the general and prisoner populations. This annual bulletin uses yearend 2004 data from the National Prisoner Statistics and the Deaths in Custody series. Supplemental information from the 2004 Survey of Inmates in State and Federal Correctional Facilities is provided in this report including estimates of HIV infection among prison inmates by age, gender, race, Hispanic origin, education, marital status, current offense, and selected risk factors such as prior drug use. Expected release date around 08/15/2006.

Yes **Medical Problems of Jail Inmates**
(L. Maruschak) Presents findings on jail inmates who reported a current medical problem, a physical impairment or mental condition, or an injury since admission based

on data from the 2002 Survey of Inmates in Local Jails. The prevalence of specific medical problems and conditions are also included. The report examines medical problems and other conditions by gender, age, time served since admission, and select background characteristics. Expected release date around 08/15/2006.

Yes **Mental Health Problems of Prison and Jail Inmates**

(D. James, L. Glaze) Presents estimates of the prevalence of mental health problems among prison and jail inmates using self-reported data on recent history and symptoms of mental disorders. The report compares the characteristics of offenders with a mental health problem to other inmates, including current offense, criminal record, sentence length, time expected to be served, co-occurring substance dependence or abuse, family background, and facility conduct since current admission. It presents measures of mental problems by gender, race, Hispanic origin, and age. The report describes mental health problems and mental health treatment among inmates since admission to jail or prison. Findings are based on the Surveys of Inmates in State and Federal Adult Correctional Facilities, 2004, and the Survey of Inmates in Local Jails, 2002. Expected release date around 08/15/2006.

State Court Organization, 2004

(D. Rottman, S. Strickland, T. Cohen, BJS project monitor) Presents detailed comparative data by State trial and appellate courts in the United States. Topics covered include: the number of courts and judges; process for judicial selection; governance of court systems, including judicial funding, administration, staffing, and procedures; jury qualifications and verdict rules; and processing and sentencing procedures for criminal cases. Diagrams of court structure summarize the key features of each State's court organization. This fifth edition of State Court Organization is a joint effort of the Conference of State Court Administrators, the National Center for State Courts, and BJS. Expected release date around 08/15/2006.

Yes **Criminal Victimization, 2005**

(S. Catalano) Presents estimates of national levels and rates of personal and property victimization for the year 2005. Rates and levels are provided for personal and property victimization by victim characteristics, type of crime, victim-offender relationship, use of weapons, and reporting to police. Annual average victimization rates for 2004-05 are compared with those of the previous two years, 2002-03. A section is devoted to trends in victimization from 1993 to 2005. Estimates are from data collected using the National Crime Victimization Survey (NCVS), an ongoing survey of households that interviews about 76,000 persons in 42,000 households twice annually. Violent crimes included in the report are rape/sexual assault, robbery, aggravated assault and simple assault (from the NCVS), and homicide (from the FBI's UCR program). Property crimes examined are burglary, motor vehicle theft, and property theft. Expected release around 08/20/2006.

Yes **Federal Criminal Justice Trends, 2003**
(M. Motivans) Presents data on Federal criminal justice trends from 1994-2003. This report summarizes the activities of agencies at each stage of the Federal criminal case process. It includes 10-year trend statistics on the number arrested (with detail on drug offenses); number and disposition of suspects investigated by U.S. attorneys; number of persons detained prior to trial; number of defendants in cases filed, convicted, and sentenced; and number of offenders under Federal correctional supervision (incarceration, supervised release, probation, and parole). Expected release around 08/27/2006.

Census of State and Local Law Enforcement Agencies, 2004
(B. Reaves) Reports the results of a census, conducted every four years, of all State and local law enforcement agencies operating nationwide. The report provides the number of employees of State and local law enforcement agencies as of September 2004, including State-by-State data for sheriffs' offices, local police departments, State police and highway patrol agencies, and special jurisdiction police. Expected release date around 08/31/2006.

Jails in Indian Country, 2004
(T. Minton) Presents findings from the 2004 Survey of Jails in Indian Country, an enumeration of 68 confinement facilities, detention centers, jails, and other facilities operated by tribal authorities or the Bureau of Indian Affairs. BJS conducted the survey on June 30, 2004. Included are the numbers of adults and juveniles held, seriousness of offense, persons confined on the last weekday of each month, average daily population, peak population and admissions for June, and inmate deaths. Numerical tables also summarize rated capacity, facility crowding, and jail staffing.

For the first time, information was collected on four infectious diseases, including HIV, hepatitis B and C, and tuberculosis. Other new information is presented on inmate medical and mental health services, suicide prevention, substance dependency programs, domestic violence counseling, sex offender treatment, educational programs, and inmate work assignments. Expected release date around 08/31/2006.

Organizations as Defendants in the Federal Justice System, 1994-2005
(M. Motivans) Describes criminal cases brought against organizations including business entities set-up to conduct commercial activities and hold assets as well associations, unions, and unincorporated and nonprofit organizations. Federal statutes for the most part do not differentiate between organizational and individual defendants, applying similarly to both. This special report describes criminal case processing of organizational defendants, the crimes that bring them to the Federal justice system, and case outcomes. It includes the number of organizations in matters investigated by U.S. attorneys, the

number prosecuted, convicted and sentenced, and organizations on Federal supervision. Expected release date around 08/31/2006.

Survey of State Procedures Relating to Firearm Sales, Midyear 2005
(D. Adams) Provides an overview of the firearm check procedures in each State and State interaction with the National Instant Criminal Background Check System (NICS), operated by the FBI. The report summarizes issues about State procedures, including persons prohibited from purchasing firearms, restoration of rights of purchase to prohibited persons, permits, prohibited firearms, waiting periods, fees, and appeals. Supplemental tables contain data on 2004 applications to purchase firearms and rejections, as well as tabular presentations of State-by-State responses. This is one of a series of reports published from the BJS Firearm Inquiry Statistics (FIST) project, managed under the BJS National Criminal History Improvement Program (NCHIP). Expected release around 08/31/2006.

Law Enforcement Management and Administrative Statistics, 2003: Data for Individual State and Local Agencies with 100 or More Officers
(B. Reaves) Presents agency-specific data collected from more than 800 State and local law enforcement agencies employing 100 or more officers based on the 2003 Law Enforcement Management and Administrative Statistics (LEMAS) survey. The report provides agency-specific information on the characteristics of the largest law enforcement agencies nationwide. Large agencies are described in detail for such issues as staff and financial resources, technologies and equipment in use, and policies and practices of the agencies on a wide array of law enforcement and administrative concerns. Summary data for State police and highway patrol agencies, municipal police departments, county police departments, and sheriffs' offices are also included. Expected release date around 09/15/2006.

Statistical table updates and web content (electronic only):

Yes **Intimate Partner Violence**
(S. Catalano) Examines fatal and non-fatal violence by intimates (current or former spouses, girlfriends, or boyfriends) since the redesign of the National Crime Victimization Survey (NCVS) in 1993. Victim characteristics such as race, sex, age, income, and ethnicity are presented. Measured crimes include murder, rape, robbery, aggravated assault, and simple assault experienced by males and females age 12 years and older. In addition, characteristics of the victimization are presented such as offender use of alcohol/drugs, offender use of weapons, location, time of day, reporting to police, injury and medical treatment, and presence of children in the household. Data for this Internet only release are from the NCVS and FBI's Supplementary Homicide Reports. Expected release date around 08/15/2006.

Recently released:

Crime and the Nation's Households, 2004
(P. Klaus) Released on 04/19/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/cnh04.htm*. Printed copies available.

Justice Expenditure and Employment in the United States, 2003
(K. Hughes) Released on 04/30/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/jeeus03.htm*. Printed copies available.

Local Police Departments, 2003
(M. Hickman, B. Reaves) Released on 05/02/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/lpd03.htm*. Printed copies available around 07/31/2006.

Sheriffs' Offices, 2003
(M. Hickman, B. Reaves) Released on 05/02/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/so03.htm*. Printed copies available around 07/31/2006.

Prison and Jail Inmates, Midyear 2005
(P. Harrison, A. Beck) Released on 05/21/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/pjim05.htm*. Printed copies available.

Characteristics of Drivers Stopped by Police, 2002
(E. Smith, M. Durose) Released on 06/02/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/cdsp02.htm*. Printed copies available around 07/31/2006.

Citizen Complaints about Police Use of Force
(M. Hickman) Released on 06/25/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/ccpuf.htm*. Printed copies available around 08/15/2006.

Criminal Victimization in the United States - Statistical Tables, 2004
(C. Maston) Released on 06/29/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/cvusst.htm*. Website update.

Homicide Trends in the United States
(M. Zawitz, J. Fox, BJS Visiting Fellow) Released on 06/29/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/homicide/homtrnd.htm*. Website update.

Appeals from General Civil Trials in 46 Large Counties, 2001-2005
(T. Cohen) Released on 07/06/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/agctlc05.htm*. Printed copies available around 08/15/2006.

cc: Rachel L. Brand, OLP
Frank Shults, ODAG
Tasia Scolinos, PAO
Nicholas J. Tzitzon, OAAG
David Hagy, OAAG
Cybele Daley, OAAG
Beth McGarry, OAAG
Laura Keehner, OAAG
Domingo Herraiz, BJA
J. Robert Flores, OJJDP
John Gillis, OVC
Glenn Schmitt, NIJ
Denise Viera, CCDO
Diane Stuart, OVW
Thomas R. Kane, BOP
Maryvictoria Pyne, FBI-CJIS
Steven R. Schlesinger, AOUSC
Michael Battle, EOUSA

OASG CORRESPONDENCE ROUTING AND ACTION

From: Jeffrey Sedgwick	Date: 07/21/2006	Due Date: 7/24/2006	Workflow ID: 1034908
Subject: Memo providing the BJS Statistical Release Report - July 2006.			
Reviewer: Jeff Senger		Due Back for Processing to Exec Sec: 7/23/2006	
Instructions: **Please review and provide written comments.**			
From: **Jeff Senger**	To: **Neil Gorsuch**		Date: 7/27/06
Comments: looks okay. Jeff			
From: **Neil Gorsuch**	To: **Robert McCallum**		Date:
Comments:			

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT:	07/14/2006	**WORKFLOW ID:**	1034908
DATE RECEIVED:	07/19/2006	**DUE DATE:**	07/24/2006

FROM: The Honorable Jeffrey L. Sedgwick
Director
Bureau of Justice Statistics
Washington, DC 20531

TO: AG (cc indicated for OLP Brand, ODAG Shults, PAO Scolinos, BOP Kane, FBI Pyne, EOUSA Battle)

MAIL TYPE: Information Memorandum

SUBJECT: Memo providing the BJS Statistical Release Report, July 2006.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
07/19/2006	For ASG initialing on Information Memorandum. Return to ES for forwarding to the AG and DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Shirley McKay: 202-514-5305

1033193

U.S. Department of Justice

Office of Justice Programs

Bureau of Justice Statistics

Washington, D.C. 20531

JUL 12 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE Acting ASSOCIATE ATTORNEY GENERAL 7/20/06

THROUGH: Regina B. Schofield
Assistant Attorney General
Office of Justice Programs

FROM: Jeffrey L. Sedgwick
Director, Bureau of Justice Statistics

SUBJECT: **Advance Notification of BJS Publication**

PURPOSE: To provide the Attorney General with advance copies and notification of the pending publication of (NCJ 212750), by Brian Reaves of BJS.

DISCUSSION: **Federal Law Enforcement Officers, 2004** reports the results of a biennial census of Federal agencies employing personnel with arrest and firearms authority. Using agency classifications, the report presents the number of officers working in the areas of police response and patrol, criminal investigation and enforcement, inspections, security and protection, court operations, and corrections, by agency and State, as of September 2004. Data on gender and race of officers are also included. Highlights include the following:

- As of September 2004, about 3 in 4 Federal law enforcement officers working outside the Armed Forces were employed within the Department of Homeland Security or the Department of Justice.

- Federal officers' duties included criminal investigation (38%), police response and patrol (21%), corrections and detention (16%), inspections (16%), court operations (5%), and security and protection (4%).

• The largest employers of Federal officers were U.S. Customs and Border Protection (CBP) (27,705), the Federal Bureau of Prisons (15,214), the FBI (12,242), and U.S. Immigration and Customs Enforcement (ICE) (10,399). Ten other agencies employed at least 1,000 officers.

• The combined officer employment of CBP and ICE in 2004 was 21% greater than the comparable combined totals of the INS, U.S. Customs Service, and Federal Protective Service in 2002.

• Women accounted for 16% of Federal officers in 2004. A third of Federal officers were members of a racial or ethnic minority in 2004. This included 17.7% who were Hispanic or Latino, and 11.4% who were black or African American.

• About half of the Federal officers in the U.S. were employed in Texas (14,633), California (13,365), the District of Columbia (9,201), New York (8,159), or Florida (6,627). New Hampshire and Delaware, with 112 each, had the fewest Federal officers.

• Nationwide, there were 36 Federal officers per 100,000 residents. Outside the District of Columbia, which had 1,662 per 100,000, State ratios ranged from 90 per 100,000 in Arizona to 7 per 100,000 in Iowa.

COORDINATION: As in the previous versions of this report for 1996, 1998, 2000, and 2002, the data are the result of a cooperative effort involving BJS and staff in all Federal agencies employing personnel with arrest and firearms authority. Within the Department of Justice, this included the BOP, FBI, DEA, USMS, ATF, and IG Office.

DISSEMINATION: The text and data tabulations will be made available on the Internet for instantaneous dissemination upon release. When printed, this report will be distributed to criminal justice practitioners, policymakers, and others who have indicated an interest in this subject.

TIMETABLE: BJS will make this publication available 30 days from the date of this memorandum.

If we may provide additional information about this document, please contact 307-3813.

cc Steven R. Schlesinger, Director, Statistics Division, Administrative Office of the U.S. Courts
Thomas R. Kane, Assistant Director, Bureau of Prisons
Michael Battle, Director, Executive Office for United States Attorneys
Maryvictoria Pyne, Chief, FBI Criminal Justice Information Service Div., Communications Unit
Frank Shults, Senior Advisor, Office of the Deputy Attorney General

cc: Kyle Sampson, OAG

Office of the Deputy Attorney General

Assistant Attorney General, OLP

Assistant Attorney General, OLA

Director, PAO

Director, COPS

Federal Law Enforcement Officers, 2004

Every two years the Bureau of Justice Statistics conducts a census of Federal law enforcement officers. The census provides basic information about Federal officers, including their employing agency, gender, race, ethnicity, primary job function, and the State in which they primarily perform their duties. The most recent census collected data for the reference date of September 30, 2004.

Q. Which agencies does the BJS Census cover?
A. The 2004 Census of Federal Law Enforcement Officers covers 65 Federal agencies employing full-time personnel with the authority to make arrests and carry a firearm. The total includes 27 offices of inspector general. Because of limitations on the availability of data for some agencies, the BJS census does not include the Armed Forces (Army, Navy, Air Force, Marines, and Coast Guard), the Federal Air Marshals (in the Department of Homeland Security), or the Central Intelligence Agency.

Q. Is the number of Federal law enforcement officers increasing?
A. The Federal agencies included in the 2004 BJS Census of Federal Law Enforcement Officers, collectively employed about 105,000 officers as of September 2004. This was about 13% more than in 2002.

Q. What are the duties of Federal law enforcement officers?
A. According to the 2004 Census, 38% primarily performed duties related to criminal investigation and enforcement, and 21% provided patrol and response services. Corrections and detention-related duties were performed by 16% of officers, and another 16% performed inspections duties related to customs and immigration laws.

Q. Which Federal agency employs the most officers?
A. As of September 2004, U.S. Customs and Border Protection in the Department of Homeland Security (DHS) was the largest agency with 27,705 personnel authorized to make arrests and carry firearms in the 50 States and the District of Columbia. Other agencies with at least 10,000 officers included two Justice Department agencies - the Federal Bureau of Prisons (15,214) and the FBI (12,242) - and another DHS agency, U.S. Immigration and Customs Enforcement (10,399).

Q. What is the representation of women and minorities among Federal officers?
A. In 2004, women accounted for about a sixth of Federal officers. A third were members of a racial or ethnic minority. This included about 18% who were Hispanic or Latino, and 11% who were black or African American.

Q. Relative to the population, how many Federal officers are there? Which States have the most officers? Which States have the fewest?
A. Nationwide there were 36 Federal officers with arrest and firearm authority for every 100,000 U.S. residents. Outside the District of Columbia which had 1,662 officers per 100,000 residents, State ratios ranged from 90 per 100,000 in Arizona, to 7 per 100,000 in Iowa. In actual numbers Texas (14,633) and California (13,365) had the most Federal officers while New Hampshire and Delaware, with 112 each, had the fewest.

OASG CORRESPONDENCE ROUTING AND ACTION

From: Jeffrey Sedgwick	Date: 07/19/2006	Due Date: 7/21/2006	Workflow ID: 1033193
Subject: Memo providing advance copies and notification of the pending release of the BJS publication entitled, Federal Law Enforcement Officers - 2004 (NCJ212750)			
Reviewer: Jeff Senger		Due Back for Processing to Exec Sec: 7/20/2006	
Instructions: **Please review and provide written comments.**			
From: **Jeff Senger**	To: **Neil Gorsuch**		Date: 7/27/06
Comments: Looks okay. JSH			
From: **Neil Gorsuch**	To: **Robert McCallum**		Date:
Comments:			

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/12/2006 **WORKFLOW ID:** 1033193
DATE RECEIVED: 07/14/2006 **DUE DATE:** 07/21/2006

FROM: The Honorable Jeffrey L. Sedgwick
Director
Bureau of Justice Statistics

Washington, DC 20531

TO: AG (cc indicated for BOP Kane, EOUSA Battle, FBI Pyne, ODAG Shults, OAG Sampson, OLP, OLA, PAO, COPS)

MAIL TYPE: Information Memorandum

SUBJECT: Memo providing advance copies and notification of the pending release of the BJS publication entitled, Federal Law Enforcement Officers, 2004 (NCJ212750).

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
07/18/2006	For ASG initialing on Information Memorandum. Return to ES for forwarding to the AG and DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Paula Stephens: 202-616-0074

1033186

U.S. Department of Justice

Office of Justice Programs

Bureau of Justice Statistics

Washington, D.C. 20531

JUL 12 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL (Acting) 7/28/06

THROUGH: Regina B. Schofield
Assistant Attorney General
Office of Justice Programs

FROM: Jeffrey L. Sedgwick
Director, Bureau of Justice Statistics

SUBJECT: **Advance Notification of BJS Publication**

PURPOSE: To provide the Attorney General with advance copies and notification of the pending publication of **Violent Felons in Large Urban Counties** (NCJ 205289), by Brian Reaves of BJS.

DISCUSSION: **Violent Felons in Large Urban Counties** presents data collected from a representative sample of felony cases that resulted in a felony conviction for a violent offense in 40 of the Nation's 75 largest counties. The study tracks cases for up to 1 year from the date of filing through final disposition. Defendants convicted of murder, rape, robbery, assault or other violent felonies are described in terms of demographic characteristics (gender, race, Hispanic origin, age), prior arrests and convictions, criminal justice status at time of arrest, type of pretrial release or detention, type of adjudication, and sentence received. Highlights include the following:

- From 1990 to 2002, 18% of felony convictions in the 75 largest counties were for violent offenses, including 7% for assault and 6% for robbery.

• Six percent of those convicted of violent felonies were under age 18, and 25% were under age 21. Ten percent of murderers were under 18, and 30% were under 21.

• Thirty-six percent of violent felons had an active criminal justice status at the time of their arrest. This included 18% on probation, 12% on release pending disposition of a prior case, and 7% on parole.

• Seventy percent of violent felons had a prior arrest record, and 57% had at least one prior arrest for a felony. Sixty-seven percent of murderers and 73% of those convicted of robbery or assault had an arrest record.

• A majority (56%) of violent felons had a prior conviction record. Thirty-eight percent had a prior felony conviction and 15% had a previous conviction for a violent felony.

• Forty-one percent of murder convictions occurred at a trial rather than through a guilty plea. Trials accounted for 12% of rape and robbery convictions and 11% of assault convictions.

• Eighty-one percent of violent felons were sentenced to incarceration with 50% going to prison and 31% to jail. Nineteen percent received a probation term without incarceration.

• Median prison sentences received included a maximum of 240 months for murder, 120 months for rape, 60 months for robbery, and 48 months for other violent felonies.

DISSEMINATION: The text and data tabulations will be made available on the Internet for instantaneous dissemination at the time of the press release. When printed, this report will be distributed to criminal justice practitioners, policymakers, and others who have indicated an interest in this subject. We have consulted with the OJP Office of Communications, and they have made preliminary plans to issue a press release.

TIMETABLE: The press release is anticipated for Sunday, August 6, 2006, at 4:30 p.m. EDT. BJS will begin distributing this publication at that time.

If we may provide additional information about this document, please contact 307-3813.

cc Steven R. Schlesinger, Director, Statistics Division, Administrative Office of the U.S. Courts
Thomas R. Kane, Assistant Director, Bureau of Prisons
Michael Battle, Director, Executive Office for United States Attorneys
Maryvictoria Pyne, Chief, FBI Criminal Justice Information Service Div., Communications Unit
Frank Shults, Senior Advisor, Office of the Deputy Attorney General

cc: Kyle Sampson, OAG

Office of the Deputy Attorney General

Assistant Attorney General, OLP

Assistant Attorney General, OLA

Director, PAO

Director, COPS

Violent Felons in Large Urban Counties

Q. What violent offenders does this report cover?

A. The report presents analyses covering a sample of 9,000 convicted violent felons representing 33,000 cases from State courts in the 75 largest counties. These cases were selected during seven separate studies conducted in even-numbered years from 1990 through 2002. A sample of felony cases filed during the month of May was selected in each of these years. They were included in the analyses as long as they resulted in the defendant being convicted of a violent felony.

Q. What proportion of violent crimes are committed by youthful offenders?

A. Six percent of violent felons in the 75 largest counties were under the age of 18, and 25% were under the age of 21. Ten percent of murderers were under the age of 18, and 30% were under 21.

Q. Is it true that many violent crimes are committed by repeat offenders?

A. Thirty-six percent of violent felons had an active criminal justice status at the time of their arrest. This included 18% on probation, 12% on release pending disposition of a prior case, and 7% on parole. Seventy percent had a prior arrest record, and 56% had a conviction record. Thirty-eight percent had at least 1 prior felony conviction, and 15% had been previously convicted of a violent felony.

Q. Do persons convicted of a violent felony typically receive a prison sentence?

A. Overall, 50% of those convicted of a violent felony received a prison sentence, and another 31% received a jail sentence. Nearly all (96%) murderers were sentenced to prison. A majority of those convicted of robbery (69%) or rape (62%) were sentenced to prison as well. About a fifth of rape and robbery sentences were to jail. For those convicted of felony assault, equal percentages (38%) were sentenced to prison and jail. Nearly all violent felons not sentenced to incarceration received a probation term.

Q. How long are the prison sentences for violent felons?

A. The median sentence length was 20 years for murderers, 10 years for rape, 5 years for robbery, and 4 years for assault.

OASG CORRESPONDENCE ROUTING AND ACTION

From: Jeffrey L. Sedgwick	Date: 7/17/2006	Due Date: 7/20/2006	Workflow ID: 1033186

Subject: Memo providing advance copies and notification of the pending BJS publication entitled, sexual Violent Felons in Large Urban Counties

Review: I , Jeffrey Senger	Due Back for processing to Exec Secy: **7/18/2006**

Instructions: **Please review and provide written comments.**

From: Jeffrey Senger	To: **Neil M. Gorsuch**	Date: 7/27/06

Comments:

Looks okay.

JLS

From: **Neil M. Gorsuch**	To: **Robert D. McCallum, Jr.**	Date:

Comments:

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/12/2006 **WORKFLOW ID:** 1033186
DATE RECEIVED: 07/14/2006 **DUE DATE:** 07/20/2006

FROM: The Honorable Jeffrey L. Sedgwick
Director
Bureau of Justice Statistics
Washington, DC 20531

TO: AG (cc indicated for BOP Kane, EOUSA Battle, FBI Payne, ODAG Shults, OAG Sampson, OLP, OLA, PAO, COPS)

MAIL TYPE: Information Memorandum

SUBJECT: Memo providing advance copies and notification of the pending BJS publication entitled, Violent Felons in Large Urban Counties (NCJ205289).

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
07/17/2006	For ASG initialing on Information Memorandum. Return to ES for forwarding to the AG and DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

1033190

U.S. Department of Justice

Office of Justice Programs

Bureau of Justice Statistics

Washington, D.C. 20531

JUL 12 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 7/28/06

THROUGH: Regina B. Schofield
Assistant Attorney General
Office of Justice Programs

FROM: Jeffrey L. Sedgwick
Director, Bureau of Justice Statistics

SUBJECT: **Advance Notification of BJS Publication**

PURPOSE: To provide the Attorney General with advance copies and notification of the pending publication of **Sexual Violence Reported by Correctional Authorities, 2005** (NCJ 214646), by Allen Beck and Paige Harrison of BJS.

DISCUSSION: **Sexual Violence Reported by Correctional Authorities, 2005** presents data from the Survey on Sexual Violence, 2005, an administrative records collection of incidents of inmate-on-inmate and staff-on-inmate sexual violence reported to correctional authorities. The report provides counts of sexual violence by type and includes tables on reporting capabilities, how investigations are handled, and characteristics of victims and perpetrators of sexual violence. In 2005, the survey was expanded to collect detailed information on substantiated incidents, including the circumstances surrounding each incident, characteristics of victims and perpetrators, the type of pressure or coercion, victim injuries, sanctions imposed, and victim assistance. The appendix tables include counts of sexual violence, by type, for the 1,867 facilities included in the survey. The report also includes an update on BJS activities related to implementation of the data collections required under the Prison Rape Elimination Act of 2003 (Public Law 108-79). Highlights include the following:

- 6,241 allegations of sexual violence in prison and jail reported in 2005, up from 5,386 in 2004. 38% of allegations involved staff sexual misconduct; 35%, inmate-on-inmate nonconsensual sexual acts; 17%, staff sexual harassment; and 10%, abusive sexual contact.

• Correctional authorities reported 2.83 allegations of sexual violence per 1,000 inmates in 2005, up from 2.46 in 2004.

• Correctional authorities substantiated 885 incidents of sexual violence in 2005, 15% of completed investigations. There were an estimated 0.40 substantiated incidents of sexual violence per 1,000 inmates in 2005, down from the 0.55 recorded in 2004.

• Based on completed investigations only, 37% of allegations of staff sexual misconduct in local jails and 15% in State prisons were substantiated.

• Half of inmate-on-inmate sexual violence involved physical force or threat of force; two-thirds of staff misconduct was romantic. In prisons 67% of the victims involved in staff sexual misconduct were male, while 62% of the perpetrators were female. In jails 78% of victims of staff sexual misconduct were female; 87% of the perpetrators, male.

• Staff were arrested or prosecuted in 45% of substantiated incidents of staff sexual misconduct; discharged, fired or resigned in 82%.

COORDINATION: The Census Bureau of the U.S. Department of Commerce assisted with data collection and processing of the survey.

DISSEMINATION: The text and data tabulations will be made available on the Internet for instantaneous dissemination at the time of the press release. When printed, this report will be distributed to criminal justice practitioners, policymakers, and others who have indicated an interest in this subject. We have consulted with the OJP Office of Communications, and they have made preliminary plans to issue a press release.

TIMETABLE: The press release is anticipated for Sunday, July 30, 2006, at 4:30 p.m. EDT. BJS will begin distributing this publication at that time.

If we may provide additional information about this document, please contact 307-3813.

cc Steven R. Schlesinger, Director, Statistics Division, Administrative Office of the U.S. Courts
Thomas R. Kane, Assistant Director, Bureau of Prisons
Michael Battle, Director, Executive Office for United States Attorneys
Maryvictoria Pyne, Chief, FBI Criminal Justice Information Service Div., Communications Unit
Frank Shults, Senior Advisor, Office of the Deputy Attorney General

cc: Kyle Sampson, OAG

Office of the Deputy Attorney General

Assistant Attorney General, OLP

Assistant Attorney General, OLA

Director, PAO

Director, COPS

Sexual Violence Reported by Correctional Authorities, 2005

Presents data from the Survey on Sexual Violence, 2005, an administrative records collection of incidents of inmate-on-inmate and staff-on-inmate sexual violence reported to correctional authorities. The report provides counts of sexual violence in all State prison systems, the Federal prison system, and a sample of privately-operated and local jail facilities, by type of violence. The 2005 survey also collected individual level data on substantiated incidents, which expands our knowledge on the characteristics of the victims, perpetrators, and circumstances of sexual assault incidents. Finally, the report also includes an update on activities related to implementation of the data collections required under the Prison Rape Elimination Act of 2003 (Public Law 108-79). The publication of this report is mandated by statute and is prepared on June 30 of each year. Data on sexual violence as reported to the juvenile justice authorities will be published later this year.

1. What is the Prison Rape Elimination Act of 2003?

- The Prison Rape Elimination Act of 2003 was signed into law on September 4, 2003, by President George W. Bush. The Act establishes a zero-tolerance policy for inmate-on-inmate and staff-on-inmate sexual violence in correctional facilities.
- Under the Act, the Bureau of Justice Statistics (BJS) is required to conduct an annual data collection to measure the incidence and prevalence of sexual violence in at least 10% of the Nation's 5,220 adult correctional facilities and 3,470 juvenile facilities. This includes State and Federal prisons, local jails, private adult correctional facilities, jails in Indian Country, facilities operated by the U.S. Military or by the Bureau of Immigration and Customs Enforcement, State juvenile facilities, and local and private juvenile facilities.
- BJS is required to submit a report to Congress on June 30 of each year on the activities related to the Act for the preceding year and to provide a listing of institutions ranked according to the incidence of sexual violence.

2. How is sexual violence measured?

- Incidents of inmate-on-inmate sexual violence were separated into two categories: *nonconsensual sexual acts* and *abusive sexual contacts*. Incidents of staff-on-inmate sexual violence were categorized into *staff sexual misconduct* and *staff sexual harassment*.
- Most correctional systems and facilities were able to report information on the most serious incidents of sexual violence.
- Additional information was collected on substantiated incidents, including victim and perpetrator characteristics, time and place of incident, and actions taken following the report.

3. How extensive is sexual violence in the Nation's correctional facilities?

- During 2005 an estimated 6,241 allegations of sexual violence were reported by correctional authorities -- the equivalent of 2.8 allegations per 1,000 inmates, up from 2.5 per 1,000 inmates in prison, jails, and other adult correctional facilities in 2004.
- State and Federal prison systems reported 74% of all allegations; local jails, 22%.
- Approximately 38% of the reported allegations of sexual violence involved staff-on-inmate sexual misconduct; 35% involved inmate-on-inmate nonconsensual sexual acts; 17% staff sexual harassment of inmates; and 10% inmate-on-inmate abusive sexual contacts.

4. What additional information is learned from the 2005 survey?

- Correctional authorities substantiated 885 incidents of sexual violence in 2005, 15% of completed investigations.
- Relative to the number of inmates, there were 0.40 substantiated incidents of sexual violence per 1,000 inmates reported in 2005, down from 0.55 per 1,000 inmates in adult facilities in 2004.
- Half of inmate-on-inmate incidents of sexual violence involved physical force or threat of force.
- In more than two-thirds of inmate-on-inmate incidents, the sexual violence occurred in the victim's cell or living area. In only 20% of the incidents did the violence occur in a common area, such as a shower or dayroom.
- Victims received physical injuries in 15% of substantiated incidents of inmate-on-inmate sexual violence. Victims received medical attention, counseling or mental health treatment in two-thirds of the incidents of nonconsensual sexual acts.
- Half of the victims of nonconsensual sexual acts were placed in protective custody or administrative segregation.
- In half of the incidents of inmate-on-inmate sexual violence, the perpetrators were arrested or referred for prosecution; in more than two-thirds of the incidents, the perpetrator was placed in solitary confinement.

5. What is learned about staff sexual misconduct and harassment in prisons and jails?

- Two-thirds of incidents of staff sexual misconduct with inmates were reported to be romantic in nature. Fewer than 15% of the substantiated incidents involved physical force, abuse of power or pressure by staff.
- In State prison and Federal prisons 67% of the victims of staff misconduct were male; while 62% of the perpetrators were female. In local jails 78% of the victims were female; 87% of the perpetrators, male.
- Most substantiated incidents of staff sexual misconduct and harassment involved correctional officers (69%). About 13% of the incidents involved contract employees or vendors.
- Nearly 90% of the perpetrators of staff misconduct were arrested, referred for prosecution or discharged.
- In incidents involving a romantic relationship between inmate and staff, more than half of the inmates were either transferred to another facility or placed in administrative segregation.

6. When will the other PREA data collections be implemented?

- *The National Inmate Survey of Sexual Assault*, an ACASI self-report instrument designed for adult prisons and jails, has completed the testing stage, and BJS and RTI staff are analyzing the results (report of pretest results will be issued in September). National implementation in 120 prisons and 330 jails, with a yield of 60,000 interviews, will begin in November, 2006. Results from the survey will be included in the report to Congress on June 30, 2007.
- *The National Survey of Sexual Assault in Juvenile Facilities*, an ACASI self-report instrument designed for youth, is currently undergoing cognitive testing and will be fully tested in 10 facilities with up to 600 youth is planned for September 2006. Full national implementation in up to 180 juvenile facilities (with 14,000 adjudicated youth) is expected in 2007.

- *The National Survey of Sexual Assault Reported by Former Inmates*, an ACASI self-report instrument designed for former inmates under active supervision, will undergo pretesting in 10-20 parole offices in fall 2006. National implementation is expected to occur in 285 parole offices (with up to 11,500 interviews) in 2007.
- *National Prison Rape Surveillance Project,* a collection using medical indicators as an additional measure of sexual violence, is currently being developed in partnership with the National Institute of Justice and the Centers for Disease Control and Prevention.

OASG CORRESPONDENCE ROUTING AND ACTION

From: Jeffrey L. Sedgwick	Date: 7/17/2006	Due Date: 7/20/2006	Workflow ID: 1033190

Subject: Memo providing advance copies and notification of the pending BJS publication entitled, sexual Violence Reported by Correctional Authorities, 2005.

Review: Jeffrey Senger	Due Back for processing to Exec Secy: **7/18/2006**

Instructions: **Please review and provide written comments.**

From: Jeffrey Senger	To: **Neil M. Gorsuch**	Date: 7/27/06

Comments:

Looks okay. This one is likely to attract attention with its sordid subject matter and race- and sex-based findings.

JLS

From: **Neil M. Gorsuch**	To: **Robert D. McCallum, Jr.**	Date:

Comments:

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/12/2006 **WORKFLOW ID:** 1033190
DATE RECEIVED: 07/14/2006 **DUE DATE:** 07/20/2006

FROM: The Honorable Jeffrey L. Sedgwick
Director
Bureau of Justice Statistics
Washington, DC 20531

TO: AG (cc indicated for BOP Kane, EOUSA Battle, FBI Pyne, ODAG Shults, OAG Sampson, OLP, OLA, PAO, COPS)

MAIL TYPE: Information Memorandum

SUBJECT: Memo providing advance copies and notification of the pending BJS publication entitled, Sexual Violence Reported by Correctional Authorities, 2005. (NCJ214646).

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
07/17/2006	For ASG initialing on Information Memorandum. Return to ES for forwarding to the AG and DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

1041386

U.S. Department of Justice

Office of Justice Programs

Office of Juvenile Justice and Delinquency Prevention

Office of the Administrator

Washington, D.C. 20531

JUL 28 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 8/4/06

THROUGH: Regina B. Schofield
Assistant Attorney General
Office of Justice Programs

FROM: J. Robert Flores
Administrator

SUBJECT: Advance Notification of an OJJDP Publication

PURPOSE: To provide you with advance copies and notification of the pending release of *National Evaluation of the Title V Community Prevention Grants Program* (Online Report) (NCJ 212214).

DISCUSSION: This Online Report presents the findings from a multiyear, multisite national evaluation of the Title V Community Prevention Grants Program. Through Title V, OJJDP provides communities with funding and a guiding framework for developing and implementing comprehensive juvenile delinquency prevention plans that meet their unique circumstances and risk conditions.

This Report presents the experiences of 11 communities in 6 states that implemented the basic principles of the Community Prevention Grants Program. Specifically, the Report examines how the program affected these communities, including the benefits they received and the challenges they encountered. It also analyzes the national evaluation team's efforts to design and implement a national assessment that balanced the information needs of the federal government with the evaluation capacity of local Title V communities.

Talking Points for
National Evaluation of the Title V
Community Prevention Grants Program
(OJJDP Online Report)

Recognizing that community-based programs and local involvement are critical components of delinquency prevention efforts, OJJDP provides communities with funding and a guiding framework for developing and implementing comprehensive delinquency prevention plans. For more than a decade, OJJDP's Title V Community Prevention Grants Program has helped communities prevent delinquency and improve the lives of youth and their families.

Beginning in 1998, OJJDP undertook a multiyear, multijurisdictional evaluation of the Community Prevention Grants Program to examine the viability and effectiveness of its delinquency prevention model. Based on input from national experts in designing and conducting evaluations of comprehensive program initiatives, the evaluation tests the key assumptions on which the program model rests.

This Report presents the experiences of 11 communities in 6 states that implemented the basic principles of the Community Prevention Grants Program. Specifically, the Report examines how the program affected these communities, including the benefits they received and the challenges they encountered. Evaluation findings include the following:

- Title V means different things to different communities. For some communities, it means communitywide systems change; for others, it means implementation of one or more specific prevention programs. These differences can be attributed to whether the community was previously exposed to comprehensive prevention planning at the time it was introduced to the Title V model.

- A reasonable plan generally means communities are trying to affect no more than three risk factors and are implementing no more than two or three prevention strategies.

- Having subscribed to "program first" thinking for years, some local prevention policy board members were reluctant to embrace a more comprehensive planning model that emphasized "assessment first, program planning later."

- Because the Title V model is complex, especially for communities with little experience with collaborative, communitywide prevention efforts, it is important to encourage local leaders to start small. Over time, after communities have reassessed their local risk and protective factors, they can modify or enhance existing efforts or put new programs and strategies in place.

- Most of the communities struggled to develop and implement local evaluation plans. Suggestions for improving evaluation efforts include: emphasizing program evaluation and risk-factor tracking; building state-level evaluation capacity to monitor and support local-

level evaluation; mandating evaluation and set-aside funds to support it; and requiring the use of evidence-based programs.

Since the inception of the Title V Community Prevention Grants Program in 1992, overall, progress has been made. Communities have become better at collaborating, assessing their local needs, identifying appropriate strategies, and institutionalizing and evaluating local efforts.

cc: Kyle Sampson, OAG

Robyn Thiemann, ODAG

Assistant Attorney General, OLP

Assistant Attorney General, OLA

Director, PAO

Director, COPS

The national evaluation described in this Report provides a framework for understanding both the process and progress of the Title V Program. As one of the nation's first comprehensive, community-based prevention initiatives, Title V offers a unique opportunity for OJJDP and others in the field of delinquency prevention to observe communities nationwide as they attempt to translate theory into practice. Findings from the national evaluation have helped OJJDP refine the Title V model.

The national evaluation provided opportunities to learn firsthand about the challenges of evaluating comprehensive, community-based initiatives like Title V. As the evaluation progressed, so did other national evaluations of comprehensive, community-based initiatives. In combination, these national evaluation team experiences can help inform future national evaluations of programs like Title V by identifying what works in terms of methodology, design, and data collection activities and how best to support communities to participate fully in large evaluation projects.

GRANT INFORMATION:

- **Project:** OJJDP's Management and Evaluation Contract
- **Grantee:** Caliber Associates, Inc.
- **Award Amount:** $1.3 million

COORDINATION: This Report was developed by OJJDP.

DISSEMINATION: We have consulted with the OJP Office of Communications, which has made preliminary plans to issue a publication advisory. The report will be posted on OJJDP's Web site 30 days from the date of this memorandum.

We will take advantage of a range of e-mail lists of our targeted audiences to send an electronic notification of the publication's availability and a link to it on the OJJDP Web site to approximately 30,100 of our customers.

If you need additional information regarding this document, please call 202–307–5911.

OASG CORRESPONDENCE ROUTING AND ACTION

From: Robert Flores	Date: 8/2/2006	Due Date: 8/7/2006	Workflow ID: 1041386
Subject: Memo providing advance copies and notification of the pending release of the OJJDP publication entitled National Evaluation of the Title V Community Prevention Grants Program (Online Report) (NCJ212214)			
Reviewer:		Due Back for Processing to Exec Sec: 8/6/2006	
Instructions: **Please review and provide written comments.**			

From: Andi Bottner	To: **Neil Gorsuch**	Date:
Comments: Looks fine to move forward. Thanks. Andi 8/3/06		

From:	To: **Neil Gorsuch**	Date:
Comments:		

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/28/2006 **WORKFLOW ID:** 1041386
DATE RECEIVED: 08/01/2006 **DUE DATE:** 08/07/2006

FROM: The Honorable J. Robert Flores
Administrator
Office of Juvenile Justice and Delinquency Prevention
Office of Justice Programs
Washington, DC 20531

TO: AG (cc indicated for OAG Sampson, ODAG Thiemann, OLP, OLA, PAO, COPS)

MAIL TYPE: Information Memorandum

SUBJECT: Memo providing advance copies and notification of the pending release of the OJJDP publication entitled, National Evaluation of the Title V Community Prevention Grants Program (Online Report) (NCJ212214).

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
08/02/2006	For ASG initialing on Information Memorandum. Return to ES for forwarding to the AG and DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Shirley McKay: 202-514-5305

1042849

U.S. Department of Justice

Office of Justice Programs

Bureau of Justice Statistics

Washington, D.C. 20531

AUG 2 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 8/4/06

THROUGH: Regina B. Schofield RBS
Assistant Attorney General
Office of Justice Programs

FROM: Jeffrey L. Sedgwick
Director, Bureau of Justice Statistics

SUBJECT: **Advance Notification of BJS Publication**

PURPOSE: To provide the Attorney General with advance copies and notification of the pending publication **State Court Organization, 2004** (NCJ 212351), by David Rottman and Shauna Strickland of the Conference of State Court Administrators and National Center for State Courts, for BJS.

DISCUSSION: **State Court Organization, 2004** presents detailed comparative data by State trial and appellate courts in the United States. Topics covered include: the number of courts and judges; process for judicial selection; governance of court systems, including judicial funding, administration, staffing, and procedures; jury qualifications and verdict rules; and processing and sentencing procedures for criminal cases. Diagrams of court structure summarize the key features of each State's court organization.

COORDINATION: This volume is the 5th release in a series from which data collection and report preparation was carried out by the National Center for State Courts (NCSC). Review of tables was coordinated with Conference of State Court Administrators and staff from BJS.

DISSEMINATION: The more than 300 pages of text will be made available on the Internet for instantaneous dissemination at the time of release. When printed, this report will be distributed to judges, court administrators, and other members of the court community, as well as by federal and state policymakers, criminologists, researchers, journalists, and members of the public.

TIMETABLE: BJS will make this publication available, in its entirety, 30 days from the date of this memorandum.

If we may provide additional information about this document, please contact 307-3813.

cc Steven R. Schlesinger, Director, Statistics Division, Administrative Office of the U.S. Courts
Thomas R. Kane, Assistant Director, Bureau of Prisons
Michael Battle, Director, Executive Office for United States Attorneys
Maryvictoria Pyne, Chief, FBI Criminal Justice Information Service Div., Communications Unit
Frank Shults, Senior Advisor, Office of the Deputy Attorney General

cc: Kyle Sampson, OAG

Robyn Thiemann, ODAG

Assistant Attorney General, OLP

Assistant Attorney General, OLA

Director, PAO

Director, COPS

OASG CORRESPONDENCE ROUTING AND ACTION

From: Jeffrey Sedgwick	Date: 8/4/2006	Due Date: 8/9/2006	Workflow ID: 1042849
Subject: Memo providing advance copies and notification of the pending BJS publication entitled State Court Organization - 2004			
Reviewer: Andi Bottner		Due Back for Processing to Exec Sec: 8/8/2006	
Instructions: **Please review and provide written comments.**			
From: Andi Bottner	To: **Neil Gorsuch/Greg Katsas**		Date:
Comments: Looks fine. 8/4/06			
From:	To: **Neil Gorsuch/Greg Katsas**		Date:
Comments:			

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 08/02/2006 **WORKFLOW ID:** 1042849
DATE RECEIVED: 08/03/2006 **DUE DATE:** 08/09/2006

FROM: The Honorable Jeffrey L. Sedgwick
Director
Office of Justice Programs
Bureau of Justice Statistics
Washington, DC 20531

TO: AG (cc indicated for BOP Kane, EOUSA Battle, FBI Pyne, ODAG Shults, Thiemann, OAG Sampson, OLP, OLA, PAO, COPS)

MAIL TYPE: Information Memorandum

SUBJECT: Memo providing advance copies and notification of the pending BJS publication entitled, State Court Organization, 2004. (NCJ212351)

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
08/04/2006	For ASG initialing on Information Memorandum. Return to ES for forwarding to the AG and DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

Deputy Associate Attorney General

Oct 5, 2006

Will—

Per my email of last night, here is the congressional correspondence on the BOS issue. Can you take this from here?

Thanks Mark

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

~~Please work~~ ~~together~~ ~~response~~ ~~draft~~

DATE OF DOCUMENT: 09/22/2005 **WORKFLOW ID:** 874955
DATE RECEIVED: 09/23/2005 **DUE DATE:** 10/11/2005

FROM: The Honorable George V. Voinovich
United States Senate

Washington, DC 20510

TO: AG (cc indicated for OLA Moschella)

MAIL TYPE: Congressional Priority

SUBJECT: Ltr (fax) from the Chmn, Subcomte on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Comte on Homeland Security and Governmental Affairs, requesting information regarding allegations made about DOJ's treatment of the former head of the Bureau of Justice Statistics (BJS) in connection with the release of the DOJ's report, Contacts between Police and the Public, which examined the issue of racial profiling. Encls a copy of a news article on this matter. See WFs 759253 and 874662.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
06/26/2005	~~For appropriate handling. Advise ES of any action taken.~~ ~~Office of the Inspector General~~

INFO COMPONENT: OAG, ODAG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Paula Stephens: 202-616-0074

Robert -
please work
w/ W.H on
a draft
response.
TS

GEORGE V. VOINOVICH
OHIO

524 HART SENATE OFFICE BUILDING
(202) 224-3353
TDD: (202) 224-6997
senator_voinovich@voinovich.senate.gov
http://voinovich.senate.gov

United States Senate

WASHINGTON, DC 20510-3504

ENVIRONMENT AND PUBLIC WORKS
CHAIRMAN, SUBCOMMITTEE ON CLEAN AIR, CLIMATE CHANGE AND NUCLEAR SAFETY
ETHICS
CHAIRMAN
FOREIGN RELATIONS
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE AND THE DISTRICT OF COLUMBIA

September 22, 2005

The Honorable Alberto Gonzales
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Dear Mr. Attorney General Gonzales:

I recently read the enclosed article which makes certain allegations about the Department of Justice's treatment of the former head of the Bureau of Justice Statistics in connection with the release of the Department's report, *Contacts between Police and the Public*, which examined the issue of racial profiling.

As Chairman of the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, I would like to know more about this matter and would appreciate any additional information you can provide me.

Thank you for your assistance.

Sincerely,

George V. Voinovich
United States Senator

Cc: The Honorable William Moschella

STATE OFFICES:
36 EAST SEVENTH STREET, ROOM 2615, CINCINNATI, OHIO 45202, (513) 684-3265
1240 EAST NINTH STREET, ROOM 2955, CLEVELAND, OHIO 44199, (216) 522-7095
37 WEST BROAD STREET, ROOM 320 (CASEWORK), COLUMBUS, OHIO 43215, (614) 469-6774
37 WEST BROAD STREET, ROOM 310, COLUMBUS, OHIO 43215, (614) 469-6697
417 SECOND AVENUE, P.O. BOX 788, GALLIPOLIS, OHIO 45631, (740) 441-6410
420 MADISON AVENUE, ROOM 1210, TOLEDO, OHIO 43604, (419) 259-3895

Sept. 1, 2005 Cleveland Call + Post

Blaming the messenger

There is some good news — and a lot of bad news — on the racial profiling front.

But since the Justice Department official responsible for reporting all the news wanted to tell America the bad news, the Bush administration has not only tried to hide the news, but also kill the messenger.

The good news is that a study by the U.S. Department of Justice's Bureau of Justice Statistics, released in April, shows that according to a national study of racial profiling trends, African Americans, Hispanics and Whites are stopped by police in traffic situations in about the same numbers on the nation's highways.

The study — based on inquiries of the public and thus not subject to the self-selection that might come from police agencies doctoring their own records of police stops — gives some credence to police officials who have argued that "racial profiling" — the pattern of stopping minorities based on nothing more than their minority status — might not be as pronounced as many have feared.

But the bad news in the study is bad news, indeed. The study found that African Americans and Hispanics were — if stopped — three times more likely than Whites to be have their vehicles inspected, or be involved in a physical confrontation with police.

Those statistics are cause for concern. Why would African Americans and Hispanics be three times more likely to have their vehicles searched than Whites — given the same probability of being stopped? And why are they more likely to report having force used against them? Is this because African Americans and Hispanics are being subjected to greater levels of scrutiny, based on racial profiles? These are questions that should be asked — and that the Justice Department should aggressively attempt to answer.

But the Department of Justice, rather than trumpeting the study, has attempted to bury it. And when the head of the Bureau of Justice Statistics, Lawrence Greenfeld, resisted high-ranking Justice Department officials' efforts to soft-pedal the disturbing information in a standard press release that comes out after a study is released, he was demoted. And the study was buried in the DOJ Web site, without an accompanying press release that would let the public know of this important research.

The Department of Justice is shocked — shocked — that U.S. Rep. John Conyers, D-Mich., ranking minority member on the House Judiciary Committee, would request an *investigation* of the circumstances surrounding Greenfeld's demotion. There was no intent to bury the bad news, they say.

But the facts speak otherwise. And they reflect a disturbing and quite common trait of the Bush administration: to attack and ultimately isolate those who present it with bad news.

When the president's first economic adviser said that the Iraq war was going to cost $200 billion — while the administration was saying it would probably cost no more than $50 billion — he was ousted. Scientists at the Environmental Protection Agency struggled in their efforts to present unvarnished information on the phenomenon of global warming. And armed services leaders who have challenged the handling of the Iraq war have found their careers affected. [illegible]

Racial profiling is an important issue today. It is at the center of discussions as to how we will confront the "global war on terror" on our own shores. That's why we need the best information the government can produce — and its widest dissemination. [illegible]

Sen. George Voinovich, who is backing anti-profiling legislation, and Sen. Mike DeWine, who serves on the Senate Judiciary Committee, should express their concerns to the president and the Justice Department about the handling of Greenfield — and the dissemination of information on racial profiling.

Just because the administration does not like the message, it should not blame the messenger.

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA

George V. Voinovich, Republican Chairman
Committee on Homeland Security and Governmental Affairs
442 Hart Senate Building • Washington, DC 20510
Phone: (202) 224-3682 • Fax: (202) 224-3328

TO: The Honorable Alberto Gonzales OFFICE: Attorney General

FAX #: 202-514-4507 DATE: 9/22/05

FROM:

- ☐ Andrew Richardson, *Staff Director*
- ☐ Theresa Prych, *Professional Staff*
- ☐ David Cole, *Professional Staff*
- ☐ Tara Baird, *Chief Clerk*
- ☐ John Salamone, *Professional Staff*
- ☐ Jessica Fox, *Professional Staff*
- ✓ Andrew Olmem, Counsel

NOTES: _____

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT:	03/08/2005	**WORKFLOW ID:**	759253
DATE RECEIVED:	03/09/2005	**DUE DATE:**	

FROM: The Honorable Lawrence A. Greenfeld
Director, Bureau of Justice Statistics
Office of Justice Programs
U.S. Department of Justice

Washington, DC 20530-0001

TO: AG (cc indicated for OAG Sampson, ODAG Dhillon, OLP, OLA, PAO, COPS, BOP Kane, EOUSA Buchanan)

MAIL TYPE: Information Memorandum

SUBJECT: Memo providing the AG with advance copies and notification of the pending release of the BJS publication entitled, Contacts between Police and the Public (NCJ207845).

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
03/10/2005	For ASG initialing on Information Memorandum. Return to ES for forwarding to the AG and DAG. Office of the Associate Attorney General

INFO COMPONENT: 03/14/05: OAG, ODAG

COMMENTS: 03/14/2005: Workflow closed after ASG initialed on 03/11/05 and copies forwarded to AG & DAG.

FILE CODE: AG FILE: OFFICE OF JUSTICE PROGRAMS BJS

EXECSEC POC: Paula Stephens: 202-616-0074

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 08/25/2005
DATE RECEIVED: 09/22/2005
WORKFLOW ID: 874662
DUE DATE: 10/06/2005

FROM: The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

TO: AG

MAIL TYPE: Sensitive

SUBJECT: Ltr (fax rec'd from OLA) from the RMM, Judiciary Comte, expressing concerns about recent reports in the New York Times and the Washington Post indicating that the Director of BJS, Lawrence A. Greenfeld, was demoted for insisting that data on aggressive police treatment of blacks and Hispanics be included in a press release announcing the results of a racial profiling and traffic stop study. The MCs request that the AG immediately reinstate Mr. Greenfeld as the Director of BJS and refer this matter to the OIG for a thorough investigation. Letter also signed by 4 other MCs.

DATE ASSIGNED **ACTION COMPONENT & ACTION REQUESTED**
For appropriate handling. Advise ES of any action taken.
Office of the Inspector General

INFO COMPONENT: OAG, ODAG, PAO, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

Congress of the United States
Washington, DC 20515

874662

August 25, 2005

Honorable Alberto Gonzales
Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington DC 20530

Dear Attorney General Gonzales:

We are writing to express our deep concern over recent reports in the New York Times and the Washington Post indicating that the Director of the Bureau of Justice Statistics ("BJS"), Lawrence A. Greenfeld, was demoted for insisting that data on aggressive police treatment of blacks and Hispanics be included in a press release announcing the results of a racial profiling and traffic stop study. We ask that you immediately reinstate Lawrence A. Greenfeld as the director of BJS and refer this matter to the Inspector General for a thorough investigation.

We are particularly troubled by reports that senior political officials at the Department of Justice ("DOJ") sought to include conclusions in a proposed press release relating to data showing that black and Hispanic drivers were equally likely to be stopped by the police as were white drivers, while eliminating any discussion of data showing that, once stopped, police officers acted in a more aggressive manner toward black and Hispanic drivers. Mr. Greenfeld apparently sought to include both pieces of relevant information in the press release. Failure to do so would have led to an incomplete and inaccurate description of the results of this critical study.

President Bush called for an end to racial profiling in 2001, and we have introduced comprehensive legislation in the United States Congress to achieve that goal. We strongly support the President's call for an end to racial profiling and applaud DOJ for undertaking this study on racial profiling and traffic stops. We are eager to work with you to achieve the President's goal, but we are troubled by the message that this episode sends about the Department's commitment to it.

As you know, racial profiling is a crucial issue for all Americans. When this kind of bias finds a home in the enforcement of the very laws meant to protect us and bind us together, it literally rips our communities apart. While the vast majority of law enforcement officers discharge their duties without bias, it is unacceptable for even one police officer to fail in this regard. The reliance by some law enforcement agents on race, ethnicity, national origin or religion in deciding who to target for criminal investigations violates our nation's

basic constitutional commitment to equal justice under the law. As such, we need to be vigilant in our efforts to end racial profiling.

Although whites, blacks, and Hispanics were stopped by the police at the same rate, the BJS study revealed deep racial disparities in the treatment of black and Hispanic drivers following the initial stop. The study indicated that blacks and Hispanics were much more likely to be arrested than whites, Hispanics were much more likely to be ticketed than blacks or whites, blacks and Hispanics were much more likely to report the use or threatened use of force by a police officer, blacks and Hispanics were much more likely to be handcuffed than whites, and blacks and Hispanics were much more likely to have their vehicles searched than whites.

It is essential that DOJ be forthcoming about these troubling statistics. We strongly believe that such data collection and analysis is the only means through which we can understand and confront the insidious problem of racial profiling. Transparent and accurate statistics also represent the only means through which we can judge our progress in our continuing effort to end racial profiling.

The integrity and independence of statistical studies that inform the drafting and enforcement of our nation's laws cannot be overstated. While individuals may disagree about particular interpretations of a statistical study, there can be no doubt that all of the data and all of the statistical conclusions must be completely transparent. It is likewise essential that all data and statistical conclusions be free from political manipulation. As such, BJS must maintain a level of independence and integrity beyond that found in most other sections of DOJ.

Thank you for your attention to this important matter. Again, we request that you immediately reinstate Lawrence A. Greenfeld as the director of BJS and refer this matter to the Inspector General for investigation.

Sincerely,

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 08/25/2005
DATE RECEIVED: 09/22/2005
WORKFLOW ID: 874662
DUE DATE: 10/06/2005

FROM: The Honorable John J. Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
U. S. House of Representatives
Washington, DC 20510-0001

TO: AG

MAIL TYPE: Sensitive

SUBJECT: Ltr (fax rec'd from OLA) from the RMM, Judiciary Comte, expressing concerns about recent reports in the New York Times and the Washington Post indicating that the Director of BJS, Lawrence A. Greenfeld, was demoted for insisting that data on aggressive police treatment of blacks and Hispanics be included in a press release announcing the results of a racial profiling and traffic stop study. The MCs request that the AG immediately reinstate Mr. Greenfeld as the Director of BJS and refer this matter to the OIG for a thorough investigation. Letter also signed by 4 other MCs.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
09/22/2005	For appropriate handling. Advise ES of any action taken. Office of the Inspector General

INFO COMPONENT: OAG, ODAG, PAO, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

Department of Justice
Executive Secretariat
Daily Report for 09/23/2005

MAIL TYPE	DUE DATE	ACTION COMPONENT	WORKFLOW ID	DATE RECEIVED	DOCUMENT ADDRESSED TO
Sensitive	10/06/2005	OIG	874662	09/22/2005	AG

FROM: John Conyers, Ranking Minority Member, Committee on the Judiciary U.S. House of Representatives, 2138 Rayburn House Office Building, Washington, DC 20515

SUBJECT: Ltr (fax rec'd from OLA) from the RMM, Judiciary Comte, expressing concerns about recent reports in the New York Times and the Washington Post indicating that the Director of BJS, Lawrence A. Greenfeld, was demoted for insisting that data on aggressive police treatment of blacks and Hispanics be included in a press release announcing the results of a racial profiling and traffic stop study. The MCs request that the AG immediately reinstate Mr. Greenfeld as the Director of BJS and refer this matter to the OIG for a thorough investigation. Letter also signed by 4 other MCs.

INFO: OAG, ODAG, PAO, OLA

Sensitive Total: 1

U.S. Department of Justice

Office of the Associate Attorney General

Principal Deputy Associate Attorney General

Washington, D.C. 20530

March 7, 2006

Ms. Ann Yerger
Executive Director
Council of Institutional Investors
1730 Rhode Island Avenue, NW
Suite 512
Washington, DC 20036

Dear Ann:

I only yesterday received a copy of your November 9, 2005 letter to Paul McNulty. Such are the vagaries of government mail post 9/11.

It was a pleasure to see your name and I hope you're enjoying your "new" role at the Council. Please give everyone there as well as Sarah my warmest wishes.

Very truly yours,

Neil Gorsuch

P.S. My title is Principal Associate Attorney General as noted on this letterhead – in your correspondence with Paul you gave me a very kind promotion!

COUNCIL OF INSTITUTIONAL INVESTORS

Suite 512 • 1730 Rhode Island Avenue, N.W. • Washington, D.C. 20036 • (202) 822-0800 • Fax (202) 822-0801

November 9, 2005

Paul J. McNulty
Acting Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. McNulty:

The Council of Institutional Investors, an association of more than 140 corporate, public and union pension funds with more than $3 trillion in pension assets, is writing to invite you to deliver a keynote address at the Council's semi-annual meeting on Thursday, March 30 and Friday, March 31, 2006, at the Loews L'Enfant Plaza in Washington, DC.

The theme of the meeting is "New Environment, New Faces," and the 500-plus attendees would value your insights on the Justice Department's work prosecuting white collar corporate crime. The Council believes the Department's work has played an integral role rebuilding the confidence of investors in the US markets following the scandals of the past five years.

As you know, Council members represent long-term patient capital. They have a significant stake in the U.S. capital markets, and as a result, they have suffered tremendous losses from the recent corporate scandals. They look to companies to institute the strongest systems of checks and balances possible and to the Department of Justice to hold wrongdoers accountable.

Our mutual friend Assistant Attorney General Neil Gorsuch—who was outside counsel to the Council—will vouch for the Council's reputation and credentials. I hope you can participate at this important event, and I look forward to hearing from you. Please contact me with any questions.

Sincerely,

Response to

Ann Yerger
Executive Director
anny@cii.org

cc: Neil Gorsuch, Assistant Attorney General, Department of Justice

Dear Ann,
I only recently received a copy of your November 9, 2005 letter to Paul McNulty. Such are the vagaries of government mail post 9-11.
It was a pleasure to see you and I hope you're enjoying your "new" role at the Council. Please give everyone there as well as Sarah my warmest wishes.
Very truly yours,
P.S. My name is misspelled in this letter head — in your correspondence with →

Paul you gave me a very kind praise!

SUPREME COURT OF PENNSYLVANIA
CONTINUING LEGAL EDUCATION BOARD
5035 Ritter Road, Suite 500, PO Box 869, Mechanicsburg, PA 17055
(800)497-2253 (717)795-2139 FAX: (717)795-2120
www.pacle.org
e-mail: pacleb@pacle.org

June 23, 2005

Common Good
Sara Berg, Staff Attorney
1424 16th Street, NW, Suite 210
Washington, DC 20036

Dear Provider:

This letter will serve as official notice that the following program has been approved by the PA CLE Board.

Name Of Course	Date	Location	Credits Approved
Lawsuits and Liberty: A Forum Addressing the Role of Civil Justice in a Free Society	06/27/2005	Philadelphia, PA	Maximum: 7.00 = 3.00E 4.00S

Please Note: When lawyers from Pennsylvania attend your course, please give them a copy of the enclosed Pennsylvania CLE Credit Request Form, along with your attendance certificate (if available), and remind them to submit a check payable to the **PA CLE Board** for the hours that they attended. This fee is also required for each half hour increment. We accredit only programs that are at least one hour long; in addition, we accredit only in half hour increments.

If you have any questions, please contact our office at (800)497-2253.

Enclosure

CERTIFICATE OF ATTENDANCE

COMMON GOOD
477 MADISON AVE., 7TH FLOOR
NEW YORK, NY 10022

"LAWSUITS AND LIBERTY: A FORUM ADDRESSING THE ROLE OF CIVIL JUSTICE IN A FREE SOCIETY"

JUNE 27 AND 28, 2005
NATIONAL CONSTITUTION CENTER
PHILADELPHIA, PA

Neil Gorsuch

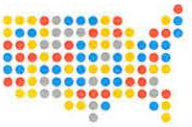
Pennsylvania CLE Credits

Ethics:	**3**
Substantive:	**4**
Total Credits:	**7**

Franklin H. Stone, Executive Director

8/3/05
Date

477 Madison Avenue, 7th Floor, New York, NY 10022
Phone 212.681.8199 Fax 212.681.8221



COMMON GOOD℠
RESTORING COMMON SENSE TO AMERICAN LAW
WWW.CGOOD.ORG

DATE: August 3, 2005
TO: Lawsuits and Liberty conference attendees
FROM: Sara A. Berg
RE: CLE credit for the Lawsuits and Liberty conference

Enclosed please find your Certificate of Attendance for the Lawsuits and Liberty conference at the National Constitution Center in Philadelphia on June 27 and 28. Also enclosed is the accreditation letter from the Pennsylvania CLE Board granting credit for this course.

Please contact your state CLE Board for the requirements to claim CLE credit in your state.

You may reach me at 212-681-8199 ext. 12 or sberg@cgood.org with any questions.

Enclosures

NEIL M. GORSUCH

October 5, 2005

CLE Board,

Thank you for your recent letter noting that certain questions were unanswered in the attached forms. I have filled in the answers as requested, but if you should have any questions please do not hesitate to call me at 202 305 1434.

Thank you for your attention and assistance in this matter.

Neil Gorsuch

SETTLEMENTS IN SECURITIES FRAUD CLASS ACTIONS: IMPROVING INVESTOR PROTECTION

by
Neil M. Gorsuch and Paul B. Matey
Kellogg, Huber, Hansen,
Todd, Evans & Figel, P.L.L.C.

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INTRODUCTION

In 1941, Harry Kalven, Jr. and Maurice Rosenfield suggested a new use for class action lawsuits based on the emerging marketplace for publicly traded securities.[1] Kalven and Rosenfield argued that the securities markets had become so complex that investors had little incentive to seek remedies under the Securities Act because the cost of prosecuting a claim far surpassed the expected recovery.[2] To remedy this problem, the authors proposed using civil class actions to police abuses in the securities markets – a theory that would later be dubbed the "private attorney general."[3] The

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[1]*See* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

[2]*See id.*; *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 569 (1992).

[3]The term was coined by Judge Jerome Frank of the United States Court of Appeals for the Second Circuit. *See Associated Indus. of New York State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) ("[T]here is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals."). For a discussion of the rise of private enforcement actions under federal regulatory

current class action provision codified in Federal Rule of Civil Procedure 23 embodies Kalven's and Rosenfield's idea that civil class action suits could empower individual consumer redress while simultaneously ensuring enforcement of the federal securities laws.[4]

While securities class actions have offered some of the social benefits Kalven and Rosenfield envisioned, experience has shown that, like many other well-intended social experiments, they are not exempt from the law of unintended consequences, having brought with them vast social costs never imagined by their early promoters. Today, economic incentives unique to securities litigation encourage class action lawyers to bring meritless claims and prompt corporate defendants to pay dearly to settle such claims. These same incentives operate to encourage significant attorneys' fee awards even in cases where class members receive little meaningful compensation. And the problem is widespread. Recent studies conclude that, over a five-year period, the average public corporation faces a 9% probability of facing *at*

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laws, *see generally* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983). For criticism of the private attorney general model, *see generally* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff's Attorneys' Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991) (proposing private rights of action be auctioned to attorneys seeking to bring the class claim).

[4]Although there is little documentation of the discussion of Kalven's and Rosenfield's theory during the advisory committee sessions, their arguments proved important to the final proposed rule. *See* Note, *Developments in the Law — Class Actions*, 89 HARV. L. REV. 1318, 1321-23 (1976).

least one securities class action lawsuit.[5] As Congresswoman Anna Eshoo (D-Cal.) has put it, "Businesses in my region place themselves in one of two categories: those who have been sued for securities fraud and those that will be."[6] In the last four years alone, securities class action settlements have exceeded two billion dollars *per year*.[7]

What are the sources of the problems confronting securities class litigation? And how might we address them in a way that ensures we protect the valuable function securities class action litigation was originally intended to serve? This article seeks to offer a preliminary step toward answering these questions.

I. CERTAIN STRUCTURAL PROBLEMS OF SECURITIES FRAUD CLASS ACTIONS

A. The Incentive to Bring – and the Pressure to Settle – Meritless Suits

Because the amount of damages demanded in securities class actions is frequently so great, corporations often face the choice of "stak[ing] their companies on the outcome of a single jury trial, or be forced by fear of the

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[5]*See* Elaine Buckberg et al., NERA, *Recent Trends in Securities Class Action Litigation: 2003 Early Update* 4 (Feb. 2004) ("*2003 Early Update*").

[6]Conference Report on H.R. 1058, Private Securities Litigation Reform Act of 1995, 141 Cong. Rec. H14039, H14051 (Dec. 6, 1995).

[7]*See Laura E. Simmons & Ellen M. Ryan*, Cornerstone Research, *Post-Reform Act Securities Settlements Reported Through December 2004* at 1 (Mar. 2005), *available at* http://securities.cornerstone.com. Settlements in 2001 were estimated at $2.1 billion, rising to $2.537 billion in 2002, holding at $2.016 billion in 2003, and rising to a record high 2.8 billion in 2004. *Id.*

risk of bankruptcy [into settling] even if they have no legal liability."[8] Unsurprisingly, executives faced with the potential destruction of their companies in a single trial typically opt to settle – even if it means paying out on meritless claims. They are, as Congress has recognized, "confronted with [an] implacable arithmetic . . . even a meritless case with only a 5% chance of success at trial must be settled if the complaint claims hundreds of millions of dollars in damages."[9] Illustrating just how powerful the incentive to settle can be, Bristol-Myers Squibb recently agreed to settle a pending class action for $300 million *even after the suit was dismissed with prejudice* at the trial court level.[10]

With such pressure to settle meritless suits comes, unsurprisingly, a concomitant incentive to bring them. As one academic commentator has candidly recognized, there is simply "*no appreciable risk* of non-recovery" in securities class actions; merely "*[g]etting the claim into the legal system,*

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[8]*In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995); *see also* Victor E. Schwartz, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 490 (2000) ("For defendants, the risk of participating in a single trial [of all claims], and facing a once-and-for-all verdict is ordinarily intolerable.") (internal quotation marks omitted); Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2064 (1995); Woodruff-Sawyer & Co., *A Study of Shareholder Class Action Litigation* 25 (2002) (83% of securities fraud cases are resolved through settlement).

[9]H.R. Rep. No. 106-320, at 8 (1999). *See also West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002) (noting scholarly concerns that "settlements in securities cases reflect high risk of catastrophic loss, which together with imperfect alignment of managers' and investors' interests leads defendants to pay substantial sums even when the plaintiffs have weak positions"); Schwartz, *supra* note 8, at 490.

[10]Jonathan Weil, *Win Lawsuit – and Pay $300 Million*, WALL ST. J., Aug. 2, 2004, at C3.

without more, sets in motion forces that ultimately compel a multi-million dollar payment."[11] And the Second Circuit concurs: "[a]necdotal evidence tends to confirm this conclusion. Indeed, [Melvyn I.] Weiss and his partner William S. Lerach of the Milberg firm have stated that losses in these cases are 'few and far between,' and they achieve a 'significant settlement although not always a big legal fee, in 90% of the cases [they] file.'"[12] Even the Supreme Court has acknowledged that, as a result of this phenomenon, securities class action litigation poses "a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general."[13] Illustrating how tempting these cases are for plaintiffs' lawyers, one court found it "peculiar that four of the lawsuits consolidated in this action were filed around 10:00 a.m. on the first business day following [the defendant's] announcement" of business problems and that "[m]ost of the complaints are virtually identical (including typographical errors)."[14] At the hearing on the

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[11]Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 578, 569 (1991) (emphasis added). *Accord Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004) (noting "numerous courts and scholars have warned that settlements in large [securities] class actions can be divorced from the parties' underlying legal positions"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001) (discussing the "inordinate or hydraulic pressure on [securities fraud] defendants to settle, avoiding the risk, however small, of potentially ruinous liability").

[12]*Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000) (quoting *In re Quantum Health Res., Inc. Sec. Litig.*, 962 F. Supp. 1254, 1258 (C.D. Cal. 1997)). The Milberg Weiss Bershad Hynes & Lerach firm has now divided into two separate partnerships known as Milberg Weiss Bershad & Schulman, and Lerach Coughlin Stoia Geller Rudman & Robbins.

[13]*Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975).

[14]*Ferber v. Travelers Corp.*, 785 F. Supp. 1101, 1106 n.8 (D. Conn. 1991).

defendant's motion to dismiss, the judge inquired:

> [H]ow did you get to be so smart and to acquire all this knowledge about fraud from Friday to Tuesday? On Friday afternoon, did your client suddenly appear at your doorstep and say 'My God, I just read in the Wall Street Journal about Travelers. They defrauded me,' and you agreed with them and you interviewed them and you determined that there was fraud and therefore you had a good lawsuit, so you filed it Tuesday morning, is that what happened?[15]

The court tellingly noted that "[c]ounsel for the plaintiffs was not responsive to this line of inquiry."[16]

B. The Incentive to Reward Class Counsel But Not Necessarily Class Members

While plaintiffs' attorneys have a strong financial incentive to bring meritless suits, and defendants have a strong incentive to settle them, neither has a particularly strong incentive to protect class members. Once the scope of the settlement fund is determined, defendants usually have no particular concern how that fund is allocated between class members and plaintiffs' counsel. And with the threat of adversarial scrutiny from the defendant largely abated, plaintiffs' counsel has free reign to seek (and little reason not to try to grab) as large a slice of the settlement fund as possible. Thus, settlement hearings frequently devolve into what the Third Circuit has called "jointly orchestrated . . . pep rallies," in which no party questions the

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[15] *Id.*

[16] *Id.*

fairness of the settlement or attorneys' fee request and "judges no longer have the full benefit of the adversarial process."[17] This arrangement has led one prominent securities fraud attorney to boast that "I have the greatest practice in the world because I have no clients. I bring the case. I hire the plaintiff. I do not have some client telling me what to do. I decide what to do."[18]

Just how true that is can be illustrated by a 2002 settlement involving AT&T and Lucent regarding allegedly improper billing practices. A settlement fund for class members and counsel was established and valued at $300 million in settlement hearing proceedings. Soon after, the lawyers for the class collected some $80 million in fees, or more than 26% of the $300 million fund. Class members, meanwhile, "didn't collect as easily."[19] Two years later, in 2004, the parties revealed that class members found the settlement terms so unattractive that they had bothered to redeem a mere $8 million from the settlement fund – meaning that the plaintiffs' lawyers earned *ten times* the amount of the injured consumers.[20]

In re PeopleSoft Securities Litigation exemplifies the same problem.[21]

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[17]*Id.* at 1310. *See also Cohen v. Young*, 127 F.2d 721, 725 (6th Cir. 1942); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 532 n.7 (1984).

[18]*In re Network Assocs. Inc. Sec. Litig.*, 76 F. Supp. 2d 1017, 1032 (N.D. Cal. 1999).

[19]Editorial, *Fees Line Lawyers' Pockets*, USA TODAY, Apr. 6, 2004.

[20]*Id.*

Immediately following a decline in the common stock of PeopleSoft, Inc., 19 complaints were filed alleging that top company executives had made materially false and misleading statements to inflate the stock price. At the onset of the action, counsel represented that the case was worth hundreds of millions of dollars in damages. Yet, one year later, the plaintiffs sought approval for a settlement of $15 million. In reviewing the proposed settlement, the district court concluded that counsel had engaged in "minimal" discovery, "on the borderline of acceptability" given the purported scope of the case. Although the district court concluded that "a substantial part of the allegations that led the court to sustain the complaint in the first place are untrue, were never true, and had, at most, razor-thin support," plaintiffs' counsel pocketed $2.5 million in fees and expenses all taken from the common settlement fund.[22]

C. The Transfer Effect

Yet another unique structural issue affects securities class action settlements. Because settlement payments often come largely out of corporate coffers (directors' and officers' insurance policies also contribute), securities class actions frequently involve only "a transfer of wealth from

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[21]*See* Order Certifying Settlement Class, Approving Class Settlement, and Awarding Fees and Expenses, *In re PeopleSoft, Inc. Sec. Litig.*, No. C 99-00472 WHA, at 9-10 (N.D. Cal. Aug. 24, 2001).

[22]*Id.*

current shareholders to former shareholders."[23] That is, to the extent the corporation pays out, it is only transferring a portion of that wealth to existing shareholders' bank accounts (essentially an economic wash) in addition to sums paid to former shareholders who sold at some point during the class period and, of course, class counsel. Thus, to the extent that class members still own shares in the company at the time of the suit (as they often do), "payments by the corporation to settle a class action amount to transferring money from one pocket to the other, with about half of it dropping on the floor for lawyers to pick up."[24] All this led Judge Friendly to observe that securities fraud litigation carries the risk of "large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers."[25]

II. WHERE TO GO FROM HERE?

A. Recent Efforts at Reform

To be sure, Congress has recognized and sought to address some of

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[23]Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487, 1503 (1996). *See also* Frank H. Easterbrook & Daniel R. Fischel, *Optimal Damages in Securities Cases*, 52 U. CHI. L. REV. 611, 638-39 (1985); Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 698-700; Donald C. Langevoort, *Capping Damages for Open-Market Securities Fraud*, 38 ARIZ. L. REV. 639, 650 & n.48 (1996); Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 921-22.

[24]Alexander, *supra* note 23, at 1503.

[25]*SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968).

the negative side-effects of securities class action litigation.[26] In 1995, Congress enacted the Private Securities Litigation Reform Act[27] ("PSLRA").[28] It followed up in 1998 with the Securities Litigation Uniform Standards Act ("SLUSA").[29] Together, these bills sought to toughen pleading standards for securities class action suits,[30] encourage the appointment of pension funds as lead plaintiffs in the hope that they might better oversee class counsel,[31] and ensure that cases are tried in federal courts rather than in state courts.[32]

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[26]H.R. Conf. Rep. No. 104-369, at 31 (1995), *reprinted in* 1996 U.S.C.C.A.N. 730, 731. Congress explained that:

> The House and Senate Committees heard evidence that abusive practices committed in private securities litigation include: (1) the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action; (2) the targeting of deep pocket defendants, including accountants, underwriters, and individuals who may be covered by insurance, without regard to their actual culpability.

Id.

[27]15 U.S.C. § 78u-4.

[28]Pub. L. No. 104-67, 109 Stat. 737, 15 U.S.C. §§ 77k *et seq.* (1995).

[29]Pub. L. No. 105-353, 112 Stat. 3227, 15 U.S.C. §§ 77b *et seq.* (1998).

[30]*See* S. Rep. No. 104-98, at 15 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 694 (noting the PSLRA imposes a "strong pleading requirement" on the filing of any securities fraud action); H.R. Conf. Rep. No. 104-369, at 41 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 740 (the PSLRA "requires the plaintiff to plead and then to prove that the misstatement or omission alleged in the complaint actually caused the loss incurred by the plaintiff"); *see also Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 597 (2001) (noting the "stricter pleading requirements" imposed in the PSLRA).

[31]H.R. Conf. Rep. No. 104-369, at 34, *reprinted in* 1995 U.S.C.C.A.N. at 733.

[32]*See* H.R Conf. Rep. No. 105-803 (Oct. 9, 1998) (explaining Congress's intent that SLUSA would "prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court").

Congress's reforms, however, did little to address the underlying incentives that encourage plaintiffs' lawyers to bring – and defendants' lawyers to settle – meritless suits, or the incentives the parties have to benefit class counsel more than class members.[33] In fact, there has been a 32% nationwide increase in the mean number of securities fraud suits filed in the six years since the enactment of the PSLRA.[34] According to one published report, public companies now face a nearly 60% greater chance of being sued by shareholders.[35] And virtually all of these suits continue to be settled. One recent opinion quoted a statistic showing the dismissal rate in the Ninth Circuit as *only 6%*.[36] Studies show, too, that six years after the passage of the PSLRA, shareholders in class action suits collected, on average, just six cents for every dollar of claimed loss while their counsel continue to reap enormous fees.[37] As a result, despite congressional efforts at reform securities class action settlements reached an all-time high in

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[33]*See* Laura E. Simmons & Ellen M. Ryan, Cornerstone Research, *Post-Reform Act Securities Lawsuits: Settlements Reported Through December 2003* (May 2004) ("*Post-Reform Study*"), *available at* http://www.cornerstone.com.

[34]Perino, *supra* note 23, at 930.

[35]*See* Todd S. Foster et al., National Economic Research Associates, *Trends in Securities Litigation and the Impact of PSLRA* 4 (2003).

[36]*In re Infospace, Inc. Secs. Litig.*, No. C01-931Z, 2004 WL 1879013, at *4 (W.D. Wash. Aug. 5, 2004).

[37]Cornerstone Research, *Securities Class Action Case Filings 2002: Year in Review* (2003).

2004 of $2.9 billion.[38]

More recently, Congress passed the Class Action Fairness Act of 2005.[39] That law imposes several new hurdles for class action litigants. First, the Act expands the original jurisdiction of the federal courts to include suits where the aggregate amount of controversy exceeds $5 million and the class includes at least 100 potential members, only one of whom must be a citizen of a different state than the defendant.[40] Second, the Act eliminates restrictions on removal, including the one-year time limitation otherwise applicable to civil suits, the need for all defendants to consent to removal, and the inability for defendants to remove from state courts where they are citizens.[41] Third, the Act closes the so-called "joinder loophole" that allowed massive actions on behalf of numerous plaintiffs to proceed without seeking class action certification by extending federal jurisdiction over most all civil actions seeking monetary damages on behalf of 100 or more persons.[42] The Class Action Fairness Act also places new controls on the

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[38]*See Laura E. Simmons & Ellen M. Ryan*, Cornerstone Research, *Post-Reform Act Securities Settlements Reported Through December 2004* (Mar. 2005) at 1, *available at* http://securities.cornerstone.com. Notably, the $2.9 billion total was adjusted for the effects of inflation and did not include the $2.6 billion partial settlement in the WorldCom, Inc. litigation. *Id.*

[39]Class Action Fairness Act of 2005, Pub. L. 109-2, § 2 (outlining Congress's findings of class action abuses that have "harmed class members with legitimate claims and defendants that have acted responsibly").

[40]*Id.* § 4.

[41]*Id.* § 5.

settlement of class actions, particularly certain settlements awarding coupons in lieu of damages.[43]

For better or for worse, however, the Class Action Fairness Act will have little impact on securities class action litigation. By its terms, the Act does not apply to claims that could not already be removed under SLUSA, suits relating to "internal affairs or governance of a corporation," and suits relating to breaches of fiduciary duties in the sale of a security.[44] As a result, securities fraud class actions remain susceptible to the very problems that Congress sought to redress in other forms of class action litigation.

Beyond Congress, some have promoted recent changes to the Federal Rules of Civil Procedure as ways to improve the class action mechanism. Like Congress's reforms, however, these recent rule changes simply do not address the fundamental problematic incentives and structures unique to securities litigation.

First, until its recent amendment, the decision whether to opt out of a Rule 23 class action frequently had to be made early in the case – often before the nature and scope of liability and damages could be fully understood. As amended, Rule 23(e)(3) now permits courts to refuse to

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[42] *Id.* § 4.

[43] *Id.* § 3. The Act also authorizes the Court to receive expert testimony on the valuation of a class settlement.

[44] *Id.* § 4.

approve a settlement unless it affords a new opportunity to request exclusion at a time when class members can make an informed decision based on the proposed settlement terms. Early experience, however, shows that few courts have permitted additional opt-out periods following settlement approval.[45] Critically, too, a second opt-out offers no protection where settlement occurs before a class is certified – yet such early settlements are the norm in securities class action litigation given the scope of damages they involve, and the fact that securities class actions are so frequently certified.[46]

Second, Rule 23(f) has been amended to encourage interlocutory appeals from district court class certification orders. Early reports indicate, however, that Rule 23(f) has been used modestly, resulting in approximately nine published opinions per year since the rule was adopted in 1998.[47] The discretionary nature of Rule 23(f), moreover, has led to a patchwork of standards and guidelines in the circuit courts, thus raising the possibility of

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[45]*See In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 WL 1068807, at *3 (E.D. Pa. May 11, 2004) (finding "no significant developments since the original opt-out that would require . . . a second opt-out period"); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 518 (E.D.N.Y. 2003) (declining to offer the class a second opt-out opportunity "in light of the infinitesimal number of objections" by class members).

[46]*See* Lawrence J. Zweifach & Samuel L. Barkin, *Recent Developments in the Settlement of Securities Class Actions*, 1279 PLI/Corp. 1329, 1339 (2001).

[47]Brian Anderson & Patrick McLain, *A Progress Report on Rule 23(f): Five Years of Immediate Class Certification Appeals*, Washington Legal Foundation LEGAL BACKGROUNDER (Mar. 19, 2004).

inconsistent remedies depending on the forum.[48] And, once again, Rule 23(f) provides little assistance in cases where settlement occurs *before* class certification – and that is, again, the dominant practice in securities class actions.[49]

B. Toward Meaningful Reform in Securities Class Action Settlements

While the procedural fixes and patches enacted by Congress and in the federal rules may help, it seems clear that they have proven insufficient to the task of preventing unmeritorious securities fraud cases or deterring settlements that benefit lawyers more than their clients. Future reform efforts may be more effective if focused less on procedures and more directly on the underlying economic incentives. What does this mean? Here are some possibilities.

1. Enforce the PSLRA's Loss Causation Requirement

A majority of circuit courts have held that a securities fraud plaintiff must demonstrate that the price of the security at issue declined as the result of disclosure of previously concealed information, and have limited

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[48]*See* Aimee G. Mackay, Comment, *Appealability of Class Certification Orders under Federal Rule of Civil Procedure 23(f): Toward a Principled Approach*, 96 NW. U. L. REV. 755 (2002) (collecting the various standards of the circuit courts).

[49]*See* Zweifach & Barkin, *supra* note 46, at 1339.

the plaintiff's damages to the amount of that decline.[50] As recently explained by the Second Circuit in an opinion affirming the decision of the late Judge Milton Pollack in *Lentell v. Merrill Lynch*, "to establish loss causation, a plaintiff must allege . . . that the *subject* of the fraudulent statement or omission was the cause of the actual loss suffered."[51] There, a class of investors in once high-flying Internet startups brought suit for losses suffered after the now-famous "irrational exuberance" that fueled investments in the late 1990s diminished and the Internet stock price bubble burst. Eager to find someone to blame for their losses, the plaintiffs filed suit against Merrill Lynch claiming the company issued false recommendations in its analyst reports – this despite the fact that the plaintiffs were not clients of Merrill Lynch and had not relied on, read, or even seen a copy of any of Merrill's reports. The Second Circuit rejected the plaintiffs' construction of the loss causation requirement and held that they failed "to account for the price-volatility risk inherent in the stocks they chose to buy" or plead any other facts showing that "it was defendant's fraud – rather than other salient factors – that proximately caused [their] loss."[52]

In contrast, the Ninth Circuit has held that a securities fraud plaintiff

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[50] *See Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189 (2d Cir. 2003); *Semerenko v. Cendant Corp.*, 223 F.3d 165 (3d Cir. 2000); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997); *Bastian v. Petren Res. Corp.*, 892 F.2d 680 (7th Cir. 1990).

[51] *Lentell v. Merrill Lynch*, 396 F.3d 161, 173 (2d Cir. 2005).

[52] *Id.* at 177.

need only argue that the price of a security was "inflated" when he or she bought shares.[53] Rather than holding companies liable for the damage they inflict, as reflected by actual market events, the Ninth Circuit's rule thus permits liability to be found and damages to be awarded even when the plaintiff can point to *no actual market price reaction to a corrective disclosure at all.* Under this regime, a plaintiff can bring a class action simply on the allegation that a company's share price was once "inflated" because of the undisclosed accounting issue – and do so without ever having to establish a causal link between any price decline and the alleged misrepresentation. The Ninth Circuit's approach thus allows recovery where investors are *never hurt* by the alleged fraud, including in cases where the plaintiff sold before the alleged misrepresentation was exposed; where the misrepresentation was never exposed at all; or where the misrepresentation was exposed but the market did not respond negatively.

The facts of the Ninth Circuit case are illustrative. On February 24, 1998, Dura Pharmaceuticals announced a revenue shortfall for the following year, unrelated to any alleged fraud. By the next day, shares in Dura dropped from $39.125 to $20.75 for a one-day loss of 47%. Some *nine months later*, on November 3, 1998, Dura announced for the first time that the Food and Drug Administration had declined to approve its Albuterol

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[53]*Broudo v. Dura Pharms, Inc.*, 339 F.3d 933 (9th Cir. 2003); *see also Gebhardt* v. *ConAgra Foods, Inc.*, 335 F.3d 824, 831 (8th Cir. 2003).

Spiros product – an announcement that plaintiffs themselves contend constitutes the first public disclosure of the alleged fraud in this case. Following this announcement, however, Dura shares fell only slightly and briefly. Share prices initially dropped from $12.375 to $9.75, but, within 12 trading days, they recovered to $12.438, ultimately climbing to $14.00 within 90 days of the announcement. A claim of fraud on behalf of Dura investors followed.

But seeking to boost their recovery, the class plaintiffs never alleged damages based on the brief and shallow $2.625 stock price dip after the November 3 disclosure of the supposed fraud. Rather, they demanded recovery based on the much more significant February 24 stock price decline of $19. In other words, the plaintiffs sought damages based on a decline in share value that occurred nine months *before* the disclosure of the alleged fraud. The facts were as simple, and seemingly insufficient, as if Mrs. Palsgraf had filed suit for a headache she developed before ever leaving for the train station. The district court agreed and dismissed the action. The Ninth Circuit saw things differently, finding loss causation satisfied where the plaintiffs "have shown that the price *on the date of purchase* was inflated because of the misrepresentation."[54]

The economic implications of the Ninth Circuit's holding are

[54] *Broudo*, 339 F.3d at 938.

staggering. Rather than holding companies liable for the damage they inflict, as reflected by actual market events, the Ninth Circuit's rule permits liability to be found and damages to be awarded even when the plaintiff can point to no actual market price reaction to a disclosure of the supposed fraud. Denying courts any means for weeding out at the pleading stage suits where the alleged fraud had no empirical effect on share price, and thus imposed no demonstrable harm on class members, the Ninth Circuit's rule adds fuel to a fire in which virtually every case is settled, wealth is transferred away from current shareholders to former shareholders.

Recently, however, the Ninth Circuit's treatment of the loss causation requirement received a cool response when the Supreme Court granted certiorari and heard arguments in the *Dura* case – a case that gives the High Court its first chance to explain the loss causation doctrine.[55] The questions posed by the Justices at oral argument suggest a fundamental disagreement with the Ninth Circuit's logic, exemplified by Justice Ruth Bader Ginsburg's observation: "How could you possibly hook up your loss to the news that comes out later? There is no loss until somehow the bad news comes out."[56]

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[55]The Solicitor General had urged the Supreme Court to review the decision concluding that the Ninth Circuit's reasoning was "difficult to reconcile with the well-established principle that transaction causation and loss causation are distinct elements of a Rule 10b-5 cause of action." *See* Brief for the United States as Amicus Curiae at 12, *Dura Pharms., Inc. v. Broudo*, No. 03-932 (U.S. filed May 28, 2004).

[56]Hope Yen, *High Court Hears Securities Fraud Case*, SEATTLE POST-INTELLIGENCER, Jan. 12. 2005.

Justice Sandra Day O'Connor also summed up the problem: "The reason why loss-causation is used is because a 'loss' experienced by the plaintiff is 'caused' by the misrepresentation. You have to put pleadings that are clear, which you didn't do."[57]

The Court's skepticism is well-founded. The Ninth Circuit's holding introduces a new legal rule that only further encourages plaintiffs to file and companies to settle meritless claims by removing a key safeguard against such suits. Worse still, the Ninth Circuit's rule encourages risky investment behavior, effectively forcing issuers to insure against speculative losses having nothing to do with their own conduct. Under the Ninth Circuit's rule, an investor can file a claim and obtain recovery even when the disclosure of an allegedly fraudulent statement has absolutely *no effect* on the stock price. To estimate damages in the absence of any contemporaneous real world stock price movement, moreover, the Ninth Circuit's rule encourages, and in fact depends upon, a return to the use of "junk science" by allowing recovery where disclosures do *not* prompt any stock price decline – *i.e.*, any actual harm. Under this standard, the parties and courts are, by necessity, forced to rely on a grab-bag of speculative theories to estimate damages since no empirically verifiable proof of injury exists. Like *Daubert v. Merrell Dow Pharmaceuticals* and its progeny, the

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[57] *Id.*

loss causation requirement arms courts with a tool to ensure that the legal system compensates fully for empirically confirmable losses, but not for "phantom losses" based on "cause-and-effect relationships whose very existence is unproven and perhaps unprovable."[58]

By contrast, the alternative loss causation rule endorsed by the Government, petitioners, and four other courts of appeals would avoid all of these problems while ensuring full recovery of real losses. Requiring plaintiffs to plead facts showing loss causation enables judges to separate investor losses stemming from actual fraud from those caused by mere market downturns. Allowing the theory of "fraud-on-the-market" to satisfy the plaintiffs' entire burden on causation risks overcompensating investors for stock losses unrelated to any specific action by a defendant. Where an alternative cause (such as the marketwide drop in Internet, technology, and telecommunications securities in early 2000) results in comparable losses across similarly situated investors, plaintiffs must logically allege some facts that tend to show that their particular losses were caused by the defendants' alleged wrongdoings. Only by requiring a specific causal nexus can courts achieve optimal deterrence against fraud without transforming the federal securities laws into a system of national investor insurance.

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[58]Kenneth R. Foster *et al.*, *Phantom Risk: Scientific Inference and the Law* 1 (1993).

2. *Mandate Separate Fee Funds*

The practice of paying plaintiffs' attorneys' fees from the settlement fund creates a powerful incentive to "structure a settlement such that the plaintiffs' attorneys' fees are disproportionate to any relief obtained for the corporation,"[59] and insulates the fee request from adversarial scrutiny. Paying fees out of the common settlement fund reduces the recovery available to consumers, and shifts the burden of paying the class counsels' fees to class members. In contrast, a regime that requires fee requests to be made separately from, and outside of, the class settlement fraud would help reintroduce the possibility that defendants might have some incentive to scrutinize fee requests and more closely monitor a regime that currently doles out 25% to 30% of every settlement to securities class action attorneys – many of whom do little or nothing to prosecute their cases and simply "free ride" on SEC or Justice Department investigations.

3. *Revive the Lodestar Method for Calculating Fees*

While the trend in federal courts has been toward using percentage of recovery methodology to determine fee awards, the lodestar method can provide a useful cross-check. The purpose behind any fee award from a

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[59] *Bell Atlantic v. Bolger*, 2 F.3d 1304, 1308-09 (3d Cir. 1993) (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.9, at 570 (4th ed. 1992) (plaintiffs' attorney "will be tempted to offer to settle with defendant for a small judgment and a large legal fee, and such an offer will be attractive to the defendant provided the sum of the two figures is less than the defendant's net expected loss from going to trial")).

common fund settlement is to compensate attorneys for the fair market value of their time in successfully prosecuting the class claims. While the lodestar method has been criticized as burdensome and fact intensive (it is both), strict adherence to the percent of recovery standard can also overlook inequitable fee awards. For instance, when Bank of America paid $490 million to settle a securities fraud class action in 2002, plaintiffs' lawyers pocketed $28.1 million dollars in fees. Although at first glance the fee award appears reasonable as a percentage of recovery, the plaintiffs' lawyers actually earned $2,007 per hour.[60] In such cases, the lodestar method can provide an important safeguard against attorney over-billing through a closer review of counsels' hours, rates, and other charges.

4. Employ Competitive Bidding to Select Class Counsel

A bidding process to determine class counsel would employ market forces to constrain the supra-competitive prices often charged by plaintiffs' attorneys. This concept was first employed by Judge Vaughn R. Walker of the Northern District of California.[61] There, the district court solicited sealed bids from law firms seeking to represent the lead plaintiff,

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[60]Peter Shinkle, *Deal Was Just the Beginning in Class-Action Suit*, ST. LOUIS POST DISPATCH, Jan. 16, 2005.

[61]*See* District Judge Vaughn R. Walker, Remarks at the ABA National Securities Litigation Institute 7-8 (June 5, 1998) ("[I]nstances of institutional investors actively leading a [securities class] litigation effort remain relatively rare.... This is no surprise.... [I]nstitutional investors have disincentives to becoming [parties].... Lawsuits are costly in time, money and other resources.").

accompanied by a description of the firm's experience and qualifications in such actions. The court then selected the lead plaintiffs' lawyer from these submissions, and determined the attorneys' fees based on the firm's own bid.[62] In another approach to competitive bidding, the district court might interview each of the prospective class attorneys, and select the lead plaintiffs' counsel based on the judge's independent analysis of the attorneys' ability to monitor and represent the interests of the class. Although Judge Walker's innovative approach was initially rejected by the Ninth Circuit,[63] recent amendments to Rule 23 appear to have vindicated Judge Walker's experiment, allowing judges to conduct competitive auctions based in part on the fees class counsel will receive.[64]

5. Encourage Meaningful Oversight

Participation by the appropriate state and federal agencies in

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[62]*In re Oracle Sec. Litig.*, 131 F.R.D. 688, 697 (N.D. Cal. 1990). Auctions for lead counsel have also been used in *In re Comdisco Sec. Litig.*, 141 F. Supp. 2d 951 (N.D. Ill. 2001); *In re Commtouch Software Sec. Litig.*, No. C 01-00719, 2001 WL 34131835 (N.D. Cal. June 27, 2001); *In re Quintus Sec. Litig.*, 148 F. Supp. 2d 967 (N.D. Cal. 2001); *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71 (S.D.N.Y. 2000); *In re Bank One Holders Class Actions*, 96 F. Supp. 2d 780 (N.D. Ill. 2000); *In re Lucent Techs., Inc., Sec. Litig.*, 194 F.R.D. 137 (D.N.J. 2000); *Sherleigh Assocs., LLC v. Windmere-Durable Holdings, Inc.*, 184 F.R.D. 668 (S.D. Fl. 1999); *Wenderhold v. Cylink Corp.*, 188 F.R.D. 577 (N.D. Cal. 1999); *In re Network Assoc., Inc., Sec. Litig.*, 76 F. Supp. 2d 1017; *In re Cendant Corp. Litig.*, 182 F.R.D. 144 (D.N.J. 1998); and *In re California Micro Devices Sec. Litig.*, 168 F.R.D. 257 (N.D. Cal. 1996); *see also* John F. Grady, *Reasonable Fees: A Suggested Value-Based Approach Analysis for Judges*, 184 F.R.D. 131, 142 (1999).

[63]*See In re Quintus Sec. Litig.*, 201 F.R.D. 475 (N.D. Cal. 2001), *rev'd sub nom. In re Cavanaugh*, 306 F.3d 726 (9th Cir. 2002).

[64]FED. R. CIV. P. 23(g)(1)(C)(iii) permits district courts to direct class counsel "to propose terms for attorney fees and nontaxable costs." *See In re Copper Mountain Sec. Litig.*, 305 F. Supp. 2d 1124, 1129 (N.D. Cal. 2004) (Walker, J.) (noting changes to federal class action rule cast doubt on Ninth Circuit's rejection of competitive bidding).

reviewing and commenting on proposed settlements could also help expose and prevent collusive deals. In recent years, the FTC has launched an aggressive and admirable effort in this area.[65] For example, in *In re First Databank* the FTC successfully challenged the fees sought in a consumer class suit that largely relied on an earlier enforcement action brought by the Commission.[66] In *Databank*, the FTC obtained agreement on $16 million in consumer redress as part of an antitrust enforcement action. Soon after, a private class action settlement added $8 million to the consumer fund, for a total of $24 million. Despite this marginal increase, class counsel sought fees of 30% of the *entire* $24 million fund, or more than 90% of the additional value added by the private action. Based largely on the FTC's objection, the district court reduced the fee award to 30% of the $8 million dollar additional recovery noting that the settlement was reached after the FTC "had already expended substantial efforts to establish" liability.[67]

Other agencies – including the Justice Department, the SEC, and the state attorneys' general – should be encouraged to follow the instructive example of the FTC and begin their own oversight of class action settlements purporting to piggy-back on their own investigations. Indeed, the Class

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[65]*See* Thomas B. Leary, *The FTC and Class Action*, June 26, 2003, *available at* http://www.ftc.gov/speeches/leary/classactionsummit.htm; Remarks of R. Ted Cruz Before the Antitrust Section of the American Bar Association, Dec. 12, 2002, *available at* http://www.ftc.gov/speeches/other/tcamicus.

[66]209 F. Supp. 2d 96 (D.D.C. 2002).

[67]*Id.* at 101.

Action Fairness Act of 2005 imposes just such a reporting requirement for class action settlements *not* involving securities fraud. Under the Act, each settling defendant must notify both the Attorney General of the United States and the appropriate state officials no later than 10 days after any proposed class action settlement.[68] The Act further states that final approval of a settlement may not issue earlier than 90 days after notice to the governmental officials. It is unclear why securities class actions should be exempted from these requirements — especially given the federal government's strong and historic interest in the regulation of the securities industry.

The FTC previously sought to address the notice problem in 2002 in a way that would have helped in the securities context when it proposed an amendment to Rule 23 under which parties to any class action would be required to notify the court of any related actions by government agencies, and to notify the government agencies involved in those actions of the related private class action.[69] The advisory committee, however, somewhat astonishingly declined to adopt these suggestions. Until the committee or Congress recognizes the value of a hard, independent look at securities class action settlements and reverses course, no procedure exists to ensure the

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[68]Class Action Fairness Act of 2005, Pub. L. 109-2, § 3.

[69]Federal Trade Commission, *Comments on Proposed Amendments to Rule 23 of the Federal Rules of Civil Procedure* (Feb. 15, 2002).

timely participation of interested governmental enforcement agencies.

6. Don't Duplicate Governmental Efforts

While agency oversight may help prevent collusive settlements, one well-intentioned feature of the Sarbanes-Oxley bill actually risks double recoveries. It is well known that actions by a federal regulatory agency frequently trigger parallel private class actions. Indeed, since the passage of the PSLRA in 1995, over 20% of all securities fraud actions have followed an SEC litigation release or administrative proceeding.[70] And more than half of recent SEC enforcement actions have produced parallel private civil actions.[71] The prevalence of these follow-on private actions is significant because Congress has recently granted the SEC the power to redress consumer harms directly. Section 308 of the Sarbanes-Oxley Act[72] allows the SEC to reimburse investors by depositing civil penalties for securities or accounting violations into a victim's compensation fund. And in the last couple years the SEC has exercised this authority with zeal, collecting hundreds of millions of dollars in compensation for affected shareholders.[73]

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[70] *See* Simmons & Ryan, *Post-Reform Study*, *supra* note 33.

[71] James D. Cox et al., *SEC Enforcement Heuristics: An Empirical Study* 53 DUKE L.J. 737, 777 n.113 (2003).

[72] 15 U.S.C. § 7246.

[73] *See* Paul F. Roye, Director, Division of Investment Management, U.S. Securities and Exchange Commission, Keynote Address at the 22nd Annual Advanced ALI-ABA Conference on Life Insurance Company Products (Nov. 4, 2004), *available at* http:// www.securitiesmosaic.com

Where the SEC exercises this authority, therefore, a parallel shareholder class action may be simply unnecessary to deter the alleged wrongdoing and adequately compensate the investors.

To date, however, the SEC, Congress, and the courts have not given this question the attention it deserves and parallel class actions continue even in cases where the SEC has already acted to compensate victims. Permitting plaintiffs to receive damages through private civil suits in addition to disgorgement awards risks overcompensating both class investors and plaintiffs' attorneys who fail to account for the government's efforts in their fee requests. At a minimum, courts should insist that disgorgement awards be treated separately from any class action settlement to prevent plaintiffs' lawyers from "free riding" on the good will achieved by the government's enforcement actions.

7. Encourage Meaningful Oversight by Litigants

In the PSLRA, Congress sought to reign in non-meritorious suits by expressing a strong preference for having institutional investors appointed as class representatives.[74] Congress, not unreasonably, believed that

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(noting that as of 2004 the SEC had "brought 51 enforcement cases related to the mutual fund scandals and levied $900 million in disgorgement penalties").

[74]The PSLRA requires courts to appoint as "lead plaintiff" the class member "that the court determines to be most capable of adequately representing the interests of class members." 15 U.S.C. § 78u-4(a)(3)(B)(i), and creates a rebuttable presumption that the most adequate plaintiff is the party with the "largest financial interest in the relief sought by the class." *Id.* § 78u-4(a)(3)(B)(iii)(I)(bb).

"increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions," rather than leaving the responsibility to small individual holders, many of which were often repeat players closely aligned with specific plaintiff law firms.[75] Congress may have failed, however, to consider the magnitude of the task it asked institutional investors to assume. Although some are suitable candidates to lead class action litigation, many lack the staff, resources, funding, and experience to monitor independently the suits brought on their behalf.

For example, the trustees of the Louisiana Teachers' Retirement System recently brought a derivative suit against the majority shareholders of Regal Entertainment to stop the issuance of a $750 million dividend, despite holding only a $30,000 investment in the company. The court denied the Louisiana Teachers' application for a preliminary injunction, finding "'not a shred of evidence' that minority shareholder would be hurt," and the Teachers subsequently dropped their claims.[76] Notably, the court found the claims so doubtful, that it asked plaintiffs' counsel "[t]o what extent has the plaintiff thought about the claims they're asserting and have

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[75]H.R. Conf. Rep. No. 104-369, at 34, *reprinted in* 1995 U.S.C.C.A.N. at 733.

[76]Editorial, *Pension Fund Shenanigans*, WALL ST. J., Aug. 20, 2004, at A12 ("[W]hat we have here is a public fund whose risky practices have cost the taxpayer billions throwing mud at a profitable company's management . . . a company . . . that was one of the fund's better-returning investments."). By way of full disclosure, the authors represented Regal in this suit.

they really studied them?"[77] As it turned out, the Louisiana Teachers' Retirement System has been involved in 60 class action lawsuits in the last eight years.[78] Citing this substantial docket, one district court judge in the Eastern District of Tennessee declined to allow the Teachers to serve as a lead plaintiff in one of these class actions, concluding that "the Court cannot help but conclude the Louisiana Funds' resources are being spread too thin."[79]

To help institutional investors from becoming spread too thin, and the concomitant loss of meaningful oversight promised by the PSLRA, courts might consider greater enforcement of the PSLRA's "professional plaintiff" rule to bar actions repeating allegations already considered and rejected in a prior suit. The PSLRA prohibits a party from serving as lead plaintiff in more than five securities class actions brought during a three-year period.[80] Some courts have disregarded this rule with respect to institutional investors, relying on commentary contained in the Conference Report accompanying the PSLRA.[81] As other courts have properly noted, however,

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[77]Transcript of Oral Argument Before the Hon. William B. Chandler, *Teachers' Retirement Sys. of La. v. Regal Entm't Group*, No. 444-N, at 156 (Del. Ch. June 1, 2004).

[78]*Pension Fund Shenanigans, supra* note 76.

[79]*In re Unumprovident Corp. Secs. Litig.*, MDL Case No. 03-1552, No. 03-CV-049 (E.D. Tenn. Nov. 6, 2003).

[80]15 U.S.C. § 78u-4(a)(3)(B)(vi).

[81]*See* H.R. Conf. Rep. No. 104-369, at 35 (stating that "[i]nstitutional investors . . . may need to exceed this limitation and do not represent the type of professional plaintiff this legislation

the PSLRA's plain language "contains no express blanket exception for institutional investors" and automatically excusing institutional investors from the rule would undermine rather than further the PSLRA's purposes.[82] Institutional investors themselves might also consider the creation of neutral litigation oversight committees to help them review solicitations made by plaintiffs' lawyers to ensure that the cases brought are meritorious, that fee agreements are fair and reasonable, and that any settlement benefits shareholders overall and does not, for example, simply result in a transfer of assets from current shareholders (very often including institutional investors themselves) to former shareholders.

CONCLUSION

Congress intended the PSLRA to reform the abuses that dominated securities fraud litigation in the early 1990s. Despite the best of legislative intentions, virtually all securities fraud claims that survive initial motions practice will be settled. With little prospect that their claims will be fully tested by the adversarial process, plaintiffs' attorneys have a strong economic incentive to bring ever-more securities fraud class actions without regard to the underlying merit of the suit, or the ultimate recovery to the

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seeks to restrict").

[82] *In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 443-44 (S.D. Tex. 2002); *see also In re Telxon Corp. Sec. Litig.*, 67 F. Supp. 2d 803, 821 (N.D. Ohio 1999).

class. Faced with such daunting prospects, businesses are frequently forced to comply with all but the most outrageous of settlement demands. As a result, new corporate investments are deterred, the efficiency of the capital markets is reduced, and the competitiveness of the American economy declines. And class members, who often have absolutely no interest in the suit from filing to final judgment, literally wind up paying the bills.

The reforms attempted so far are steps in the right direction. But none directly addresses the underlying economic incentives that drive the filing of frivolous securities fraud class actions in the first instance. Meaningful reforms must move beyond procedure to address these incentives directly. Enforcing the PSLRA's loss causation requirement will empower judges to dismiss securities fraud suits stemming from mere market downturns. Utilizing a competitive bidding process for the selection of class counsel will help address the de facto cartel responsible for the vast majority of securities class suits. Requiring attorneys' fees to be paid from a separate fee fund will increase adversarial challenges to exorbitant requests, and reviving the loadstar method will provide a tool to guard against overbilling. And no fees should be awarded for suits that do not provide meaningful benefits to investors after an opportunity for review by the appropriate regulatory agency. While no single reform can guarantee that securities fraud class action settlements will always be fair and reasonable,

these proposals are just a few possible steps in the direction of helping to secure the full promise of the securities class action mechanism as the vehicle for consumer protection envisioned by Kalven and Rosenfield nearly six decades ago.

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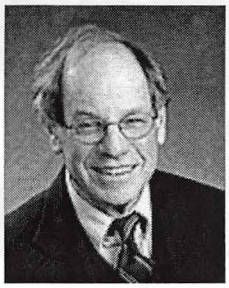

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HEADLINE: Freedom to file suit is so American

BYLINE: By Daphne Eviatar, New York Times News Service

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BODY:

The familiar image of manipulative lawyers and rapacious clients bringing frivolous lawsuits is almost as much a part of American lore as George Washington chopping down the cherry tree. Whether it's teenagers suing McDonald's for making them fat or a woman winning millions for burning herself with spilled coffee, the succession of sensational stories fuels the public's fury at a legal system apparently running amok.

But now a growing number of political scientists are arguing that America's famous litigiousness is not rooted in plain and simple greed but is rather the logical response to America's distinctive distribution of power and to a historical distrust of big government.

The proliferation of lawsuits grows out of "fundamental features of the American constitutional tradition," Thomas F. Burke, assistant professor of political science at Wellesley College, declares in a new book, "Lawyers, Lawsuits and Legal Rights: The Battle over Litigation in American Society."

In other words, blame the Founding Fathers for their deep mistrust of centralized authority and their glorified view of self-reliance. The government they structured -- with its separation of powers, its limited national control over state and local police forces and its independent judiciary -- was intended to protect against tyranny, but it had the unintended consequence of making it harder for democratically elected leaders to get things done.

While countries like Britain, Germany, France or Sweden have a centralized government with powerful regulatory agencies to provide safeguards and with generous social welfare benefits to cushion life's blows, Burke argues, the decentralized American system forces Americans to take their problems to court. So instead of national health care, he says, Americans get proposals for a "patients' bill of rights" that would allow the sick to sue their managed-care companies.

Certain expectations

Burke was a student of **Robert A. Kagan,** a political science professor at the University of California and the author of "Adversarial Legalism: The American Way of Law." Kagan argues that while the public is suspicious of government, it nonetheless "expects and demands comprehensive governmental protections from serious harm, injustice and environmental dangers."

This "fundamental tension" forces people to turn to the courts to do everything from cleaning

up the environment to rooting out discrimination to ensuring public safety. Under this system of "adversarial legalism," as Kagan calls it, the judiciary and lawyers become a critical part of the governing process.

Both Kagan and Burke rely in part on the work of the Stanford legal historian Lawrence Friedman, who in his 1985 book, "Total Justice," wrote that growing wealth and technological advances were increasingly leading people to expect government to solve their problems. As Kagan said recently, "People used to say if we can put a man on the moon, we certainly ought to be able to figure out how to make a product safe."

Modern tort law actually developed because the American government wasn't passing laws to protect people from the hazards of the Industrial Revolution, Carl T. Bogus, a law professor at Roger Williams University, explains in his book "Why Lawsuits Are Good for America," published last year. The courts stepped in to mandate safety measures, some of them life saving, when the legislatures refused to.

By the middle of the 20th Century, lawyers discovered that litigation could also be a tool for broad social change, filing the landmark Brown v. Board of Education in 1954. Then Congress passed the Civil Rights Act of 1964, inviting plaintiffs to sue to open up the workplace to women and minority workers.

'Due process revolution'

This was the era of what's known as the "due process revolution," when lawyers won criminal defendants the right to counsel and welfare recipients the right to hearings.

Eventually, the aged and disabled won rights that were likewise enforceable by lawsuits. Lawyers began bringing class actions, and the law seemed to be expanding into every facet of daily life. Sexual harassment law developed in the 1980s, for example, bringing the courts into the workplace.

All of this soon alarmed corporations and insurance companies, which began lobbying to limit their liability. By the 1990s, popular books such as "The Litigation Explosion" by Walter Olson and "The Death of Common Sense" by Philip K. Howard made the threat of litigation a public cause, warning that individual greed was replacing community values.

Not everybody accepted that story, however. Scholars such as Mark Galanter, law professor at the University of Wisconsin, published articles debunking the claims of outrageous litigiousness and demonstrating that there were not many more lawsuits in the 1980s than there were in the decade before.

Others such as Ralph Nader, the nation's most outspoken litigation supporter, defended lawsuits for their unusually democratic potential, asking: "Where else can a person without money take on General Motors?"

Like many liberal academics, Michael McCann, a political science professor at the University of Washington and the co-author of a forthcoming book, "Law's Lore: Tort Reform, Mass Media and the Social Production of Legal Knowledge," was once optimistic about using the courts to solve social problems. But now he concedes that lawsuits are often not the best way to get things done. The system is costly, inefficient and unpredictable, he and other scholars say, deterring meritorious claims and inspiring contentiousness.

Lawsuits are far too cumbersome to help the vast majority of people, Burke says. Of 100 Americans injured in an accident, he writes, only 10 make a liability claim and only 2 file a lawsuit. Only one in eight people who suffer serious injury from medical malpractice sue, he finds, and only about 50 in 1,000 who believe they've encountered discrimination at work file an action.

Burke also argues that partly because of well-organized defense lawyers, court decisions are

skewed against plaintiffs. In his case-study of the Americans With Disabilities Act, for example, Burke finds that about 95 percent of plaintiffs lost on appeal. None of this means the laws have no effect, he maintains -- companies may settle those cases that have merit or be deterred from violating the law in the first place -- but the system is far from equitable or predictable.

Still, Burke doesn't believe that the solution is simply to limit lawsuits and monetary awards. "That doesn't sort out frivolous from non-frivolous cases," he said. He argues that replacements -- say, no-fault auto insurance -- could substitute for much of today's costly post-accident litigation.

Academics across the political spectrum point to state-run workers' compensation schemes as a rare example of a government-run alternative to litigation in America: a way to help injured workers without making them fight it out in court. Although such government-run systems have their drawbacks, even Olson, a senior fellow at the conservative Manhattan Institute, is surprisingly sanguine about them. In his forthcoming book, "The Rule of Lawyers: How the New Litigation Elite Threatens the Rule of Law," Olson warns that mass litigation has transformed lawyers and judges into an unelected "fourth branch of government." So to him, a workers' comp-style alternative to lawsuits would be an improvement. "It's so much more civilized," he said recently.

Scholars are now watching the heated debate over the Securities and Exchange Commission to see how the American political system will respond to a recent crisis that some say has come right out of the debate over litigation.

Congress steps in

In the mid-1990s, responding to complaints about lawsuits from accounting firms, Congress changed the law to make it harder for corporate shareholders to sue the accountants.

That, along with some other legal changes, essentially immunized accounting firms from liability for fraud, said John Coffee, a law professor at Columbia who has written widely about securities class actions.

"That can translate into greater acquiescence in aggressive and dubious accounting policies management wants to pursue," Coffee said.

Burke says the accounting fraud scandal is a consequence of the myths about American litigiousness. Congress took away the right to sue, he argues, but failed to substitute another credible means of enforcing the law. "So what are we going to do now?" Burke asked. "Will we build up the SEC?"

That is, of course, the focus of a bitterly contested political battle. But skeptical political scientists doubt that the fragmented federal government will be able to take a strong stand. Which means more calls to bring back the lawsuits are likely.

As Kagan said, "We end up with adversarial legalism because we have all of these government failures."

LOAD-DATE: November 28, 2002

The New York Times

November 23, 2002 Saturday
Late Edition - Final

SECTION: Section B; Column 1; Arts & Ideas/Cultural Desk; Pg. 7

LENGTH: 1548 words

HEADLINE: Is Litigation A Blight, Or Built In?

BYLINE: By DAPHNE EVIATAR

BODY:

The familiar image of manipulative lawyers and rapacious clients bringing frivolous lawsuits is almost as much a part of American lore as George Washington chopping down the cherry tree. Whether it's teenagers suing McDonald's for making them fat or a grandmother winning millions for burning herself with spilled coffee, the succession of sensational stories fuels the public's fury at a legal system apparently running amok.

But now a growing number of political scientists are arguing that America's famous litigiousness isn't rooted in plain and simple greed but is rather the logical response to America's distinctive distribution of power and to a historical distrust of big government.

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In other words, blame the founding fathers for their deep mistrust of centralized authority and their glorified view of self-reliance. The government they structured -- with its separation of powers, its limited national control over state and local police forces and its independent judiciary -- was intended to protect against tyranny, but it also had the unintended consequence of making it harder for democratically elected leaders to get things done.

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This "fundamental tension" forces people to turn to the courts to do everything from cleaning up the environment to rooting out discrimination, or to go one step further, to warn them away from unhealthy overeating or even unexpectedly scalding coffee. Under this system of "adversarial legalism," as Professor Kagan calls it, the judiciary and lawyers become a critical part of the governing process.

Both Professors Kagan and Burke rely in part on the work of the Stanford legal historian Lawrence Friedman, who in his 1985 book, "Total Justice," wrote that growing wealth and technological advances were leading people to expect government to solve their problems. As Professor Kagan said recently, "People used to say if we can put a man on the moon, we certainly ought to be able to figure out how to make a product safe." This quest for "total justice" has had the effect of creating a far greater role for courts and lawyers: because elected officials aren't sufficiently empowered to bring changes, people turn to the judiciary.

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URL: http://www.nytimes.com

GRAPHIC: Photos: For proliferating lawsuits, some experts say, blame America's founding fathers. (F. Carter Smith)(pg. B7); To skeptics, litigation is a plague of trivia. But to the people in these cases involving (clockwise from top right) sexual harassment, fatal auto malfunction and tobacco-related death, it was the only recourse. (Photographs by Associated Press)(pg. B9)

LOAD-DATE: November 23, 2002

The New York Times

July 12, 2002 Friday
Late Edition - Final

SECTION: Section C; Column 1; Business/Financial Desk; Pg. 4

LENGTH: 632 words

HEADLINE: CORPORATE CONDUCT: POLITICS;
Parties Trade Lobs Over Issue of Lax Oversight

BYLINE: By DANIEL ALTMAN

DATELINE: WASHINGTON, July 11

BODY:

While senators debated an accounting reform bill today in advance of an expected vote on Monday, Democrats and Republicans eagerly tried to blame each other for years of supposedly lax oversight of corporate behavior.

Richard A. Gephardt, the House minority leader, accused Republicans today of setting the stage for corporate wrongdoing through a gradual drive for deregulation, starting with the Contract With America in 1995. "We see daily evidence of what happens when the drive to deregulate succeeds," he said, "as it did over the last seven or eight years."

Mr. Gephardt distributed a 26-page pamphlet to support his point, with photographs of Tom DeLay, the House majority whip, and Newt Gingrich, the former speaker of the House, on the cover, along with the logos of Enron, WorldCom and other embattled companies.

The pamphlet describes Republican-led campaigns to deregulate the derivatives markets in which Enron traded, to cut financing for the Securities and Exchange Commission and to limit a handful of environmental and consumer protections.

In a response sent via e-mail, the Republican National Committee pointed out that some Democrats had supported the bills that Mr. Gephardt's pamphlet called "overzealous efforts to roll back public protections."

In every case, however, a majority of Democrats had voted against the bills.

Senior Republican aides in the Senate countered with their own pamphlet, which tries to pin lax oversight on Bill Clinton. It points out that the most recent company restatements involve earnings dating from his administration. The pamphlet also summarizes reports of connections between officials of the Clinton administration and Enron and Global Crossing.

In the House, a Republican staff member passed out reprints of newspaper articles detailing unusual financing arranged for Mr. Gephardt's presidential campaign in 1988 by Terry McAuliffe, who is now chairman of the Democratic National Committee. Another article described Mr. McAuliffe's business connections and his rise as a Democratic fund-raiser.

One of the House's two independent members, Representative Bernard Sanders of Vermont, said both parties were to blame for the "incredible culture of corporate greed" that led to the scandals. "Certainly the Democrats have not been strong enough on this issue," Mr. Sanders

said, "and the Republicans are much worse."

Experts on regulation dismissed the back-and-forth sniping as misguided.

"I don't see how you can lay the blame for this at the doorstep of the Democrats or the Republicans," said Robert W. Hahn, director of the American Enterprise Institute-Brookings Joint Center for Regulatory Studies. For a long time, Mr. Hahn said, policy makers have known about the difficulties of ensuring truly independent corporate audits. Like the politicians, independent oversight agencies like the Financial Accounting Standards Board underestimated the problem.

"It's not as if politicians determine all the rules for these things anyway," Mr. Hahn said. "The notion that this is lax enforcement on the part of Clinton or his predecessor, Bush, or the Congressional committees is a laugh."

Robert A. Kagan, a professor of law and political science at the University of California at Berkeley, asserted that economic factors bore as much responsibility for the corporate scandals as political rule-making.

"The Clinton years were a time of huge economic development and change and new markets," Professor Kagan said. "That's going to develop the opportunities for new kinds of malfeasance."

He also suggested that Mr. Gephardt was exaggerating the deregulating success of Mr. Gingrich's time. "I don't think the Contract With America did very much with regulation," he said. "It was sort of a failure. The Republicans blew their opportunity."

URL: http://www.nytimes.com

GRAPHIC: Photos: Charges are being swapped by Republicans like J. Dennis Hastert, left, the House speaker, and Democratic leaders like Richard A. Gephardt. (Agence France-Presse); (Alex Wong/NBC, via Associated Press)

LOAD-DATE: July 12, 2002

The Washington Post, February 21, 1982

The Washington Post

February 21, 1982, Sunday, Final Edition

SECTION: Business & Finance; E4

LENGTH: 690 words

HEADLINE: Loosen the Rigidity of Regulation, Authors Urge

BYLINE: By James L. Rowe Jr., Washington Post Staff Writer

DATELINE: NEW YORK

BODY:
Individuals and society need not face increased risks of physical or social harm as a result of President Reagan's moves to cut the budgets of regulatory agencies, according to a report prepared for the Twentieth Century Fund.

If administrators reallocate their reduced resources and concentrate on the worst pollutors, for example, society may get the same level of benefit at a lower cost, according to Eugene Bardach and **Robert A. Kagan,** professors at the University of California at Berkeley.

But if administrators make a "uniform" cutback in their activities, Kagan said, "they may be endangering the public more than they have to. It is a people problem. What happens will vary from agency to agency."

Kagan and Bardach said that what has passed for regulatory reform in the Reagan administration so far has been little more than budget cutting.

"In general, the direction is right," said Bardach. "In some areas--like toxic substances and hazardous wastes--the administration has been too insensitive" to the dangers of decreased regulation, while in other areas that require changes in the law, the administration has not moved far enough.

For example, when the Clean Air Act came up for review in 1981, the administration made no attempt to change or force Congress to reexamine some of the provisions that, according to Bardach, impose a high cost on society with relatively little benefit.

Kagan and Bardach are authors of a new report, "Going by the Book," on whether regulators are "reasonable" in their enforcement of protective regulations, such as air and water pollution control, workplace and highway safety, and job discrimination.

To make regulation "fair, uniform, predictable and accountable," Kagan said, the laws often "impose a rigidity that deprives the regulators of the ability to adapt the rules to the variety of circumstances with which they must deal."

The report was funded by the Twentieth Century Fund and published by Temple University Press.

Often, Kagan said, regulations get passed to deal with specific catastrophes that are the "bad apples--the worst coal mines, the nursing homes that are the most avaricious." Because regulators often are deprived of discretion by the rules, they are unable to focus on the most serious threats and businesses are forced to divert their efforts to what the regulators say is the worst problem, not what businesses may judge to be the worst problem.

He said chances of cooperation between regulators and businesses are reduced because of these kinds of rigidities. Often, he said, the problem is not merely an overzealous or rule-bound regulator, but the difficulty in "determining what is a truly dangerous situation."

Bardach and Kagan said that most regulations have been written to deal with legitimate safety, health or social concerns that are "imperfectly dealt with by the marketplace and liability law."

In many, but not all circumstances, they say, the aims of regulation might be better achieved by more "indirect" regulation through private action. Self-regulation, which is practiced by many professional and trade associations (as well as stock exchanges), might be used in some circumstances. In addition, most harms have some remedy in the law, they said. Furthermore, to enable potential victims to take actions on their own, more information about potential hazards should be made public. The government, as a prod, might require wider disclosure.

Bardach said he and Kagan were surprised to discover that about 95 percent of the "regulation" in the United States is not mandated by government, but is done in the private sector.

While more regulation might be moved to the private sector, some has to be undertaken by government, they said; water and air pollution, for example, where the specific harms to individuals and the specific wrongdoings by polluters are hard to prove and measure, probably should continue to be regulated by government.

One of the primary reasons that government regulation is so difficult, Bardach said, is that the government "picks up the messiest regulatory jobs that no one can do well."

Robert Kagan

Adversarial Legalism: The American Way of Law

Harvard University Press, 2001

Kent Roach [*]

This book offers a conventional yet important thesis: namely that the United States relies to an unprecedented degree on litigation as a means to advance and contest public policy. The author, Robert Kagan, is a professor of both political science and law with a special interest in the comparative regulation of American and European seaports. Professor Kagan's comparative and political sensibilities distinguish his work from the raft of other popular and academic work decrying excessive reliance on litigation in the United States.

The comparative strand in the book "draws on studies that contrast legal and regulatory processes in the United States with similar processes in other economically advanced democracies" (p.5). It results in an emphasis on "American legal exceptionalism" (p.6). The political strand is concerned with "the links between the distinctive characteristics of the American legal system and fundamental features of American political culture, political structure and political processes" (p.5). It results in an emphasis on how the strong courts found in the United States are a reaction and a substitute for the weak bureaucracies, legislatures and political parties found in that country.

Kagan's work will be of value to all those concerned with the role of law and litigation in governance. Those who are concerned that the enactment of the Canadian Charter of Rights and Freedoms and increased use of class actions is Americanizing the Canadian legal system may be especially interested in Kagan's book. Kagan does not focus on Canada, but his analysis does suggest the need to place the Canadian legal system in its political context. For example, he concludes that Canadian environmental regulation is less legalistic, detailed and adversarial than American regulation in part because under the Canadian parliamentary system "the government in power can quickly amend the law to reverse administrative or judicial decisions that displease it" (p. 222). As he reminds readers throughout the book, the role of courts and the shape of the law are related to the larger political context of governance.

The first part of the book is devoted to articulating its thesis. Adversarial legalism is defined as "policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation." (p.3) It involves complex legal rules, formal, adversarial and costly means for resolving disputes, punitive sanctions, more frequent judicial review of administrative and legislative processes, more political controversy over legal rules and institutions, fragmented decision making and legal uncertainty. Adversarial legalism is thus concerned not only with litigation in courts, but broader patterns of governance that affect administrative agencies and legislatures.

Kagan is candid that he is primarily concerned with the costly excesses of adversarial legalism and that his preference is for "more reliable administrative mechanisms for deterring official arbitrariness and economic rapaciousness and for compensating the victims of injury, injustice and bad luck." (p.17). To his credit, however, he is prepared to recognize some of the strengths of adversarial legalisM. In the second chapter, "The Two Faces of Adversarial Legalism," he contrasts the positive role of courts in reforming prison conditions in Alabama with their less positive role in delaying economic development such as the much needed dredging of Oakland's harbour. Even at its best, however, adversarial legalism is intimately related to weaknesses in the American system of governance. This is well symbolized by the fact that a court had to appoint the governor of Alabama to be the "receiver" of the state's prison system to ensure some political responsibility for the barbaric conditions of confinement.

The relation between adversarial legalism and weak governance is explored in the third chapter, on "Political Construction of Adversarial Legalism." Here Kagan the political scientist shines as he rejects cultural explanations for the American reliance on litigation in favour of institutional explanations. Congressional government and weak party discipline, as opposed to the strong legislatures, political parties and bureaucracies found in many countries with parliamentary government, have forced Americans to place greater reliance on litigation to implement the ambitious policies of the positive state. The result has often been regulation by litigation commenced by private attorneys general in the form of interest groups and entrepreneurial lawyers as opposed to more coherent and efficient policies as implemented by strong legislatures and bureaucracies.

The bulk of the book is devoted to exploring the causes and effects of adversarial legalism on criminal justice, civil justice and administrative law. There are striking parallels in his analysis of the pathologies of all three systems. All rely on high penalties (the death penalty, high damages and high fines) in an attempt to make up for the uncertain application of the law. The high costs of unleashing "the dogs of law" (p. vii) in litigation result in most cases being settled in a manner that may be as haphazard as random jury verdicts. The costs and excesses of adversarial legalism have perverse effects. Due process protections designed to ensure that welfare recipients are treated fairly encourage local administrators to be more stingy in granting welfare or to reduce welfare benefits. Aggressive prosecution of detailed regulatory offences encourages regulated industries to provide only the bare minimum demanded by the law.

Criminal, civil and administrative law is all characterized by a preference for decentralized local control (whether by elected judges or juries, state or municipal legislatures or prosecutors or private attorneys general) as opposed to the more centralized controls that come from national legislation, national bureaucracies or trial by career judges found in most European countries. The decentralized control that comes from court scrutiny of governmental and corporate behaviour provides a costly and unreliable form of behaviour modification. Increased litigation consumes much in private resources without any assurance of benefits in terms of either justice or deterrence. Kagan defends judge-dominated inquisitorial systems used in Europe as more efficient and predictable than the lottery of adversarial legalism before juries and elected judges. At the same time, he notes that the American adversarial system allows the State to off-load the vast majority of the cost of dispute resolution to private parties.

Kagan remains sensitive to the larger political picture by relating the Am reliance on litigation to its unwillingness to introduce no fault compensatior which would compensate more people with much lower transaction costs reluctance to guarantee health care or adequate levels of social assistan "political mistrust of government and politics itself leaves adversarial legalism" (p. 155) as the main means of compensating people and implem... norms of equality.

In his eagerness to illustrate the excesses of adversarial legalism, Kagan sometimes downplays its aspirations to justice. He appears somewhat critical of a famous death penalty case which went to the U.S. Supreme Court twice before the accused was electrocuted. The $2 million spent in public and private legal expenses in each death penalty case could be seen not so much as a sign of adversarial legalism but a symptom of America's decision to retain the death penalty when the European countries that Kagan admires have all renounced it. Kagan somewhat pejoratively terms David and Goliath struggles for justice in civil litigation "morality tales" (p. 144). He suggests that tobacco companies have hidden research on the addictive effects of cigarettes "because they feared that any admission would be used in pending and future lawsuits" (p. 146) when others may be less willing to see any excuse for such immoral behaviour. Kagan sees much corporate behaviour as essentially benign or a defensive reaction to adversarial legalisM. Not all will agree with Kagan's concerns about neighbourhood groups and advocacy groups using the courts to halt or delay nuclear power plants or waste disposals. There is a tendency to see adversarial legalism as a cause rather than a response to injustice, and Kagan does not seriously explore the counter-thesis that exceptional American legalism may be a response to exceptional American injustice.

Although the book takes a socio-legal approach, its methodology will not please all social scientists. Many of the wide and eclectic range of previously published studies that Kagan relies upon are more qualitative than quantitative. This, however, should not be seen as a flaw in a book that takes a broad analytic approach and is intended for a wide audience. Kagan's argument is only weakened when he reaches for quantitative conclusions that are not supported by the evidence. For example, he asserts that injustices caused by the loser pay cost rule used in civil litigation in almost all countries outside the United States in deterring risk-averse litigants "are not as large and pervasive as the injustices that stem from the American rule" (p. 123), which allows a plaintiff to bring an unsuccessful lawsuit without paying any of the victor's costs. It is difficult to know how the author has reached this conclusion given the difficulties of both costing and calculating the injustices caused by meritorious lawsuits that were deterred by the loser pay cost rule and frivolous lawsuits that were encouraged because of the no way cost rule. These, however, are only minor criticisms of a book that is well written and well researched.

The final chapter is devoted to proposals to tame adversarial legalisM. These include less reliance on civil and criminal juries, use of the loser pay cost rule in civil litigation, increased no fault schemes, better health care, a less politicized bureaucracy and more informal administrative tribunals. Kagan is not, however, terribly optimistic both because of his belief that adversarial legalism is deeply rooted in America's political and legal culture and that it is supported by elements of both major political parties. He confesses that what is most needed is "a bit of magic in a disbelieving age, to restore faith in the competence and public-spirited nature of governmental authority" (p. 250). If the quest to reduce adversarial legalism in the

United States is indeed futile, the next question that Professor Kagan should address is whether adversarial legalism is spreading to other countries.

Common Good Conference - "Lawsuits & Liberty"
June 27-28, 2005
Philadelphia, PA

Train Schedule:

6/27/05 - 3:00 pm - Depart Union Station - Amtrak Metroliner #2118
4:40 pm - Arrive Phil, PA

Take taxi (10 minute ride) to hotel:

Hotel Omni Hotel at Independence Park
401 Chestnut Street, Philadelphia, PA 19106
(215) 925-0000

After check in, take taxi to conference (3 blocks from hotel):

Cocktail reception begins at 6:00 pm - Program adjourn 8:00 pm

National Constitution Center
525 Arch Street - Independence Mall
Philadelphia, PA 19106
(866) 917-1787

6/28 - program beings 8:00 am - adjourns 4:15 pm

Train Back to DC:

6/28/05 - 5:15 pm - Depart Phil, PA- Amtrak Metroliner #2125
6:59 pm - Arrive Wash, DC

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WWW.CGOOD.ORG

DATE: Thursday, June 16, 2005

TO: "Lawsuits and Liberty" Participants

FROM: Philip K. Howard

RE: Conference Schedule and Logistics

Thank you again for agreeing to participate in the "Lawsuits and Liberty" conference at the National Constitution Center on June 27th and 28th. We hope to have an interesting and productive discussion.

As you can see from the draft agenda below, each panel will have one or more formal presentations. The panelists and moderators are not expected to make formal statements. Instead, we hope to have spontaneous give-and-take discussions.

The lineup presented below is tentative. Please let us know if you have different thoughts on the lineup, or if you would appreciate a warm-up discussion beforehand. We plan to distribute the conference papers before next weekend. Logistical information is included in this memorandum as well.

PRELIMINARY AGENDA

Monday, June 27

6:00	Cocktail reception at the National Constitution Center.
7:00	Welcome by Richard Stengel, President & CEO, National Constitution Center.
7:05	Overview of Conference by Philip K. Howard, Chair, Common Good.
7:15	Introduction of Lord Hoffmann by Dolores K. Sloviter, Judge, U.S. Court of Appeals for the Third Circuit.
7:20	*The Social Cost of Tort Liability*, Keynote Address by Lord Hoffmann, Member of the Appellate Committee of the House of Lords.
8:00	Dinner at the National Constitution Center.

Tuesday, June 28

8:00 – 8:45	Informal breakfast at the National Constitution Center.
8:45 – 10:15	**Panel 1: The Historical Role of the Civil Justice System in American Society**
	Moderator: John M. Walker, Jr., Chief Judge, U.S. Court of Appeals for the Second Circuit
	Presentations: *The Modern Transformation of Civil Law* George L. Priest, Professor, Yale Law School

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What the American Civil Justice System Once Was: What It Might Be Again
Stephen B. Presser, Professor, Northwestern University School of Law and Kellogg School of Management

Panelists: Geoffrey C. Hazard, Jr., Professor, University of Pennsylvania Law School

TBA

10:30 – 12:00 **Panel 2: Has Distrust of the Civil Justice System Affected Daily Choices in Modern Society?**

Moderator: Robert E. Litan, Vice President for Research and Policy, Kauffmann Foundation; Senior Fellow, The Brookings Institution

Presentations: *How Adversarial Legalism Affects Behavior*
Robert A. Kagan, Professor, University of California, Berkeley

Effects of Law on Healthcare
Troyen A. Brennan, M.D., Professor, Harvard Medical School and Harvard School of Public Health

The Public's Perceptions: Presentation of Harris Poll Results and Other Polling Results
Judyth W. Pendell, Senior Fellow, AEI-Brookings Joint Center for Regulatory Affairs

Panelists: Robert D. McCallum, Jr., Associate U.S. Attorney General

Stephanie L. Franklin-Suber, Partner, Ballard Spahr Andrews & Ingersoll, LLP; Former Chief of Staff to Mayor John F. Street and City Solicitor for the City of Philadelphia

12:00 – 1:00 Lunch – Informal Discussion

1:00 – 2:30 **Panel 3: Law and Fact: The Role of Policy in Civil Justice**

Moderator: Walter E. Dellinger, Professor, Duke University School of Law; Partner, O'Melveny & Myers LLP; Former Acting Solicitor General

Presentation: *The Administrative Advantage in Civil Procedure: Tort Reform through Consistent and Intelligent Policies Applied by Administrative Tribunals*
E. Donald Elliott, Professor, Yale Law School; Partner, Willkie Farr & Gallagher LLP

	Panelists:	Lord Hoffmann, Member of the Appellate Committee of the House of Lords
		Eric H. Holder, Jr., Partner, Covington & Burling; Former U.S. Deputy Attorney General
2:45 – 4:15	**Panel 4: The Responsibility of Judges Versus Juries**	
	Moderator:	Edith H. Jones, Judge, U.S. Court of Appeals for the Fifth Circuit
	Presentation:	*The Forgotten Goal of Civil Justice: A Foundation for Common Sense in Daily Life* Philip K. Howard, Chair, Common Good
	Panelists:	Larry D. Thompson, Senior Vice President for Government Affairs and General Counsel, PepsiCo, Inc.; Former U.S. Deputy Attorney General
		Walter E. Dellinger, Professor, Duke University School of Law; Partner, O'Melveny & Myers LLP; Former Acting Solicitor General
		Geoffrey C. Hazard, Jr., Professor, University of Pennsylvania Law School
		Dolores K. Sloviter, Judge, U.S. Court of Appeals for the Third Circuit
		Robert A. Kagan, Professor, University of California, Berkeley

LOGISTICAL INFORMATION

Event Information

All conference events will be at the National Constitution Center. The first event is a cocktail reception beginning at 6:00 PM on Monday evening and will take place on the second floor of the Constitution Center. Common Good staff will be on hand to direct you to all events. Also, for your convenience, you will have access to a green room adjacent to the auditorium on Tuesday to store your belongings or to take a break from the proceedings. The address for the National Constitution Center, and information regarding parking is as follows:

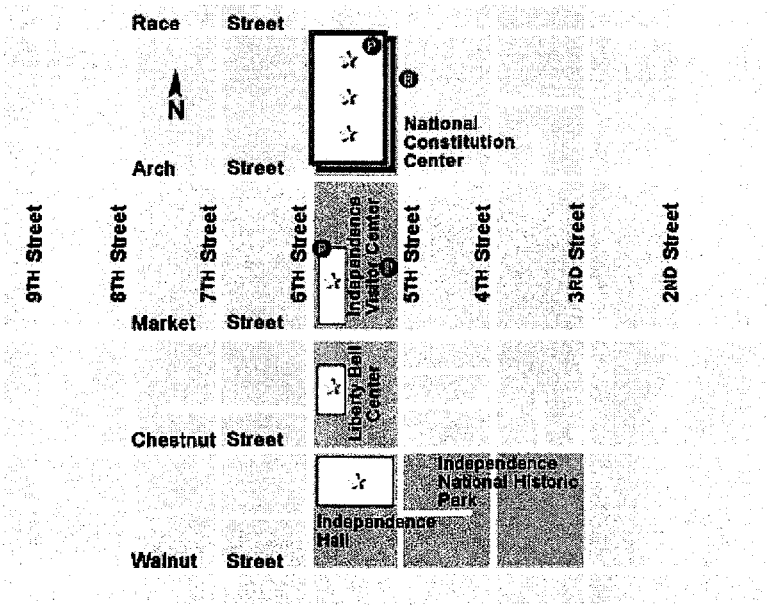
Address and Telephone

National Constitution Center
525 Arch Street, Independence Mall, Philadelphia, PA 19106
Toll Free: 866.917.1787

Parking

Convenient parking for cars is available at the underground lots below the National Constitution Center (enter from Race Street) and at the Independence Visitor Center (enter from 5th or 6th Streets, between Arch and Market Streets).

Map of the National Constitution Center Area



Hotel Information

For those coming in from out of town, we have arranged for a hotel room in your name for the night of Monday, June 27th at The Omni Hotel at Independence Park. Check-in time is 4:00 PM, but rooms are guaranteed for later arrivals. The Omni is just three blocks south of the National Constitution Center. The address for The Omni and information regarding arrival by taxi is as follows:

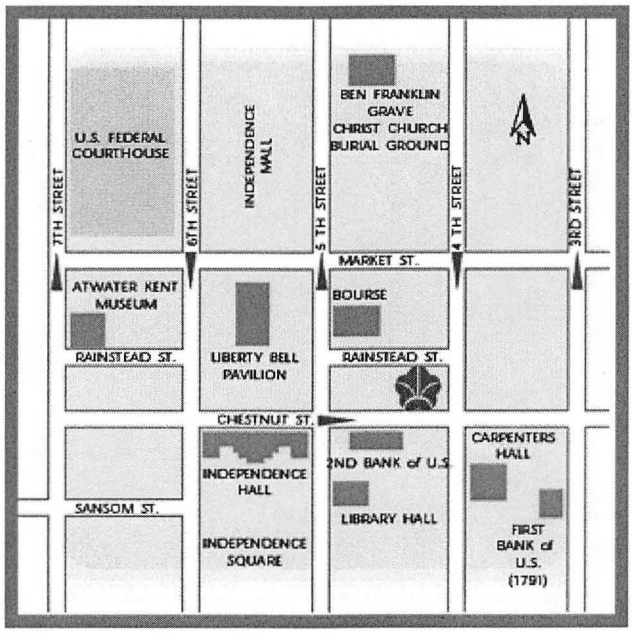
Address and Telephone

The Omni Hotel at Independence Park, 401 Chestnut Street, Philadelphia, PA 19106
215.925.0000

Taxi Information

It is a flat fee of $25.00 for cab fare from the Philadelphia International Airport. Cab fare from 30th Street Station (Philadelphia's train station) is roughly $10.00.

Map of The Omni Hotel Area



Reimbursement of Expenses

Upon the conference's completion, we will send you reimbursement forms for expenses you incur in attending the conference, as well as forms for your respective honorariums.

Common Good Staff Contact Information

If you have any questions or concerns at any time, please do not hesitate to bring them to our attention – particularly to Andrew Park, Sara Berg, or Eric Hauser, whose contact information is as follows:

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75 to 100

The Modern Transformation of Civil Law

George L. Priest*

This paper addresses the transformation of civil law that began in this country roughly around the mid-1960s changing a legal system that intervened in the lives of citizens only on occasions of serious moral dereliction into the most extensive and powerful regulatory mechanism of modern society. Prior to the 1960s, civil law served a modest role in U.S. affairs. It enforced property rights and policed boundary disputes through property law, enforced promises as well as disclaimers of liability through contract law, and provided damages for personal injury through negligence law (tort law) where an individual was injured by an egregious breach of standards of normal behavior. Though the negligence standard proved loose enough to allow substantial subsequent expansion, prior to the 1960s courts employed that standard only where a party had shown clear moral culpability substantially antagonistic to social norms. Standards determined by private contract were far more significant with respect to the determination of the obligations of citizens.

Since the 1960s, however, our civil law has changed dramatically. Contract law, property law, and especially personal injury law have been transformed both in function and effect. The transformation occurred neither through some sudden change in legal doctrine nor through legislative statute or popular referendum. Instead, it occurred through the triumph of a set of ideas: the acceptance by the judiciary of the proposition that civil damage judgments can serve as the most effective public policy instrument for regulating the level of harm suffered by citizens in the society.

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* John M. Olin Professor of Law and Economics, Yale Law School. I have studied this subject for many years. See generally, Priest, The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law, 14 J. Legal Studies 461 (1985); Priest, Strict Products Liability: The Original Intent, 10 Cardozo L. Rev. 2301 (1989); Priest, The New Legal Structure of Risk Control, 119 Daedalus 207 (1990); Priest, The Culture of Modern Tort Law, 34 Valparaiso L. Rev. 573 (2000). This paper draws variously from this work.

It is surely not coincidental that the outset of the transformation of civil law was roughly contemporaneous with the creation of various federal regulatory agencies charged with controlling levels of harm, such as the Occupational Health and Safety Administration (created in 1971), the Environmental Protection Agency (1970), the National Highway Traffic Safety Administration (1970), and the Consumer Product Safety Commission (1972). In many respects, however, the transformation of civil law developed in ways that gave it a far more ambitious and extensive regulatory authority than any of these agencies. All regulatory agencies have limited budgets and, as a consequence, are constrained to thresholds of concern. Thus, even agencies with broad authority—such as OSHA or EPA—can effectively regulate the decisions of only a limited number of corporations. Other regulatory agencies—such as NHTSA—possess jurisdiction over only a single industry (auto manufacture).

Our modern civil justice system, in contrast, aspires to regulate the sources of harm with respect to all activities of the society. Our civil courts can entertain the question of whether a victim should receive compensation from the party that caused it harm as long as it is economically worthwhile for a person feeling victimized to initiate litigation. And all of such claims will be entertained. Indeed, to perfect the system, the incentives for initiating litigation have themselves been enhanced by various statutes awarding attorneys' fees and shifting litigation costs as well as by expansive notions of "harm", for example by awarding damages for medical monitoring to individuals who only suspect or fear that they have been harmed. As a result, our courts today employ civil damage judgments to regulate all activities implicating harm, made within every industry, indeed, by every citizen. Through the daily aggregation of civil damage judgments (or the settlement of lawsuits informed by expected judgments), our courts provide fine-tuned control of all societal behavior.

How did this transformation of civil law come about?[2] In the 19th and early 20th

[2] For a more thorough account of this history, see Priest, The Invention of Enterprise Liability: A Critical

Centuries, the basic doctrines of civil law remained generally stable. Yet, there was serious debate in the legal academy as well as in the public policy community generally over the role of civil law with respect to harms suffered in the society. An important initial step in the transformation of civil law occurred in the early years of the 20th Century when civil law was abandoned as a mechanism for dealing with injuries suffered by workers during the course of their employment. The adoption by state legislatures of worker compensation statutes during the period roughly 1907-1915—creating mandatory employer insurance programs—represented the rejection of both tort law and contract law as means of regulating the sources of worker injuries.

Prior to the establishment of workers' compensation insurance, injured workers could seek recovery against their employers in tort law where they could show employer negligence as a cause of the injury. Employers could defend such claims, however, by showing that the worker had been contributorily negligent, that the worker had assumed the risk of injury, or that the worker's injury resulted from the negligence of a fellow worker, according to what is called the fellow-servant doctrine. Workers could sue their fellow workers for negligence, but recovery was not likely to be substantial given workers' limited resources. Thus, it became widely accepted that tort law was largely ineffective in providing recovery to injured workers, and tort law was rejected as a mechanism for recovery. In its place, workers' compensation statutes compelled employers to provide insurance for worker injuries and, at the same time, prohibited workers from suing employers in tort.

Though somewhat less sharply, workers' compensation insurance also represented a rejection of contract law as a mechanism for dealing with injuries. Few believed that workers, individually, were able to negotiate safer working conditions, and only a small portion of the working class was unionized. In addition, the concept of compensating wage differentials was

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History of the Intellectual Foundations of Modern Tort Law, 14 J. Legal Studies 461 (1985) (hereafter, "Priest, Invention"). Priest, Strict Products Liability: The Original Intent, 10 Cardozo L. Rev. 2301 (1989).

not widely understood. Contract law, therefore, was not an answer. To the contrary, employer-provided insurance was necessary if workers were to receive compensation for injuries.

Besides serving the ambition of increasing payments to injured workers, workers' compensation insurance came to be justified by a concept that derived from economics: the concept of internalizing costs.[3] According to this concept, if a party engaging in some activity fails to take into account the full costs that the activity generates, the party is likely to engage in more of the activity than is appropriate for the society. Where the costs are injury costs, there will result higher levels of injurious activities and thus larger numbers of injuries than societally appropriate. If injury costs are internalized, however, the party causing the harm will be led to prevent losses where possible and otherwise to readjust its activity level to reduce the aggregate number of injuries. Compelling employers to provide insurance for all injuries suffered by workers during the course of employment serves to internalize the costs of worker injuries to employers.[4]

The adoption of workers' compensation programs was widely praised in the legal academy. Indeed, some academics thought the concept so meritorious that they sought to extend such insurance programs more broadly, to provide compensation for all injuries suffered in the society. Fleming James was a prominent promoter of this idea.[5] The ambition of James and others to have enacted general societal accident insurance, however, never found success. First, a general social insurance program is a program, basically, of socialism, to which there was deep

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[3] See A. C. Pigou, Wealth and Welfare (1912); Pigou, The Economics of Welfare (1920).

[4] By contrast, failing to compensate workers for their injuries, say, by enforcement of the common law tort defenses of contributory negligence, assumption of risk or the fellow-servant doctrine, serves to internalize worker injury costs to the workers themselves. Many years later, Ronald Coase would show that, with respect to activity levels, internalizing injury costs to workers will have economic effects equivalent to internalizing those costs to employers. This profound idea, however, remains foreign to the debate today. Ronald H. Coase, The Problem of Social Cost, 3 J. Law & Economics 1 (1960).

[5] James' work is described in more detail in Priest, Invention, supra.

political opposition. (Note that even during the New Deal, insurance programs were established only with respect to particular risks—such as crop insurance, savings and loan insurance, and Social Security.[6]) Secondly, general social insurance is at heart inconsistent with the internalizing costs rationale. General social insurance is not self-contained as is insurance for workplace injuries. To provide general insurance for injuries does not serve to internalize costs to the specific activities that generated the injuries. General social insurance would provide compensation to injured parties—sufficient grounds for support to James and others—but it would not serve to create incentives for reducing the accident rate.

Faced with the failure of their social insurance proposals and with no serious prospect of future success, many academics pressed for the expansion of civil law as a means of providing broader compensation to injured parties. James, again, was the most prominent toward this end. In a set of roughly fifty articles, James urged the expansion of tort liability in all of its forms and the restriction of available defenses, moving toward a standard of absolute liability.

For many years, James' advocacy had little effect. An opening wedge appeared, however, in the early 1960s with regard to the subject of manufacturer liability. Until the 1960s, recovery for injuries resulting from product use was chiefly determined by contract law. Contract law allowed the specific purchaser of the product to recover according to the terms of the express product warranty or of the implied warranty of merchantability. Recovery was available to the specific purchaser and, generally, only to the specific purchaser, because that person was the only party to the contract of sale (a legal doctrine known as privity of contract). Virtually all product warranties at the time, however, disclaimed liability for any personal injury associated with use of the product.[7] Thus, according to contract law and the terms of product contracts, there was no recovery for personal injury.

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[6] Franklin Roosevelt justified Social Security as providing protection for the "risk of old age".

There had been some concern about the operation of these contract doctrines prior to the 1960s, but it remained chiefly academic. Some few jurisdictions recognized an action in negligence by a victim not a party to the contract. MacPherson v. Buick[8] was decided in 1916, but it extended negligence liability only to manufacturers of products regarded as "imminently dangerous", and only where it could be shown that the purchaser or an intermediate dealer would not inspect the product for defects. Over the four decades that followed MacPherson, some jurisdictions extended the scope of the negligence doctrine, in particular to cases involving spoiled foodstuffs, although the jurisdictions were far from unanimous. Thus, through the late 1950s and early 1960s, defective product cases were controlled by contract law with its privity requirement and, to a substantially lesser extent, by negligence law.

This was to change, however, and change dramatically in the early 1960s and 1970s first in the then-limited field of product liability. In my judgment, there were two conceptual forces leading to this change. The first was the delegitimation of contract law—in particular, warranty law—as a means for dealing with product injuries. The second was the growing belief that the expansion of tort liability in the context of personal injuries could have beneficial effects on the society.

The delegitimation of contract law followed from the work of another law professor, Friedrich Kessler.[9] Kessler was a German scholar who had fled the Hitler regime to the United States. Kessler had no specific interest in product-related injuries. His attack on contract law was far more expansive. Kessler believed that fundamental changes had occurred in the

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[7] The central warranty remedy then (as now) was repair and replacement if a product were found to be defective. There are good economic reasons for manufacturers to disclaim liability for personal injury—chiefly because manufacturer-provided insurance is a very poor insurance mechanism—though these reasons were never articulated at the time. See Priest, A Theory of the Consumer Product Warranty, 90 Yale L. J. 1297 (1981).

[8] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (Ct. App. 1916).

[9] Kessler's work is described in detail in Priest, Invention, supra.

character of Western economies that deeply threatened democratic societies and the individual freedoms that had been achieved in modern times. Kessler attributed these social changes to the "decline of the free market system,"[10] which he saw as a consequence of "the innate trend of competitive capitalism toward monopoly."[11] Kessler's criticism of the capitalistic world was quite pointed. He described the modern industrial culture as a form of fascism. "The rise of fascism in our industrial world has made us realize that democratic freedom is not inevitable."[12] According to Kessler, single firms are now able "to control and regulate the distribution of goods from producer all the way down to the ultimate consumer."[13]

Quite curiously, Kessler saw the principal mechanism for this new means of fascist control to be contract law. The formation of "large industrial empires" had been made possible by contract and by standardized contracts in particular.[14] Standardized contracts—such as insurance policies or consumer product warranties—were the equivalent of the forms of bondage typical of the feudal era. According to Kessler, "[s]tandard contracts . . . [have] become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals."[15]

Kessler's most influential article with respect to the transformation of modern civil law is the classic "Contracts of Adhesion—Some Thoughts about Freedom of Contract". The article presents a moral narrative that contrasts the ancient to the modern, the good to the evil, the

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[10] Friedrich Kessler, Natural Law, Justice and Democracy—Some Reflections on Three Types of Thinking about Law and Justice, 19 Tulane L. Rev. 32, 33 (1944) (hereafter, "Kessler Natural Law").

[11] Friedrich Kessler, Contracts of Adhesion—Some Thoughts about Freedom of Contract, 43 Colum. L. Rev. 629, 641 (1943) (hereafter, "Kessler, Contracts of Adhesion").

[12] Kessler, Natural Law at 33.

[13] Kessler, Contracts of Adhesion, at p. 632.

[14] Id.

[15] Id. at 640.

redeemable to the unredeemable that possesses a persuasive power that continues to command acceptance today. Kessler contrasts a "society of small enterprisers, individual merchants and independent craftsmen" for whom 19th Century contract law was designed, with large-scale enterprise and monopoly capitalism characteristic of modern times. Freedom of contract may have had meaning in the earlier world. Today, however, the prototypical modern contract is a standardized form employed by enterprises with strong bargaining power against weaker parties—consumers—in need of necessary goods and services. Modern contracts are contracts of adhesion that consumers must take or leave without ever understanding their terms at all. In this context, the enforcement of contract terms according to the principle of freedom of contract serves only to protect "the unequal distribution of property."[16]

The second principal conceptual force toward the transformation of civil law was the insistence by James and others that an expansion of tort liability would substantially improve social welfare. James, as mentioned, was principally concerned with providing compensation to injured parties. He supported general social insurance and, in its absence, the expansion of tort liability to achieve that end. His ambition was valuably aided, however, by judicial opinions that focused more sharply on the positive societal gains from expanded tort liability.

Judicial acceptance of the broader role of tort law toward these ends first appeared in 1944 in California Supreme Court Justice Roger Traynor's concurring opinion in Escola v. Coca Cola Bottling Co.[17] Traynor's opinion sets forth the grounds for the strict liability standard for product defects that later was adopted by the California Supreme Court and virtually all other states. The case was simple. A waitress at a restaurant was moving some bottles of soda pop when one of them exploded, injuring her. (The context of the incident was never made clear. The California Supreme Court, and Traynor, approached the issue as if the bottle exploded

[16] Id. at 640, 632.

[17] 24 Cal. 2d 453, 150 P.2d 436 (1944).

spontaneously. Whether the waitress dropped the bottle, hit the bottle against something, or stumbled and fell was not present before the Court.) The majority of the California Supreme Court also found the case simple: they invoked the tort doctrine of res ipsa loquitur (roughly, the event speaks for itself) to hold that, despite the terms of any contractual arrangement between the distributor and the restaurant (in fact, the Court did not even discuss the contractual arrangement), the manufacturer should be liable because Coke bottles should not explode.

Justice Traynor's concurrence was more subtle and more policy oriented. He concurred with the Court's finding of liability, but provided deeper grounds for the appropriateness of shifting the costs of the waitress's injury to Coca-Cola. Traynor embraced a theory of strict liability in tort of the manufacturer. Strict liability was to be distinguished from negligence liability—in which the victim has to show that the defendant committed some negligent act. Traynor analogized the strict liability standard to the standard of res ipsa loquitor: if there is something defective with respect to the product, the manufacturer is to blame. That analogy, however, important for many courts in the future, was not Traynor's principal point. Traynor argued that there were important social grounds to extend liability to manufacturers for product-related injuries. First, such liability would lead manufacturers to invest to prevent product-related injuries in the future. Second, tort liability, resulting in the payment of compensatory damages to injured consumers, would provide a form of insurance to the injured that could be passed along in the product prices paid by all consumers. The expansion of tort liability, thus, would—like workers' compensation insurance—serve to internalize injury costs to the firms that generated them. In 1944, however, Traynor's concurrence was only a concurrence, and received little notice, though that would later change.

These ideas—contract law is perverted by market power, and tort law is a means of encouraging investments in accident prevention and insurance for resulting losses—transformed modern civil law. The first applications, again, were in the products liability field. In 1960, in

the case Henningsen v. Bloomfield Motors, Inc., the New Jersey Supreme Court marked the effective end of the relevance of contract law in defective product actions involving personal injury.[18] The decision repudiates the basic principles of contract law applicable to product defect cases. Henningsen involved an action brought by the wife of the purchaser of a car, injured when the car veered off the road without an adequate explanation, though there was testimony suggesting a mechanical defect. Even putting aside the privity of contract problem, the automobile manufacturer's warranty provided only for repair or replacement of any defective part and disclaimed implied warranties that might extend liability further, including to personal injury damages. The New Jersey Supreme Court held that the privity doctrine as well as the express disclaimer of implied warranties were invalid as a matter of law—quoting from and relying heavily on Kessler's "Contracts of Adhesion". According to the Court, contract law should not be read to "authorize the automobile manufacturer to use its grossly disproportionate bargaining power to relieve itself from liability . . . An instinctively felt sense of justice cries out against such a sharp bargain."[19] The Court held that Mrs. Henningsen could recover under the Court's interpretation of the implied warranty of merchantabilty.

The permanent shift from contract to an expanded tort law as the basis for the resolution of product defect claims occurred in 1963 in the California Supreme Court decision in Greenman v. Yuba Power Products.[20] The case involved personal injury from an allegedly defectively designed machine tool.[21] The manufacturer-defendant believed that its strongest defense was the failure of the victim to provide notice of the alleged breach of warranty within a reasonable time.

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[18] 32 N.J. 358, 161 A. 2d 69 (1960).

[19] 32 N.J. at 404, 388, 161 A. 2d at 95, 85.

[20] 59 Cal. 2d 57, 377 P. 2d 897, 27 Cal. Rptr. 697 (1963).

[21] The product was a wood lathe in which a piece of wood being turned had detached and injured the plaintiff. The Court gave no attention as to whether Mr. Greenman had fastened the piece of wood adequately prior to turning on the lathe.

The strict notice requirement of contract law, however, had been flagged as illustrative of the outdated character of warranty law in many treatments of the product defect question, including those by James and a scholar writing in a similar vein, William Prosser. In Greenman, it seemed to trigger the final acceptance by a majority of the California Supreme Court of Traynor's strict liability argument first presented nearly two decades earlier in Escola.

In Greenman, the court, in a Traynor opinion, announced the standard of strict liability in tort, applicable to a manufacturer whenever "an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." The purpose of strict liability, according to the court, "is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[22] For a further elaboration of justifications of strict liability, the reader was referred to James, Prosser and Traynor's concurring opinion in Escola.

Henningsen and Greenman were important moments in the transformation of civil law. One further event, however, vastly accelerated the transformation by jurisdictions skittish of the cutting edge. In 1964, the American Law Institute adopted Section 402A of its second Restatement of Torts, which extended strict liability to sellers of all products defective and unreasonably dangerous without regard to the seller's fault. The Reporter of the Restatement, William Prosser,[23] represented to the Institute that 16 separate jurisdictions had adopted strict liability or some standard resembling it, citing 40 different cases. This was blatant exaggeration. A rereading today shows that there were only three cases actually supporting Prosser's recommendation: Henningsen, Greenman, and a 1963 New York decision, Goldberg v.

[22] 59 Cal. 2d. at 62, 63, 377 P. 2d 900, 901, citing Henningsen.

[23] James and Traynor, among others, were Advisers to Prosser on the Restatement project.

Kollsman Instrument Co.[24] But Prosser's recommendation was sufficient for the Institute, and the Institute's adoption of the strict liability standard was sufficient for the various states to adopt the standard as well. Within a little more than a decade following the Institute's adoption of the strict liability standard, forty-one of fifty jurisdictions had adopted the rule.

As mentioned, the change in the legal standards regarding product liability was only an opening wedge in the more general transformation of modern civil law though, surely, a significant wedge. The broader transformation of the law resulted from the extension of the underlying ideas that had motivated the change in products liability, first, to all other areas of civil law and, second, conceptually by the acceptance of the proposition that civil law could serve as a mechanism for regulating all risks faced by the society.

First, although the strict liability standard itself has been limited to the products field, the concept of cost internalization that underlies it has been extended across the various fields of civil law. Thus, the internalization policy has been extended to justify awarding damages in pollution cases,[25] in sexual harassment cases,[26] and in false arrest, malicious prosecution and Section 1983 civil rights violation cases,[27] among others. In these various contexts, as with product manufacture, it appears evident to which party costs should be internalized: to the

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[24] 12 N.Y. 2d 432, 191 N.E. 2d 81 (N.Y. 1963).

[25] E.g., Atlas Chem. Indus., Inc. v. M.P. Anderson, 514 S.W. 2d 309, 316 (Tex. Civ. App. 1974) ("the costs of injuries resulting from pollution must be internalized by industry as a cost of production and borne by consumers or shareholders, or both, and not by the injured individual.")

[26] Horn v. Duke Homes, 755 F.2d 599, 605 (7th Cir. 1985) ("[G]oods produced by the entrepreneurs who do not assume the costs of remedying a tort (in this case sexism) are artificially cheap; forcing them to internalize the costs of the tort regardless of fault, eliminates incentives to be sexist and insures proper allocation of societal resources.")

[27] Dobson v. Camden, 705 F.2d 759, 765 (5th Cir. 1983) ("If the person contemplating an action will reap the benefits but will not pay the costs, we have no assurance that the socially correct decision will be made. . . . Cost internalization provides us with a mechanism for reaching the correct level of deterrence for official misconduct. If people acting under color of state law know that they will bear the consequences of their actions, they will be deterred from violating a person's federal rights, but will not be over-deterred. The 'correct' level of deterrence will be established.")

manufacturer rather than the consumer; similarly, to the polluter, to the party harassing the victim, and to the official committing misconduct.

The second extension of the concept involved its application to contexts in which it is less clear to which party costs should be internalized. In contexts such as these, extension of the cost internalization concept requires consideration of losses viewed as risks attending the activity in question. Thus, all losses suffered in the society represent the outcome of some probabilistic process. The actions of one party or another can be viewed as contributing to the probability of occurrence of a loss, arrayed upon a continuum from losses the probability of which is 100 percent—intentionally caused harms—to losses the probability of which is zero.

With this extension, the basic foundation of civil law is transformed into controlling risks through cost internalization. The question before the court becomes which party to the litigation is in the best position to control the risk of loss. Again, in many contexts—such as product manufacture—it may seem obvious which party is in the superior position to control risks.[28] In other contexts, however, determining which party is in the superior position to bear the risk of loss from the activity is more complicated and requires a seemingly more sophisticated analysis of the relative abilities of the parties before the court to prevent or to bear those risks.

The adoption of risk control as the central purpose of civil law shifts sharply the focus of legal controversy in each of its various subfields. In the field of contract law, for example, contract litigation only a few decades ago turned chiefly on differing interpretations in terms of standard English of the provisions of underlying written contracts. In modern contract litigation, in contrast, the issues have been completely reoriented around the question of risk. The fact that some change in underlying conditions led one of the parties to breach the contract is only the

[28] In fact, from an economic point of view, this conclusion—though embraced in modern civil law—is not so obvious. See, Priest, The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform, 5 J.Econ. Perspectives 31 (1991).

beginning of the inquiry. The issue before the court is which party should bear the risk of the change in conditions that impelled the breach. Today, courts summon sophisticated theories of economics and risk bearing to determine whether it is more consistent with the long-term interests of the parties to assign the risk of the specific change of conditions that animated the breach to the breaching party or to the victim of the breach itself.

Similarly, in earlier years the law of corporations and of mergers and acquisitions was defined almost exclusively by the terms of corporate documents. Today, the papers of incorporation are often treated as only other obstacles that must be surpassed as part of the analysis of how to allocate risks that affect corporate ownership and structure. In recent highly publicized litigation involving mergers and acquisitions, for example, the issue before the court is whether the market for corporate control will be facilitated by assigning the risk and the commensurate benefits of some novel method of hostile takeover to current shareholders, to current management, or to the corporate raiders who have initiated the struggle.

The development of risk control as the central function of civil law has been most prominent in fields involving personal injury. As in other fields, this development has led to an extensive redefinition of legal issues. In cases involving claims of medical malpractice, for example, modern litigation extends far beyond the earlier relatively simple inquiry into whether the doctor was morally culpable for breaching standards of community practice. In the most sophisticated malpractice litigation today, the issue is one of risk and its control: Did the attending surgeon have sufficient control over the determinants of the risk of the medical maloccurrence to justify liability, or should that risk be assigned to supporting physicians or to the hospital vicariously through a judgment against its staff?

An important implication of the adoption of risk control as the principal function of civil law is that issues of motive and volition central to the legal regime that prevailed until the 1960s are rendered largely irrelevant. In modern contract law, for example, the decision of a party to

intentionally breach a contract has little legal significance. It is acknowledged that the risks are omnipresent that changes in conditions will occur that might unsettle contracts and, thus, that it is inevitable that some contracts will be breached. The role of a court, as a result, is no longer to punish breach of contract, but to allocate between the parties the risks of such changes in underlying conditions. Similarly, though in earlier years it was necessary to demonstrate that a manufacturer had acted with bad motives or had behaved recklessly or negligently, such issues today are largely ignored. The concern of the courts has extended beyond specific bad motives to the broader risks of product injury. Thus, a manufacturer may have organized its production process with deep humanitarian concern for the welfare of its consumers, but if the company has miscalculated the risks and benefits of safety design, liability will follow immediately.

Many believe the derogation in civil law of issues of motive and volition as indicating a decline in commitment to individual responsibility or, perhaps, a shift of expectations toward an impersonal or a collective responsibility. The shift in standards of law may indirectly have that effect as citizens revise their expectations of the ultimate consequences of misoccurrences that afflict them. But I believe that the stimulus for the shift toward risk control as the central purpose of civil law is different and that it did not derive from a diminished conviction of the importance of individual responsibility.

The legal regime that prevailed from the 19th Century through the mid-1960s functioned chiefly by categorizing certain actions that generated loss as so particularly extreme or egregious as to deserve liability for any harm that resulted. Actions subject to legal liability were those for which there was a dramatically greater chance than normal that loss would result. According to this regime, prototypical candidates for liability were harms caused intentionally and those close to the intentional because of the high likelihood of injury.

Resolving disputes according to the standards of risk control is entirely different and implies vastly different methods of legal analysis. A property law whose focus is boundary

disputes, a contract law whose focus is breach of promise, and a personal injury law whose focus is serious moral dereliction are each regimes in which the law defines a clear demarcation between acts subject to liability and acts immune from it. If the property line is transgressed, a trespass action will follow. If the contract is not performed, or if the injurer is morally culpable, damages will follow.

According to this earlier conception of the role of civil law, there are certain clear actions for which liability will apply, but equally clear sets for which liability is unavailable. Indeed, there are large sets of injuries suffered by property owners, parties to contracts, and injured victims that not only do not justify liability, but do not justify even judicial scrutiny. For example, under such a regime, a consumer injured by a product who cannot show that the product was intentionally or recklessly mis-manufactured or who cannot show clear moral negligence in the manufacturing process cannot recover damages. From the standpoint of the law, the product-related injury remains one of life's hazards to be suffered as best as possible according to the victim's resources, but without reference to the legal system. As another example, if a farmer promised to provide a broker 1,000 bushels of corn but because of drought can only provide 500, the farmer has breached the contract and must pay damages to the broker for the remainder. According to the law, the farmer must suffer the loss because it was the farmer, not the broker, who promised to deliver the corn.

This is not to suggest that the earlier regime was totally indifferent to conditions generating losses. If the probability of injury from product use were exceptionally high, the law could conclude that the manufacturer should have known of the product danger and find the manufacturer liable despite its claim of ignorance. Similarly, if the drought itself were so extreme that it prevented the farmer from delivering any of the 1,000 bushels, the law could relieve the farmer by rescinding the contract by finding it impossible to perform. Nevertheless, the method of analysis under the regime, even in these examples, was one of comparing the

extremity of the factual context of the loss to some standard of normal or expected behavior.

According to this approach, some actions differ so dramatically from the normal—reckless manufacture or breach of contract—that legal liability is justified. Legal analysis under such a regime consisted of categorizing acts as either qualifying as sufficiently abnormal to justify liability or not. Obviously, intentional harm-causing actions justified liability. Beyond the intentional, unusually egregious actions may have justified liability. In almost all other cases, however, liability was unavailable, and the law allowed the loss to lie where it had fallen.

The adoption of risk control as the central goal of civil law rejects this categorical method of legal analysis. A law concerned with risk perceives losses as occurring probabilistically, with greater or lesser likelihood. Actions become subject to potential legal liability if they increase the occurrence of loss by some sufficient amount.

This shift does not reject, but builds upon, the liability of the previous regime. Losses caused intentionally or that are especially egregious remain subject to liability *a fortiori*. The frontier of liability, instead, is extended to disputes involving actions that increase the probability of loss by some dimension, though they may not make the loss inevitable or even highly likely. Thus, a manufacturer is made responsible for avoiding more than recklessly or egregiously negligent production methods; the manufacturer must monitor all potential sources of product risk and will be held liable whenever a risk eventuates that the manufacturer could readily have controlled. Thus, manufacturers of automobiles are routinely held liable for failing to design safety features in autos that would protect even drunk drivers from injuries resulting from the accidents they cause.

Similarly, liability for breach of contract induced by a drought will turn not on the simple issue of whether it was the farmer or the broker who breached the promise. Rather, the breach of promise is viewed as a probabilistic outcome of the drought. The issue in the case

shifts to the question of the appropriate assignment of the risk of drought: Is it better to allocate the risk of drought to the individual farmer, locked into the specific climatic position of the farm, or to the broker, who can diversify drought risk by entering contracts with geographically disparate farmers?

A law concerned with risk control rejects a discrete demarcation between actions regarded as extreme and those regarded as normal. All actions can be arrayed on a continuum of contribution toward loss. Thus, central concepts of causation are changed dramatically. The earlier regime that imposed a sharp distinction between particularly extreme sources of harm and all others was necessarily committed to a very strict conception of causation. Actions were subject to liability for causing harm chiefly if they constituted the sole or exclusive source of the harm. In contrast, our modern civil law, devoted to risk control, focuses less upon strict causation than upon contribution to the occurrence of the harm. Some action may generate liability because of its contribution to the risk of occurrence, though it was only one of many simultaneously contributing sources of the loss.

The new regime of risk control thus vastly expands the opportunity for the attachment of legal liability as well as the importance of civil law as an instrument of social control. Many decry what they perceive as the increased litigiousness of modern society. But the level of litigiousness is only a function of the underlying legal rules in force. Our modern civil law encourages litigation as an instrument for internalizing costs to control risks. Because in our society intentionally or egregiously caused harms are infrequent, the earlier legal regime that focused only upon such harms was a regime of very limited scope. In contrast, our modern legal regime, focused upon every contribution to risk, is a regime of dramatically greater dimension. Such a regime aspires to impose legal controls on all activities in the society that contribute to risk in any way. Thus, virtually every action by every citizen becomes subject to potential legal review because every action will increase the risk of some loss in some way.

To my mind, far from incorporating a diminished view of individual responsibility, the shift of the law's purpose toward risk control represents a vastly expanded commitment to standards of individual liability, though expanded liability is somewhat different than enhanced individual responsibility. Under the new regime, an individual may be held liable not only for intentionally or maliciously harmful behavior, but for all behavior that increases the risk of loss, though the loss itself may be remote. Under earlier law, an individual needed to make certain only that his or her actions caused no direct injury to another individual. Under modern law, in contrast, an individual must make certain that his or her actions do not increase the risk of loss in any way. Thus, for each citizen, the potential of civil liability is vastly increased. The law charges each citizen to carefully monitor every action for its potential contribution to risk of loss.

From the standpoint of the control of risk, it is difficult to define a truly solitary act—an act that does not in some way implicate risks to others. The gardener spraying plants or the recluse reading silently before the fireplace may not be subject to liability personally for the increase in the collective social risk from pesticides or particulates, but will suffer the attachment of liability as pesticide or firewood prices rise or as the society proscribes such enjoyments directly. It is equally difficult in a society concerned with risk to truly shield or isolate oneself from others. The gardener's yield will be affected by the acidity of the rain, just as book prices will reflect the shift to acid-free paper. The centrality of risk effectively prevents all efforts of social escape.

Beyond increasing the scope of individual responsibility, the regime of risk control dramatically changes the substantive content of that responsibility. The focus of modern law on risk control diminishes the importance of moral standards in the evaluation of harm-causing activities. It is no longer useful in such a regime to distinguish between the guilty and the innocent or the culpable and the blameless. Almost every human action will increase the probability of some loss by some amount; empirically, it would be extremely rare for an action to

contribute zero toward the probability of occurrence of all losses in all contexts. It follows, therefore, that under the modern conception of risk, no action is ever truly innocent. Each of us must recognize that all of our actions are likely to harm others in the society in some way. As a consequence, every citizen stands in a position of continuous potential interaction with the law since every action is potentially subject to liability. Indeed, each of us must be aware that many of our specific actions may well lie close to the point on the risk continuum at which the attachment of legal liability becomes socially worthwhile.

Once it is accepted that all actions can be arrayed at some point upon the risk-contribution continuum, sharp moral distinctions lose moment. It is no longer possible to clearly separate the moral quality of one's personal actions from the quality of the actions of others. On the risk-contribution continuum, there are no clear qualitative differences between actions whatsoever; all actions contribute something to risk. The only question is the extent of the contribution.

The decline in the importance of moral standards as grounds for comparing loss-contributing actions, however, should not be interpreted to suggest that our new legal regime of risk control lacks moral foundation. The moral foundation of the new regime is relentlessly utilitarian. The objective of controlling risk as effectively as possible prevails over all else. Civil law serves to internalize costs, first, to create incentives to reduce the risk level as much as is practicable placing liability on that party in the relatively better position to prevent it. Second, if the injury could not have been practicably prevented, liability will be placed on that party in the relatively better position to spread the risks of the injury as if an insurer.

The adoption of these two utilitarian principles of risk control has subtly changed the nature of modern adjudication. Modern trials have been transformed from disputes between individuals to occasions for judicial social engineering. In earlier days, the function of adjudication was to resolve specific controversies between often embittered parties. In such

cases, the particular moral qualities of the parties or of their actions were of central importance, as issues of motive and goodwill were crucial. In modern litigation, in contrast, the court must evaluate, not how one individual or another behaved in a moment of crisis, but whether one party or another, as representatives of generic categories of actors, was in a better position to prevent injuries or to spread the costs of them. In litigation of this nature, the qualities of the actual litigants become irrelevant because the issue before the court is how best to fashion incentives for parties in such positions in the future. An obstetrician and a nurse-midwife may have dedicated their lives to serving others; in the incident before the court, they may have exerted great effort to help the injured child and suffered as deeply as the parents over the subsequent injury. But if the court determines that the risk of injury was within their control, that it was affected in any way by some technical decision made or ignored, or that the two professionals or their insurers were in the best position to spread such injury costs, liability for a lifetime of losses may be placed upon them.

In modern adjudication, the dispute between the specific litigants is of secondary, even trivial, importance to the exercise. The concern of the courts is how best to fashion broader incentives to maximize social welfare. The parties themselves and the loss one of them has suffered become mere informational inputs to the process of judicial revision of controlling rules of law. The legal claim serves only as an empirical example of a social problem for which a more specific legal rule defining behavior is needed. Frequently in modern litigation, the parties are unwitting instruments of this broader judicial purpose. But increasingly in recent years, the adversarial character of litigation has become pretended rather than real. The requirements of procedure compel the parties to defend contesting positions. Yet often the litigants and their attorneys play out their roles, not as hostile adversaries, but as characters, knowing that the drama being staged serves only to determine which of their insurers should foot the bill.

The new purpose of the law has led courts to adopt many novel and interesting rules that

seem bizarre from the vantage point of earlier years. An example is the 1982 decision of the New Jersey Supreme Court in Beshada v. Johns-Manville, a relatively early case in the transformation of civil law.[29] The case involved a claim by a worker that an asbestos manufacturer should be liable for damages because the manufacturer had failed to warn the worker that asbestos could cause cancer. The manufacturer sought to defend the claim by proving that, at the time the worker contracted cancer, it was not known and could not have been known scientifically that asbestos causes cancer. More perceptive of the contours of our modern regime, the plaintiffs challenged the defense as irrelevant as a matter of law. The court concurred, holding that the manufacturer was liable for breaching its duty to warn the worker that asbestos causes cancer though the court accepted that, at the time of the breach, it was impossible scientifically to have known that asbestos causes cancer

The notion of liability for breach of a duty with which it was impossible to comply seems to strain the most basic notions of responsibility. But responsibility in a regime of risk control has a very unusual meaning. According to the court, the manufacturer should be liable for the loss for two reasons. First, the decision improved incentives for accident avoidance: "By imposing on manufacturers the costs of failure to discover hazards, we create an incentive for them to invest more actively in safety research." Second, regardless of the information available at the time of injury, holding the manufacturer liable will serve to distribute the risks of product injuries broadly, because manufacturers can include expected injury costs in the prices of their products. Responsibility under the regime of risk control, thus, can mean a responsibility imposed ex post facto to reduce or to spread the risks of injuries.[30]

Many disapprove of the contours of modern civil law. But can those contours be

[29] 90 N.J. 191, 447 A. 2d 539 (1982).

[30] The Beshada opinion generate substantial criticism, and the New Jersey Supreme Court limited its scope to asbestos cases in Feldman v. Lederle Labs, 97 N.J. 429, 479 A. 2d 374 (1984). Several other jurisdictions, however, have adopted the approach.

changed? In my judgment, it is fanciful to imagine a return to the categorical analysis of civil law that prevailed until the 1960s. In retrospect, that legal regime was simplistic. There is a probabilistic character to all societal losses. All societal activities do implicate risks that some individuals will be harmed in some way.

The concept of internalizing costs to address those losses, however, can be substantially sharpened. As suggested earlier, Ronald Coase explained now forty years ago that, with respect to activity levels, injury costs are always internalized. Civil law is not needed to achieve the economic effect.[31] The question that remains is whether and how aggregate social welfare can be enhanced by shifting injury costs, which is to say, by changing the method of cost internalization.

Many have shown that employing civil law to provide insurance is counterproductive. Civil law may continue to possess a role, however, in creating incentives to directly reduce accident rates. Perhaps oddly, despite over forty years of experience with the expanded liability created by modern civil law, there are no empirical studies that have demonstrated that the expansion of liability has reduced the level of harm. Of course, there are strong market forces that generate greater levels of safety. No one has been able to show that legal liability serves to increase safety further.

Still, it remains possible that expanded liability enhances safety and thus that civil law can serve a regulatory role. It is an entirely separate question whether that regulation is sensibly administered through our adversarial process with the final decision delegated to lay juries, selected intentionally because their members know nothing about the subject before them. Put differently, we cannot imagine a regulatory agency such as, say, NHTSA setting standards for auto safety based upon the presentation of a claim by a single seriously injured individual with respect to that person's single accident, delegating the ultimate decision to laypersons.

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[31] Although Coase's article is widely known and universally accepted, this point remains not fully understood even among economists. For a prominent example, see Steven Shavell, Strict Liability Versus Negligence, 9 J. Legal Studies 1 (1980), discussed in Priest, Internalizing Costs (forthcoming).

Our modern regime of civil law, nevertheless, remains deeply entrenched both in terms of economic interests (note the to-date successful efforts of the trial bar and the unions to thwart the rejection of civil law with respect to asbestos-related injuries) and in popular conception. To change that legal regime in a serious way will require a substantial demonstration of the harms that it causes.

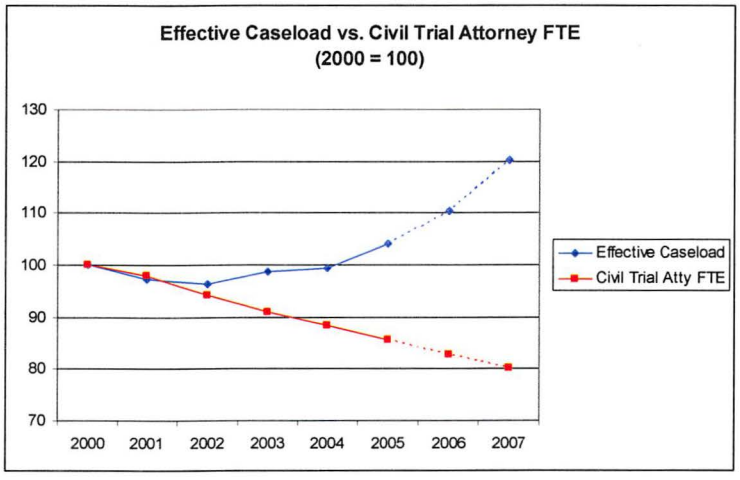
TAX DIVISION OVERVIEW - FY 2007

A. New FY 2006 Program Changes: "Operation Follow-Through" Initiative

1. Executive Summary

The Tax Division requests 106 FTE (76 attorney FTE and 30 support staff FTE) and $6,786,000 in enhancement to its base appropriation to support the priority placed by the President on increased and more effective tax law enforcement. The Administration's renewed focus on tax enforcement has generated increased enforcement efforts by the IRS, which in turn has resulted in a significantly increased workload for the Division. Just as importantly, and to help meet the demand generated by the IRS's activity, the Division seeks this additional appropriation to support its "Operation Follow-Through" initiative.

As the graph illustrates and as discussed below, the Division is already beginning to experience an anticipated flood of complex civil litigation, while the number of attorneys available to handle that caseload is predicted to continue to fall.



Through Operation Follow-Through, the Tax Division seeks to handle the large influx of litigation resulting from the IRS's significant expansion of enforcement activity and its efforts focusing on tax kingpins—those who promote or enable the illegal tax avoidance of others, including scam artists and unscrupulous accountants, lawyers and tax preparers.

By doing so, the Division also seeks to advance the Administration's goal of closing the "Tax Gap." The Tax Gap is the difference between taxes that are owed and taxes that are actually paid. The IRS estimates (based on most recent data available, from 2001), that the annual Tax Gap, before enforcement activity, is between **$312 and $353 billion.** Enforcement activity reduces the gap to around $260 to $310 billion annually, but there remain huge amounts of taxes properly owing that are not being paid.

Part of the reason the Tax Gap exists is a decline in voluntary compliance with the tax laws. The IRS collects over $2 trillion annually; only $40 billion of this comes from enforcement activity. The balance, over $1.96 trillion (or 98 percent of total collections) results from taxpayers' voluntary compliance with the tax law. But the number of taxpayers who stated an unwillingness to comply voluntarily climbed from **11 percent** in

1999 to **17 percent** in 2003.[1] Efforts of the IRS and the Tax Division over the last four years are beginning to have an effect on voluntary compliance: the percentage of taxpayers who responded that it was OK to cheat on their taxes at least some of the time **dropped in 2004 to 12 percent**.[2]

This renewed willingness to adhere to the tax laws results in part from the Bush Administration's renewed focus on tax enforcement. In Fiscal Year 2005, the IRS received an additional $227.5 million for enforcement efforts. President Bush's 2006 budget request seeks an additional $500 million for IRS enforcement activities, a 7.8 percent increase above the 2005 funding. A significant portion ($233 million and 1307 FTE) of the FY 2006 increase sought by the IRS is devoted to closing the Tax Gap through targeted enforcement efforts:

IRS FY 2006 Budget Request[3]		
	New Funding Requested	FTE
Corrosive Non-Compliance Driving the Tax Gap	$ 149,700,000	920
Corrosive Corporate Non-Compliance (Base Reinvestment)	$ 6,711,000	52
Corrosive Corporate Non-compliance (New Program Initiative)	$ 51,800,000	236
Abusive Transactions	$ 14,460,000	77
Fraudulent Refund Crimes	$ 10,772,000	22
Total	**$ 233,443,000**	**1307**

As described below, the Tax Division has been an integral part of the Administration's increased enforcement initiatives, resulting in ever-increasing workloads for the Division's attorneys. However, the additional resources being devoted in the IRS's 2005 and 2006 budget will have a direct impact on the Tax Division's workload in 2007 and thereafter, as additional cases and investigations are identified and readied for civil and criminal litigation and then referred to the Division. To handle this expected influx and properly support the Administration's priority on enhanced tax enforcement, the funding of the Tax Division's FY 2007 budget request is imperative.

2. "Operation Follow-Through"

a) Background

The Tax Division proposes "Operation Follow-Through" to allow the Department to handle the increased litigation resulting from the IRS's additional enforcement efforts.

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[1] IRS Oversight Board, 2004 Taxpayer Attitude Survey, at 5 (April 2005) (available at http://www.treas.gov/irsob/documents/release040405.pdf). The cited percentages are the total of the percentage of respondents who replied that it was acceptable to cheat on their income taxes "a little" or "as much as possible."

[2] *Id.*

[3] Internal Revenue Service, Budget in Brief FY 2006, at 8-9 (February 2005) (available at http://www.irs.gov/pub/irs-utl/bib_irs.pdf).

Unlike many other sorts of program initiatives, however, the additional work covered by this proposal is not discretionary: the Tax Division must handle the cases referred by the IRS, or cases will go undefended or priority enforcement initiatives will be thwarted. The Division has prioritized and can prioritize its work, in tandem with the IRS, to focus on cases that return maximum enforcement effect for each dollar spent. Accordingly, the Division has focused, and will continue to focus, a large share of its resources on curtailing the activity of promoters, enablers and tax professionals (including return preparers, accountants and lawyers) who help others to avoid taxes illegally—the tax-avoidance kingpins.

Tax kingpins enable illegal tax avoidance by:

- **Promoting tax fraud schemes**
- **Devising and promoting abusive technical tax shelters for corporations and wealthy individuals**
- **Publicly advocating defiance of the tax laws on frivolous or false grounds**

Some tax kingpins make considerable sums charging clients for advice or tax-avoidance packages. Others are motivated by ideological resistance to taxes or to legitimate government authority in general.

Like drug kingpins, tax kingpins are the vector of illegal activity, enabling and encouraging their customers—hundreds and sometimes thousands of them—to break the law, usually for their own enrichment. Those who are tempted to avoid taxes through illegal means rely on them for assistance. And honest taxpayers can be led astray and engage in improper transactions or file fraudulent tax returns based upon the tax kingpins' advice.

Focusing our finite resources on tax kingpins gives each dollar of enforcement effort a multiplier, or a "ripple effect," extending the power of enforcement resources to hundreds of thousands of people. By taking tax kingpins out of the equation, tax evaders lose the help of willing accomplices.

Moreover, public enforcement efforts against tax kingpins reinforce an ethic of respect for law, showing the taxpaying public that the tax laws are being fairly enforced, reassuring honest taxpayers that they are not "chumps" for paying their taxes, and encouraging honest businesses that they do not face a competitive disadvantage when they meet their tax obligations.

b) Main Components of Operation Follow-Through

(1) Challenging and closing down abusive technical tax shelters for corporations and the wealthy

A prime feature of Operation Follow-Through is litigation seeking to shut down complex tax shelters. In these cases, the Division challenges, on the merits, the legitimacy of sophisticated financial transactions that the IRS believes are engaged in solely or primarily to avoid taxes rather than for any business purpose. The transactions at issue often are devised, packaged and sold by large accounting firms or law firms.

Shelter cases typically require extensive discovery, briefing, depositions, expert witness preparation and trial time, consuming thousands of hours of attorney time. The Tax Division must devote an increasingly large portion of its resources to complex tax shelter litigation to handle the cases adequately and to succeed.

(2) Opening the books and customer lists of tax shelter promoters to IRS inspection, through enforcement of IRS summonses

Tax kingpins instruct their clients on how to evade detection on their tax returns. Consequently, the IRS is frequently unable to identify, based on returns alone, which taxpayers have used sophisticated transactions to manipulate their income and deductions to reduce tax. One of the main tools provided by statute to assist the IRS with investigation of suspected illegal tax avoidance is the administrative summons, which the IRS can issue to taxpayers or third parties to obtain documents and other records. Since IRS summonses can only be enforced by court order, the Tax Division plays an integral role in obtaining judicial enforcement of summonses. Successful enforcement often involves overcoming defenses to disclosure such as attorney-client privilege. The documents and customer lists produced allow the IRS to focus its investigations and identify potentially abusive transactions.

(3) Obtaining injunctions that shut down the promotion of fraudulent tax schemes

Promoters of tax scams are the ultimate "tax kingpins": Like drug dealers, they sell false hope to individuals, who are often in difficult circumstances. They prey on taxpayers on the low end of the tax-avoidance spectrum, seeking to sell "do-it-yourself" tax-relief packages to individuals (some who know better, some who are misled into illegal tax avoidance), using schemes and scams that are false and fraudulent. Many of these promotions grew to involve huge numbers of taxpayers, using the internet to market their schemes to large audiences who were previously unreachable or using sophisticated "boiler-room" telemarketing techniques. Beginning in 2001, the Tax Division has met head-on the onslaught of tax-scam promotions. Prior to or along with any criminal investigation, the Division uses civil enforcement remedies, primarily civil injunctions, which seek to halt to the promotion of the fraud and to require turnover of customer lists and documents. Division attorneys spend many hours preparing cases and collecting evidence, since obtaining an injunction virtually always requires proving the merits of the government's case at a preliminary stage, in advance of discovery.

(4) Winning criminal sanctions against illegal tax protesters, public tax scofflaws and prominent tax evaders

Along with its other criminal enforcement work, the Tax Division concentrates its resources on high-profile tax criminals who encourage others illegally to evade taxes. This includes those who advocate disobedience of the tax laws, those who publicize their refusal to comply with the law, and those who seek to garner a competitive advantage through tax evasion or who otherwise violate the law with impunity.

(5) Finding and bringing to justice those who promote or use offshore bank accounts for illegal tax avoidance

As the Department's Strategic Plan acknowledges, "In a society that has become globalized and more technologically advanced, the opportunities for criminals to exploit have grown exponentially."[4] One of these opportunities has been the increased use of accounts in offshore "tax haven" countries, made more accessible through advances in the financial industry and the internet. The Tax Division is working closely with the IRS to identify holders of offshore accounts through civil actions seeking records from financial institutions and credit-card companies and to prosecute those account-holders who have committed U.S. tax violations.

c) Success of Operation Follow-Through to Date

(1) Tax Shelter Litigation

Tax Division victories in United States Courts of Appeals have established precedent that effectively shut down technical tax shelters estimated to have cost the Federal Treasury $11 billion.

(2) Summons Enforcement Litigation

Tax Division victories in summons enforcement litigation—in which courts uniformly have rejected claims of privilege as unfounded—have required accounting firms, law firms, and financial institutions involved in the promotion of tax shelters to turn their tax shelter files and customer lists over to the IRS.

(3) Tax Scam Injunctions

Over 100 injunctions have been entered against tax scam promoters, shutting down scams involving over 400,000 taxpayers and hundreds of millions of dollars.

(4) Tax Convictions

Tax prosecutions have resulted in convictions of tax protesters and scofflaws in the following cases:

- **Walter ("Al") Thompson (sentenced 6 years)** – business owner refused to pay taxes or withhold them from employees' wages; was the subject of a November 2000 *New York Times* front page article in which he publicly declared his refusal to comply with tax laws
- **Anderson's Ark defendants (sentences of up to 20 years)** – long-running promotion that facilitated, through offshore accounts, evasion of taxes on more than $120 million in taxable income
- **Lynne Meredith (sentenced 10 years)** – illegal tax protester associated with tax fraud group "We the People;" promoted bogus trust arrangements and assisted taxpayers in forming phony "pure trusts" to conceal income and assets from government

[4] Strategic Plan, ch. 1 at 4.

- **Richard Simkanin (sentenced 7 years)** – business owner refused to pay taxes or withhold them from employees' wages; one of five small business owners who published a full-page *USA Today* advertisement in March 2001 claiming there was no law requiring taxes to be withheld from employees
- **Richard Flowers (sentenced 4 years)** – operated "warehouse bank" scheme for 14 years, enabling customers to conduct anonymous banking transactions using numbered accounts, using funds commingled in a single commercial bank account

(5) Tax Prosecutions

The Tax Division has also secured indictments against the following defendants:

- **Irwin Schiff** – Indictment charges Schiff and two conspirators with aiding and assisting the filing of false tax returns, tax evasion and willful failure to file tax returns. Schiff was previously convicted of tax crimes twice before. Indictment alleges that conspirators promoted the filing of fraudulent returns reporting zeroes on each income and expense line, often resulting in full refund of federal taxes withheld.
- **Walter Anderson** – Indictment charges Anderson with tax evasion, obstruction of the IRS and defrauding District of Columbia government, by failing to pay well in excess of $200 million in taxes.
- **The Aegis Company defendants** – Indictment charges six defendants with a nearly decade-long conspiracy to market and sell sham domestic and foreign trusts through The Aegis Company to some 650 wealthy taxpayer clients throughout the United States in order to hide hundreds of millions of dollars in income, causing a tax loss to the United States of at least $68 million. Additional indictments in multiple jurisdictions charged certified public accountants and others with aiding and assisting the preparation and filing of false tax returns by Aegis trust clients.

(6) Offshore Accounts

The Division's use of civil and criminal remedies to attack abuse of offshore accounts has resulted in the production of hundreds of thousands of bank records, identification of hundreds of potential violators and convictions of many users of offshore entities and bank accounts.

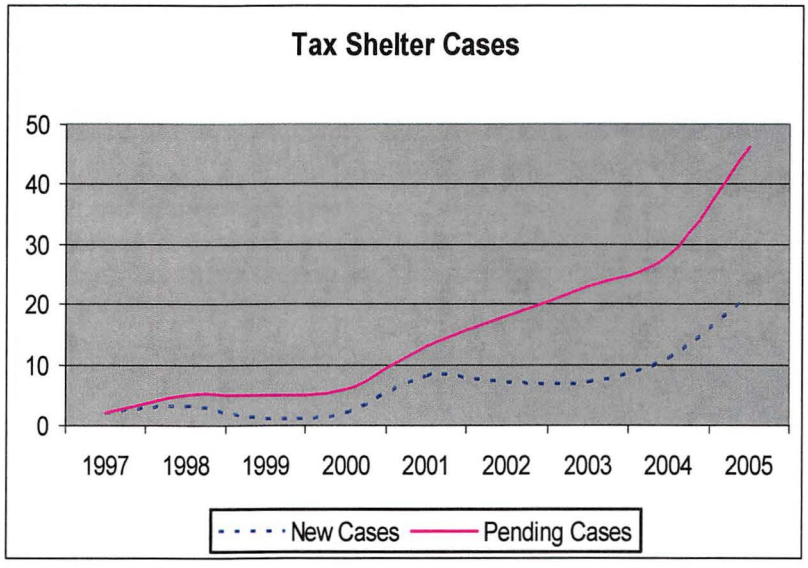
3. Growth in Division's Workload

Even as the Division focuses on tax kingpins, its workload is growing.

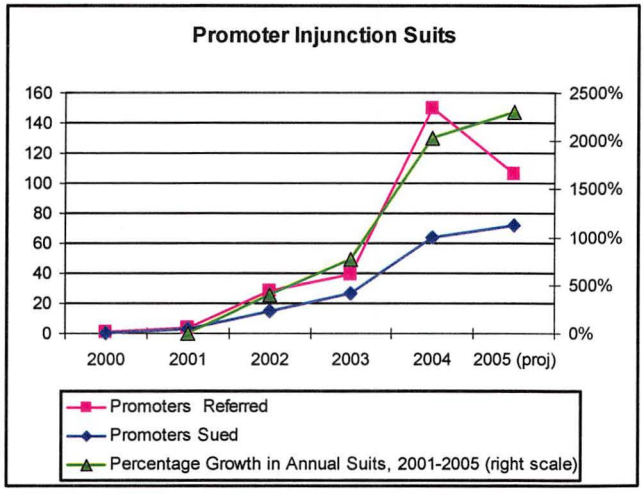
a) Litigation targeting tax kingpins is growing significantly

(1) 115% growth in tax shelter cases

From FY 2001 to FY 2004, tax shelter cases handled in the Division grew from 13 to 28, a 115% percent increase. The number of shelter cases skyrocketed in FY 2005, and now stands at 41, a 254% increase from FY 2001.



(2) 2
300% growth in tax scam injunction case filings



The number of scam promoter injunction suits filed by the Division from FY 2001 to FY 2004 increased by 2,000 percent; that figure is expected to increase to 2,300 percent by the end of FY 2005:[5]

Note: The decline in promoter referrals from 2004 to 2005 (projected) is due to the referral in 2004 of a single case involving 45 promoters. Referrals of tax scam promoters for injunction litigation is expected to continue at a high rate. Indeed, as of May 2005, the Division had a backlog of 84 promoters who had not yet been sued or otherwise acted upon.

b) In addition to pursuing tax kingpins, the Division is devoting resources to its growing caseload

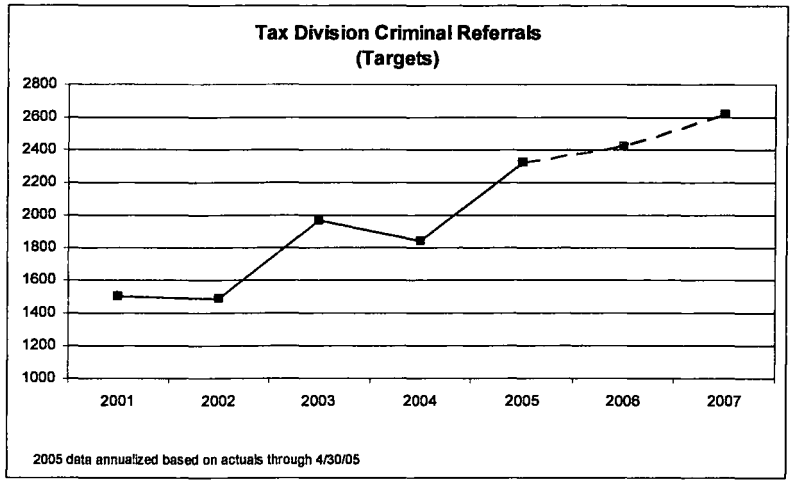
- The Division's caseload grew 7.2 percent (from 14,631 to 15,691 cases) from FY 2004 to FY 2005
- In the first half of FY 2005, the Division's caseload's grew at an annual rate of 7.8 percent

[5] In 2001, the IRS referred 4 promoters to the Tax Division for institution of injunction proceedings; in 2005, it is projected to refer 106 promoters for injunction. The Division expects to file suit against 72 promoters in FY 2005, compared to 3 in FY 2001.

- From 2001-2004, criminal referrals from the IRS grew 20%

The Division has seen significant growth in the number of criminal matters referred to the Division, and expects this growth to continue through FY 2007.

Based on current trends, the Division predicts receiving 2,618 criminal matter referrals in FY 2007.



c) The Division's workload is growing in other ways beyond an increasing number of cases

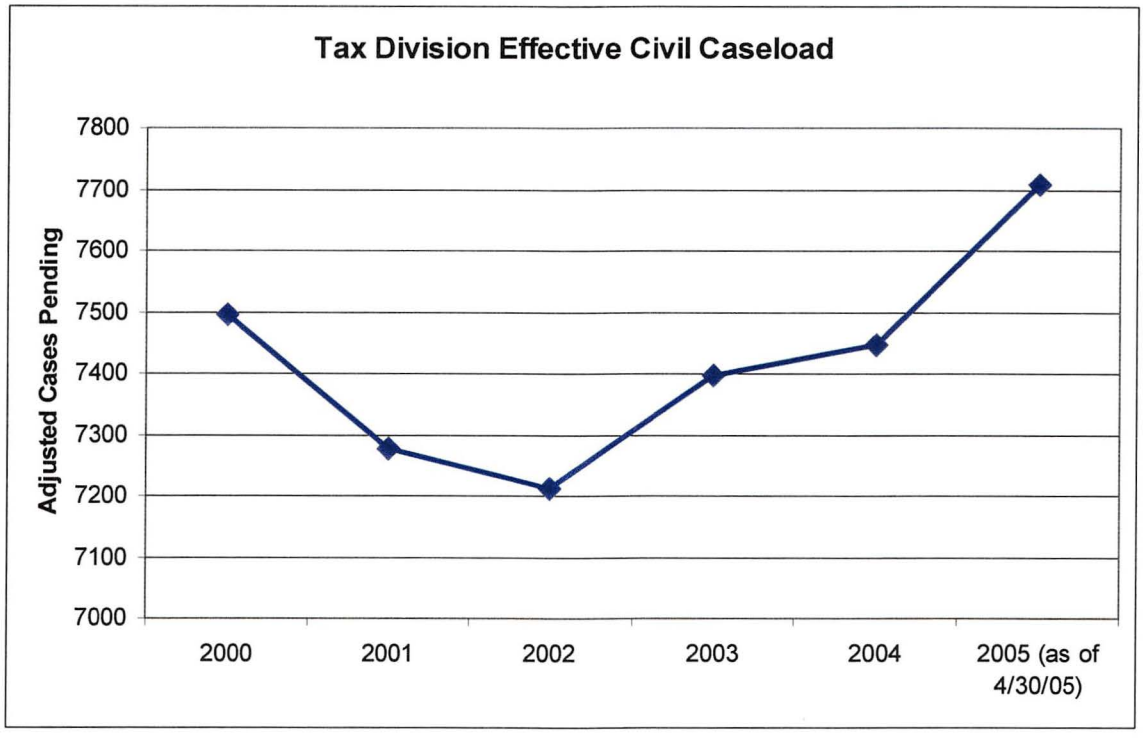
(1) As measured by increases in complex civil litigation

Tax shelter litigation constitutes perhaps the most complex civil litigation in courts today. The cases involve sophisticated, complex transactions devised by financial experts (some of them Nobel laureates in economics), executed in elaborate structures that seek to take advantage of perceived loopholes in the tax code. The litigation frequently entails hundreds of thousands of documents, multiple parties and witnesses, multiple jurisdictions, novel issues and well-financed opposition.

As illustrated by the chart above (page 7), the number of tax shelter cases being handled by the Tax Division has been increasing. Moreover, the number of hours that must be devoted to tax shelter cases far outstrips the hours devoted to other kinds of civil cases handled by the Division. Analysis of all of the 19 tax shelter cases handled to closure by the Division in recent years, or whose activity is substantially complete, shows that on average a tax shelter case consumes between 5,000 and 6,000 attorney hours to completion, over a span of 4 to 5 years. Assuming an average case takes 5,000 hours over a four-year period, the average annual attorney time needed for each shelter case is 1,250 hours. This is 30 times the average hours per case for other kinds of cases (44.5 hours per case), based on data for the last 5 years:

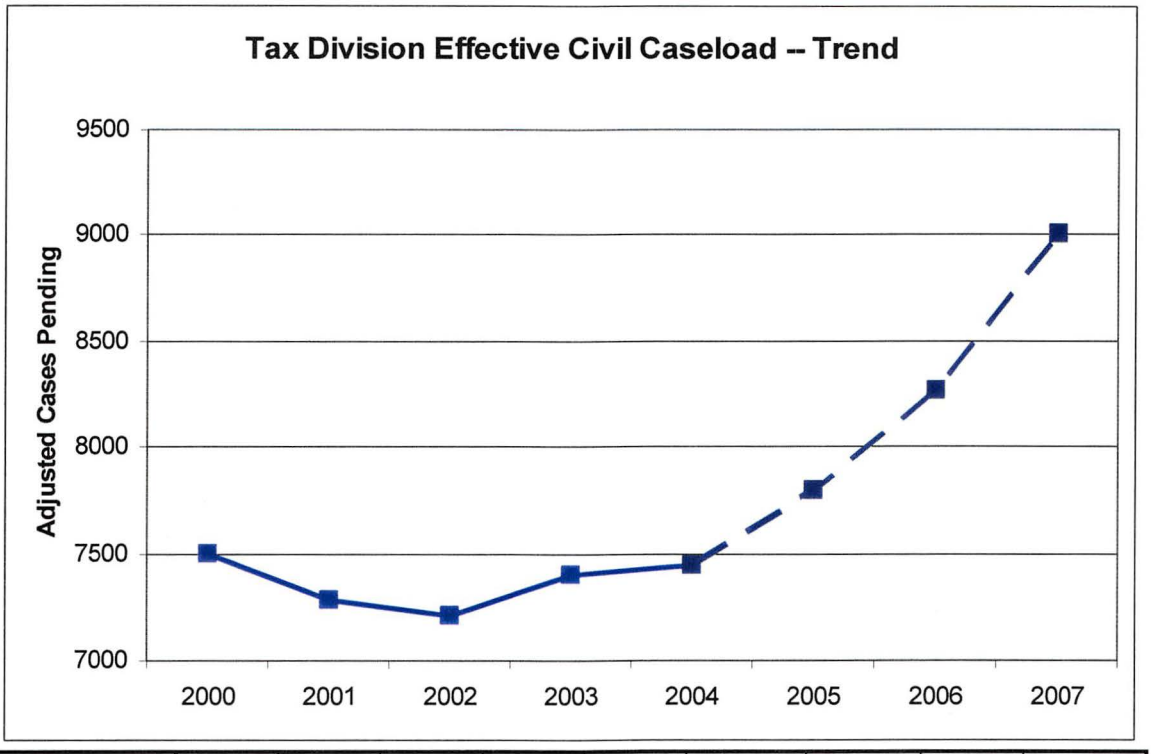
Hours Charged to All Types of Civil Cases					
	2000	2001	2002	2003	2004
Pending Suits	7,320	6,900	6,690	6,758	6,663
Total Hours	336,376	312,574	312,991	308,952	257,018
Hours/Suit	46.0	45.3	46.8	45.7	38.6
				Average	44.5

Accordingly, each new shelter case is the equivalent of 30 new non-shelter cases handled by the Division. Because the number of new shelter cases is growing substantially, it is appropriate to analyze the current and projected civil workload of the Division in terms of number of shelter cases and number of non-shelter cases, and to treat the shelter cases as counting as 30 non-shelter cases, due to the additional time they take and the additional resource demands they create. This yields an "effective civil caseload" that provides a more accurate picture of resource demands than treating all cases as being equal. The charts below indicate that the Division's effective civil caseload has been growing:



	2000	2001	2002	2003	2004	As of 4/30/05
All Cases	7320	6900	6690	6758	6663	6518
Shelter	6	13	18	22	27	41
Non-shelter	7314	6887	6672	6736	6636	6477
Shelter x 30	180	390	540	660	810	1230
Effective Caseload	7494	7277	7212	7396	7446	7707

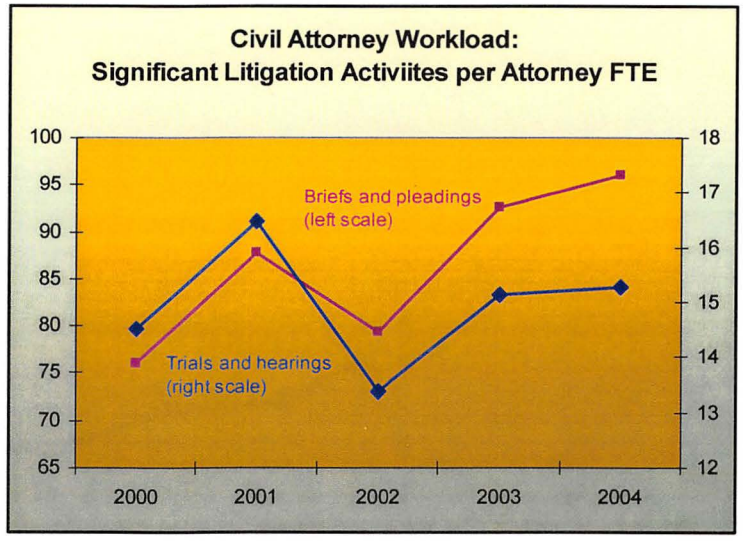
Assuming current trends in shelter case growth continue, by FY 2007 the Division's effective caseload will be 25 percent larger than its 2002 nadir:



	2000	2001	2002	2003	2004	As of 4/30/05	2005 (proj)	2006 (proj)	2007 (proj)
All Cases	7320	6900	6690	6758	6663	6518	6448	6315	6185
Shelter	6	13	18	22	27	41	47	67	97
Non-shelter	7314	6887	6672	6736	6636	6477	6401	6248	6088
Shelter x 30	180	390	540	660	810	1230	1397	2017	2914
Effective Caseload	7494	7277	7212	7396	7446	7707	7798	8265	9002

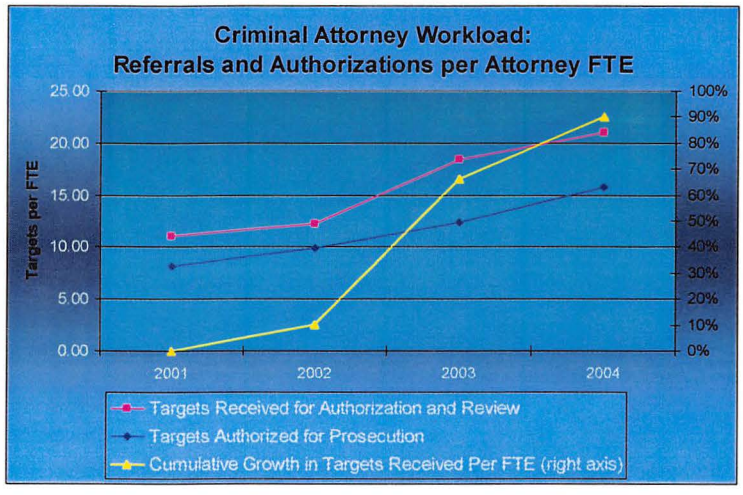
(2) As measured by significant litigation activities per civil attorney FTE

The Division tracks the number of significant litigation activities performed by each attorney, both by the number of briefs, pleadings or other court documents prepared and by the number of trials or court hearings attended. As the Division's workload has increased, Division attorneys have been working harder to complete more significant litigation activities per year, as the graph illustrates.



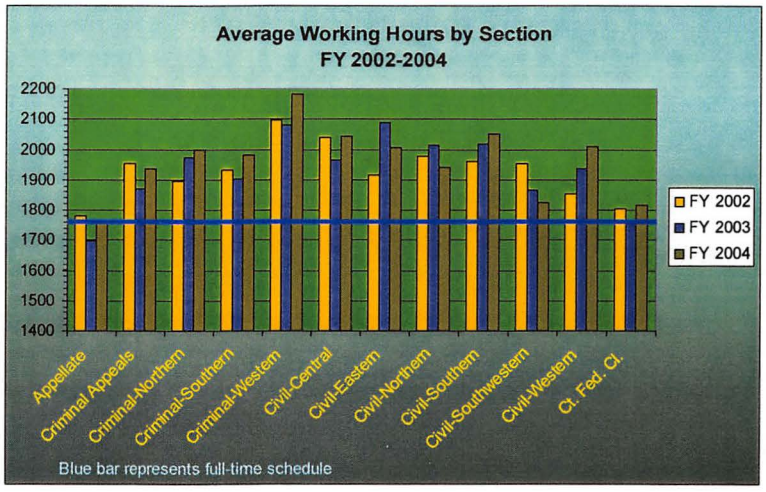
(3) As measured by criminal referrals and authorized prosecutions per criminal attorney FTE

Similarly, on the criminal side, the Division tracks the number of criminal referrals made to the Division, per attorney FTE, and the number of prosecutions authorized. The number of criminal referrals received per attorney FTE in FY 2004 was 90 percent higher than that received in FY 2001. As workload has increased, Division attorneys have become more efficient, doubling the number of prosecutions authorized per attorney FTE by FY 2004. Nonetheless, the gap between targets referred and targets authorized has grown, suggesting that further efficiency gains would be difficult to realize.

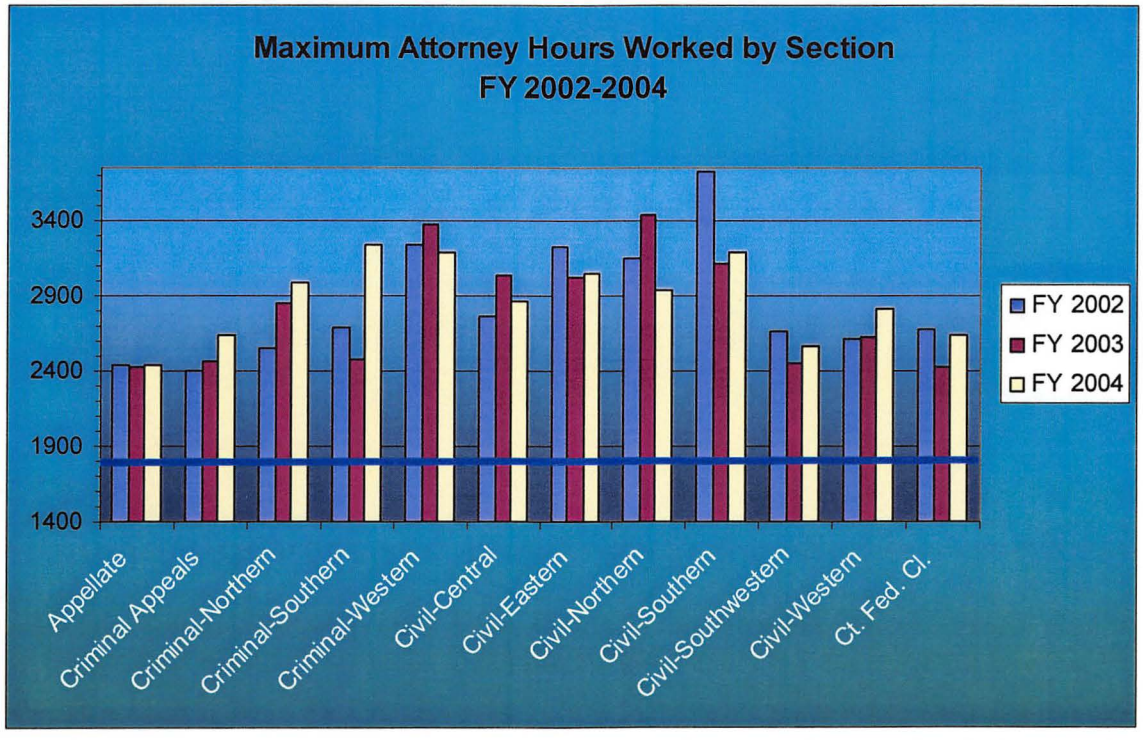


d) The capacity of attorneys to absorb additional growth is at its limit

Division attorneys worked an annual average of 1,950 hours in 2003, and 1,955 hours in 2004. This average yearly schedule is the equivalent of working nearly a whole extra month per year above a full-time schedule of 1,800 hours. The following chart shows the average hours worked per year in the last three fiscal years in each of the Division's sections:



Many attorneys put in many more hours than the average, working up to 2,500 or even 3,400 hours per year (3,120 hours per year is the equivalent of 10 hours per day, 6 days per week, 52 weeks per year).

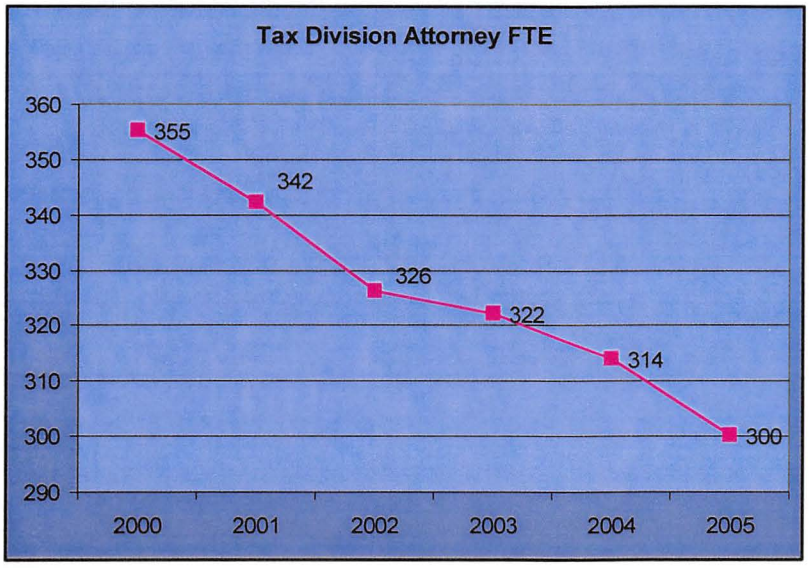


Tax Division attorneys are working to capacity, and can no longer absorb its growing workload.

4. Decline in Attorney FTE

a) The Division is losing many talented attorneys to the private sector and other government offices

Tax Division attorneys are in high demand in the private sector and in other government offices. Division attorneys entering private practice can double their government salary. Since the beginning of FY 2001, the Division has lost nearly 100 trial attorneys to law firms, U.S. Attorneys' offices and other agencies. Because of budget restrictions, the Division has been able to replace only 50 of these departures through the Honors Program and lateral hiring.

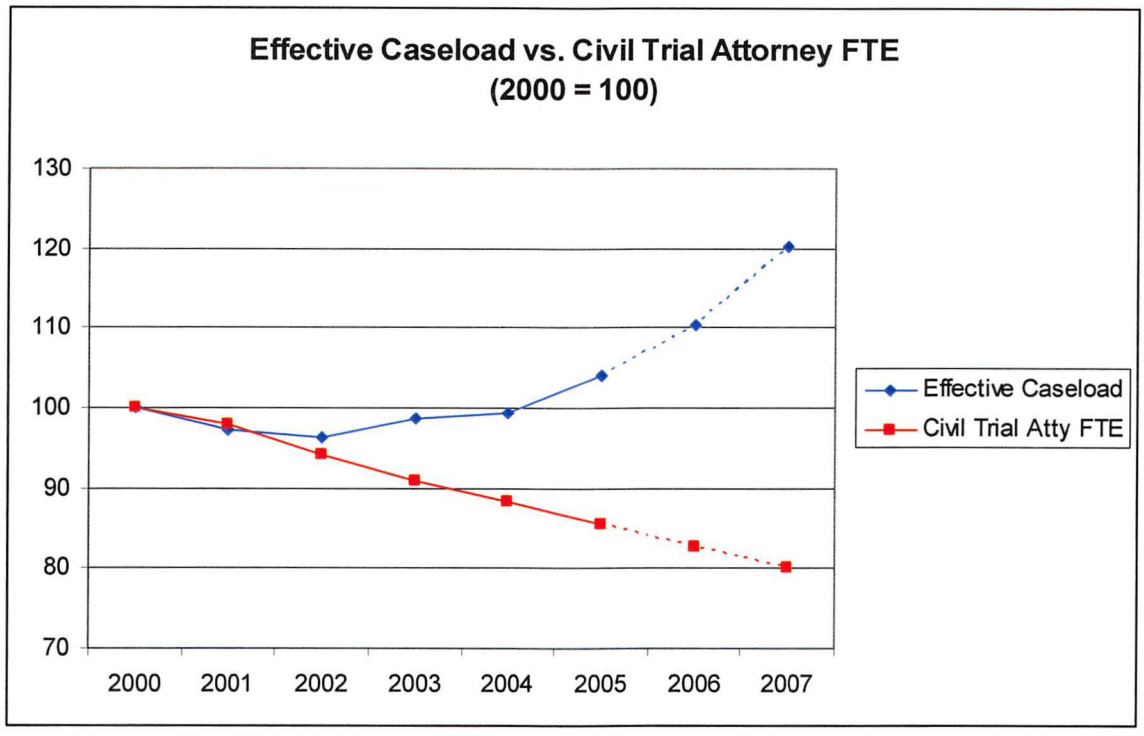


Of the attorneys lost since the beginning of FY 2001, 25 prosecutors from the Division's criminal enforcement sections have transferred to 15 U.S. Attorney's Offices. In addition, in FY 2004, three Honor's Program hires designated for the Division, prior to entry on duty, were reassigned by OARM to a U.S. Attorney's Office. While these 28 transfers have enhanced the strength of U.S. Attorney's Offices, they have severely diminished the strength of the Tax Division.

As of May 2005:

- Civil trial attorney FTE was at 158 (down from 194 in 2001, an 18.5 percent reduction)
- Criminal trial FTE was at 68 (down from 93 in 2001, a 27 percent reduction)
- Attorney staff had declined by 15.5% since 2000, representing a loss of 1 out of 6 attorneys

The following graph compares the percentage reduction in civil trial attorney FTE to the percentage growth in civil trial effective caseload, compared with FY 2000 levels:



5. Projected New Cases

In addition to the caseload the Division is attempting to manage with declining resources, the Division has already begun to receive dozens of new complex cases, the first of a significant number it anticipates receiving for next several years, requiring additional attorney and support staff.

a) IRS's enhanced enforcement activity is spawning hundreds of new cases from taxpayers who refuse to participate in its settlement initiatives

The IRS has made a priority of combating corrosive activity by corporations, high-income individuals and other contributors to the Tax Gap. In addition to stepping up audits, the IRS is making increasing use of "settlement initiatives," under which the IRS publicly states the terms to which it would agree to resolve disputes concerning the taxes (and penalties and interest) owing as a result of specific abusive transactions. Settlement initiatives are a useful enforcement tool, bringing in billions of dollars of unpaid taxes, interest and penalties and resolving hundreds of cases. The terms of recent IRS settlement initiatives have been very tough, requiring settling taxpayers to concede 100 percent of the taxes owing plus a portion of applicable penalties and interest. Nonetheless, thousands of taxpayers are accepting the terms proposed and paying billions of dollars.

Tax Division litigation directly supports the effectiveness of IRS settlement initiatives. Its summons enforcement litigation has required shelter promoters to turn over customer lists and transaction documents, permitting the IRS to identify shelter participants who otherwise might evade detection. Further, the Division's litigation

challenging the merits of abusive tax shelters allows the IRS to assert the credible threat that shelter participants will lose in court, which encourages them to settle.

For example, in May 2004, the IRS made a settlement offer regarding the Son of Boss tax shelter, which has been used by wealthy individual taxpayers to eliminate multi-million dollar gains. As a condition of participating in the settlement program, the IRS required a total concession by the taxpayer of artificial losses claimed. The IRS also required the payment of penalties in most cases. As of April 14, 2005, 1,165 taxpayers (of the over 1,800 believed to have employed the Son of Boss technique) had participated in the settlement initiative, yielding $3.2 billion in taxes, interest, and penalties. The IRS anticipated that this figure will rise to approximately $3.5 billion when the program concluded.

Significantly, however, more than 600 of the 1,800 identified Son-of-Boss users did *not* participate in the settlement initiative. The IRS estimates that cases involving around 325 taxpayers will be litigated, and more than half of these are likely to be handled by the Tax Division (as taxpayers will be more likely to file suit in district court or the Court of Federal Claims, courts in which the Tax Division represents the United States, than in the Tax Court). To date in 2005, over 20 such cases have already been filed and are being litigated by the Tax Division, involving almost 100 taxpayers.

The IRS is promising to offer additional settlement initiatives. Indeed, in February 2005, the IRS implemented a new settlement initiative relating to an illegal tax shelter transaction under which taxpayers transferred executive stock options or restricted stock to family-controlled entities, sometimes at the expense of public shareholders. The settlement offer required full payment of taxes owed plus a penalty. Other initiatives involving tax-exempt entities may be offered. As of May 2005, the IRS estimated that at least 15 other tax shelter cases were headed for litigation, along with 33 other large cases that were important to tax administration.

b) New injunction cases

As of April 2005, the number of scam promoters being investigated by the IRS Lead Development Center had climbed to 1,266, up 25 percent from the beginning of the fiscal year and double the number pending at the beginning of FY 2004. Significant numbers of these cases are likely to be referred to the Division for civil injunctions. These new cases would come on top of the significant injunction work the Division is already handling.

c) Outgrowth of offshore work

As summarized below, as of May 2005, the IRS estimated that thousands of taxpayers identified through the Division's offshore enforcement litigation (seeking to enforce IRS summonses on credit-card issuers and processors to obtain information regarding U.S. holders of accounts in tax-haven countries) were in examination, or would be shortly. Hundreds of these cases are likely to be referred to the Division for further litigation or prosecution.

- 1317 cases have been selected for examination, but are waiting to be classified before they are sent to the field.

- 177 cases have been selected for examination and sent to the field, but have not been assigned to an agent.
- 338 cases have been assigned to a revenue agent, but no time has been charged to the case yet.
- 1423 cases are assigned to a revenue agent and are under examination.
- 474 cases have been examined and are in a post-audit status—*e.g.*, a 30-day letter has been issued.
- Of the 1423 under examination, 391 cases have either been referred to IRS Criminal Investigation Division (CI) or CI has accepted the case. This is an exceptionally high percentage of referrals.

Without a substantially fortified attorney workforce, the Tax Division will be unable to litigate appropriately its current caseload, much less the hundreds of new cases expected to be filed by FY 2007.

6. Return on Investment

Not only are additional resources for tax litigation imperative to support the Administration's priorities, they are also an excellent investment. Over the last four years, Tax Division attorneys on average have returned 21 dollars to the Treasury for every dollar paid to them:

Return on Investment for Tax Division Attorneys

	2001	2002	2003	2004
Collections in millions	$47	$90	$72	$69
Refund Suit Savings in millions	$769	$1,246	$794	$658
Total in millions	$815	$1,336	$866	$727
Attorney FTE	342	326	322	314
Dollars collected, refunds saved per attorney	$ 2,383,626	$ 4,096,626	$ 2,690,062	$ 2,315,287
Modular cost per attorney	$ 132,190	$ 134,280	$ 137,340	$ 141,000
Return on Investment per Attorney	**18.03:1**	**30.51:1**	**19.59:1**	**16.42:1**
Average				**21.14:1**

In addition, these returns on investment are based only the *direct* effect of the Tax Division's work. The cases the Division brings and wins, the precedent that the Division establishes and the convictions that the Division obtains profoundly affect taxpayer behavior, making the *indirect* effect of the Tax Division's work many billions of dollars more. Accordingly, provision of resources for the Tax Division more than repays for itself in revenue for the Federal Treasury.

7. Calculation of FTE Needed

The Division calculates its FTE request based on projected caseload for FY 2007 and the average hours per case needed to handle that caseload, calculated separately for civil matters and criminal matters.

The Division projects having 9,002 civil trial matters (adjusted for the complexity of tax shelter cases, as described at pages 8 to 11 above). The Division calculates that it spends an average of 44.5 hours per case per year in civil matters. Accordingly, the total hours needed (and the corresponding attorney FTE needed, assuming 1800 work hours per attorney FTE) for the projected case load is calculated as follows:

	Average Hours/Case	2007 Caseload Projection	Projected Caseload in Hours	FTE Needed (@1800 hours/FTE)	Baseline FY 2007 FTE	FTE Requested (Difference)
Civil	44.5	9002	400,272	222.37	157	65.37

For criminal matters, the Division projects receiving 2,618 criminal referrals. (See page 8.) Other than for cases for which the Division declines to authorize prosecution, each year an average of around 10 percent of referred matters are handled in litigation by Division prosecutors and 90 percent are sent to U.S. Attorneys' offices for handling, following Division review and authorization. In 2007, therefore, the Division expects to handle 262 litigated matters and 2,356 non-litigated matters.

Litigated matters require far more Division time and resources. As a result, the Division calculates the average hours per case for criminal matters separately for litigated matters and for non-litigated matters. For the last four years, the average hours per case per year is 348.6 hours for litigated cases, and 29.9 hours for non-litigated cases:

	Average Hours Per Case Per Year*				Average
	2001	2002	2003	2004	
Cases with Litigation Assignments	276.4	350.4	357.8	409.6	348.6
Cases with No Litigation Assignment	30.4	31.6	28.4	29.0	29.9

*Litigated cases are assumed to be handled over 2 years

Applying these averages to the expected number of litigated and non-litigated cases in 2007 yields the caseload in hours and the FTE needed (using 1,800 hours/FTE):

	Average Hours/ Case	2007 Caseload Projection	Projected Caseload in Hours	FTE Needed (@1800 hours/FTE)	Baseline FY 2007 FTE	FTE Requested (Difference)
Criminal-Litigated Cases	348.6	262	91,246	50.69		
Criminal-Non Litigated Cases	29.9	2356	70,363	39.09		
Total				89.78	79	10.78

Accordingly, the Division requests 65 civil attorney FTE and 11 criminal attorney FTE, for a total of 76 attorney FTE.

In addition, the Division seeks 30 support staff FTE, based on the following ratios of support staff to attorneys, developed in conjunction with the Division's 1997 restructuring:

	Ratio of Staff to Attorneys	Attorney FTE Requested	Support Staff FTE Requested
Paralegals	1 to 8	76	9.5
Litigation Assistants	1 to 4	76	19.0
Administrative Support			1.5
Total			30.0

The Forgotten Goal of Civil Justice: A Foundation for Common Sense in Daily Life

by Philip K. Howard

The debate over civil justice in recent decades has focused on its fairness. Tort reformers complain of "lawsuit abuse" and "judicial hell-holes."[1] Defenders of the current system talk of the need to protect the little guy against corporate abuses, and extol the jury system as "Democracy in Action."[2]

In this paper I argue that civil justice has a broader goal than fairness: to provide a foundation for reasonable choices in a free society. The main defect in the current system is not that juries are unfair or that there is an avalanche of litigation -- about which there is sharp disagreement[3] -- but that law does not offer predictable guidelines of who can sue for what. The system of justice offers recourse not only against abusive and negligent conduct, but also against

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[1] *See* American Tort Reform Association, *Judicial Hellholes: 2004*, December 15, 2004, available at http://www.atra.org/reports/hellholes/report.pdf.

[2] Senator John Edwards, "Juries: Democracy in Action," *Newsweek*, December 15, 2003, p. 53.

[3] *See* Marc S. Galanter, *The Day After the Litigation Explosion*, 46 Md. L. Rev. 3, 4 (1986); *See also*, John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 Cornell L. Rev. 990 (1995), Arthur R. Miller, *Maybe Light at the End of the Tunnel: is the Litigation Explosion Imploding?*, 61 Def. Couns. J. 378 (1994), Marc S. Galanter, *News From Nowhere: The Debased Debate on Civil Justice*, 71 Denv. U. L. Rev. 77 (1993), Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641 (1987); arguing that there has been an avalanche of litigation, see Walter Olson, The Litigation Explosion: What Happened When America Unleashed the Lawsuit (1991); Brian J. Ostrom, Neal B. Kauder, and Robert C. LaFountain, eds., *Examining the Work of State Courts, 2002: A National Perspective from the Court Statistics Project* (National Center for State Courts, 2003) (All civil claims increased 23% between 1987 and 2001. Tort claims, a subset of civil claims, declined 9% since 1992 because traffic claims, which make up the bulk of tort claims, declined 14% during that period. The decline in traffic claims is attributable to the rise of no-fault insurance and other reforms designed to reduce the volume of those claims. Between 1975 and 2002, all tort claims increased a total of 38%, including the 9% decrease since 1992.)

conduct that most people consider reasonable. Civil justice tolerates, and arguably encourages, inconsistent verdicts for similar disputes. The law offers few guidelines on standards of care or on the potential exposure when there is a dispute.

Civil justice has changed markedly in 40 years.[4] These changes can be traced in part to a shift in judicial philosophy: whatever authority judges believed they held withered with the rise of the "legal process" movement in the 1960s, in which their role was reconceived as one of a neutral referee.[5] The effect was not to achieve neutrality, however, but to leave a vacuum. That vacuum has been filled by an ever-broadening range of private legal claims and threats, giving rise to a lawsuit culture in which ordinary interaction is now weighed down by legal considerations.

The main harm to society is not the total cost of verdicts, but that Americans no longer feel free to act reasonably. Legal fear has infected the culture. Paranoid doctors focus on avoiding lawsuits.[6] Recreational activities are cancelled.[7] Teachers have trouble maintaining

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[4] *See* Philip K. Howard, The Collapse of the Common Good at 3-70 (2001); *See also* George L. Priest, *The Culture of Modern Tort Law*, 34 Val. U. L. Rev. 573 (2000) (discussion of the recent changes in tort law), George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Legal Stud. 461 (1985) , Lawrence Friedman, Total Justice (1985)

[5] *See* Charles E. Wyzanski, Jr., *Equal Justice Through Law*, 47 Tulane L. Rev. 951, 959 (1973) (Representative of the prevailing opinion in the 1970s, Federal judge Wyzanski stated "Choosing among values is much too important a business for judges to do the choosing. That is something the citizens must keep for themselves"), Michael Sandel, Democracy's Discontent: America in Search of a Public Philosophy 77 (1996) (Describing that the point of justice became to "respect people's freedom to choose their own values."); *See also* Eric Foner, The Story of American Freedom 293 (1998) (Describing "a massive redefinition of freedom as a rejection of all authority", a contributing factor to the doctrinal shift).

[6] See e.g. David M. Studdert, Michelle M. Mello, William M. Sage, et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293 J. Am. Med. Ass'n 2609 (2005); Louis Harris and Associates, *Fear of Litigation Study: The Impact on Medicine*, New York, NY: Common Good (2002), available at http://cgood.org/assets/attachments/57.pdf.

[7] See e.g. Louv, Richard, *Last Child in the Woods: Saving Our Children from Nature-Deficit Disorder* (Algonquin Books) April 15, 2005; "More Green, Less Screen," Interview with Richard Louv, *People Magazine*, June 13, 2005; "For All Who Have Never Climbed a Tree," Marilyn Gardner, *Christian Science Monitor*, May 24, 2005; "Nature

order.[8] Volunteerism is chilled.[9] Because of legal threats, and fear of possible claims, common institutions such as hospitals and schools are increasingly difficult to manage.[10]

Deficit," Kevin O'Connor, *Rutland Herald*, May 1, 2005; "Playtime is Over," *Dallas Morning News*, March 3, 2005; "Old Rockets Fate is Up in the Air," Doug Grow, *Minneapolis Star Tribune*, November 29, 2004 ("[S]wings don't reach the sky as they once did. Slides, too, have changed in height and slope. Teeter-totters are gone."); "Playground Safety Left Up to Schools," Bob Kasarda, *The Northwest Indiana Times*, September 24, 2004 ("The wooden equipment that was popular a couple of decades ago has been replaced by a variety of low-lying metal equipment covered in rubber. ... Slides are now shorter and covered, gaps in the equipment have been narrowed to prevent children from placing their heads into openings and all swings have been removed."); "Cannonball!" Field Maloney, *The New Yorker*, August 30, 2004 ("After a golden age in the seventies--a decadent, late-Roman last hurrah--the American pool has suffered a gradual decline: thanks, for the most part, to concerns about safety and liability, diving boards have been removed and deep ends undeepened. At municipal pools across the country, the once-ubiquitous one-metre springboard has become an endangered species; and the three-metre high dive--the T. rex of the community pool--is now virtually extinct."); "Recess Gets Regulated," Sandy Louey, *Sacramento Bee*, August 22, 2004; "Extreme Cheerleading: How Schools Grapple with New Risks," Kris Axtman, *Christian Science Monitor*, June 24, 2004.

[8] See Arum, Richard, *Judging School* Discipline (Harvard, 2003); Public Agenda, "Teaching Interrupted: Do Discipline Policies in Today's Public Schools Foster the Common Good?" New York, NY: Common Good (May 2004), available at http://cgood.org/assets/attachments/22.pdf; Public Agenda, "'I'm Calling My Lawyer': How Litigation, Due Process and Other Regulatory Requirements Are Affecting Public Education," New York, NY: Common Good (November 1, 2003), available at http://cgood.org/assets/attachments/96.pdf.

[9] See e.g. "$17 Million Verdict Has Many Concerned," Derrick Nunnally, *Milwaukee Journal-Sentinel*, February 23, 2005; "Charity Case," Philip K. Howard, *The Wall Street Journal*, March 17, 2005; "Teams Offer Help on Parks," Rachel Gordon, *San Francisco Chronicle*, April 29, 2005 (The City of San Francisco is afraid to use volunteers to help fix softball fields because of "liability concerns—liability concerns—what happens if someone throws out their back patching the gopher holes in the outfield and decides to sue the city?"); "County Tells Bicyclist Thanks, but Stop Plowing Trail," Garrett Ordower, *Daily Herald (IL)*, February 21, 2004. On doctors volunteering, see e.g. Kapp, Marshall B., *Our Hands Are Tied: Legal Tension and Medical Ethics* (Westport: Auburn House, 1998), p. 43 ("Other examples of fear of malpractice litigation include 'physicians failing to stop and render aid in emergency situations despite the existence of Good Samaritan statutes in every jurisdiction that immunize physicians against liability, and the fact that no physician in the United States has ever been successfully sued for rendering emergency aid as a Good Samaritan."); "Report: Aid Needed for Clinics," Kerra L. Bolton, *The Asheville Citizen-Times*, April 27, 2005; "Paving the Way for Good Samaritans," Andy Miller, *The Atlanta Journal-Constitution*, March 12, 2005.

[10] For hospitals see e.g., Louis Harris and Associates, *Fear of Litigation Study: The Impact on Medicine*, New York, NY: Common Good (2002), available at http://cgood.org/assets/attachments/57.pdf; Linda T. Kohn, Janet Corrigan, et al., eds., *To Err is Human: Building a Safer Health System* (Washington, DC: National Academy Press, 2000) p. 43, http://www.nap.edu/books/0309068371/html/ ("Patient safety is also hindered through the liability system and the threat of malpractice, which discourages the disclosure of errors. The discoverability of data under legal proceedings encourages silence about errors committed or observed. Most errors and safety issues go undetected and unreported, both externally and within health care organizations."); "Two-Thirds of Emergency Departments Report On-call Specialty Coverage Problems," American College of Emergency Physicians, *Press Release*, September 28, 2004; "Emergency Departments Face Shortage of Specialty Care," Mary Ellen Schneider, *eObGyn News*, June 16, 2005 ("Obstetricians are among the specialists who are reluctant to take call because of the liability risks involved. ... Even if physicians are compensated for taking call, it's not enough to cover the related malpractice

The solution I propose is not to set arbitrary limits on lawsuits but to shift responsibility back to judges to decide, as a matter of law, the boundaries of reasonable claims. To re-instill the public trust in civil justice, judges need to provide people with a sense of who can sue for what.

The authority of judges to assert social norms, although rarely discussed today, is well-established in common law jurisprudence, and was the central theme of those we hold up as lions of the common law, such as Oliver Wendell Holmes, Jr. and Benjamin Cardozo. [11]

The question of what should be decided by a judge versus a jury, in truth, did not matter much until recent decades. Under prevailing social mores, it didn't occur to people to sue for ordinary accidents or workplace disagreements. But now that perception has radically changed: any disagreement or accident is a potential lawsuit.

The need to reassert judicial authority is not a matter of abstract preference for a particular judicial philosophy. The need to reassert judicial authority is profoundly practical: Because Americans no longer trust civil justice, they have lost their freedom to make reasonable daily choices.

LcCivil Justice as the Foundation for Reasonable Choices

insurance costs. The risks incurred far exceed any payment provided."). For schools see e.g., Public Agenda, "Teaching Interrupted: Do Discipline Policies in Today's Public Schools Foster the Common Good?" New York, NY: Common Good (May 2004), available at http://cgood.org/assets/attachments/22.pdf; Louis Harris and Associates, "Evaluating Attitudes Toward the Threat of Legal Challenges in Public Schools," New York, NY: Common Good (March 10, 2004), available at http://cgood.org/assets/attachments/11.pdf; Public Agenda, "'I'm Calling My Lawyer': How Litigation, Due Process and Other Regulatory Requirements Are Affecting Public Education," New York, NY: Common Good (November 1, 2003), available at http://cgood.org/assets/attachments/96.pdf; Common Good, "The Effects of Law on Public Schools," Washington, DC, compiled for a forum entitled "Is Law Undermining Public Education?" (November 5, 2003), available at http://cgood.org/assets/attachments/10.pdf; Arum, Richard, *Judging School Discipline* (Harvard, January 2003) ; Gerald Grant, *The World We Created at Hamilton High* (Harvard, April 1998).

[11] See, Oliver Wendell Holmes, Jr., The Path of Law, 10 Harv. L. Rev. 457 (1897). *Quoted* at nt. 69; Benjamin Cardozo, The Nature of Judicial Process 134 (Yale University Press 1921). "What really matters is this, that the judge is under a duty... to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience."

Civil justice is conceived today primarily as a dispute resolution mechanism. But civil justice also has a broader goal -- as the foundation for reasonable choices in a free society. Holmes stated that, "the first requirement of a sound body of law" is to uphold reasonable community norms. [12]

Lawsuits do not affect just the named parties to the litigation but, frequently, "the interests of society in general."[13] Derek Bok, former Harvard President and Law School Dean, observed that lawsuits "often have their greatest effect on people who are neither parties to the litigation nor even aware that it is going on." [14] The news last year that someone received a large verdict in a sledding accident had the natural effect of causing other towns to declare that they no would no longer permit winter sports on town property. [15] No court, however, made a ruling that sledding is an unreasonable risk. Who is representing the interests of the citizens who want to enjoy winter sports?

Our system of law is considered the foundation of a free society not because it allows claims over any disagreement to go to a jury, but because it sets forth legal duties that provide the guideposts defining the scope of our freedom. People feel free to interact reasonably

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[12] *Quoted in* Howard, *supra* note ___ at 54 (2001)

[13] See Prosser and Keeton on *The Law of Torts* (5th ed. 1984): [T]he twentieth century has brought an increasing realization of the fact that the interests of society in general may be involved in disputes in which the parties are private litigants."

[14] Derek Bok, *Law and Its Discontents: A Critical Look at Our Legal System*, 37th Annual Benjamin N. Cardozo Lecture, November 9, 1982, reprinted in *The Record*, January/February 1983, at 21

[15] See "Town's Downhill Pastime May Face an Uphill Fight," Patrick Healy, *The New York Times*, April 26, 2004; "Sledders Are Finding it Tough to Hit the Slopes," Christine Schiavo, *Philadelphia Inquirer*, January 26, 2005; "Where Sledders Head," Mark Shaffer, *Arizona Republic*, January 9, 2005; "This Winter, Sledders Finding it a Tough Go," David Rattigan, *Boston Globe*, January 6, 2005; "Citing Risk, Golf Clubs Look to Ban Sledding," Emily Sweeney and Douglas Belkin," Boston Globe, January 2, 2005; "Column: Liability, Litigation Make Sled Tracks Disappear," Taylor Armerding, *Gloucester Daily Times*, December 28, 2004.

with others because the system of law will put criminals in jail, enforce contracts by their terms, and require a negligent person to compensate the person injured. Civil law protects the good as well as prosecutes the bad: citizens in a free society should be confident that if they act reasonably, their freedom to do so will be defended. As long as you act within those guideposts, you are free: free to follow your star and act on your instincts simply because you choose to.[16]

The rule of law does not seek to maximize possible legal claims -- as one observer noted, "America did not sue its way to greatness"[17] -- but to define legal duties in a way that promotes our freedom. "The end of law," John Locke said, "is not to abolish or restrain, but to preserve freedom."[18]

Today, at least in areas such as tort law, America's civil justice system is not providing these guideposts of right and wrong. There exists a widespread perception, generally accurate, that any injured or angry person can haul another person into court over any accident or disagreement and put that claim to a jury.LC There is also a perception that the amounts for which people may sue, if not unlimited, are subject to amorphous guidelines and few limits.

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[16] Prosser and Keeton note that an essential aspect of freedom is being free from "restraint and ...undue consideration for the interests and claims of others." See Prosser and Keeton, supra:

> Individuals have many interests for which they claim protection from the law, and which the law will recognize as worthy of protection...Individuals wish to be secure in their persons against harm and interference, not only as to their physical integrity, but as to their freedom to move about and their peace of mind. They want food and clothing, homes and land and goods, money, automobiles and entertainment, and they want to be secure and free from disturbance in the right to have these things, or to acquire them if they can. They want freedom to work and deal with others, and protection against interference with their private lives, their family relations, and their honor and reputation. They are concerned with freedom of thought and action, with opportunities for economic gain, and with pleasant and advantageous relations with others. The catalogue of their interests might be as long as the list of legitimate human desires; and not the least of them is the desire to do what they please without restraint and without undue consideration for the interests and claims of others.

[17] Discussion with Daniel Popeo, President, Washington Legal Foundation.

[18] John Locke, Second Treatise of Civil Government § 57 (Peter Laslett ed., 1967)(1690).

The operating assumption of current legal orthodoxy is that the availability of a lawsuit encourages people to act reasonably. Indeed, by making people potentially liable for their negligence, law provides incentives for reasonable conduct. What people seem to have forgotten is that the converse is also true: Allow lawsuits against reasonable behavior and pretty soon people no longer feel free to act reasonably.

An "open season" conception of justice has enormous appeal if people are thinking of getting back at others or looking for comfort in blaming others, but it also has infected daily interaction in society with distrust. People understand, as Professor Robert Kagan observed, that this sue-for-anything approach to justice "can be used against the trustworthy, too. An equal opportunity weapon, it can be invoked by the misguided, the mendacious, and the malevolent, as well as by the mistreated."[19]

The ultimate test of a system of justice, Justice Cardozo suggested, is how people feel about it.[20] By that standard, civil justice is not only a failure, but is actively tearing at the fabric of our society.

Distrust of Justice and Social Decline

In almost every area of social interaction, Americans no longer feel free to act reasonably. The effects of this distrust have been subject of extensive studies in healthcare, which have concluded that the legal system is a prime contributor to the crisis of cost and quality. Doctors and nurses no longer feel comfortable acting on their best judgment or being candid with

[19] *See* Robert A. Kagan, Adversarial Legalism: The American Way of Law (2003)

[20] *See* Benjamin Cardozo, The Nature of Judicial Process 89 (Yale University Press 1921). Asserting that justice is, "not what I believe to be right. It is what I may reasonably believe that some other man of normal intellect and conscience might reasonably look upon as right."; *See also,* Archibald Cox, The Role of the Supreme Court in American Government 110 (New York: Oxford University Press, 1976), Observing that, for law to be effective, it "must meet the needs of men and match their ethical sensibilities."

each other.

- It is the ubiquitous practice of physicians to order tests that they do not believe are medically necessary, driving up the costs of healthcare.[21] Defenders of this practice say that more tests mean better healthcare, but 45 million Americans lack health insurance in part because individuals and small businesses cannot afford healthcare premiums that have skyrocketed.[22]
- Health care expenditures per person are projected to reach $6,477 per person in 2005. U.S. spending per person is "just over" double that of persons in Canada, France, Germany, Italy, Japan, and the United Kingdom.[23]
- The Institute of Medicine has concluded that "patient safety is also hindered through the liability system and the threat of malpractice."[24] Doctors are scared to

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[21] The United States spends a greater percent of gross domestic product on health care than any other major industrialized nation. American healthcare now costs almost twice as much as that in other Western countries. In 2001, the United States spent 14.1 percent of the GDP on health care. This translates to $1.4 trillion, up 8.7 percent from 2000. ("Highlights from Health Tables and Chartbook," Health, United States 2003, National Center for Health Statistics, Centers for Disease Control, http://www.cdc.gov/nchs/products/pubs/pubd/hus/highlits.pdf.) More tests do not correlate positively with better outcomes. See "Should You Be Tested for Cancer___"

[22] U.S. Census Bureau, "Income, Poverty, and Health Insurance Coverage in the United States: 2003," August 2004, http://www.census.gov/prod/2004pubs/p60-226.pdf

[23] Sager, Alan and Deborah Socolar, "Health Costs Absorb One Quarter of Economic Growth, 2000-2005," Boston University School of Public Health: Health Reform Program Data Brief No. 8, February 9, 2005, pp. 11, 14, available at http://dcc2.bumc.bu.edu/hs/Health%20Costs%20Absorb%20One-Quarter%20of%20Economic%20Growth%20%202000-05%20%20Sager-Socolar%207%20February%202005.pdf, citing data from the Centers for Medicare and Medicaid Services, "National Healthcare Expenditures Projections, 2005-1013," February 6, 2004, available at http://www.cms.hhs.gov/statistics/nhe/projections-2003/highlights.asp; Stephen Heffler, Sheila Smith, et al., "Health Spending Projections through 2013," *Health Affairs* web exclusive, February 11, 2004, available at http://content.healthaffairs.org/cgi/content/full/hlthaff.w4.79v1/DC1; and Organization for Economic Cooperation and Development, *OECD Health Data 2004*, 1st Edition, available at http://www.oecd.org/document/16/0,2340,en_2649_34631_2085200_1_1_1_1,00.html.

[24] Linda T. Kohn, Janet Corrigan, et al., eds., *To Err is Human: Building a Safer Health System* (Washington, DC: National Academy Press, 2000) p. 43, http://www.nap.edu/books/0309068371/html/

be candid with each other, leading to unnecessary and often tragic errors. They avoid using email because it leaves a written record. They are reluctant to admit fault even in cases of near misses, where no harm is done to the patient.

- In a 2002 Harris Poll, 78% of physicians admitted ordering unnecessary tests and 94% said that other physicians did.[25] A recent survey in Pennsylvania found that 93% reported practicing defensive medicine, and 92% reported ordering unneeded tests and diagnostic procedures and making unnecessary referrals.[26]
- The legal system makes it difficult to hold bad doctors accountable. Doctors who make mistakes can drag out litigation for years, often compelling an unfair settlement. Inept doctors often successfully avoid efforts to revoke their licenses by hiring a lawyer and threatening to sue for defamation.

LcDistrust of the legal system has transformed public schools. Teachers struggle to maintain order in the classroom because they face threats of being dragged into hearings. The degradation of the school culture, as described by Prof. Richard Arum in his book, *Judging School Discipline*, is linked to requirements to "prove" the correctness of decisions in an adversarial proceeding.[27] The disrespect accorded teachers is shocking. Polls and focus groups show that educators will do almost anything to avoid the unpleasantness of legal hearings. In

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[25] Louis Harris and Associates, *Fear of Litigation Study: The Impact on Medicine*, New York, NY: Common Good (2002), available at http://cgood.org/assets/attachments/57.pdf

[26] David M. Studdert, Michelle M. Mello, William M. Sage, et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293 J. Am. Med. Ass'n 2609 (2005)

[27] *See generally* Arum *supra* note ___; *See also* Public Agenda, "Teaching Interrupted: Do Discipline Policies in Today's Public Schools Foster the Common Good?" New York, NY: Common Good (May 2004), available at http://cgood.org/assets/attachments/22.pdf; Public Agenda, "'I'm Calling My Lawyer': How Litigation, Due Process and Other Regulatory Requirements Are Affecting Public Education," New York, NY: Common Good (November 1, 2003), available at http://cgood.org/assets/attachments/96.pdf .

America today, teachers will not put an arm around a crying child for fear of being sued for an unwanted sexual touching. LC

Recreation has been transformed. Playgrounds have been stripped of anything athletic—for example, jungle gyms and even seesaws. Playgrounds are so boring, according to some experts, that no child over the age of four wants to go in them.[28] I was on a panel convened by Health Secretary Tommy Thompson in 2002, at which a group of experts concluded that re-instilling a culture of physical fitness was essential in order to address the surge in childhood obesity. Forty years ago, JFK's President's Council on Youth Fitness, with the same goal, called for installing monkey bars and other athletic equipment in playgrounds. Now, because of fear of liability, they've largely been ripped out.

Many other ordinary aspects of growing-up have disappeared. Lakes were closed to swimming as the word got out that you might get sued. Field trips are cancelled.[29] 'Recently, a school in Brooklyn had their beach day near Coney Island—the children were prohibited from going in the water for fear that someone might be liable if there were an accident.[30] A new book,

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[28] See e.g., Howard *supra* note ___ at 3-4 ("The new equipment is so boring, according to Lauri Macmillan Johnson, a professor of landscape architecture at the University of Arizona, that children make up dangerous games, like crashing into the equipment with their bicycles."); "More Green, Less Screen," *People Magazine,* June 13, 2005 (Child and nature advocate Richard Louv says playgrounds are "being designed to avoid lawsuits, so many of them are quite boring to kids."); "Playtime is Over," *Dallas Morning News*, March 3, 2005; "Old Rockets Fate is Up in the Air," Doug Grow, *Minneapolis Star Tribune*, November 29, 2004 ("[S]wings don't reach the sky as they once did. Slides, too, have changed in height and slope. Teeter-totters are gone."); "Playground Safety Left Up to Schools," Bob Kasarda, *The Northwest Indiana Times*, September 24, 2004 ("The wooden equipment that was popular a couple of decades ago has been replaced by a variety of low-lying metal equipment covered in rubber. ... Slides are now shorter and covered, gaps in the equipment have been narrowed to prevent children from placing their heads into openings and all swings have been removed.").

[29] See e.g. "Safety Always an Issue on School Trips," Martha Irvine, *The Associated Press*, June 11, 2005; "Dealing with the Dresden Deficit a Challenge," Lynne Jeter, *Mississippi Business Journal*, March 7, 2005 ("[S]ome schools were not taking as many field trips due to discipline problems or liability concerns."); Gerald S. Cohen, "Schools Cancel Field Trips — Fear of Suits, *San Francisco Chronicle*, August 30, 1989.

[30] Conversation with Franklin Stone.

Last Child in the Woods, addresses the cost to society when children lose the experience of spontaneous play and exploration.[31]

Business life has been transformed in many ways. "Foreign businessmen express amazement," Derek Bok observed, at "a system that exposes the entrepreneur to legal challenge so easily and on so many fronts, a system that lends itself so readily to harassment, obstruction, and delay."

It is the regular practice of firms, including my own law firm, not to give references for fear of liability. Last year, a nurse admitted to killing 42 people in hospitals in New Jersey and Pennsylvania but continued to get rehired because no one would give him a bad reference. The hospitals did not know he was a murderer, but each knew that he was a troubled person and an ineffective nurse, and fired him. But when the nurse applied for a job at a hospital down the road, the prior employer would not give a negative referral, but only confirm his prior employment. As one hospital administrator admitted, "we're prevented from telling one another what we know out of fear, quite frankly, of being sued."[32]

Symptoms of the distrust of justice are all around us. Warning labels are found on virtually every product. Billions of coffee cups contain the helpful legend "Caution: Contents are Hot." A recent winner of the annual "wacky warning" contest was a 5-inch fishing lure with the following legend: "Harmful if Swallowed."[33] The warnings cost little or nothing, apologists say. But that's not correct either. When every product has a warning, the effect is a version of the

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[31] Louv, Richard (Algonquin Books) April 15, 2005

[32] "Hospitals Didn't Share Records of a Nurse Accused in Killings," Richard Perez-Pena, *The New York Times*, December 17, 2003; see also "Would You Hire this Man?," *Christian Science Monitor*, March 1, 2004

[33] M-LAW, "Past Winners of M-Law's 'Wacky Warning Label' Contest," http://www.mlaw.org/wwl/pastwinners.html

child crying wolf -- consumers are less likely to pay attention to the warnings that really matter.

In almost all areas of social interaction -- hospitals, schools, recreation, child-rearing activities, even churches and synagogues -- Americans no longer feel comfortable acting on their reasonable judgment. The reason, polls confirm, is distrust of American Justice. A new Harris Poll, commissioned for this conference, found the following:

- 76% of Americans strongly or somewhat agree that people have become so fearful of frivolous lawsuits that they are discouraged from performing normal activities. [34]
- 83% of Americans strongly or somewhat agree that the system of justice makes it too easy to make invalid claims. [35]
- 94% strongly or somewhat agree that there is a tendency for people to threaten legal action when something goes wrong.[36]
- 16% trust the legal system if someone makes a baseless claim against them.[37]

The lack of confidence in civil justice is echoed in numerous other polls. [38] In a

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[34] Louis Harris and Associates, *Public Attitudes Toward the Civil Justice System*, New York, NY: Common Good (2005)

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *See* Stephen S. Meinhold & David W. Neubauer, *Exploring Attitudes About the Litigation Explosion*, 22 Just. Sys. J. 105 (2001); Indiana University Public Opinion Laboratory, *How the Public Views the State Courts: a 1999 National Survey*, Williamsburg, VA: National Center for State Courts & The Hearst Corporation, presented at the National Conference on Public Trust and Confidence in the Justice System (1999); David Neubauer & Stephen S. Meinhold, *Too Quick to Sue? Public Perceptions of the Litigation Explosion*, 16:3 Just. Sys. J. 1 (1994); Gary A. Hengstler, *The Public Perception of Lawyers: ABA Poll*, 79-SEP A.B.A. J. 60 (1993); Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 Law & Soc'y Rev. 85 (1992); Tom R. Tyler, Why People Obey the Law (1990); Louis Harris and Associates, *Public Attitudes Toward the Civil Justice System and Tort Law Reform*, Hartford, CT: Aetna Life and Casualty Company (1987); Darlene Walker et al., *Contact and Support: An Empirical Assessment of Public Attitudes Toward the Police and the Courts*, 51 N.C. L. Rev. 44 (1972-1973)

1999 public opinion survey commissioned by the National Center for State Courts, for example, only 23% of the respondents had a great deal of trust in the court system.[39] American courts were ranked below most institutions.[40] Only the media and the state legislature were ranked worse.[41]

Defenders of our system of justice say that Americans are irrational, and that the crisis has been manufactured (i) by irresponsible media that makes headlines of occasional rogue jury verdicts and (ii) by a calculated scare campaign of tort reformers. It's correct that the media emphasizes anything that might shock or titillate the public.[42] This bad habit has been observed in the media since colonial days, and, in the land of the First Amendment, it is hard to know what to do about it. It is correct also that reformers have gone of the stump to tell the public that the litigation system is unfair.[43]

By far the biggest promoters of "jackpot justice," however, are the plaintiff's lawyers.LC One need only look through the Yellow Pages, or look at billboards, or listen to AM radio, to be barraged by lawyer advertisements encouraging Americans to believe that they can

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[39] Indiana University Public Opinion Laboratory, *supra* note ___ at 12.

[40] *Id.*

[41] *Id.*

[42] *Cf.* James Fallows, *Why Americans Hate the Media*, The Atlantic Monthly, Feb. 1996 (criticism of the media's tendency to sensationalize), H. L. Mencken, A Gang of Pecksniffs: and Other Comments on Newspaper Publishers, Editors, and Reporters (1975)

[43] See e.g. Common Good, "Is the Legal System Broken?" *The New York Times* and *The Washington Post*, December 26, 2005 ("[S]tandards today are changeable from jury to jury. With uncertain legal boundaries, it seems that anyone can sue for almost anything. ... Reform must restore reliability to law."); American Tort Reform Association (ATRA), "About" ATRA website at http://www.atra.org/about/ ("Some astonishing decisions come out of the courts these days. Hundreds of millions in punitive damages piled on top of relatively minor actual damages. Meritless cases settled because defendants fear the outcome of an emotion-filled jury trial or a lawless court. That's why the [ATRA] leads the fight for a better civil justice system--one that's fair, efficient and predictable," says ATRA President Sherman Joyce.); U.S. Chamber of Commerce Institute for Legal Reform (ILR), "About ILR—Who We Are," ILR website at http://www.instituteforlegalreform.com/about/index.html ("Many plaintiffs' lawyers are exploiting flaws in our legal system in search of jackpot justice.")

sue for anything.[44] The unavoidable message of those ads, of course, is that you might be on the receiving end of one of those lawsuits.

There is significant factual dispute over the amount of litigation and the trend in verdicts. The data are notoriously unreliable because fewer than 3% of all cases ever get resolved at trial, and the overwhelming number of claims are settled or disposed of in some other way.[45] Legal threats don't show up in the numbers at all. The best data appear to confirm that the amounts awarded by juries continues to increase and that the number of claims—at least of certain types— is also up.[46]

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[44] A full 77 pages (pp. 535-612) of the 2004-2005 District of Columbia yellow pages is devoted to lawyer advertisements, many with provocative headings like "Whoever said justice had to be fair?", "Injured? Get the money you deserve", and "Millions Recovered". Lawyers do not limit themselves to ads in print; see, for example, a current (June, 2005) ad campaign targeting Washington, D.C. metro riders and internet surfers; available at www.milkmakesmesick.org

[45] Patrick E. Higginbotham, *So Why do we Call them Trial Courts?*, 55 SMU L. Rev. 1405, 1408 (2002) (Noting that although the number of federal civil cases filed rose by 152% between 1970 and 1999, that the number of claims reaching the jury fell by 20%, leaving only 3% of all claims reaching a jury).

[46] *Id. at* 1408., Brian J. Ostrom, Neal B. Kauder, and Robert C. LaFountain, eds., *Examining the Work of State Courts, 2002: A National Perspective from the Court Statistics Project* (National Center for State Courts, 2003) (All civil claims increased 23% between 1987 and 2001. Tort claims (a subset of civil claims) declined 9% since 1992 because traffic claims (which make up the bulk of tort claims) declined 14% during that period. The decline in traffic claims is attributable to the rise of no-fault insurance and other reforms designed to reduce the volume of those claims. Between 1975 and 2002, all tort claims increased a total of 38% (including the 9% decrease since 1992).); Stuart Taylor Jr. and Evan Thomas, "Civil Wars," *Newsweek*, December 13, 2003, p. 48 (Mean jury awards now exceed $1.2 million, up from approximately $600,000 in 1996); Seth A. Seabury, Nicholas M. Pace, and Robert T. Reville, "Forty Years of Civil Jury Verdicts," *Journal of Empirical Legal Studies* Vol. 1 (March 2004), available at http://www.blackwell-synergy.com/links/doi/10.1111/j.1740-1461.2004.00001.x/abs/?cookieSet=1 (Average jury awards tend to be highly variable from year to year, making it difficult to distinguish trends over relatively short periods of time. We use the longest time series of data on jury verdicts ever assembled: 40 years of data on tort cases in San Francisco County, CA and Cook County, IL collected by the RAND Institute for Civil Justice. We find that while there has been a substantial increase in the average award amount in real dollars, much of this trend is explained by changes in the mix of cases, particularly a decreasing fraction of automobile cases and an increase in medical malpractice. Claimed economic losses, in particular claimed medical losses, also explain a great deal of the increase. Although there appears to be some unexplained growth in awards for certain types of cases, this growth is cancelled out on average by declines in awards in other types of cases); On medical malpractice specifically, see Physician Insurers Association of America, *PIAA Claim Trend Analysis: 2003 ed.* (2004), cited in American Medical Association, "Medical Liability Reform—NOW," June 14, 2005, available at http://www.ama-assn.org/ama1/pub/upload/mm/-1/mlrnowjune142005.pdf (The median medical liability jury award in medical liability cases nearly doubled from 1997 to 2003, increasing from $157,000 to $300,000. The average award

As a matter of probabilities, however, the odds of being sued and then losing before a jury are remote for most Americans.[47] Studies also indicate that, in most cases, juries tend to do a reasonable job.[48] But there is also contrary evidence – especially in tragic circumstances, such as a child injured in an accident or a baby born with birth defects, studies show that juries tend to award huge sums irrespective of fault.[49] ""

Arguing about probabilities of being sued does not take into account the reality of human nature. To feel free to act on their reasonable judgment, people seem to need clarity[50] --

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increased from $347,134 in 1997 to $430,727 in 2002. The growth in settlements has mirrored that of jury awards. Median and average settlements increased from $100,000 to $200,000, and from $212,861 to $322,544 between 1997 and 2002, respectively.); Jury Verdict Research, "Medical Malpractice Jury Award Median Up Slightly," Press Release, April 1, 2004, available at http://www.juryverdictresearch.com/Press_Room/Press_releases/Verdict_study/verdict_study8.html (Median award in medical malpractice cases was $1,010858 in 2002, up from $473,055 in 1996.)

[47] The chances of being sued are significant for physicians in certain specialties: [facts]

[48] *Cf.,* Thomas Munsterman, *How Judges View Civil Juries,* 48 Depaul L. Rev. 247, 249-253 (1998).

[49]In birth-injury cases, juries sided with plaintiffs 60% of the time in 2002, up 34 percent from two years earlier. The median award for childbirth-negligence cases in 2002 was $2.2 million. (Jury Verdict Research, cited in "Doctors Spell Out Risks of Childbirth on Consent Forms," Carol M. Ostrom, *The Seattle Times*, August 9, 2004.) When all malpractice claims are considered, however, plaintiffs win just 1% at trial and lose 4% at trial—with the remaining 95% being settled, dropped or dismissed. (Presentation of Lawrence E. Smarr , Physicians Insurers Association of America, to American College of Surgeons, June 23, 2003, at http://www.facs.org/about/chapters/smarr.pdf.) In large counties in 2001, plaintiffs prevailed in 27 percent of medical malpractice cases. (Bureau of Justice Statistics, "Civil Trial Cases and Verdicts in Large Counties, 2001," April 2004, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc01.pdf.) The median award for all malpractice cases was $425,000 in 2001. (Bureau of Justice Statistics, "Medical Malpractice Trials and Verdicts in Large Counties, 2001," April 2004, p. 1, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/mmtvlc01.pdf) On the correlation between the adverse events, negligence and jury awards, a study of malpractice claims published in the *New England Journal of Medicine* found "no association between the occurrence of an adverse event due to negligence or an adverse event of any type and payment. ... Among the malpractice claims we studied, the severity of the patient's disability, not the occurrence of an adverse event or an adverse event due to negligence, was predictive of payment to the plaintiff." (Troyen A. Brennan, M.D., J.D., M.P.H., Colin M. Sox, B.A., and Helen R. Burstin, M.D., M.P.H., "Relation between Negligent Adverse Events and the Outcomes of Medical Malpractice Litigation," *The New England Journal of Medicine*, Volume 335: 1963-1967, December 26, 1996, Number 26, available at http://content.nejm.org/cgi/content/short/335/26/1963.)

[50] Indeed, researchers have found that people value "decorum, fairness, and *finality* in decision-making". David B. Rottman, *Public Perceptions of the State Courts: A Primer*, 15:3 Ct. Manager 1, 3 (2000) (emphasis added).

for example, if a baseless claim is brought, that the system of justice will affirmatively protect them. Economic theorists were wrong, as it turns out, that people are rational actors. In the face of uncertainty, individuals often give disproportionate weight to risk—psychologists Daniel Kahneman and Amos Tversky famously explained this phenomenon as the "overweighting of low probabilities."[51]

This theory helps to explain why people think about sharks before swimming in the ocean, even though chances of being bitten are negligible.[52] The prospect of litigation is a similarly horrifying fear, and there are many more potential plaintiffs in our immediate daily lives than there are sharks. Many doctors, for example, say that they view every patient as a potential plaintiff. Americans understand that one injured or disappointed person can unilaterally drag you through a legal process for years.

The phenomenon of legal fear appears to be that, once people learn that someone was exposed to a lawsuit for some ordinary life activity, that activity becomes a risk to avoid.[53] I could find no court that held that a seesaw was unreasonably dangerous, or that putting suntan lotion on children would subject you to liability, but Americans now understand someone could make the claim.LC That risk is one that Americans increasingly will not take.[54]

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[51] Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 Econometrics 263, 263 (1979).

[52] *See also* Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 Nw. U. L. Rev. 1295 (2003) (discussing the widespread fear and panic resulting from sniper killings in the Washington, D.C. area in the fall of 2002, even though the statistical probability of falling victim to the snipers was quite low)

[53] Donald J. Black, *The Mobilization of Law*, 2 J. Legal Studies 125, 131, n.24 (1973)

[54] As Chief Justice Warren Burger noted almost twenty years ago, there is a "litigation neurosis" developing in "otherwise normal, well-adjusted people". Chief Justice Warren E. Burger, *Isn't There a Bettter Way?*, 68 A.B.A. J. 275 (1982)

What is important is not that the claim reaches an adverse verdict. What seems to be important is that a viable legal claim is available. "An act is illegal," Professor Donald Black once observed, "if it is vulnerable to legal action." By that standard almost any accident or dispute is illegal. Nothing could be easier to come up with a theory of what someone might have done differently and present it to the jury.

Recently, the jury found the Catholic Archdiocese of Milwaukee liable because a volunteer for a Catholic lay organization, driving her own car, ran a red light and caused an accident while delivering a statue of the Virgin Mary to an invalid. Although the church does not direct the meetings of this group, called the Legion of Mary, its meetings are held on church property. The jury decided the Archdiocese should pay $17 million to the paralyzed victim, an 82 year-old man.[55]

Reasonable people can argue about whether volunteer organizations should be liable for the driving of volunteers. But the effect of the case is predictable: there will be a chill on volunteer activities because no one knows the contours of liability. Why take the risk?

Getting Beyond Tort Reform

The debate over "tort reform" in the last two decades has focused not on the effectiveness of justice as the foundation for reasonable daily choices, but whether civil justice achieves fairness in particular cases.[56] As Derek Bok noted 20 years ago, there is a tendency to

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[55] "$17 Million Verdict Has Many Concerned," Derrick Nunnally, *Milwaukee Journal-Sentinel*, February 23, 2005; "$17 Million Verdict against Archdiocese Over Crash Upheld," Steve Schultze, *Milwaukee Journal-Sentinel*, April 19, 2005; see also "Charity Case," Philip K. Howard, *The Wall Street Journal*, March 17, 2005

[56] Those engaged in the current tort reform debate would do well to heed Geoffrey Hazard's advice that "In all law reform it is important to be circumspect about the nature and magnitude of the problems to which reform is to be addressed." Geoffrey C. Hazard, Jr., *Individual Justice in a Bureaucratic World*, 7 Tul. J. Int'l & Comp. L. 73 (1999). To properly tackle the problems in the current system, it is important to take a broader view of the effect of civil justice on society.

concentrate on the "plight of individual litigants and ignore[] the effects on the system as a whole."[57]

Tort reformers talk about the "lawsuit lottery," and point to jurisdictions that are notoriously tilted toward claimants and characterize them as "judicial hell-holes" and "magic jurisdictions" where plaintiffs' lawyers can bring baseless or excessive claims with a high probability of success.[58] The focus throughout is fairness. "Is it fair to get a couple of million dollars from a restaurant because you spilled a cup of hot coffee on yourself?"[59] As the Chamber of Commerce asks on its website, "How fair are your courts?"[60]

Actual reform proposals have not questioned the basic functioning of the system, however. As Professor Robert Kagan put it, tort reform has only "nibbled at the edges."[61] Indeed, many tort reformers have gone out of their way to suggest that the problem can be fixed with a few tweaks: "all it takes is a few of those magic jurisdictions to distort the whole system,"[62] said a representative of the National Association of Manufacturers. "A minor change in procedures—the class action bill now pending before Congress—can make that impossible by

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[57] Bok, *supra* note ____ at 27.

[58] American Tort Reform Association, *supra* note 1.

[59] "Politicians, pundits, and industry leaders replayed endless variations on [this] theme summarized by the national Chamber of Commerce." Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 Duke L.J. 447, 454 (2004) (citing Ralph Nader & Wesley J. Smith, No Contest: Corporate Lawyers and the Perversion of Justice in America 267 (1996)).

[60] See the main page of the U.S. Chamber of Commerce's Institute for Legal Reform (as viewed on June 21, 2005) at http://www.instituteforlegalreform.com/

[61] Robert A. Kagan, *How Much do Conservative Tort Tales Matter? On Haltom and McCann's Distorting the Law.* 33 (6/25/05) (*Unpublished manuscript* on file with Philip K. Howard.)

[62] Wallstreet Week with Fortune, Scruggs/Baroody Debate, aired Jan. 28, 2005, *available at* http://www.pbs.org/wsw/tvprogram/20050128.html.

driving those kinds of mass claims into federal court."[63] (That legislation—the Class Action Fairness Act of 2005—was passed earlier this year.)

The medical profession has thrown its energy into an effort to "cap" non-economic damages at $250,000. If ever enacted, this would certainly moderate malpractice insurance premiums. But doctors acknowledge that "caps" do little to alleviate the extreme distrust that doctors harbor towards the system. For example, limiting damages awarded for pain and suffering is of little help to an obstetrician who could not have caused a baby's birth defects but is nonetheless found liable for millions of dollars of "economic" damages representing a lifetime of care.[64]

Where tort reformers see the system as rigged by trial lawyers, opponents of reform portray tort reformers as special interests trying to rig the system their way. Joanne Doroshow, a founder of the Center for Justice and Democracy, put it this way: "there has been an increase in efforts to eviscerate the civil justice system and make sure corporations do not get sued for anything they do wrong." [65]

Opponents of tort reform also focus on fairness, which they define as the right to have every case decided by a jury. Robert S. Peck, the head of the Center for Constitutional Litigation, extols the virtues of modern civil justice this way:

> There, an individual, neither wealthy nor well-connected, can haul a huge multinational conglomerate into court and hold it

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[63] That class action legislation was passed earlier this year. *Id. [CITATION]*

[64] No tort reform of which I am aware address the reliability of justice. A majority of states have passed laws that limit defendant's exposure in personal injury actions; for example, by limiting non-economic damages or joint and several liability. But these citizens in take states still seem to distrust the system of justice.

[65] Justice For all: Speaking Truth to Power, 40-JUL Trial 20 (2004).

accountable for its wrongful and harmful actions.[66]

"I trust the jury system and I trust the American people and their common sense," as trial lawyer Richard Scruggs put it, "far more than the National Association of Manufacturers to protect the American public."[67]

The focus on fairness has proved unproductive on many levels. In any given case, the question of fairness can easily be argued either way. Take the McDonald's hot coffee case, the poster child of "lawsuit abuse." There, an elderly woman was badly burned when she put her coffee cup between her legs, and it spilled as her daughter drove away from the drive-through window. That's her fault, it's easy to say. On the other hand, McDonald's coffee was brewed - 20 degrees hotter than other restaurants, and hundreds of people had complained over the years. McDonald's countered by arguing that hot coffee brews better and stays warm longer—with annual sales of over one billion cups, McDonald's hot coffee enjoys a significant measure of market acceptance. But why should the drive-in window sell coffee that's so hot? Why not, aren't drivers grown up?

Arguing about fairness quickly turns into a version of a playground spat. (Yes, it is. No, it isn't.) This is, more or less, the state of the tort reform debate. Tort reformers talk about the need to limit frivolous lawsuits. Who can be against that? Defenders of the system

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[66] Robert S. Peck, *Tort Reform's Threat to an Independent Judiciary*, 33 Rutgers L.J. 835, 838 (2002).

[67] Wallstreet Week with Fortune, Scruggs/Baroody Debate, aired Jan. 28, 2005, *available at* http://www.pbs.org/wsw/tvprogram/20050128.html. The populist rhetoric by trial lawyers about "trust the American people" doesn't seem quite accurate. As Walter Olson recounts in vivid detail in "The Rule of Lawyers" (Truman Talley/St. Martin's 2003) entrepreneurial lawyers practice discrimination overtly; manuals explain that Mexican Americans are "passive" and "Orientals tend to go along with the majority." The plaintiff lawyers use focus groups to figure out which juries would be most sympathetic to their arguments. In the silicone breast implant cases, for example, they discovered that blue collar men who like big bosoms would be most likely, out of guilt, to return verdicts for the plaintiffs. cite.

talk about protecting the little guy against corporate wrongdoers. Who can be against that?

Any functional system of civil justice, of course, should accomplish both goals: it should reliably get rid of frivolous lawsuits, and it should also effectively protect the little guy against a corporate wrongdoer. What's missing in the debate is any coherent vision of how a system of justice should work. The impact of justice on the workings of a society is only touched on tangentially. Plaintiffs' lawyers often assert that lawsuits serve a "regulatory function." But it's hard to identify the regulatory rule when results vary from case to case, 'the trial lawyers simply assume (contrary to substantial evidence)LC[68] that the more exposure to liability, the better people will behave.

While both sides can endlessly argue about the fairness of the current system, it is hard to argue the fact that Americans distrust justice and, as a result, no longer feel free to act on their reasonable judgment. The key question is how to fix the system.

The Responsibility of Judges vs. Juries.

> *Ad questionem facti non respondent judices . . .*
> "Judges do not answer questions of fact..."
>
> *...ad questionem juris non respondent juratores.*
> "...jurors do not answer questions of law."
>
> Sir Edward Coke, Commentary on Littleton 460 (J. H. Thomas ed., 1818).

Just as both sides to the tort reform debate have focused on fairness rather than the broader effects of civil justice on society, so too have they assumed that juries, not judges, have the responsibility of deciding whether conduct constitutes negligence or an unreasonable risk. Under current judicial orthodoxy, judges believe they should lean over backwards to put every

[68] cites from medical area

case to a jury. One standard often quoted is *Conley v. Gibson*, 355 U.S. 41 (1957) admonishing lower courts not to dismiss any claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to recover."[69]

Any effort at legal reform is routinely resisted as trespassing on the constitutional right of trial by jury. **[quote from plaintiff's lawyer.]** But the role of the civil jury is generally misunderstood and, to the public, probably confused with the jury's role in criminal cases. In criminal prosecutions, juries play a critical role as our protection against the abuses of government power. Juries are our defense against state coercion: no one can be convicted to jail unless a jury decides they're guilty. But in a civil case, where citizens can use the justice system as an offensive weapon, the role of the jury depends upon whether the issues should be determined as a matter of law or as a matter of disputed fact.

The Seventh Amendment, which states that the "right of trial by jury shall be preserved," underscores this fact-law distinction. It defines the civil jury right as applying to "suits in common law" and ends by saying that "no fact tried by a jury shall be otherwise reexamined...than according to the rules of the common law."[70] Judges declare the standards of law that affect all of society; juries find disputed facts in the particular case.[71]

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[69] Conley v. Gibson, 355 U.S. 41, 45 (1957).

[70] U.S. Const. amend. VII. "In suits in common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

[71] Arthur Miller, *The Pretrial Rush to Judgment: are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1083 (2003). (Positing that an issue that "involves the resolution of principles generally applicable to a class of cases" is a question of law for the judge). *See also* Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 Green Bag 367 (1999) (Commenting that "Marshall the judge seems memorable for his insistence that the courts deal only and impartially with questions of law")

While most lawyers assume today that the Seventh Amendment is an automatic pass to the jury, what constituted a "suit at common law" in 1791 was sharply limited. There was no cause of action for negligence, for example, until judges in the 19th century made rulings creating this new cause of action. Some issues -- say, interpretation of a statute -- are clearly law. Others are clearly issues of fact: "credibility determinations, the weighing of evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."[72]

Determining whether someone acted reasonably involves mixed questions of law and fact. Any claim for negligence, for example, usually involves what is reasonable conduct in the circumstances. The almost universal practice in tort cases is to give the claim to the jury. One study found that courts show "extreme vigilance against treading on contested fact issues or mixes questions of law and fact - even arguable ones - reserving them for evidentiary hearings . . .. This was especially true in cases applying indeterminate legal standards, such as reasonableness."[73] Most courts do not even pay attention to the question of what should be decided as a matter of fact or law.

> There has been ... a strong tendency to let all issues go to the jury without discriminating among them. Judges may see this not only as conventional, but also as convenient, because it reduces judicial effort and the risk of reversal.[74]

The general practice of American courts is summed up by a sign that once hung over the federal courtroom door in New Orleans: "No spitting. No summary judgment."[75]

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[72] Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986)

[73] Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 Marq. L. Rev. 141, 147 (2000), *Quoted* in Miller, *supra* nt. 50 at 1027.

[74] Schwarzer, Hirsch & Barrans, *supra* note 41, at 460.

[75] Steven A. Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 6 Rev. Litig. 263, 264 (1987).

There is a different conception of civil justice that, at least in tort law, would dramatically increase the responsibility of judges. In this tradition, articulated most notably by Oliver Wendell Holmes, Jr., the overriding goal of civil justice is to provide guidance and protection to society as a whole: Instead of acting as referees over a neutral process, judges have the obligation to make rulings of law on legal duty and standards of care. Whether seesaws are a reasonable risk would be determined by the judge as a matter of law.

This approach has been largely lost to our generation and to most probably seems like heresy. But the jurists that we hold up as our leading common law thinkers considered this an essential responsibility of judges. To Holmes, what constitutes reasonable conduct was a question that required a ruling of law:

> Negligence ... [is] a standard of conduct, a standard we hold the parties bound to know before-hand, and which in theory is always the same fact and not a matter dependent upon the whim of a particular jury nor the eloquence of the particular advocate.[76]

Benjamin Cardozo devoted his famous lectures in 1923 to the importance of this type of "judicial legislation":

> The judge is under a duty...to maintain a relation between law and morals, between precepts of jurisprudence and those of reason and good conscience. "it is the function of courts to keep doctrines up to date with the *mores* by continued restatement...This is judicial legislation, and the judge legislates at his peril. Nevertheless, it is the necessity and duty of such legislation that gives to judicial office its highest honor; and no brave and honest judge shirks the duty or fears the peril."[77]

Chief Justice Roger Traynor of the California Supreme Court, a famous liberal innovator -- he created the doctrine of strict liability for manufacturers whose products fail[78] --

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[76] Oliver Wendell Holmes, Jr., *Law in Science and Science in Law,* 12 Harvard L. Rev. 443, 458 (1899)
[77] Cardozo *Supra,* note 3 at 133-135.
[78] *See* Escola v. Coca-Cola Bottling Co. of Fresno, 24 Cal.2d 453 (1944).

emphasized the need for judges to declare rulings even in the simplest accident, and not leave standards to the "oscillating verdicts of juries."[79] When a woman hit her head on an angled ceiling while walking down a staircase, Traynor insisted that the judge determine whether it was an unreasonable hazard; in that case, "the danger is so apparent that visitors could reasonably be expected to notice it."[80]

Judges in tort claims today assume that they lack this power, but they need only look to commercial law to see the philosophy at least partially in action. In commercial law, the focus is predictability and efficiency. It is a well-established principle that judges, not juries, have the obligation to interpret standard language of contracts.[81] The Uniform Commercial Code was a legislative effort to achieve consistency.[82] Its core concepts, including ones that look very much like those of tort, including reasonableness, are often decided as a matter of law in situations where the fact patterns are likely to be repeated. America's system of commercial law, generally considered the most consistent and predictable in the world, is the bedrock of

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[79] *Quoted* in G. Edward White, Tort Law in America, 185 (Oxford University Press 1980).

[80] *Id.* at 190-191.

[81] *See e.g.* Joseph M. Perillo, *Comments on William Whitford's Paper on the Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 Wis. L. Rev. 965, 965 (2001) (Explaining the limited instances in which juries interpret contracts: "Courts which follow the more traditional approach permit the jury to determine the proper interpretation of a contract only if the judge without the aid of parol evidence deems the contract to be ambiguous and parol evidence is then admitted to clarify the parties' intentions. A wider role is permitted by courts that follow the Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co., approach, which essentially allows the court to hear parol evidence to determine whether the writing is susceptible to more than one interpretation. If the court finds that the writing is susceptible to more than one interpretation, and parol evidence is admitted in the hearing of the jury, the jury is charged with determining the meaning of the writing"); *Cf.* Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 Tex. L. Rev. 1581 (2005) (Stating that "contract interpretation is, of course, a judicial staple."), The Hon. Justice Michael Kirby AC CMG, *Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts*, 24 Statute L. Rev. 95 (2003) (Observing that a large part of the work of judges is composed of interpreting contracts and statutes); *But see* William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 Wis. L. Rev. 931 (2001) (Stating that a significant proportion of cases involving contract interpretation are actually decided by juries).

[82] U.C.C. § 1-102(2)(c) (one of the main purposes of the U.C.C. is "to make uniform the law among the various jurisdictions.")

America's economic strength.[83]

The Supreme Court in recent years has begun to emphasize the goal of legal consistency. Several important decisions, for example, emphasized the desirability of judges using summary judgment to make rulings as a matter of law. In *Celotex v. Caltrett*, a wrongful death asbestos case, the court starkly shifted direction from the presumption that summary dismissal should be avoided if there was a "scintilla of evidence."[84] Thus,

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." (quoting Fed. Rules Civ. Proc. 1.)[85]

In *Markman v. Westview Instruments*, Justice Souter explained the importance of consistency in patent cases:

> "...we see the importance of uniformity in the treatment of a given patent as an independent reason to allocate all issues of construction to the court. As we noted in *General Elec. Co. v. Wabash Appliance Corp.*, "[t]he limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public."[86]

What discourages economic energy, Justice Souter cautioned, was a legal system that created a

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[83] The reliability of American commercial law is the advantage that drives economic investment here despite higher costs and other inefficiencies. **Cite**

[84] *Supra* note 42 at 251. "Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority [referring to Celotex and Matsushita 516 U.S. 367] have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."

[85] Celotex v. Caltrett, 477 U.S. 317, 327 (1986).

[86] Markman v. Westview Instruments, 570 U.S. 370, 390 (1996).

"zone of uncertainty:"

> "[A] zone of uncertainty which enterprise and experimentation may enter only at the risk of infringement claims would discourage invention only a little less than unequivocal foreclosure of the field," *United Carbon Co. v. Binney & Smith Co.*, 317 U.S. 228, 236, 63 S.Ct. 165, 170, 87 L.Ed. 232 (1942), and "[t]he public [would] be deprived of rights supposed to belong to it, without being clearly told what it is that limits these rights."" *Merrill v. Yeomans*, 94 U.S. 568, 573, 24 L.Ed. 235 (1877).[87]

In *Cooper v. Leatherman*, the court held that the boundaries of punitive damages should be decided as a matter of law: ""Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself.""[88]

In *State Farm v. Campbell*, the court went further on punitive damages, suggesting clear guidelines so that claims of punitive damages could not be used to extort settlements.[89]

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.[90]

In *Daubert v. Merrell Dow*, the court shifted the responsibility of what constitutes credible expert

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[87] *Id.*

[88] Cooper Industries Inc. v. Leatherman Tool Group, 532 U.S. 424, 436 (2001), *Quoting* Justice Breyer in BMW of N. Am. v. Gore, 517 U.S. 559, 587.

[89] For further discussion of the value of punitive damages in the context of tort law, see E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 Ala. L. Rev. 1053 (1989)

[90] State Farm Mut. Auto Ins. Co. v. Campbell 538 U.S. 408, 416-17 (2003). *Citations omitted.*

testimony from jury to judge:

> ...the Rules of Evidence -- especially Rule 702 -- do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.[91]

Professor Arthur Miller, in a thorough article on the history of the fact-law distinction, is critical of what he sees as a new trend to make decisions as a matter of law on summary judgment. His main point, it seems, is that judges should not be allowed to draw on their values:

> "Judges are human, and their personal sense of whether a plaintiffs' claim seems "implausible" can subconsciously infiltrate even the most careful analysis."[92]

The idea of "result-oriented" decisions based on considerations of policy strikes Professor Miller as basically unlawful. When deciding cases as a matter of law before trial.

> ...lower courts may curtail litigants' access to trials - and obviously a jury - through arbitrary, result-oriented, or efficiency-motivated determinants at the pretrial motion stage.[93]

At bottom, Professor Miller trusts juries more than judges and seems to subscribe to Senator John Edwards' idea that juries are "Democracy in Action." Civil justice is conceived as a kind of mini-election, with decisions made jury by jury, on an ad hoc basis.

But Holmes and Cardozo did not necessarily think that judges are wiser than

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[91] Daubert v. Merrell Dow Pharms., 509 U.S. 579, 597 (Note that Federal Rule 702 was modified in Dec. 2000, and now reads: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case," thereby essentially codifying Daubert.)

[92] *Supra* note 50 at 1071.

[93] *Id* at 1076.

juries. Their point is that juries can't make consistent rulings of what is reasonable care and what is not. Juries have no authority make rulings at all. Every case is a blank slate. The effect is that civil law offers no predictability or guidance.

Professor Miller is correct that, in making rulings of law, judges will necessarily have to draw on their sense of community values. Cardozo agreed that a judge can never "eliminate altogether the personal measure of the interpreter," but explained that society can't function without a ruling by someone:

> You may say there is no assurance that judges will interpret the mores of their day more wisely and truly than other men. I am not disposed to deny this, but in my view it is quite beside the point. The point is rather that this power of interpretation must be lodged somewhere...[94]

Holmes famously defined law as "The prophecies of what the courts will do in fact."[95] Today in America, in areas such as tort law, no one has any idea of what a court will do. What that means, I submit, is that in these areas Americans have lost the protection of law.

"The basic moral principle, acknowledged by every legal system we know anything about," Yale Professor Eugene Rostow once observed, "is that similar cases should be decided alike."[96] To accomplish that goal, judges must take the responsibility to draw the boundaries of reasonable lawsuits. Sooner or later, as Derek Bok observed, "our legal system [must] empower someone to keep watch and make sure that the process as a whole is meeting the needs of those whom it purportedly serves."[97]

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[94] Cardozo *Supra* nt. 9 at 136. (*Quoted* in Philip K. Howard, The Collapse of the Common Good 67-68 (2001)

[95] Holmes, *Supra* note 4; *See, eg.,* Cardozo, *Supra* nt. 4 at 112. "One of the most fundamental social interests is that law shall be uniform and impartial."

[96] *Quoted in* Ken Greenwalt, *The Enduring Significance of Neutral Principles*, 78 Colum. L. Rev. 982, 1001, nt. 65 (1978).

[97] Bok, *supra* note___ at 23.

Restoring Reliability to Civil Justice:

Times have changed.

In many ways, the changes have been for the better. The shift in legal philosophy that began in the 1960s opened doors for broad segments of society. In an effort to avoid abuses of authority, however, we undermined the authority needed to make common choices needed to run the institutions of society, including the system of civil justice.

We have created a society obsessed with law. Legal threat, once a rare event in anyone's life, is now commonplace. A recent Public Agency survey found that 78% of middle and high-school teachers in American had been threatened by their students with possible violation of their legal rights.[98] The debate over civil justice cannot take place by putting a magnifying glass over a particular dispute. Arguments about fairness, or homilies about the common sense of juries,[99] do nothing to confront the reality that legal fear has become a defining feature of our culture.

Other countries are beginning to have a similar problem of legal fear (perhaps influenced by American culture) and are proposing solutions. British Prime Minister Tony Blair recently gave a speech pointing to how fear of possible lawsuits has resulted in counterproductive behavior in England: "something is seriously awry when teachers feel unable to take children on school trips, for fear of being sued" or when a town "remove[d] hanging baskets for fear that they might fall on someone's head, even though no such accident has occurred in the 18 years they

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[98] Public Agenda, "Teaching Interrupted: Do Discipline Policies in Today's Public Schools Foster the Common Good?" New York, NY: Common Good (May 2004), available at http://cgood.org/assets/attachments/22.pdf

[99] "People who are entrusted to choose the leader of the free world are capable of weighing evidence in a courtroom—and they do, every day across America. I found again and again that they take their service seriously, and follow the law even when the law is at odds with what they personally believe." John Edwards *supra* nt. 2, "One suspects that some judges are simply selling the good faith and collective wisdom of juries short." Arthur Miller, *supra* nt. 67 at 1024.; *See e.g.*, R.R. Co. v. Stout, 84 U.S. 657, 664 (1874).

had been hanging there."[100]

The problem in the UK occurs not because of erratic juries -- the UK long ago abolished juries in most civil cases[101]-- but because judges are not focusing on the social policy implications of allowing certain claims. In an important decision in 2003, the Appellate Committee of the House of Lords took this issue on, and discussed the responsibility of judges to consider policy when deciding whether to permit claims.[102]

The case before the House of Lords could have been picked from many courts in America. On a hot day in the Cheshire region of England, a 18 year-old named John Tomlinson went for a swim in the lake of a local park.[103] Racing into the water from the beach, he dived too sharply and broke his neck on the sandy bottom. He was paralyzed for life.[104]

Mr. Tomlinson sued the Cheshire County Council for not doing more to protect against the accident. The Council, he discovered, knew about the risk. There were three or four near drownings every year. "No swimming" signs had been posted and widely ignored for over a decade. The popularity of the park—more than 160,000 visitors every year—made effective policing almost impossible. Fearful of liability, the Cheshire Council had decided to close off the lake by dumping mud on the beaches and planting reeds. But before the reeds could be planted Mr. Tomlinson had his accident. The Cheshire Council should have acted sooner, as his

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[100] Tony Blair, British Prime Minister, Remarks at the Institute of Public Policy Research (May 26, 2005) *available at* http://www.number-10.gov.uk/output/page7562.asp.

[101] Stephen Adler, The Jury: Trial and Error in the American Courtroom xv-xvi (Random House 1994). (Noting that while Britain technically maintains a jury system, only 1 percent of civil trials are decided before a jury).

[102]Tomlinson v. Congleton BC, [2003] UKHL 47.

[103] *Id.* at [2].

[104] *Id.* at [3].

lawyer argued, to prevent "luring people into a deathtrap"[105] and to protect against a "siren sound strong enough to turn stout men's hearts."[106] The lower court accepted this argument because the County obviously knew the danger.

The Law Lords took the appeal and ordered the case to be dismissed. The lead opinion by Lord Hoffmann declared that whether a claim should be allowed hinged not just on whether an accident is foreseeable, but "also the social value of the activity which gave rise to the risk."[107] Permitting Mr. Tomlinson's claim, the Law Lords held, means that hundreds of thousands of people would not be able to enjoy the park: "[T]here is an important question of freedom at stake. It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty."[108]

The County's ineffective effort to prevent swimming, instead of establishing negligence, the Lords held, demonstrated how a misguided conception of justice hurts the public. "Does the law require that all trees be cut down," Lord Hobhouse asked, "because some youth may climb them and fall?"[109] Lord Scott added, "Of course there is some risk of accidents.... But that is no reason for imposing a grey and dull safety regime on everyone."[110]

The Tomlinson decision exposes the forgotten goal in American justice. Judges

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[105] *Id.* at [28].

[106] *Id.*

[107] *Id.* at [34].

[108] *Id.* at [46].

[109] *Id.* at [81].

[110] *Id.* at [94].

have lost sight that lawsuits concern not only the particular parties to the dispute, but everyone in society.[111] The mere possibility of a lawsuit changes people's behavior.

Protecting the freedom of everyone in society requires a basic shift in responsibility. Judges must delineate the boundaries of claims that implicate social policy. Judges must act as gatekeepers, as Holmes and Cardozo advocated, giving legal substance to general standards.[112]

This shift in responsibility is intended to accomplish two goals. It will spawn a body of legal opinions on standards of care and scope of duty that will begin to establish the contours of reasonable dispute. Most citizens don't eagerly await judicial slip opinions, of course, to learn how to behave. The more immediate benefit will be that the public will know that judges now see it as their job affirmatively to defend reasonable conduct.

The rule of thumb for when a legal ruling is needed should probably be this: if allowing a claim (or defense) to proceed to a jury would affect people not in the courtroom, then

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[111] In recent years, several state Supreme Courts have emphasized the importance of public policy in making rulings of law in tort cases. In a case involving a mugging on a town beach at night, the California Supreme Court ruled that the town should not be liable because, imposing tort liability "admonishes against any use of the property whatever, thus effectively closing the area." Hayes v. State of California, 11 Cal. 3d. 469, 473 (1974). The California Supreme Court also dismissed a claim that a touch football participant was too rough because "imposition of legal liability for such conduct might well alter fundamentally, the nature of the sport." Knight v. Jewett, 3 Cal. 4th 296, 319 (1992). *See* generally Stephen D. Sugarman, *Judges as Tort Law Unmakers: Recent California Experience with "New" Torts*, 49 Depaul L. Rev. 455, 461 (1999). The New Jersey Supreme Court recently held that an accident involving 2 toddlers at a block party should be dismissed because, otherwise, people would stop having block parties.

[112] *See* Sheldon M. Novick, *The Collected Works of Justice Holmes*, Vol. 3, Holmes, *The Common Law*, 1881 at 109-304 (University of Chicago Press 1995) "...when standards of conduct are left to the jury, it is a temporary surrender of a judicial function which may be resumed at any moment in any case when the court feels competent to do so. Were this not so the almost universal acceptance of the first proposition in this Lecture, that the general foundation of liability for unintentional wrongs is conduct different from that of a prudent man under the circumstances, would leave all our rights and duties throughout a great part of the law to the necessarily more or less accidental feelings of the jury."; Cardozo, Supra nt. 9 at 106. "It is the customary morality of right-minded men and women which he is to enforce by his decree. A jurisprudence that is not constantly brought into relation to objective or external standards incurs the risk of denigrating into what the Germans call "Die Gerfuhlsjurisprudenz," a jurisprudence of mere sentiment or feeling."; *Supra* nt. 103.; *But see,* Stephen B. Presser, *The Development and Application of Common Law*, 8 Tex. Rev. L. & Pol. 291 (2004) (discussing the importance of following prior doctrine, criticizing Holmes, and admonishing judges who "make it up as they go along")

the judge should make a ruling of law as to the contours of the claim. Are the risks inherent in a public lake ones that society should take? Avoiding this ruling is not neutral. Not ruling, in effect, is a decision to close the lake. It doesn't matter if the jury finds no liability, because the next jury may feel differently.

Shifting this responsibility to judges to make these rulings does not implicate serious concerns of judicial authority, at least if we accept that judges in civil cases are empowered to make rulings of law based on legal policy considerations. The precedents are numerous and several state supreme courts have begun to limit tort claims on this basis. [113] Nor is there any obvious need for procedural tools other than those that already exist, such as summary judgment.[114]

Important judicial rulings, even from the Supreme Court, are unlikely to effect a quick change in the way most courts handle cases.[115] The power of inertia is always underestimated, and the Supreme Court has learned many times that doctrinal shift does not necessarily occur because it says it should.

Legislation would be even more powerful in making lower courts, and the public at large, understand that justice sets boundaries. Prime Minister Blair recently announced that he

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[113] *See,* Cooper v. Leatherman *Supra* nt. 84; Markman v. Westview *Supra* nt. 79; State Farm v. Campell, *Supra* nt. 84; Hayes v. State of California and Knight v. Jewett *Supra* nt. 103.

[114] Fed. R. Civ. P., 56(c). "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."; *See also,* Fed. R. Civ. P. 50, Fed. R. Civ. P. 12(b)(6), Fed. R. Civ. P. 16(1).

[115] One example is the recognition by courts of a journalistic privilege akin to those acknowledged for lawyers, doctors, and psychologists. Although the Supreme Court ostensibly rejected such a privilege in Branzburg v. Hayes, 408 U.S. 665 (1972), there remains disagreement among lower courts, with some following the dissenting opinions filed in the case (recognizing a privilege) and others following Justice Powell's concurrence (narrow interpretation of the holding, privilege should be recognized in some cases).

will propose a new Compensation Bill that will "clarify the existing law on negligence to make clear that there is no liability in negligence for untoward incidents that could not be avoided by taking reasonable care or exercising reasonable skill."[116] Such a bill, Prime Minister Blair proposed, "will send a strong signal and...reduce risk-averse behavior by providing reassurance to those who may be concerned about possible litigation, such as volunteers, teachers and local authorities."[117]

The significance of the proposed legislation in the UK will probably not be to provide clear legislative answers,[118] but to shift the goal of civil justice. Instead of focusing only on fairness and foreseeability in a particular case, judges will likely be called upon to make rulings, as in Tomlinson, based on "considerations of social advantage."[119]

Legislation to make the shift in judicial philosophy could be in the form of a general principle, along the following lines:

> Judges shall take the responsibility of drawing the boundaries of reasonable dispute as a matter of law, applying common law principles and statutory guidelines. In making these rulings, judges should consider the impact of allowing such claims (or defenses) on the conduct of broader society.

Legislation could also address specific areas of crisis. Congress has already introduced a bill to authorize pilot projects for administrative health courts, with hearings in the Senate expected

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[116] Blair, *supra* note ___.

[117] *Id.*

[118] Judicial interpretation of traditional concepts like reasonableness seems inevitable--no statute or rulebook can account for the infinite range of possible accidents.

[119] Holmes, *Supra* nt. 4. "I think that judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often claimed aversion to deal with such considerations is simply to leave the very ground and foundations of judgments inarticulate, and often unconscious..."

over the summer.[120]

Law is a conservative institution, as it should be. The shift towards judicial responsibility will only occur after leaders of bench and bar, exercising their considerable powers of skepticism, reach their own understanding of why this change is essential. Some of the concerns, however, can be predicted.

All citizens are entitled to their day in court, many will observe. I would go further: the courthouse doors should never be barred, even to frivolous claims. The pertinent question is how far the claim goes, i.e., whether it is subject to dismissal by motion with a legal ruling.[121] What I advocate is not taking away the right to sue, but giving substance to the right to sue.

Conservatives may object that this is "judicial activism." But there is a difference between a judge assuming legislative functions, such as taking control of a school system, and a judge dismissing an unreasonable private claim. A kind of defensive activism, where judges act as gatekeepers, is essential to keep private parties from using justice unilaterally to undermine the freedom of others in society.

The main concern, I suspect, will focus on what is called "the right to sue." The mischief caused by civil justice in the last 40 years has sustained itself so long, in my view, because of a false assumption about the nature of civil justice. Pretty much everyone seems to believe there is a constitutional right to sue for almost everything.

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[120] Hearings in the Senate are expected over the summer. A broad coalition of healthcare providers, patient advocates and consumer groups has come together behind the bill, cites, and Common Good is in a joint venture with the Harvard School of Public Health to design the system.

[121] Sanctions footnote

Suing is not an act of freedom, however. The rights of freedom that our founders gave us, such as freedom of speech, were rights against state power. Suing invokes the state's coercive power against another private citizen--if you lose, the marshal will come and take your home away. Suing is just like indicting someone, except that it is an indictment for money. We would never tolerate a prosecutor bringing a baseless charge. Nor would we allow a prosecutor to threaten the death penalty for a misdemeanor.[122] That would be using state power for extortion. Why, then, do we tolerate allowing self-interested private parties to invoke legal power for whatever they want against other free citizens?

An "open season" philosophy of justice does not enhance our constitutional rights. The point of freedom was almost exactly the opposite--that we can live our lives without being cowed by state power. When private parties use the threat of state power for their private benefit, without any moderating judicial authority, justice becomes a tool for extortion. That's why legal fear in America has reached epidemic proportions.

Shifting the responsibility to draw boundaries of claims to judges is a major doctrinal change, comparable in scope to the shifts that occurred in the 1960s. But the shift must be of bold proportions to restore the public's trust in its ability to begin using common sense again. The stakes could hardly be higher, as is apparent from any tour of the daily functioning of America's common institutions. Before making changes this dramatic, we should be cautious. But is there any other way to deal with the lawsuit culture that is tearing at the fabric of freedom?

THE NATURE OF THE JUDICIAL PROCESS

BY

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Lecture I. Introduction. The Method of Philosophy.

THE work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth. Let some intelligent layman ask him to explain: he will not go very far before taking refuge in the excuse that the language of craftsmen is unintelligible to those untutored in the craft. Such an excuse may cover with a semblance of respectability an otherwise ignominious retreat. It will hardly serve to still the pricks of curiosity and conscience. In moments of introspection, when there

is no longer a necessity of putting off with a show of wisdom the uninitiated interlocutor, the troublesome problem will recur, and press for a solution. What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life. There, before us,

is the brew. Not a judge on the bench but has had a hand in the making. The elements have not come together by chance. *Some* principle. however unavowed and inarticulate and subconscious, has regulated the infusion. It may not have been the same principle for all judges at any time, nor the same principle for any judge at all times. But a choice there has been, not a submission to the decree of Fate; and the considerations and motives determining the choice, even if often obscure, do not utterly resist analysis. In such attempt at analysis as I shall make, there will be need to distinguish between the conscious and the subconscious. I do not mean that even those considerations and motives which I shall class under the first head are always in consciousness distinctly, so that they will be recognized and named at sight. Not infrequently they hover near the surface. They may, however, with comparative readiness be isolated and tagged, and when thus labeled are quickly acknowledged as guiding principles of conduct. More subtle are the forces so far beneath the

surface that they cannot reasonably be classified as other than subconscious. It is often through these subconscious forces that judges are kept consistent with themselves, and inconsistent with one another. We are reminded by William James in a telling page of his lectures on Pragmatism that every one of us has in truth an underlying philosophy of life, even those of us to whom the names and the notions of philosophy are unknown or anathema. There is in each of us a stream of tendency, whether you choose to call it philosophy or not,[1] which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of "the total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where choice shall fall.

[1] Cf. N. M. Butler, "Philosophy," pp. 18, 43.

In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought—a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter.

I have little hope that I shall be able to state the formula which will rationalize this process for myself, much less for others. We must apply to the study of judge-made law that method of quantitative analysis which Mr. Wallas has applied with such fine results to the study of politics.[2] A richer scholarship than mine is requisite to do the work aright. But until that scholarship is found and enlists itself in the task, there may be a passing interest in an attempt to uncover the nature of the process by one who is himself an active agent, day by day, in keeping the process alive. That must be my apology for these introspective searchings of the spirit.

[2] "Human Nature in Politics," p. 138.

Before we can determine the proportions of a blend, we must know the ingredients to be blended. Our first inquiry should therefore be: Where does the judge find the law which he embodies in his judgment? There are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther. The correspondence ascertained, his duty is to obey. The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges. In this sense, judge-made law is secondary and subordinate to the law that is made by legislators. It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had none the less a real and ascertainable pre-existence in

the legislator's mind. The process is, indeed, that at times, but it is often something more. The ascertainment of intention may be the least of a judge's troubles in ascribing meaning to a statute. "The fact is," says Gray in his lectures on the "Nature and Sources of the Law,"[3] "that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present."[4] So Brütt:[5] "One weighty task of the system of the application of law consists then in this, to make more profound the discovery of the latent meaning of positive law. Much more important, however, is the second task which the system serves, namely

[3] Sec. 370, p. 165.

[4] Cf. Pound, "Courts and Legislation," 9 Modern Legal Philosophy Series, p. 226.

[5] "Die Kunst der Rechtsanwendung," p. 72.

the filling of the gaps which are found in every positive law in greater or less measure." You may call this process legislation, if you will. In any event, no system of *jus scriptum* has been able to escape the need of it. Today a great school of continental jurists is pleading for a still wider freedom of adaptation and construction. The statute, they say, is often fragmentary and ill-considered and unjust. The judge as the interpreter for the community of its sense of law and order must supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision—"libre recherche scientifique." That is the view of Gény and Ehrlich and Gmelin and others.[6] Courts are to "search for light among the social elements of every kind that are the living force behind the facts they deal with."[7] The power thus put in their hands is great, and subject, like all power, to abuse; but we are not to flinch from granting it. In the long run "there is no guaranty of

[6] "Science of Legal Method," 9 Modern Legal Philosophy Series, pp. 4, 45, 65, 72, 124, 130, 159.

[7] Gény, "Méthode d'Interprétation et Sources en droit

justice," says Ehrlich,[8] "except the personality of the judge."[9] The same problems of method, the same contrasts between the letter and the spirit, are living problems in our own land and law. Above all in the field of constitutional law, the method of free decision has become, I think, the dominant one today The great generalities of the constitution have a content and a significance that vary from age to age. The method of free decision sees through the transitory particulars and reaches what is permanent behind them. Interpretation, thus enlarged, becomes more than the ascertainment of the meaning and intent of lawmakers whose collective will has been declared. It supplements the declaration, and fills the vacant spaces, by the same processes and methods that have built up the customary law. Codes and other statutes may

privé positif," vol. II, p. 180, sec. 176, ed. 1919; transl. 9 Modern Legal Philosophy Series, p. 45.

[8] P. 65, *supra;* "Freie Rechtsfindung und freie Rechtswissenschaft," 9 Modern Legal Philosophy Series.

[9] Cf. Gnaeus Flavius (Kantorowicz), "Der Kampf um Rechtswissenschaft," p. 48: "Von der Kultur des Richters hängt im letzten Grunde aller Fortschritt der Rechtsentwicklung ab."

threaten the judicial function with repression and disuse and atrophy. The function flourishes and persists by virtue of the human need to which it steadfastly responds. Justinian's prohibition of any commentary on the product of his codifiers is remembered only for its futility.[10]

I will dwell no further for the moment upon the significance of constitution and statute as sources of the law. The work of a judge in interpreting and developing them has indeed its problems and its difficulties, but they are problems and difficulties not different in kind or measure from those besetting him in other fields. I think they can be better studied when those fields have been explored. Sometimes the rule of constitution or of statute is clear, and then the difficulties vanish. Even when they are present, they lack at times some of that element of mystery which accompanies creative energy. We reach the land of mystery when constitution and statute are silent, and the judge must look to

[10] Gray, "Nature and Sources of the Law," sec. 395; Muirhead, "Roman Law," pp. 399, 400.

the common law for the rule that fits the case. He is the "living oracle of the law" in Blackstone's vivid phrase. Looking at Sir Oracle in action, viewing his work in the dry light of realism, how does he set about his task?

The first thing he does is to compare the case before him with the precedents, whether stored in his mind or hidden in the books. I do not mean that precedents are ultimate sources of the law, supplying the sole equipment that is needed for the legal armory, the sole tools, to borrow Maitland's phrase,[11] "in the legal smithy." Back of precedents are the basic juridical conceptions which are the postulates of judicial reasoning, and farther back are the habits of life, the institutions of society, in which those conceptions had their origin, and which, by a process of interaction, they have modified in turn.[12] None the less, in a system so highly developed as our

[11] Introduction to Gierke's "Political Theories of the Middle Age," p. viii.

[12] Saleilles, "De la Personnalité Juridique," p. 45; Ehrlich, "Grundlegung der Soziologie des Rechts," pp. 34, 35; Pound, "Proceedings of American Bar Assn. 1919," p. 455.

own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins. Almost invariably, his first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. *Stare decisis* is at least the everyday working rule of our law. I shall have something to say later about the propriety of relaxing the rule in exceptional conditions. But unless those conditions are present, the work of deciding cases in accordance with precedents that plainly fit them is a process similar in its nature to that of deciding cases in accordance with a statute. It is a process of search, comparison, and little more. Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If

that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins. He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it for others. The classic statement is Bacon's: "For many times, the things deduced to judgment may be meum and tuum, when the reason and consequence thereof may trench to point of estate."[18] The sentence of today will make the right and wrong of tomorrow. If the judge is to pronounce it wisely, some principles of selection there must be to guide him among all the potential judgments that compete for recognition.

In the life of the mind as in life elsewhere, there is a tendency toward the reproduction of kind. Every judgment has a generative power. It begets in its own image. Every precedent, in

[18] "Essay on Judicature."

the words of Redlich, has a "directive force for future cases of the same or similar nature."[14] Until the sentence was pronounced, it was as yet in equilibrium. Its form and content were uncertain. Any one of many principles might lay hold of it and shape it. Once declared, it is a new stock of descent. It is charged with vital power. It is the source from which new principles or norms may spring to shape sentences thereafter. If we seek the psychological basis of this tendency, we shall find it, I suppose, in habit.[15] Whatever its psychological basis, it is one of the living forces of our law. Not all the progeny of principles begotten of a judgment survive, however, to maturity. Those that cannot prove their worth and strength by the test of experience are sacrificed mercilessly and thrown into the void. The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them

[14] Redlich, "The Case Method in American Law Schools," Bulletin No. 8, Carnegie Foundation, p. 37.

[15] McDougall, "Social Psychology," p. 354; J. C. Gray, "Judicial Precedents," 9 Harvard L. R. 27.

deductively. Its method is inductive, and it draws its generalizations from particulars. The process has been admirably stated by Munroe Smith: "In their effort to give to the social sense of justice articulate expression in rules and in principles, the method of the lawfinding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined."[16]

[16] Munroe Smith, "Jurisprudence," Columbia Uni-

The way in which this process of retesting and reformulating works may be followed in an example. Fifty years ago, I think it would have been stated as a general principle that A. may conduct his business as he pleases, even though the purpose is to cause loss to B., unless the act involves the creation of a nuisance.[17] Spite fences were the stock illustration, and the exemption from liability in such circumstances was supposed to illustrate not the exception, but the rule.[18] Such a rule may have been an adequate working principle to regulate the relations between individuals or classes in a simple or homogeneous community. With the growing complexity of social relations, its inadequacy was revealed. As particular controversies multiplied and the attempt was made to test them by the

versity Press, 1909, p. 21; cf. Pound, "Courts and Legislation," 7 Am. Pol. Science Rev. 361; 9 Modern Legal Philosophy Series, p. 214; Pollock, "Essays in Jurisprudence and Ethics," p. 246.

[17] Cooley, "Torts," 1st ed., p. 93; Pollock, "Torts," 10th ed., p. 21.

[18] Phelps v. Nowlen, 72 N. Y. 39; Rideout v. Knox, 148 Mass. 368.

old principle, it was found that there was something wrong in the results, and this led to a reformulation of the principle itself. Today, most judges are inclined to say that what was once thought to be the exception is the rule, and what was the rule is the exception. A. may never do anything in his business for the purpose of injuring another without reasonable and just excuse.[19] There has been a new generalization which, applied to new particulars, yields results more in harmony with past particulars, and, what is still more important, more consistent with the social welfare. This work of modification is gradual. It goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seen to have behind them the power and the pressure of the moving glacier.

We are not likely to underrate the force that has been exerted if we look back upon its work. "There is not a creed which is not shaken, not an accredited dogma which is not shown to be

[19] Lamb v. Cheney, 227 N. Y. 418; Aikens v. Wisconsin, 195 U. S. 194, 204; Pollock, "Torts," *supra*.

questionable, not a received tradition which does not threaten to dissolve."[20] Those are the words of a critic of life and letters writing forty years ago, and watching the growing scepticism of his day. I am tempted to apply his words to the history of the law. Hardly a rule of today but may be matched by its opposite of yesterday. Absolute liability for one's acts is today the exception; there must commonly be some tinge of fault, whether willful or negligent. Time was, however, when absolute liability was the rule.[21] Occasional reversions to the earlier type may be found in recent legislation.[22] Mutual promises give rise to an obligation, and their breach to a right of action for damages. Time was when the

[20] Arnold, "Essays in Criticism," second series, p. 1.

[21] Holdsworth, "History of English Law," 2, p. 41; Wigmore, "Responsibility for Tortious Acts," 7 Harvard L. R. 315, 383, 441; 3 Anglo-Am. Legal Essays 474; Smith, "Liability for Damage to Land," 33 Harvard L. R. 551; Ames, "Law and Morals," 22 Harvard L. R. 97, 99; Isaacs, "Fault and Liability," 31 Harvard L. R. 954.

[22] Cf. Duguit, "Les Transformations générales du droit privé depuis le Code Napoléon," Continental Legal Hist. Series, vol. XI, pp. 125, 126, secs. 40, 42.

obligation and the remedy were unknown unless the promise was under seal.[23] Rights of action may be assigned, and the buyer prosecute them to judgment though he bought for purposes of suit. Time was when the assignment was impossible, and the maintenance of the suit a crime. It is no basis today for an action of deceit to show, without more, that there has been the breach of an executory promise; yet the breach of an executory promise came to have a remedy in our law because it was held to be a deceit.[24] These changes or most of them have been wrought by judges. The men who wrought them used the same tools as the judges of today. The changes, as they were made in this case or that, may not have seemed momentous in the making. The result, however, when the process was prolonged throughout the years, has been not merely to supplement or modify; it has been to revolu-

[23] Holdsworth, *supra*, 2, p. 72; Ames, "History of Parol Contracts prior to Assumpsit," 3 Anglo-Am. Legal Essays 304.

[24] Holdsworth, *supra*, 3, pp. 330, 336; Ames, "History of Assumpsit," 3 Anglo-Am. Legal Essays 275, 276.

tionize and transform. For every tendency, one seems to see a counter-tendency; for every rule its antinomy. Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless "becoming." We are back with Heraclitus. That, I mean, is the average or aggregate impression which the picture leaves upon the mind. Doubtless in the last three centuries, some lines, once wavering, have become rigid. We leave more to legislatures today, and less perhaps to judges.[25] Yet even now there is change from decade to decade. The glacier still moves.

In this perpetual flux, the problem which confronts the judge is in reality a twofold one: he must first extract from the precedents the underlying principle, the *ratio decidendi;* he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die.

The first branch of the problem is the one to which we are accustomed to address ourselves

[25] F. C. Montague in "A Sketch of Legal History," Maitland and Montague, p. 161.

more consciously than to the other. Cases do not unfold their principles for the asking. They yield up their kernel slowly and painfully. The instance cannot lead to a generalization till we know it as it is. That in itself is no easy task. For the thing adjudged comes to us oftentimes swathed in obscuring dicta, which must be stripped off and cast aside. Judges differ greatly in their reverence for the illustrations and comments and side-remarks of their predecessors, to make no mention of their own. All agree that there may be dissent when the opinion is filed. Some would seem to hold that there must be none a moment thereafter. Plenary inspiration has then descended upon the work of the majority. No one, of course, avows such a belief, and yet sometimes there is an approach to it in conduct. I own that it is a good deal of a mystery to me how judges, of all persons in the world, should put their faith in dicta. A brief experience on the bench was enough to reveal to me all sorts of cracks and crevices and loopholes in my own opinions when picked up a few months after de-

livery, and reread with due contrition. The persuasion that one's own infallibility is a myth leads by easy stages and with somewhat greater satisfaction to a refusal to ascribe infallibility to others. But dicta are not always ticketed as such, and one does not recognize them always at a glance. There is the constant need, as every law student knows, to separate the accidental and the non-essential from the essential and inherent. Let us assume, however, that this task has been achieved, and that the precedent is known as it really is. Let us assume too that the principle, latent within it, has been skillfully extracted and accurately stated. Only half or less than half of the work has yet been done. The problem remains to fix the bounds and the tendencies of development and growth, to set the directive force in motion along the right path at the parting of the ways.

The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical de-

velopment; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the *mores* of the day; and this I will call the method of sociology.

I have put first among the principles of selection to guide our choice of paths, the rule of analogy or the method of philosophy. In putting it first, I do not mean to rate it as most important. On the contrary, it is often sacrificed to others. I have put it first because it has, I think, a certain presumption in its favor. Given a mass of particulars, a congeries of judgments on related topics, the principle that unifies and rationalizes them has a tendency, and a legitimate one, to project and extend itself to new cases within the limits of its capacity to unify and rationalize. It has the primacy that comes from natural and orderly and logical succession. Homage is due to it over every competing principle that is unable by appeal to history or tradition or policy or justice to make out a

better right. All sorts of deflecting forces may appear to contest its sway and absorb its power. At least, it is the heir presumptive. A pretender to the title will have to fight his way.

Great judges have sometimes spoken as if the principle of philosophy, i.e., of logical development, meant little or nothing in our law. Probably none of them in conduct was ever true to such a faith. Lord Halsbury said in Quinn v. Leathem, 1901, A. C. 495, 506: "A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."[26] All this may be true, but we must not press the truth too far. Logical consistency does not cease to be a good because it is not the supreme good. Holmes has told us

[26] Cf. Bailhache, J., in Belfast Ropewalk Co. v. Bushell, 1918, 1 K. B. 210, 213: "Unfortunately or fortunately, I am not sure which, our law is not a science."

in a sentence which is now classic that "the life of the law has not been logic; it has been experience."[27] But Holmes did not tell us that logic is to be ignored when experience is silent. I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reason, which will commonly be some consideration of history or custom or policy or justice. Lacking such a reason, I must be logical, just as I must be impartial, and upon like grounds. It will not do to decide the same question one way between one set of litigants and the opposite way between another. "If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was defendant, I shall look for the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an

[27] "The Common Law," p. 1.

infringement, material and moral, of my rights."[28] Everyone feels the force of this sentiment when two cases are the same. Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts. A sentiment like in kind, though different in degree, is at the root of the tendency of precedent to extend itself along the lines of logical development.[29] No doubt the sentiment is powerfully reinforced by what is often nothing but an intellectual passion for *elegantia juris*, for symmetry of form and substance.[30] That is an ideal which can never fail to exert some measure of attraction upon the professional experts who make up the lawyer class. To the Roman lawyers, it meant much, more than it has meant to English lawyers or to ours, certainly more

[28] W. G. Miller, "The Data of Jurisprudence," p. 335; cf. Gray, "Nature and Sources of the Law," sec. 420; Salmond, "Jurisprudence," p. 170.

[29] Cf. Gény, "Méthode d'Interprétation et Sources en droit privé positif," vol. II, p. 119.

[30] W. G. Miller, *supra*, p. 281; Bryce, "Studies in History and Jurisprudence," vol. II, p. 629.

than it has meant to clients. "The client," says Miller in his "Data of Jurisprudence,"[31] "cares little for a 'beautiful' case! He wishes it settled somehow on the most favorable terms he can obtain." Even that is not always true. But as a system of case law develops, the sordid controversies of litigants are the stuff out of which great and shining truths will ultimately be shaped. The accidental and the transitory will yield the essential and the permanent. The judge who moulds the law by the method of philosophy may be satisfying an intellectual craving for symmetry of form and substance. But he is doing something more. He is keeping the law true in its response to a deep-seated and imperious sentiment. Only experts perhaps may be able to gauge the quality of his work and appraise its significance. But their judgment, the judgment of the lawyer class, will spread to others, and tinge the common consciousness and the common faith. In default of other tests, the method of philosophy must remain the organon of the courts if

[31] P. 1.

chance and favor are to be excluded, and the affairs of men are to be governed with the serene and impartial uniformity which is of the essence of the idea of law.

You will say that there is an intolerable vagueness in all this. If the method of philosophy is to be employed in the absence of a better one, some test of comparative fitness should be furnished. I hope, before I have ended, to sketch, though only in the broadest outline, the fundamental considerations by which the choice of methods should be governed. In the nature of things they can never be catalogued with precision. Much must be left to that deftness in the use of tools which the practice of an art develops. A few hints, a few suggestions, the rest must be trusted to the feeling of the artist. But for the moment, I am satisfied to establish the method of philosophy as one organon among several, leaving the choice of one or the other to be talked of later. Very likely I have labored unduly to establish its title to a place so modest. Above all, in the Law School of Yale University, the

title will not be challenged. I say that because in the work of a brilliant teacher of this school, the late Wesley Newcomb Hohfeld, I find impressive recognition of the importance of this method, when kept within due limits, and some of the happiest illustrations of its legitimate employment. His treatise on "Fundamental Conceptions Applied in Judicial Reasoning" is in reality a plea that fundamental conceptions be analyzed more clearly, and their philosophical implications, their logical conclusions, developed more consistently. I do not mean to represent him as holding to the view that logical conclusions must always follow the conceptions developed by analysis. "No one saw more clearly than he that while the analytical matter is an indispensable tool, it is not an all-sufficient one for the lawyer."[32] "He emphasized over and over again" that "analytical work merely paves the way for other branches of jurisprudence, and that without the aid of the latter, satisfactory solutions of

[32] Introduction to Hohfeld's Treatise by W. W. Cook.

legal problems cannot be reached."[33] We must know where logic and philosophy lead even though we may determine to abandon them for other guides. The times will be many when we can do no better than follow where they point.

Example, if not better than precept, may at least prove to be easier. We may get some sense of the class of questions to which a method is adapted when we have studied the class of questions to which it has been applied. Let me give some haphazard illustrations of conclusions adopted by our law through the development of legal conceptions to logical conclusions. A. agrees to sell a chattel to B. Before title passes, the chattel is destroyed. The loss falls on the seller who has sued at law for the price.[34] A. agrees to sell a house and lot. Before title passes, the house is destroyed. The seller sues in equity for specific performance. The loss falls upon the

[33] Professor Cook's Introduction.

[34] Higgins v. Murray, 73 N. Y. 252, 254; 2 Williston on Contracts, sec. 962; N. Y. Personal Prop. Law, sec. 103a.

buyer.[35] That is probably the prevailing view, though its wisdom has been sharply criticized.[36] These variant conclusions are not dictated by variant considerations of policy or justice. They are projections of a principle to its logical outcome, or the outcome supposed to be logical. Equity treats that as done which ought to be done. Contracts for the sale of land, unlike most contracts for the sale of chattels, are within the jurisdiction of equity. The vendee is in equity the owner from the beginning. Therefore, the burdens as well as the benefits of ownership shall be his. Let me take as another illustration of my meaning the cases which define the rights of assignees of choses in action. In the discussion of these cases, you will find much conflict of opinion about fundamental conceptions. Some tell us that the assignee has a legal ownership.[37] Others say that his right is purely equitable.[38]

[35] Paine v. Meller, 6 Ves. 349, 352; Sewell v. Underhill, 197 N. Y. 168; 2 Williston on Contracts, sec. 931.

[36] 2 Williston on Contracts, sec. 940.

[37] Cook, 29 Harvard L. R. 816, 836.

[38] Williston, 30 Harvard L. R. 97; 31 *ibid.* 822.

Given, however, the fundamental conception, all agree in deducing its consequences by methods in which the preponderating element is the method of philosophy. We may find kindred illustrations in the law of trusts and contracts and in many other fields. It would be wearisome to accumulate them.

The directive force of logic does not always exert itself, however, along a single and unobstructed path. One principle or precedent, pushed to the limit of its logic, may point to one conclusion; another principle or precedent, followed with like logic, may point with equal certainty to another. In this conflict, we must choose between the two paths, selecting one or other, or perhaps striking out upon a third, which will be the resultant of the two forces in combination, or will represent the mean between extremes. Let me take as an illustration of such conflict the famous case of Riggs v. Palmer, 115 N. Y. 506. That case decided that a legatee who had murdered his testator would not be permitted by a court of equity to enjoy the benefits of the will. Con-

flicting principles were there in competition for the mastery. One of them prevailed, and vanquished all the others. There was the principle of the binding force of a will disposing of the estate of a testator in conformity with law. That principle, pushed to the limit of its logic, seemed to uphold the title of the murderer. There was the principle that civil courts may not add to the pains and penalties of crimes. That, pushed to the limit of its logic, seemed again to uphold his title. But over against these was another principle, of greater generality, its roots deeply fastened in universal sentiments of justice, the principle that no man should profit from his own inequity or take advantage of his own wrong. The logic of this principle prevailed over the logic of the others. I say its logic prevailed. The thing which really interests us, however, is why and how the choice was made between one logic and another. In this instance, the reason is not obscure. One path was followed, another closed, because of the conviction in the judicial mind that the one selected led to justice. Analogies and

precedents and the principles behind them were brought together as rivals for precedence; in the end, the principle that was thought to be most fundamental, to represent the larger and deeper social interests, put its competitors to flight. I am not greatly concerned about the particular formula through which justice was attained. Consistency was preserved, logic received its tribute, by holding that the legal title passed, but that it was subjected to a constructive trust.[39] A constructive trust is nothing but "the formula through which the conscience of equity finds expression."[40] Property is acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest. Equity, to express its disapproval of his conduct, converts him into a trustee.[41] Such formulas are merely the remedial devices by which a result conceived of as right and just is

[39] Ellerson v. Westcott, 148 N. Y. 149, 154; Ames, "Lectures on Legal History," pp. 313, 314.

[40] Beatty v. Guggenheim Exploration Co., 225 N. Y. 380, 386.

[41] Beatty v. Guggenheim Exploration Co., *supra;* Ames, *supra.*

made to square with principle and with the symmetry of the legal system. What concerns me now is not the remedial device, but rather the underlying motive, the indwelling, creative energy, which brings such devices into play. The murderer lost the legacy for which the murder was committed because the social interest served by refusing to permit the criminal to profit by his crime is greater than that served by the preservation and enforcement of legal rights of ownership. My illustration, indeed, has brought me ahead of my story. The judicial process is there in microcosm. We go forward with our logic, with our analogies, with our philosophies, till we reach a certain point. At first, we have no trouble with the paths; they follow the same lines. Then they begin to diverge, and we must make a choice between them. History or custom or social utility or some compelling sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law must come to the rescue of the anxious judge, and tell him where to go.

It is easy to accumulate examples of the process—of the constant checking and testing of philosophy by justice, and of justice by philosophy. Take the rule which permits recovery with compensation for defects in cases of substantial, though incomplete performance. We have often applied it for the protection of builders who in trifling details and without evil purpose have departed from their contracts. The courts had some trouble for a time, when they were deciding such cases, to square their justice with their logic. Even now, an uneasy feeling betrays itself in treatise and decision that the two fabrics do not fit. As I had occasion to say in a recent case: "Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result" remain "troubled by a classification where the lines of division are so wavering and blurred."[42] I have no doubt that the inspiration of the rule is a mere sentiment of justice. That sentiment asserting itself, we have proceeded to surround it

[42] Jacobs & Youngs, Inc. v. Kent, 230 N. Y. 239.

with the halo of conformity to precedent. Some judges saw the unifying principle in the law of quasi-contracts. Others saw it in the distinction between dependent and independent promises, or between promises and conditions. All found, however, in the end that there *was* a principle in the legal armory which, when taken down from the wall where it was rusting, was capable of furnishing a weapon for the fight and of hewing a path to justice. Justice reacted upon logic, sentiment upon reason, by guiding the choice to be made between one logic and another. Reason in its turn reacted upon sentiment by purging it of what is arbitrary, by checking it when it might otherwise have been extravagant, by relating it to method and order and coherence and tradition.[43]

In this conception of the method of logic or philosophy as one organon among several, I find nothing hostile to the teachings of continental jurists who would dethrone it from its place and

[43] Cf. Hynes v. N. Y. Central R. R. Co. (231 N. Y. 229, 235).

power in systems of jurisprudence other than our own. They have combated an evil which has touched the common law only here and there, and lightly. I do not mean that there are not fields where we have stood in need of the same lesson. In some part, however, we have been saved by the inductive process through which our case law has developed from evils and dangers inseparable from the development of law, upon the basis of the *jus scriptum*, by a process of deduction.[44] Yet even continental jurists who emphasize the need of other methods, do not ask us to abstract from legal principles all their fructifying power. The misuse of logic or philosophy begins when its method and its ends are treated as supreme and final. They can never be banished altogether. "Assuredly," says François Gény,[45] "there should be no question of banishing ratiocination and logical methods from the

[44] "Notre droit public, comme notre droit privé, est un *jus scriptum*" (Michoud, "La Responsibilité de l'état à raison des fautes de ses agents," Revue du droit public, 1895, p. 273, quoted by Gény, vol. I, p. 40, sec. 19).

[45] *Op. cit.*, vol. I, p. 127, sec. 61.

science of positive law." Even general principles may sometimes be followed rigorously in the deduction of their consequences. "The abuse," he says, "consists, if I do not mistake, in envisaging ideal conceptions, provisional and purely subjective in their nature, as endowed with a permanent objective reality. And this false point of view, which, to my thinking, is a vestige of the absolute realism of the middle ages, ends in confining the entire system of positive law, *a priori*, within a limited number of logical categories, which are predetermined in essence, immovable in basis, governed by inflexible dogmas, and thus incapable of adapting themselves to the ever varied and changing exigencies of life."

In law, as in every other branch of knowledge, the truths given by induction tend to form the premises for new deductions. The lawyers and the judges of successive generations do not repeat for themselves the process of verification, any more than most of us repeat the demonstrations of the truths of astronomy or physics. A stock of juridical conceptions and formulas is

developed, and we take them, so to speak, ready-made. Such fundamental conceptions as contract and possession and ownership and testament and many others are there, ready for use. How they came to be there, I do not need to inquire. I am writing, not a history of the evolution of law, but a sketch of the judicial process applied to law full grown. These fundamental conceptions once attained form the starting point from which are derived new consequences, which, at first tentative and groping, gain by reiteration a new permanence and certainty. In the end, they become accepted themselves as fundamental and axiomatic. So it is with the growth from precedent to precedent. The implications of a decision may in the beginning be equivocal. New cases by commentary and exposition extract the essence. At last there emerges a rule or principle which becomes a datum, a point of departure, from which new lines will be run, from which new courses will be measured. Sometimes the rule or principle is found to have been formulated too narrowly or too broadly, and has to be reframed.

Sometimes it is accepted as a postulate of later reasoning, its origins are forgotten, it becomes a new stock of descent, its issue unite with other strains, and persisting permeate the law. You may call the process one of analogy or of logic or of philosophy as you please. Its essence in any event is the derivation of a consequence from a rule or a principle or a precedent which, accepted as a datum, contains implicitly within itself the germ of the conclusion. In all this, I do not use the word philosophy in any strict or formal sense. The method tapers down from the syllogism at one end to mere analogy at the other. Sometimes the extension of a precedent goes to the limit of its logic. Sometimes it does not go so far. Sometimes by a process of analogy it is carried even farther. That is a tool which no system of jurisprudence has been able to discard.[46] A rule which has worked well in one field, or which, in any event, is there whether its workings have been revealed or not, is carried over into another. Instances of such a process I group

[46] Ehrlich, "Die Juristische Logik," pp. 225, 227.

under the same heading as those where the nexus of logic is closer and more binding.[47] At bottom and in their underlying motives, they are phases of the same method. They are inspired by the same yearning for consistency, for certainty, for uniformity of plan and structure. They have their roots in the constant striving of the mind for a larger and more inclusive unity, in which differences will be reconciled, and abnormalities will vanish.

[47] Cf. Gény, *op. cit.*, vol. II, p. 121, sec. 165; also vol. I, p. 304, sec. 107.

THE COMMON LAW

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WITH A NEW INTRODUCTION BY

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LECTURE III.

TORTS. — TRESPASS AND NEGLIGENCE.

THE object of the next two Lectures is to discover whether there is any common ground at the bottom of all liability in tort, and if so, what that ground is. Supposing the attempt to succeed, it will reveal the general principle of civil liability at common law. The liabilities incurred by way of contract are more or less expressly fixed by the agreement of the parties concerned, but those arising from a tort are independent of any previous consent of the wrong-doer to bear the loss occasioned by his act. If A fails to pay a certain sum on a certain day, or to deliver a lecture on a certain night, after having made a binding promise to do so, the damages which he has to pay are recovered in accordance with his consent that some or all of the harms which may be caused by his failure shall fall upon him. But when A assaults or slanders his neighbor, or converts his neighbor's property, he does a harm which he has never consented to bear, and if the law makes him pay for it, the reason for doing so must be found in some general view of the conduct which every one may fairly expect and demand from every other, whether that other has agreed to it or not.

Such a general view is very hard to find. The law did not begin with a theory. It has never worked one out. The point from which it started and that at which I shall

try to show that it has arrived, are on different planes. In the progress from one to the other, it is to be expected that its course should not be straight and its direction not always visible. All that can be done is to point out a tendency, and to justify it. The tendency, which is our main concern, is a matter of fact to be gathered from the cases. But the difficulty of showing it is much enhanced by the circumstance that, until lately, the substantive law has been approached only through the categories of the forms of action. Discussions of legislative principle have been darkened by arguments on the limits between trespass and case, or on the scope of a general issue. In place of a theory of tort, we have a theory of trespass. And even within that narrower limit, precedents of the time of the assize and *jurata* have been applied without a thought of their connection with a long forgotten procedure.

Since the ancient forms of action have disappeared, a broader treatment of the subject ought to be possible. Ignorance is the best of law reformers. People are glad to discuss a question on general principles, when they have forgotten the special knowledge necessary for technical reasoning. But the present willingness to generalize is founded on more than merely negative grounds. The philosophical habit of the day, the frequency of legislation, and the ease with which the law may be changed to meet the opinions and wishes of the public, all make it natural and unavoidable that judges as well as others should openly discuss the legislative principles upon which their decisions must always rest in the end, and should base their judgments upon broad considerations of policy to which the traditions of the bench would hardly have tolerated a reference fifty years ago.

The business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not. But it cannot enable him to predict with certainty whether a given act under given circumstances will make him liable, because an act will rarely have that effect unless followed by damage, and for the most part, if not always, the consequences of an act are not known, but only guessed at as more or less probable. All the rules that the law can lay down beforehand are rules for determining the conduct which will be followed by liability if it is followed by harm, — that is, the conduct which a man pursues at his peril. The only guide for the future to be drawn from a decision against a defendant in an action of tort is that similar acts, under circumstances which cannot be distinguished except by the result from those of the defendant, are done at the peril of the actor; that if he escapes liability, it is simply because by good fortune no harm comes of his conduct in the particular event.

If, therefore, there is any common ground for all liability in tort, we shall best find it by eliminating the event as it actually turns out, and by considering only the principles on which the peril of his conduct is thrown upon the actor. We are to ask what are the elements, on the defendant's side, which must all be present before liability is possible, and the presence of which will commonly make him liable if damage follows.

The law of torts abounds in moral phraseology. It has much to say of wrongs, of malice, fraud, intent, and negligence. Hence it may naturally be supposed that the risk of a man's conduct is thrown upon him as the result of some moral short-coming. But while this notion has been

entertained, the extreme opposite will be found to have been a far more popular opinion;—I mean the notion that a man is answerable for all the consequences of his acts, or, in other words, that he acts at his peril always, and wholly irrespective of the state of his consciousness upon the matter.

To test the former opinion it would be natural to take up successively the several words, such as *negligence* and *intent*, which in the language of morals designate various well-understood states of mind, and to show their significance in the law. To test the latter, it would perhaps be more convenient to consider it under the head of the several forms of action. So many of our authorities are decisions under one or another of these forms, that it will not be safe to neglect them, at least in the first instance; and a compromise between the two modes of approaching the subject may be reached by beginning with the action of trespass and the notion of negligence together, leaving wrongs which are defined as intentional for the next Lecture.

Trespass lies for unintentional, as well as for intended wrongs. Any wrongful and direct application of force is redressed by that action. It therefore affords a fair field for a discussion of the general principles of liability for unintentional wrongs at common law. For it can hardly be supposed that a man's responsibility for the consequences of his acts varies as the remedy happens to fall on one side or the other of the penumbra which separates trespass from the action on the case. And the greater part of the law of torts will be found under one or the other of those two heads.

It might be hastily assumed that the action on the case

is founded on the defendant's negligence. But if that be so, the same doctrine must prevail in trespass. It might be assumed that trespass is founded on the defendant's having caused damage by his act, without regard to negligence. But if that be true, the law must apply the same criterion to other wrongs differing from trespass only in some technical point; as, for instance, that the property damaged was in the defendant's possession. Neither of the above assumptions, however, can be hastily permitted. It might very well be argued that the action on the case adopts the severe rule just suggested for trespass, except when the action is founded on a contract. Negligence, it might be said, had nothing to do with the common-law liability for a nuisance, and it might be added that, where negligence was a ground of liability, a special duty had to be founded in the defendant's *super se assumpsit*, or public calling.[1] On the other hand, we shall see what can be said for the proposition, that even in trespass there must at least be negligence. But whichever argument prevails for the one form of action must prevail for the other. The discussion may therefore be shortened on its technical side, by confining it to trespass so far as may be practicable without excluding light to be got from other parts of the law.

As has just been hinted, there are two theories of the common-law liability for unintentional harm. Both of them seem to receive the implied assent of popular textbooks, and neither of them is wanting in plausibility and the semblance of authority.

The first is that of Austin, which is essentially the theory of a criminalist. According to him, the characteristic

[1] See Lecture VII.

feature of law, properly so called, is a sanction or detriment threatened and imposed by the sovereign for disobedience to the sovereign's commands. As the greater part of the law only makes a man civilly answerable for breaking it, Austin is compelled to regard the liability to an action as a sanction, or, in other words, as a penalty for disobedience. It follows from this, according to the prevailing views of penal law, that such liability ought only to be based upon personal fault; and Austin accepts that conclusion, with its corollaries, one of which is that negligence means a state of the party's mind.[1] These doctrines will be referred to later, so far as necessary.

The other theory is directly opposed to the foregoing. It seems to be adopted by some of the greatest common-law authorities, and requires serious discussion before it can be set aside in favor of any third opinion which may be maintained. According to this view, broadly stated, under the common law a man *acts* at his peril. It may be held as a sort of set-off, that he is never liable for omissions except in consequence of some duty voluntarily undertaken. But the whole and sufficient ground for such liabilities as he does incur outside the last class is supposed to be that he has voluntarily acted, and that damage has ensued. If the act was voluntary, it is totally immaterial that the detriment which followed from it was neither intended nor due to the negligence of the actor.

In order to do justice to this way of looking at the subject, we must remember that the abolition of the common-law forms of pleading has not changed the rules of substantive law. Hence, although pleaders now generally

[1] Austin, Jurisprudence (3d ed.), 440 *et seq.*, 474, 484, Lect. XX., XXIV., XXV.

allege intent or negligence, anything which would formerly have been sufficient to charge a defendant in trespass is still sufficient, notwithstanding the fact that the ancient form of action and declaration has disappeared.

In the first place, it is said, consider generally the protection given by the law to property, both within and outside the limits of the last-named action. If a man crosses his neighbor's boundary by however innocent a mistake, or if his cattle escape into his neighbor's field, he is said to be liable in trespass *quare clausum fregit.* If an auctioneer in the most perfect good faith, and in the regular course of his business, sells goods sent to his rooms for the purpose of being sold, he may be compelled to pay their full value if a third person turns out to be the owner, although he has paid over the proceeds, and has no means of obtaining indemnity.

Now suppose that, instead of a dealing with the plaintiff's property, the case is that force has proceeded directly from the defendant's body to the plaintiff's body, it is urged that, as the law cannot be less careful of the persons than of the property of its subjects, the only defences possible are similar to those which would have been open to an alleged trespass on land. You may show that there was no trespass by showing that the defendant did no act; as where he was thrown from his horse upon the plaintiff, or where a third person took his hand and struck the plaintiff with it. In such cases the defendant's body is the passive instrument of an external force, and the bodily motion relied on by the plaintiff is not his act at all. So you may show a justification or excuse in the conduct of the plaintiff himself. But if no such excuse is shown, and the defendant has voluntarily acted, he must answer

for the consequences, however little intended and however unforeseen. If, for instance, being assaulted by a third person, the defendant lifted his stick and accidentally hit the plaintiff, who was standing behind him, according to this view he is liable, irrespective of any negligence toward the party injured.

The arguments for the doctrine under consideration are, for the most part, drawn from precedent, but it is sometimes supposed to be defensible as theoretically sound. Every man, it is said, has an absolute right to his person, and so forth, free from detriment at the hands of his neighbors. In the cases put, the plaintiff has done nothing; the defendant, on the other hand, has chosen to act. As between the two, the party whose voluntary conduct has caused the damage should suffer, rather than one who has had no share in producing it.

We have more difficult matter to deal with when we turn to the pleadings and precedents in trespass. The declaration says nothing of negligence, and it is clear that the damage need not have been intended. The words *vi et armis* and *contra pacem*, which might seem to imply intent, are supposed to have been inserted merely to give jurisdiction to the king's court. Glanvill says it belongs to the sheriff, in case of neglect on the part of lords of franchise, to take cognizance of mêlées, blows, and even wounds, unless the accuser add a charge of breach of the king's peace (*nisi accusator adjiciat de pace Domini Regis infracta*).[1] Reeves observes, "In this distinction between the sheriff's jurisdiction and that of the king, we see the reason of the allegation in modern indictments and writs, *vi et armis*, of 'the king's crown and dignity,' 'the king's

[1] Lib. I. c. 2, *ad fin.*

peace,' and 'the peace,' — this last expression being sufficient, after the peace of the sheriff had ceased to be distinguished as a separate jurisdiction."[1]

Again, it might be said that, if the defendant's intent or neglect was essential to his liability, the absence of both would deprive his act of the character of a trespass, and ought therefore to be admissible under the general issue. But it is perfectly well settled at common law that "Not guilty" only denies the act.[2]

Next comes the argument from authority. I will begin with an early and important case.[3] It was trespass *quare clausum*. The defendant pleaded that he owned adjoining land, upon which was a thorn hedge; that he cut the thorns, and that they, against his will (*ipso invito*), fell on the plaintiff's land, and the defendant went quickly upon the same, and took them, which was the trespass complained of. And on demurrer judgment was given for the plaintiff. The plaintiff's counsel put cases which have been often repeated. One of them, Fairfax, said: "There is a diversity between an act resulting in a felony, and one resulting in a trespass. . . . If one is cutting trees, and the boughs fall on a man and wound him, in this case he shall have an action of trespass, &c., and also, sir, if one is shooting at butts, and his bow shakes in his hands, and kills a man, *ipso invito*, it is no felony, as has been said,

[1] Hist. English Law, I. 113 (bis), n. *a*; Id., ed. Finlason, I. 178, n. 1. Fitzherbert (N. B. 85, F.) says that in the vicontiel writ of trespass, which is not returnable into the king's court, it shall not be said *quare vi et armis*. Cf. Ib. 86, H.

[2] *Milman* v. *Dolwell*, 2 Camp. 378; *Knapp* v. *Salsbury*, 2 Camp. 500; *Pearcy* v. *Walter*, 6 C. & P. 232; *Hall* v. *Fearnley*, 3 Q. B. 919.

[3] Y. B. 6 Ed. IV. 7, pl. 18, A. D. 1466; cf. Ames, Cases in Tort, 69, for a translation, which has been followed for the most part.

&c.; but if he wounds one by shooting, he shall have a good action of trespass against him, and yet the shooting was lawful, &c., and the wrong which the other receives was against his will, &c.; and so here, &c." Brian, another counsel, states the whole doctrine, and uses equally familiar illustrations. "When one does a thing, he is bound to do it in such a way that by his act no prejudice or damage shall be done to &c. As if I am building a house, and when the timber is being put up a piece of timber falls on my neighbor's house and breaks his house, he shall have a good action, &c.; and yet the raising of the house was lawful, and the timber fell, *me invito*, &c. And so if one assaults me and I cannot escape, and I in self-defence lift my stick to strike him, and in lifting it hit a man who is behind me, in this case he shall have an action against me, yet my raising my stick was lawful in self-defence, and I hit him, *me invito*, &c.; and so here, &c."

"Littleton, J. to the same intent, and if a man is damaged he ought to be recompensed. . . . If your cattle come on my land and eat my grass, notwithstanding you come freshly and drive them out, you ought to make amends for what your cattle have done, be it more or less. . . . And, sir, if this should be law that he might enter and take the thorns, for the same reason, if he cut a large tree, he might come with his wagons and horses to carry the trees off, which is not reason, for perhaps he has corn or other crops growing, &c., and no more here, for the law is all one in great things and small. . . . Choke, C. J. to the same intent, for when the principal thing was not lawful, that which depends upon it was not lawful; for when he cut the thorns and they fell on my land,

this falling was not lawful, and therefore his coming to take them out was not lawful. As to what was said about their falling in *ipso invito*, that is no plea, but he ought to show that he could not do it in any other way, or that he did all that was in his power to keep them out."

Forty years later,[1] the Year Books report Rede, J. as adopting the argument of Fairfax in the last case. In trespass, he says, "the intent cannot be construed; but in felony it shall be. As when a man shoots at butts and kills a man, it is not felony et il sera come n'avoit l'entent de luy tuer; and so of a tiler on a house who with a stone kills a man unwittingly, it is not felony.[2] But when a man shoots at the butts and wounds a man, though it is against his will, he shall be called a trespasser against his intent."

There is a series of later shooting cases, *Weaver* v. *Ward*,[3] *Dickenson* v. *Watson*,[4] and *Underwood* v. *Hewson*,[5] followed by the Court of Appeals of New York in *Castle* v. *Duryee*,[6] in which defences to the effect that the damage was done accidentally and by misfortune, and against the will of the defendant, were held insufficient.

In the reign of Queen Elizabeth it was held that where a man with a gun at the door of his house shot at a fowl, and thereby set fire to his own house and to the house of his neighbor, he was liable in an action on the case generally, the declaration not being on the custom of the realm,

[1] Y. B. 21 Hen. VII. 27, pl. 5, A. D. 1506.
[2] Cf. Bract., fol. 136 *b*. But cf. Stat. of Gloucester, 6 Ed. I. c. 9; Y. B. 2 Hen. IV. 18, pl. 8, by Thirning; Essays in Ang. Sax. Law, 276.
[3] Hobart, 134, A. D. 1616.
[4] Sir T. Jones, 205, A. D. 1682.
[5] 1 Strange, 596, A. D. 1723.
[6] 2 Keyes, 169, A. D. 1865.

"viz. for negligently keeping his fire." "For the injury is the same, although this mischance was not by a common negligence, but by misadventure."[1]

The above-mentioned instances of the stick and shooting at butts became standard illustrations; they are repeated by Sir Thomas Raymond, in *Bessey* v. *Olliot*,[2] by Sir William Blackstone, in the famous squib case,[3] and by other judges, and have become familiar through the text-books. Sir T. Raymond, in the above case, also repeats the thought and almost the words of Littleton, J., which have been quoted, and says further: "In all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering." Sir William Blackstone also adopts a phrase from *Dickenson* v. *Watson*, just cited: "Nothing but inevitable necessity" is a justification. So Lord Ellenborough, in *Leame* v. *Bray*:[4] "If the injury were received from the personal act of another, it was deemed sufficient to make it trespass"; or, according to the more frequently quoted language of Grose, J., in the same case: "Looking into all the cases from the Year Book in the 21 H. VII. down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass." Further citations are deemed unnecessary.

In spite, however, of all the arguments which may be

[1] *Anonymous*, Cro. Eliz. 10, A. D. 1582.

[2] Sir T. Raym. 467, A. D. 1682.

[3] *Scott* v. *Shepherd*, 2 Wm. Bl. 892, A. D. 1773.

[4] 3 East, 593. See, further, Coleridge's note to 3 Bl. Comm. 123; Saunders, Negligence, ch. 1, § 1; argument in *Fletcher* v. *Rylands*, 3 H. & C. 774, 783; Lord Cranworth, in s. c., L. R. 3 H. L. 330, 341.

urged for the rule that a man acts at his peril, it has been rejected by very eminent courts, even under the old forms of action. In view of this fact, and of the further circumstance that, since the old forms have been abolished, the allegation of negligence has spread from the action on the case to all ordinary declarations in tort which do not allege intent, probably many lawyers would be surprised that any one should think it worth while to go into the present discussion. Such is the natural impression to be derived from daily practice. But even if the doctrine under consideration had no longer any followers, which is not the case, it would be well to have something more than daily practice to sustain our views upon so fundamental a question; as it seems to me at least, the true principle is far from being articulately grasped by all who are interested in it, and can only be arrived at after a careful analysis of what has been thought hitherto. It might be thought enough to cite the decisions opposed to the rule of absolute responsibility, and to show that such a rule is inconsistent with admitted doctrines and sound policy. But we may go further with profit, and inquire whether there are not strong grounds for thinking that the common law has never known such a rule, unless in that period of dry precedent which is so often to be found midway between a creative epoch and a period of solvent philosophical reaction. Conciliating the attention of those who, contrary to most modern practitioners, still adhere to the strict doctrine, by reminding them once more that there are weighty decisions to be cited adverse to it, and that, if they have involved an innovation, the fact that it has been made by such magistrates as Chief Justice Shaw goes far to prove that the change was politic, I

think I may assert that a little reflection will show that it was required not only by policy, but by consistency. I will begin with the latter.

The same reasoning which would make a man answerable in trespass for all damage to another by force directly resulting from his own act, irrespective of negligence or intent, would make him answerable in case for the like damage similarly resulting from the act of his servant, in the course of the latter's employment. The discussions of the company's negligence in many railway cases[1] would therefore be wholly out of place, for although, to be sure, there is a contract which would make the company liable for negligence, that contract cannot be taken to diminish any liability which would otherwise exist for a trespass on the part of its employees.

More than this, the same reasoning would make a defendant responsible for all damage, however remote, of which his act could be called the cause. So long, at least, as only physical or irresponsible agencies, however unforeseen, co-operated with the act complained of to produce the result, the argument which would resolve the case of accidentally striking the plaintiff, when lifting a stick in necessary self-defence, adversely to the defendant, would require a decision against him in every case where his act was a factor in the result complained of. The distinction between a direct application of force, and causing damage indirectly, or as a more remote consequence of one's act, although it may determine whether the form of action should be trespass or case, does not touch the theory of responsibility, if that theory be that a man acts at his peril.

[1] Ex. gr. *Metropolitan Railway Co.* v. *Jackson*, 3 App. Cas. 193. See *M'Manus* v. *Crickett*, 1 East, 106, 108.

As was said at the outset, if the strict liability is to be maintained at all, it must be maintained throughout. A principle cannot be stated which would retain the strict liability in trespass while abandoning it in case. It cannot be said that trespass is for acts alone, and case for consequences of those acts. All actions of trespass are for consequences of acts, not for the acts themselves. And some actions of trespass are for consequences more remote from the defendant's act than in other instances where the remedy would be case.

An act is always a voluntary muscular contraction, and nothing else. The chain of physical sequences which it sets in motion or directs to the plaintiff's harm is no part of it, and very generally a long train of such sequences intervenes. An example or two will make this extremely clear.

When a man commits an assault and battery with a pistol, his only act is to contract the muscles of his arm and forefinger in a certain way, but it is the delight of elementary writers to point out what a vast series of physical changes must take place before the harm is done. Suppose that, instead of firing a pistol, he takes up a hose which is discharging water on the sidewalk, and directs it at the plaintiff, he does not even set in motion the physical causes which must co-operate with his act to make a battery. Not only natural causes, but a living being, may intervene between the act and its effect. *Gibbons* v. *Pepper*,[1] which decided that there was no battery when a man's horse was frightened by accident or a third person and ran away with him, and ran over the plaintiff, takes the distinction that, if the rider by spurring is the cause of

[1] 1 Ld. Raym. 38; s. c. Salk. 637; 4 Mod. 404; A. D. 1695.

the accident, then he is guilty. In *Scott* v. *Shepherd*,[1] already mentioned, trespass was maintained against one who had thrown a squib into a crowd, where it was tossed from hand to hand in self-defence until it burst and injured the plaintiff. Here even human agencies were a part of the chain between the defendant's act and the result, although they were treated as more or less nearly automatic, in order to arrive at the decision.

Now I repeat, that, if principle requires us to charge a man in trespass when his act has brought force to bear on another through a comparatively short train of intervening causes, in spite of his having used all possible care, it requires the same liability, however numerous and unexpected the events between the act and the result. If running a man down is a trespass when the accident can be referred to the rider's act of spurring, why is it not a tort in every case, as was argued in *Vincent* v. *Stinehour*,[2] seeing that it can always be referred more remotely to his act of mounting and taking the horse out?

Why is a man not responsible for the consequences of an act innocent in its direct and obvious effects, when those consequences would not have followed but for the intervention of a series of extraordinary, although natural, events? The reason is, that, if the intervening events are of such a kind that no foresight could have been expected to look out for them, the defendant is not to blame for having failed to do so. It seems to be admitted by the English judges that, even on the question whether the acts of leaving dry trimmings in hot weather by the side of a railroad, and then sending an engine over the track, are

[1] 2 Wm. Bl. 892. Cf. *Clark* v. *Chambers*, 3 Q. B. D. 327, 330, 338.

[2] 7 Vt. 62.

negligent, — that is, are a ground of liability, — the consequences which might reasonably be anticipated are material.[1] Yet these are acts which, under the circumstances, can hardly be called innocent in their natural and obvious effects. The same doctrine has been applied to acts in violation of statute which could not reasonably have been expected to lead to the result complained of.[2]

But there is no difference in principle between the case where a natural cause or physical factor intervenes after the act in some way not to be foreseen, and turns what seemed innocent to harm, and the case where such a cause or factor intervenes, unknown, at the time; as, for the matter of that, it did in the English cases cited. If a man is excused in the one case because he is not to blame, he must be in the other. The difference taken in *Gibbons* v. *Pepper*, cited above, is not between results which are and those which are not the consequences of the defendant's acts: it is between consequences which he was bound as a reasonable man to contemplate, and those which he was not. Hard spurring is just so much more likely to lead to harm than merely riding a horse in the street, that the court thought that the defendant would be bound to look out for the consequences of the one, while it would not hold him liable for those resulting merely from the other;

[1] *Smith* v. *London & South-Western Railway Co.*, L. R. 6 C. P. 14, 21. Cf. s. c., 5 id. 98, 103, 106.

[2] *Sharp* v. *Powell*, L. R. 7 C. P. 253. Cf. *Clark* v. *Chambers*, 3 Q. B. D. 327, 336-338. Many American cases could be cited which carry the doctrine further. But it is desired to lay down no proposition which admits of controversy, and it is enough for the present purposes that *Si home fait un loyal act, que apres devint illoyal, ceo est damnum sine injuria.* Latch, 13. I purposely omit any discussion of the true rule of damages where it is once settled that a wrong has been done. The text regards only the tests by which it is decided whether a wrong has been done.

because the possibility of being run away with when riding quietly, though familiar, is comparatively slight. If, however, the horse had been unruly, and had been taken into a frequented place for the purpose of being broken, the owner might have been liable, because "it was his fault to bring a wild horse into a place where mischief might probably be done."[1]

To return to the example of the accidental blow with a stick lifted in self-defence, there is no difference between hitting a person standing in one's rear and hitting one who was pushed by a horse within range of the stick just as it was lifted, provided that it was not possible, under the circumstances, in the one case to have known, in the other to have anticipated, the proximity. In either case there is wanting the only element which distinguishes voluntary acts from spasmodic muscular contractions as a ground of liability. In neither of them, that is to say, has there been an opportunity of choice with reference to the consequence complained of, — a chance to guard against the result which has come to pass. A choice which entails a concealed consequence is as to that consequence no choice.

The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune. But relatively to a given human being anything is accident which he could not fairly have been expected to contemplate as possible, and therefore to avoid. In the language of the late Chief Justice Nelson of New York: "No case or principle can be found, or if found can be maintained, subjecting an individual to liability for

1. *Mitchil* v. *Alestree*, 1 Ventris, 295; s. c., 3 Keb. 660; 2 Lev. 172. Compare *Hammack* v. *White*, 11 C. B. N. s. 588; *infra*, p. 158.

an act done without fault on his part. . . . All the cases concede that an injury arising from inevitable accident, or, which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility."[1] If this were not so, any act would be sufficient, however remote, which set in motion or opened the door for a series of physical sequences ending in damage; such as riding the horse, in the case of the runaway, or even coming to a place where one is seized with a fit and strikes the plaintiff in an unconscious spasm. Nay, why need the defendant have acted at all, and why is it not enough that his existence has been at the expense of the plaintiff? The requirement of an act is the requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability. There is no such power where the evil cannot be foreseen.[2] Here we reach the argument from policy, and I shall accordingly postpone for a moment the discussion of trespasses upon land, and of conversions, and will take up the liability for cattle separately at a later stage.

A man need not, it is true, do this or that act, — the term *act* implies a choice, — but he must act somehow. Furthermore, the public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor.

1 *Harvey* v. *Dunlop*, Hill & Denio, (Lalor,) 193.
2 See Lecture II. pp. 54, 55.

The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members. There might be a pension for paralytics, and state aid for those who suffered in person or estate from tempest or wild beasts. As between individuals it might adopt the mutual insurance principle *pro tanto*, and divide damages when both were in fault, as in the *rusticum judicium* of the admiralty, or it might throw all loss upon the actor irrespective of fault. The state does none of these things, however, and the prevailing view is that its cumbrous and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the *status quo*. State interference is an evil, where it cannot be shown to be a good. Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise. The undertaking to redistribute losses simply on the ground that they resulted from the defendant's act would not only be open to these objections, but, as it is hoped the preceding discussion has shown, to the still graver one of offending the sense of justice. Unless my act is of a nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbor against the consequences, than to make me do the same thing if I had fallen upon him in a fit, or to compel me to insure him against lightning.

I must now recur to the conclusions drawn from innocent trespasses upon land, and conversions, and the supposed analogy of those cases to trespasses against the person, lest the law concerning the latter should be supposed to lie between two antinomies, each necessitating with equal cogency an opposite conclusion to the other.

Take first the case of trespass upon land attended by actual damage. When a man goes upon his neighbor's land, thinking it is his own, he intends the very act or consequence complained of. He means to intermeddle with a certain thing in a certain way, and it is just that intended intermeddling for which he is sued.[1] Whereas, if he accidentally hits a stranger as he lifts his staff in self-defence, the fact, which is the gist of the action, — namely, the contact between the staff and his neighbor's head, — was not intended, and could not have been foreseen. It might be answered, to be sure, that it is not for intermeddling with property, but for intermeddling with the plaintiff's property, that a man is sued; and that in the supposed cases, just as much as in that of the accidental blow, the defendant is ignorant of one of the facts making up the total environment, and which must be present to make his action wrong. He is ignorant, that is to say, that the true owner either has or claims any interest in the property in question, and therefore he does not intend a wrongful act, because he does not mean to deal with his neighbor's property. But the answer to this is, that he does intend to do the damage complained of. One who diminishes the value of property by intentional damage knows it belongs to somebody. If he thinks it belongs to himself, he expects whatever harm he may do to come out of his own pocket. It would be odd if he were to get rid of the burden by discovering that it belonged to his neighbor. It is a very different thing to say that he who intentionally does harm must bear the loss, from saying that one from whose acts harm follows accidentally, as

[1] Cf. *Hobart* v. *Hagget*, 3 Fairf. (Me.) 67.

a consequence which could not have been foreseen, must bear it.

Next, suppose the act complained of is an exercise of dominion over the plaintiff's property, such as a merely technical trespass or a conversion. If the defendant thought that the property belonged to himself, there seems to be no abstract injustice in requiring him to know the limits of his own titles, or, if he thought that it belonged to another, in holding him bound to get proof of title before acting. Consider, too, what the defendant's liability amounts to, if the act, whether an entry upon land or a conversion of chattels, has been unattended by damage to the property, and the thing has come back to the hands of the true owner. The sum recovered is merely nominal, and the payment is nothing more than a formal acknowledgment of the owner's title; which, considering the effect of prescription and statutes of limitation upon repeated acts of dominion, is no more than right.[1] All semblance of injustice disappears when the defendant is allowed to avoid the costs of an action by tender or otherwise.

But suppose the property has not come back to the hands of the true owner. If the thing remains in the hands of the defendant, it is clearly right that he should surrender it. And if instead of the thing itself he holds the proceeds of a sale, it is as reasonable to make him pay over its value in trover or assumpsit as it would have been to compel a surrender of the thing. But the question whether the defendant has subsequently paid over the proceeds of the sale of a chattel to a third person, cannot affect the rights of the true owner of the

[1] See *Bonomi* v. *Backhouse*, El. Bl. & El. 622, Coleridge, J., at p. 640.

chattel. In the supposed case of an auctioneer, for instance, if he had paid the true owner, it would have been an answer to his bailor's claim. If he has paid his bailor instead, he has paid one whom he was not bound to pay, and no general principle requires that this should be held to divest the plaintiff's right.

Another consideration affecting the argument that the law as to trespasses upon property establishes a general principle, is that the defendant's knowledge or ignorance of the plaintiff's title is likely to lie wholly in his own breast, and therefore hardly admits of satisfactory proof. Indeed, in many cases it cannot have been open to evidence at all at the time when the law was settled, before parties were permitted to testify. Accordingly, in *Basely* v. *Clarkson*,[1] where the defence set up to an action of trespass *quare clausum* was that the defendant in mowing his own land involuntarily and by mistake mowed down some of the plaintiff's grass, the plaintiff had judgment on demurrer. "For it appears the fact was voluntary, and his intention and knowledge are not traversable; they can't be known."

This language suggests that it would be sufficient to explain the law of trespass upon property historically, without attempting to justify it. For it seems to be admitted that if the defendant's mistake could be proved it might be material.[2] It will be noticed, further, that any general argument from the law of trespass upon land to that governing trespass against the person is shown to be misleading by the law as to cattle. The owner is bound at his peril

[1] 3 Levinz, 37, A. D. 1681.

[2] Compare the rule as to cattle in Y. B. 22 Edw. IV. 8, pl. 24, stated below, p. 118.

to keep them off his neighbor's premises, but he is not bound at his peril in all cases to keep them from his neighbor's person.

The objections to such a decision as supposed in the case of an auctioneer do not rest on the general theory of liability, but spring altogether from the special exigencies of commerce. It does not become unjust to hold a person liable for unauthorized intermeddling with another's property, until there arises the practical necessity for rapid dealing. But where this practical necessity exists, it is not surprising to find, and we do find, a different tendency in the law. The absolute protection of property, however natural to a primitive community more occupied in production than in exchange, is hardly consistent with the requirements of modern business. Even when the rules which we have been considering were established, the traffic of the public markets was governed by more liberal principles. On the continent of Europe it was long ago decided that the policy of protecting titles must yield to the policy of protecting trade. Casaregis held that the general principle *nemo plus juris in alium transferre potest quam ipse habet* must give way in mercantile transactions to *possession vaut titre*.[1] In later times, as markets overt have lost their importance, the Factors' Acts and their successive amendments have tended more and more in the direction of adopting the Continental doctrine.

I must preface the argument from precedent with a reference to what has been said already in the first Lecture about early forms of liability, and especially about

[1] Disc. 128, pr.; 124, §§ 2, 3. As to the historical origin of the latter rule, compare Lecture V.

the appeals. It was there shown that the appeals *de pace et plagis* and of mayhem became the action of trespass, and that those appeals and the early actions of trespass were always, so far as appears, for intentional wrongs.[1]

The *contra pacem* in the writ of trespass was no doubt inserted to lay a foundation for the king's writ; but there seems to be no reason to attribute a similar purpose to *vi et armis*, or *cum vi sua*, as it was often put. Glanvill says that wounds are within the sheriff's jurisdiction, unless the appellor adds a charge of breach of the king's peace.[2] Yet the wounds are given *vi et armis* as much in the one case as in the other. Bracton says that the lesser wrongs described by him belong to the king's jurisdiction, "because they are sometimes against the peace of our lord the king,"[3] while, as has been observed, they were supposed to be always committed intentionally. It might even perhaps be inferred that the allegation *contra pacem* was originally material, and it will be remembered that trespasses formerly involved the liability to pay a fine to the king.[4]

If it be true that trespass was originally confined to intentional wrongs, it is hardly necessary to consider the argument drawn from the scope of the general issue. In form it was a mitigation of the strict denial *de verbo in verbum* of the ancient procedure, to which the inquest given by the king's writ was unknown.[5] The strict form seems to have lasted in England some time after the trial of the issue by recognition was introduced.[6] When

[1] Lecture I, pp. 3, 4. [2] Lib. I. c. 2, *ad fin.* [3] Fol. 155.
[4] Bro. *Trespass*, pl. 119; Finch, 198; 3 Bl. Comm. 118, 119.
[5] See Brunner, Schwurgerichte, p. 171.
[6] An example of the year 1195 will be found in Mr. Bigelow's very in-

a recognition was granted, the inquest was, of course, only competent to speak to the facts, as has been said above.[1] When the general issue was introduced, trespass was still confined to intentional wrongs.

We may now take up the authorities. It will be remembered that the earlier precedents are of a date when the assize and *jurata* had not given place to the modern jury. These bodies spoke from their own knowledge to an issue defined by the writ, or to certain familiar questions of fact arising in the trial of a cause, but did not hear the whole case upon evidence adduced. Their function was more limited than that which has been gained by the jury, and it naturally happened that, when they had declared what the defendant had done, the judges laid down the standard by which those acts were to be measured without their assistance. Hence the question in the Year Books is not a loose or general inquiry of the jury whether they think the alleged trespasser was negligent on such facts as they may find, but a well-defined issue of law, to be determined by the court, whether certain acts set forth upon the record are a ground of liability. It is possible that the judges may have dealt pretty strictly with defendants, and it is quite easy to pass from the premise that defendants have been held trespassers for a variety of acts, without mention of neglect, to the conclusion that any act by which another was damaged will make the actor chargeable. But a more exact scrutiny of the early books will show that liability in general, then as later, was

teresting and valuable Placita Anglo-Normannica, p. 285, citing Rot. Cur. Regis, 38; s. c. 1 Abbr. Plac., fol. 2, Ebor. rot. 5. The suit was by way of appeal; the cause of action, a felonious trespass. Cf. Bract., fol. 144 *a*.

[1] An example may be seen in the Year Book, 30 & 31 Edward I. (Horwood), p. 106.

founded on the opinion of the tribunal that the defendant ought to have acted otherwise, or, in other words, that he was to blame.

Returning first to the case of the thorns in the Year Book,[1] it will be seen that the falling of the thorns into the plaintiff's close, although a result not wished by the defendant, was in no other sense against his will. When he cut the thorns, he did an act which obviously and necessarily would have that consequence, and he must be taken to have foreseen and not to have prevented it. Choke, C. J. says, "As to what was said about their falling in, *ipso invito*, that is no plea, but he ought to show that he could not do it in any other way, or that he did all in his power to keep them out"; and both the judges put the unlawfulness of the entry upon the plaintiff's land as a consequence of the unlawfulness of dropping the thorns there. Choke admits that, if the thorns or a tree had been blown over upon the plaintiff's land, the defendant might have entered to get them. Chief Justice Crew says of this case, in *Millen* v. *Fawdry*,[2] that the opinion was that "trespass lies, because he did not plead that he did his best endeavor to hinder their falling there; yet this was a hard case." The statements of law by counsel in argument may be left on one side, although Brian is quoted and mistaken for one of the judges by Sir William Blackstone, in *Scott* v. *Shepherd*.

The principal authorities are the shooting cases, and, as shooting is an extra-hazardous act, it would not be surprising if it should be held that men do it at their peril in public places. The liability has been put on the general ground of fault, however, wherever the line of necessary

[1] 6 Ed. IV. 7, pl. 18. [2] Popham, 151; Latch, 13, 119, A. D. 1605.

precaution may be drawn. In *Weaver* v. *Ward*,[1] the defendant set up that the plaintiff and he were skirmishing in a trainband, and that when discharging his piece he wounded the plaintiff by accident and misfortune, and against his own will. On demurrer, the court says that "no man shall be excused of a trespass, . . . except it may be judged utterly without his fault. As if a man by force take my hand and strike you, or if here the defendant had said, that the plaintiff ran cross his piece when it was discharging, or had set forth the case with the circumstances so as it had appeared to the court that it had been inevitable, and that the defendant *had committed no negligence* to give occasion to the hurt." The later cases simply follow *Weaver* v. *Ward*.

The quotations which were made above in favor of the strict doctrine from Sir T. Raymond, in *Bessey* v. *Olliot*, and from Sir William Blackstone, in *Scott* v. *Shepherd*, are both taken from dissenting opinions. In the latter case it is pretty clear that the majority of the court considered that to repel personal danger by instantaneously tossing away a squib thrown by another upon one's stall was not a trespass, although a new motion was thereby imparted to the squib, and the plaintiff's eye was put out in consequence. The last case cited above, in stating the arguments for absolute responsibility, was *Leame* v. *Bray*.[2] The question under discussion was whether the action (for running down the plaintiff) should not have been case rather than trespass, the defendant founding his objection to trespass on the ground that the injury happened through his neglect, but was not done wilfully. There was therefore no question of absolute responsibility for one's acts

[1] Hobart, 134, A. D. 1616. [2] 3 East, 593.

before the court, as negligence was admitted; and the language used is all directed simply to the proposition that the damage need not have been done intentionally.

In *Wakeman* v. *Robinson*,[1] another runaway case, there was evidence that the defendant pulled the wrong rein, and that he ought to have kept a straight course. The jury were instructed that, if the injury was occasioned by an immediate act of the defendant, it was immaterial whether the act was wilful or accidental. On motion for a new trial, Dallas, C. J. said, "If the accident happened entirely without default on the part of the defendant, or blame imputable to him, the action does not lie. . . . The accident was clearly occasioned by the default of the defendant. The weight of evidence was all that way. I am now called upon to grant a new trial, contrary to the justice of the case, upon the ground, that the jury were not called on to consider whether the accident was unavoidable, or occasioned by the fault of the defendant. There can be no doubt that the learned judge who presided would have taken the opinion of the jury on that ground, if he had been requested so to do." This language may have been inapposite under the defendant's plea (the general issue), but the pleadings were not adverted to, and the doctrine is believed to be sound.

In America there have been several decisions to the point. In *Brown* v. *Kendall*,[2] Chief Justice Shaw settled the question for Massachusetts. That was trespass for assault and battery, and it appeared that the defendant, while trying to separate two fighting dogs, had raised his stick over his shoulder in the act of striking, and had accidentally hit the plaintiff in the eye, inflicting upon him a

[1] 1 Bing. 213, A. D. 1823. [2] 6 Cush. 292.

severe injury. The case was stronger for the plaintiff than if the defendant had been acting in self-defence; but the court held that, although the defendant was bound by no duty to separate the dogs, yet, if he was doing a lawful act, he was not liable unless he was wanting in the care which men of ordinary prudence would use under the circumstances, and that the burden was on the plaintiff to prove the want of such care.

In such a matter no authority is more deserving of respect than that of Chief Justice Shaw, for the strength of that great judge lay in an accurate appreciation of the requirements of the community whose officer he was. Some, indeed many, English judges could be named who have surpassed him in accurate technical knowledge, but few have lived who were his equals in their understanding of the grounds of public policy to which all laws must ultimately be referred. It was this which made him, in the language of the late Judge Curtis, the greatest *magistrate* which this country has produced.

Brown v. *Kendall* has been followed in Connecticut,[1] in a case where a man fired a pistol, in lawful self-defence as he alleged, and hit a bystander. The court was strongly of opinion that the defendant was not answerable on the general principles of trespass, unless there was a failure to use such care as was practicable under the circumstances. The foundation of liability in trespass as well as case was said to be negligence. The Supreme Court of the United States has given the sanction of its approval to the same doctrine.[2] The language of *Harvey* v. *Dunlop*[3] has been

[1] *Morris* v. *Platt*, 32 Conn. 75, 84 *et seq.*, A. D. 1864.
[2] *Nitro-glycerine Case* (*Parrot* v. *Wells*), 15 Wall. 524, 538.
[3] Hill & Denio, (Lalor,) 193; *Losee* v. *Buchanan*, 51 N. Y. 476, 489.

quoted, and there is a case in Vermont which tends in the same direction.[1]

Supposing it now to be conceded that the general notion upon which liability to an action is founded is fault or blameworthiness in some sense, the question arises, whether it is so in the sense of personal moral shortcoming, as would practically result from Austin's teaching. The language of Rede, J., which has been quoted from the Year Book, gives a sufficient answer. "In trespass the intent" (we may say more broadly, the defendant's state of mind) "cannot be construed." Suppose that a defendant were allowed to testify that, before acting, he considered carefully what would be the conduct of a prudent man under the circumstances, and, having formed the best judgment he could, acted accordingly. If the story was believed, it would be conclusive against the defendant's negligence judged by a moral standard which would take his personal characteristics into account. But supposing any such evidence to have got before the jury, it is very clear that the court would say, Gentlemen, the question is not whether the defendant thought his conduct was that of a prudent man, but whether you think it was.[2]

Some middle point must be found between the horns of this dilemma.

[1] *Vincent* v. *Stinehour*, 7 Vt. 62. See, further, Clayton, 22, pl. 88; Holt, C. J., in *Cole* v. *Turner*, 6 Mod. 149; Lord Hardwicke, in *Williams* v. *Jones*, Cas. temp. Hardw. 298; *Hall* v. *Fearnley*, 8 Q. B. 919; Martin, B., in *Coward* v. *Baddeley*, 4 H. & N. 478; *Holmes* v. *Mather*, L. R. 10 Ex. 261; *Bizzell* v. *Booker*, 16 Ark. 308; *Brown* v. *Collins*, 53 N. H. 442.

[2] *Blyth* v. *Birmingham Waterworks Co.*, 11 Exch. 781, 784; *Smith* v. *London & South-Western Ry. Co.*, L. R. 5 C. P. 98, 102. Compare Campbell, Negligence, § 1 (2d ed.), for Austin's point of view.

The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason. In the first place, the impossibility of nicely measuring a man's powers and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law. But a more satisfactory explanation is, that, when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.

The rule that the law does, in general, determine liability by blameworthiness, is subject to the limitation that minute differences of character are not allowed for. The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that. If we fall below the level in those gifts, it is our misfortune; so much as that we must have at our peril, for the reasons just given. But he who is intelligent and prudent does not act at his peril, in theory of law. On the contrary, it is

only when he fails to exercise the foresight of which he is capable, or exercises it with evil intent, that he is answerable for the consequences.

There are exceptions to the principle that every man is presumed to possess ordinary capacity to avoid harm to his neighbors, which illustrate the rule, and also the moral basis of liability in general. When a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held answerable for not taking them. A blind man is not required to see at his peril; and although he is, no doubt, bound to consider his infirmity in regulating his actions, yet if he properly finds himself in a certain situation, the neglect of precautions requiring eyesight would not prevent his recovering for an injury to himself, and, it may be presumed, would not make him liable for injuring another. So it is held that, in cases where he is the plaintiff, an infant of very tender years is only bound to take the precautions of which an infant is capable; the same principle may be cautiously applied where he is defendant.[1] Insanity is a more difficult matter to deal with, and no general rule can be laid down about it. There is no doubt that in many cases a man may be insane, and yet perfectly capable of taking the precautions, and of being influenced by the motives, which the circumstances demand. But if insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse.

Taking the qualification last established in connection with the general proposition previously laid down, it will

[1] Cf. Bro. *Corone*, pl. 6; *Neal* v. *Gillett*, 23 Conn. 437, 442; D. 9. 2. 5, § 2; D. 48. 8. 12.

now be assumed that, on the one hand, the law presumes or requires a man to possess ordinary capacity to avoid harming his neighbors, unless a clear and manifest incapacity be shown; but that, on the other, it does not in general hold him liable for unintentional injury, unless, possessing such capacity, he might and ought to have foreseen the danger, or, in other words, unless a man of ordinary intelligence and forethought would have been to blame for acting as he did. The next question is, whether this vague test is all that the law has to say upon the matter, and the same question in another form, by whom this test is to be applied.

Notwithstanding the fact that the grounds of legal liability are moral to the extent above explained, it must be borne in mind that law only works within the sphere of the senses. If the external phenomena, the manifest acts and omissions, are such as it requires, it is wholly indifferent to the internal phenomena of conscience. A man may have as bad a heart as he chooses, if his conduct is within the rules. In other words, the standards of the law are external standards, and, however much it may take moral considerations into account, it does so only for the purpose of drawing a line between such bodily motions and rests as it permits, and such as it does not. What the law really forbids, and the only thing it forbids, is the act on the wrong side of the line, be that act blameworthy or otherwise.

Again, any legal standard must, in theory, be one which would apply to all men, not specially excepted, under the same circumstances. It is not intended that the public force should fall upon an individual accidentally, or at the whim of any body of men. The standard, that is,

must be fixed. In practice, no doubt, one man may have to pay and another may escape, according to the different feelings of different juries. But this merely shows that the law does not perfectly accomplish its ends. The theory or intention of the law is not that the feeling of approbation or blame which a particular twelve may entertain should be the criterion. They are supposed to leave their idiosyncrasies on one side, and to represent the feeling of the community. The ideal average prudent man, whose equivalent the jury is taken to be in many cases, and whose culpability or innocence is the supposed test, is a constant, and his conduct under given circumstances is theoretically always the same.

Finally, any legal standard must, in theory, be capable of being known. When a man has to pay damages, he is supposed to have broken the law, and he is further supposed to have known what the law was.

If, now, the ordinary liabilities in tort arise from failure to comply with fixed and uniform standards of external conduct, which every man is presumed and required to know, it is obvious that it ought to be possible, sooner or later, to formulate these standards at least to some extent, and that to do so must at last be the business of the court. It is equally clear that the featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances. The standard which the defendant was bound to come up to was a standard of specific acts or omissions, with reference to the specific circumstances in which he found himself. If in the whole department of

unintentional wrongs the courts arrived at no further utterance than the question of negligence, and left every case, without rudder or compass, to the jury, they would simply confess their inability to state a very large part of the law which they required the defendant to know, and would assert, by implication, that nothing could be learned by experience. But neither courts nor legislatures have ever stopped at that point.

From the time of Alfred to the present day, statutes and decisions have busied themselves with defining the precautions to be taken in certain familiar cases; that is, with substituting for the vague test of the care exercised by a prudent man, a precise one of specific acts or omissions. The fundamental thought is still the same, that the way prescribed is that in which prudent men are in the habit of acting, or else is one laid down for cases where prudent men might otherwise be in doubt.

It will be observed that the existence of the external tests of liability which will be mentioned, while it illustrates the tendency of the law of tort to become more and more concrete by judicial decision and by statute, does not interfere with the general doctrine maintained as to the grounds of liability. The argument of this Lecture, although opposed to the doctrine that a man acts or exerts force at his peril, is by no means opposed to the doctrine that he does certain particular acts at his peril. It is the coarseness, not the nature, of the standard which is objected to. If, when the question of the defendant's negligence is left to a jury, negligence does not mean the actual state of the defendant's mind, but a failure to act as a prudent man of average intelligence would have done, he is required to conform to an objective standard at his

peril, even in that case. When a more exact and specific rule has been arrived at, he must obey that rule at his peril to the same extent. But, further, if the law is wholly a standard of external conduct, a man must always comply with that standard at his peril.

Some examples of the process of specification will be useful. In LL. Alfred, 36,[1] providing for the case of a man's staking himself on a spear carried by another, we read, "Let this (liability) be if the point be three fingers higher than the hindmost part of the shaft; if they be both on a level, . . . be that without danger."

The rule of the road and the sailing rules adopted by Congress from England are modern examples of such statutes. By the former rule, the question has been narrowed from the vague one, Was the party negligent? to the precise one, Was he on the right or left of the road? To avoid a possible misconception, it may be observed that, of course, this question does not necessarily and under all circumstances decide that of liability; a plaintiff may have been on the wrong side of the road, as he may have been negligent, and yet the conduct of the defendant may have been unjustifiable, and a ground of liability.[2] So, no doubt, a defendant could justify or excuse being on the wrong side, under some circumstances. The difference between alleging that a defendant was on the wrong side of the road, and that he was negligent, is the difference between an allegation of facts requiring to be excused by a counter allegation of further facts to prevent their being a ground of liability, and an allegation which involves a conclusion of law, and denies in advance the existence of an

[1] 1 Thorpe, p. 85; cf. LL. Hen. I., c. 88, § 3.
[2] *Spofford* v. *Harlow*, 3 Allen, 176.

excuse. Whether the former allegation ought not to be enough, and whether the establishment of the fact ought not to shift the burden of proof, are questions which belong to the theory of pleading and evidence, and could be answered either way consistently with analogy. I should have no difficulty in saying that the allegation of facts which are ordinarily a ground of liability, and which would be so unless excused, ought to be sufficient. But the forms of the law, especially the forms of pleading, do not change with every change of its substance, and a prudent lawyer would use the broader and safer phrase.

The same course of specification which has been illustrated from the statute-book ought also to be taking place in the growth of judicial decisions. That this should happen is in accordance with the past history of the law. It has been suggested already that in the days of the assize and *jurata* the court decided whether the facts constituted a ground of liability in all ordinary cases. A question of negligence might, no doubt, have gone to the jury. Common sense and common knowledge are as often sufficient to determine whether proper care has been taken of an animal, as they are to say whether A or B owns it. The cases which first arose were not of a kind to suggest analysis, and negligence was used as a proximately simple element for a long time before the need or possibility of analysis was felt. Still, when an issue of this sort is found, the dispute is rather what the acts or omissions of the defendant were than on the standard of conduct.[1] The

[1] See 27 Ass., pl. 56, fol. 141; Y. B. 43 Edw. III. 33, pl. 38. The plea in the latter case was that the defendant performed the cure as well as he knew how, without this that the horse died for default of his care. The inducement, at least, of this plea seems to deal with negligence as meaning the actual state of the party's mind.

distinction between the functions of court and jury does not come in question until the parties differ as to the standard of conduct. Negligence, like ownership, is a complex conception. Just as the latter imports the existence of certain facts, and also the consequence (protection against all the world) which the law attaches to those facts, the former imports the existence of certain facts (conduct), and also the consequence (liability) which the law attaches to those facts. In most cases the question is upon the facts, and it is only occasionally that one arises on the consequence.

It will have been noticed how the judges pass on the defendant's acts (on grounds of fault and public policy) in the case of the thorns, and that in *Weaver* v. *Ward*[1] it is said that the facts constituting an excuse, and showing that the defendant was free from negligence, should have been spread upon the record, in order that the court might judge. A similar requirement was laid down with regard to the defence of probable cause in an action for malicious prosecution.[2] And to this day the question of probable cause is always passed on by the court. Later evidence will be found in what follows.

There is, however, an important consideration, which has not yet been adverted to. It is undoubtedly possible that those who have the making of the law should deem it wise to put the mark higher in some cases than the point established by common practice at which blameworthiness begins. For instance, in *Morris* v. *Platt*,[3] the court, while declaring in the strongest terms that, in general,

[1] Hobart, 134.

[2] See *Knight* v. *Jermin*, Cro. Eliz. 134; *Chambers* v. *Taylor*, Cro. Eliz. 900.

[3] 32 Conn. 75, 89, 90.

negligence is the foundation of liability for accidental trespasses, nevertheless hints that, if a decision of the point were necessary, it might hold a defendant to a stricter rule where the damage was caused by a pistol, in view of the danger to the public of the growing habit of carrying deadly weapons. Again, it might well seem that to enter a man's house for the purpose of carrying a present, or inquiring after his health when he was ill, was a harmless and rather praiseworthy act, although crossing the owner's boundary was intentional. It is not supposed that an action would lie at the present day for such a cause, unless the defendant had been forbidden the house. Yet in the time of Henry VIII. it was said to be actionable if without license, "for then under that color my enemy might be in my house and kill me."[1] There is a clear case where public policy establishes a standard of overt acts without regard to fault in any sense. In like manner, policy established exceptions to the general prohibition against entering another's premises, as in the instance put by Chief Justice Choke in the Year Book, of a tree being blown over upon them, or when the highway became impassable, or for the purpose of keeping the peace.[2]

Another example may perhaps be found in the shape which has been given in modern times to the liability for animals, and in the derivative principle of *Rylands* v. *Fletcher*,[3] that when a person brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, he must keep it in at his peril; and, if he does not do so, is *prima facie* answerable for all the

[1] Y. B. 12 Hen. VIII. 2 *b*, pl. 2.

[2] Keilway, 46 *b*.

[3] L. R. 3 H. L. 330, 339; L. R. 1 Ex. 265, 279–282; 4 H. & C. 263; 3 id. 774.

damage which is the natural consequence of its escape. Cases of this sort do not stand on the notion that it is wrong to keep cattle, or to have a reservoir of water, as might have been thought with more plausibility when fierce and useless animals only were in question.[1] It may even be very much for the public good that the dangerous accumulation should be made (a consideration which might influence the decision in some instances, and differently in different jurisdictions); but as there is a limit to the nicety of inquiry which is possible in a trial, it may be considered that the safest way to secure care is to throw the risk upon the person who decides what precautions shall be taken. The liability for trespasses of cattle seems to lie on the boundary line between rules based on policy irrespective of fault, and requirements intended to formulate the conduct of a prudent man.

It has been shown in the first Lecture how this liability for cattle arose in the early law, and how far the influence of early notions might be traced in the law of to-day. Subject to what is there said, it is evident that the early discussions turn on the general consideration whether the owner is or is not to blame.[2] But they do not stop there: they go on to take practical distinctions, based on common experience. Thus, when the defendant chased sheep out of his land with a dog, and as soon as the sheep were out called in his dog, but the dog pursued them into adjoining land, the chasing of the sheep beyond the defendant's line was held no trespass, because "the nature of a dog is such that he cannot be ruled suddenly."[3]

[1] See *Card* v. *Case*, 5 C. B. 622, 633, 634.

[2] See Lecture I. p. 23 and n. 3.

[3] *Mitten* v. *Fandrye*, Popham, 161; s. c., 1 Sir W. Jones, 136; s. c., nom. *Millen* v. *Hawery*, Latch, 13; id. 119. In the latter report, at

It was lawful in ploughing to turn the horses on adjoining land, and if while so turning the beasts took a mouthful of grass, or subverted the soil with the plough, against the will of the driver, he had a good justification, because the law will recognize that a man cannot at every instant govern his cattle as he will.[1] So it was said that, if a man be driving cattle through a town, and one of them goes into another man's house, and he follows him, trespass does not lie for this.[2] So it was said by Doderidge, J., in the same case, that if deer come into my land out of the forest, and I chase them with dogs, it is excuse enough for me to wind my horn to recall the dogs, because by this the warden of the forest has notice that a deer is being chased.[3]

The very case of *Mason* v. *Keeling*,[4] which is referred to in the first Lecture for its echo of primitive notions, shows that the working rules of the law had long been founded on good sense. With regard to animals not then treated as property, which in the main were the wilder animals, the law was settled that, "if they are of a tame nature, there must be notice of the ill quality; and the law takes notice, that a dog is not of a fierce nature, but rather the contrary."[5] If the animals "are such as are naturally

p. 120, after reciting the opinion of the court in accordance with the text, it is said that judgment was given *non obstant* for the plaintiff; contrary to the earlier statement in the same book, and to Popham and Jones; but the principle was at all events admitted. For the limit, see *Read* v. *Edwards*, 17 C. B. N. S. 245.

[1] Y. B. 22 Edw. IV. 8, pl. 24.

[2] Popham, at p. 162; s. c., Latch, at p. 120; cf. *Mason* v. *Keeling*, 1 Ld. Raym. 606, 608. But cf. Y. B. 20 Edw. IV. 10, 11, pl. 10.

[3] Latch, at p. 120. This is a further illustration of the very practical grounds on which the law of trespass was settled.

[4] 12 Mod. 332, 335; s. c., 1 Ld. Raym. 606, 608.

[5] 12 Mod. 335; Dyer, 25 *b*, pl. 162, and cas. in marg.; 4 Co. Rep. 18 *b*;

mischievous in their kind, he shall answer for hurt done by them, without any notice."[1] The latter principle has been applied to the case of a bear,[2] and amply accounts for the liability of the owner of such animals as horses and oxen in respect of trespasses upon land, although, as has been seen, it was at one time thought to stand upon his ownership. It is said to be the universal nature of cattle to stray, and, when straying in cultivated land, to do damage by trampling down and eating the crops, whereas a dog does no harm. It is also said to be usual and easy to restrain them.[3] If, as has been suggested, the historical origin of the rule was different, it does not matter.

Following the same line of thought, the owner of cattle is not held absolutely answerable for all damage which they may do the person. According to Lord Holt in the above opinion, these animals, "which are not so familiar to mankind" as dogs, "the owner ought to confine, and take all reasonable caution that they do no mischief. . . . But . . . if the owner puts a horse or an ox to grass in his field, which is adjoining to the highway, and the horse or the ox breaks the hedge and runs into the highway, and kicks or gores some passenger, an action will not lie against the owner; otherwise, if he had notice that they had done such a thing before."

Buxendin v. *Sharp*, 2 Salk. 662; s. c., 3 Salk. 169; s. c., nom. *Bayntine* v. *Sharp*, 1 Lutw. 90; *Smith* v. *Pelah*, 2 Strange, 264; *May* v. *Burdett*, 9 Q. B. 101; *Card* v. *Case*, 5 C. B. 622.

[1] 12 Mod. 335. See *Andrew Baker's case*, 1 Hale, P. C. 430.

[2] *Besozzi* v. *Harris*, 1 F. & F. 92.

[3] See *Fletcher* v. *Rylands*, L. R. 1 Ex. 265, 281, 282; *Cox* v. *Burbridge*, 13 C. B. N. S. 430, 441; *Read* v. *Edwards*, 17 C. B. N. S. 245, 260; *Lee* v. *Riley*, 18 C. B. N. S. 722; *Ellis* v. *Loftus Iron Co.*, L. R. 10 C. P. 10; 27 Ass., pl. 56, fol. 141; Y. B. 20 Ed. IV. 11, pl. 10; 13 Hen. VII. 15, pl. 10; Keilway, 3 *b*, pl. 7. Cf. 4 Kent (12th ed.), 110, n. 1, *ad fin.*

Perhaps the most striking authority for the position that the judge's duties are not at an end when the question of negligence is reached, is shown by the discussions concerning the law of bailment. Consider the judgment in *Coggs* v. *Bernard*,[1] the treatises of Sir William Jones and Story, and the chapter of Kent upon the subject. They are so many attempts to state the duty of the bailee specifically, according to the nature of the bailment and of the object bailed. Those attempts, to be sure, were not successful, partly because they were attempts to engraft upon the native stock a branch of the Roman law which was too large to survive the process, but more especially because the distinctions attempted were purely qualitative, and were therefore useless when dealing with a jury.[2] To instruct a jury that they must find the defendant guilty of gross negligence before he can be charged, is open to the reproach that for such a body the word "gross" is only a vituperative epithet. But it would not be so with a judge sitting in admiralty without a jury. The Roman law and the Supreme Court of the United States agree that the word means something.[3] Successful or not, it is enough for the present argument that the attempt has been made.

The principles of substantive law which have been established by the courts are believed to have been somewhat obscured by having presented themselves oftenest in the form of rulings upon the sufficiency of evidence. When a judge rules that there is no evidence of negligence, he does something more than is embraced in an ordinary ruling that there is no evidence of a fact. He rules that

[1] 2 Ld. Raym. 909; 13 Am. L. R. 609.

[2] See *Grill* v. *General Iron Screw Collier Co.*, L. R. 1 C. P. 600, 612, 614.

[3] *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 383.

the acts or omissions proved or in question do not constitute a ground of legal liability, and in this way the law is gradually enriching itself from daily life, as it should. Thus, in *Crafton* v. *Metropolitan Railway Co.*,[1] the plaintiff slipped on the defendant's stairs and was severely hurt. The cause of his slipping was that the brass nosing of the stairs had been worn smooth by travel over it, and a builder testified that in his opinion the staircase was unsafe by reason of this circumstance and the absence of a hand-rail. There was nothing to contradict this except that great numbers of persons had passed over the stairs and that no accident had happened there, and the plaintiff had a verdict. The court set the verdict aside, and ordered a nonsuit. The ruling was in form that there was no evidence of negligence to go to the jury; but this was obviously equivalent to saying, and did in fact mean, that the railroad company had done all that it was bound to do in maintaining such a staircase as was proved by the plaintiff. A hundred other equally concrete instances will be found in the text-books.

On the other hand, if the court should rule that certain acts or omissions coupled with damage were conclusive evidence of negligence unless explained, it would, in substance and in truth, rule that such acts or omissions were a ground of liability,[2] or prevented a recovery, as the case might be. Thus it is said to be actionable negligence to let a house for a dwelling knowing it to be so infected with small-pox as to be dangerous to health, and concealing the knowledge.[3] To explain the acts or omissions in such a

[1] L. R. 1 C. P. 800.

[2] See *Gorham* v. *Gross*, 125 Mass. 232, 239, bottom.

[3] *Minor* v. *Sharon*, 112 Mass. 477, 487.

case would be to prove different conduct from that ruled upon, or to show that they were not, juridically speaking, the cause of the damage complained of. The ruling assumes, for the purposes of the ruling, that the facts in evidence are all the facts.

The cases which have raised difficulties needing explanation are those in which the court has ruled that there was *prima facie* evidence of negligence, or some evidence of negligence to go to the jury.

Many have noticed the confusion of thought implied in speaking of such cases as presenting mixed questions of law and fact. No doubt, as has been said above, the averment that the defendant has been guilty of negligence is a complex one: first, that he has done or omitted certain things; second, that his alleged conduct does not come up to the legal standard. And so long as the controversy is simply on the first half, the whole complex averment is plain matter for the jury without special instructions, just as a question of ownership would be where the only dispute was as to the fact upon which the legal conclusion was founded.[1] But when a controversy arises on the second half, the question whether the court or the jury ought to judge of the defendant's conduct is wholly unaffected by the accident, whether there is or is not also a dispute as to what that conduct was. If there is such a dispute, it is entirely possible to give a series of hypothetical instructions adapted to every state of facts which it is open to the jury to find. If there is no such dispute, the court may still take their opinion as to the standard. The problem is

[1] See *Winsmore* v. *Greenbank*, Willes, 577, 583; *Rex* v. *Oneby*, 2 Strange, 766, 773; *Lampleigh* v. *Brathwait*, Hobart, 105, 107; Wigram, Disc., pl. 249; Evans on Pleading, 49, 138, 139, 143 *et seq.*; Id., Miller's ed., pp. 147, 149.

to explain the relative functions of court and jury with regard to the latter.

When a case arises in which the standard of conduct, pure and simple, is submitted to the jury, the explanation is plain. It is that the court, not entertaining any clear views of public policy applicable to the matter, derives the rule to be applied from daily experience, as it has been agreed that the great body of the law of tort has been derived. But the court further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve men taken from the practical part of the community can aid its judgment.[1] Therefore it aids its conscience by taking the opinion of the jury.

But supposing a state of facts often repeated in practice, is it to be imagined that the court is to go on leaving the standard to the jury forever? Is it not manifest, on the contrary, that if the jury is, on the whole, as fair a tribunal as it is represented to be, the lesson which can be got from that source will be learned? Either the court will find that the fair teaching of experience is that the conduct complained of usually is or is not blameworthy, and therefore, unless explained, is or is not a ground of liability; or it will find the jury oscillating to and fro, and will see the necessity of making up its mind for itself. There is no reason why any other such question should not be settled, as well as that of liability for stairs with smooth strips of brass upon their edges. The exceptions would mainly be found where the standard was rapidly changing; as, for instance, in some questions of medical treatment.[2]

[1] See *Detroit & Milwaukee R. R. Co.* v. *Van Steinburg*, 17 Mich. 99, 120.

[2] In the small-pox case, *Minor* v. *Sharon*, 112 Mass. 477, while the

If this be the proper conclusion in plain cases, further consequences ensue. Facts do not often exactly repeat themselves in practice ; but cases with comparatively small variations from each other do. A judge who has long sat at *nisi prius* ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury. He should be able to lead and to instruct them in detail, even where he thinks it desirable, on the whole, to take their opinion. Furthermore, the sphere in which he is able to rule without taking their opinion at all should be continually growing.

It has often been said, that negligence is pure matter of fact, or that, after the court has declared the evidence to be such that negligence *may* be inferred from it, the jury are always to decide whether the inference shall be drawn.[1] But it is believed that the courts, when they lay down this broad proposition, are thinking of cases where the conduct to be passed upon is not proved directly, and the main or only question is what that conduct was, not what standard shall be applied to it after it is established.

Most cases which go to the jury on a ruling that there is evidence from which they may find negligence, do not go to them principally on account of a doubt as to the standard, but of a doubt as to the conduct. Take the case where the fact in proof is an event such as the dropping of a brick from a railway bridge over a highway upon the plaintiff, the fact must be inferred that the dropping was

court ruled with regard to the defendant's conduct as has been mentioned, it held that whether the plaintiff was guilty of contributory negligence in not having vaccinated his children was "a question of fact, and was properly left to the jury," p. 488.

[1] *Metropolitan Railway Co.* v. *Jackson*, 3 App. Cas. 193, 197.

due, not to a sudden operation of weather, but to a gradual falling out of repair which it was physically possible for the defendant to have prevented, before there can be any question as to the standard of conduct.[1]

So, in the case of a barrel falling from a warehouse window, it must be found that the defendant or his servants were in charge of it, before any question of standard can arise.[2] It will be seen that in each of these well-known cases the court assumed a rule which would make the defendant liable if his conduct was such as the evidence tended to prove. When there is no question as to the conduct established by the evidence, as in the case of a collision between two trains belonging to the same company, the jury have, sometimes at least, been told in effect that, if they believed the evidence, the defendant was liable.[3]

The principal argument that is urged in favor of the view that a more extended function belongs to the jury as matter of right, is the necessity of continually conforming our standards to experience. No doubt the general foundation of legal liability in blameworthiness, as determined by the existing average standards of the community, should always be kept in mind, for the purpose of keeping such concrete rules as from time to time may be laid down conformable to daily life. No doubt this conformity is the practical justification for requiring a man to know the civil law, as the fact that crimes are also generally sins is one of the practical justifications for requiring a man to know the criminal law. But these considerations only lead to

[1] See *Kearney* v. *London, Brighton, & S. Coast Ry. Co.*, L. R. 5 Q. B. 411, 414, 417 ; s. c., 6 id. 759.

[2] *Byrne* v. *Boadle*, 2 H. & C. 722.

[3] See *Skinner* v. *London, Brighton, & S. Coast Ry. Co.*, 5 Exch. 787. But cf. *Hammack* v. *White*, 11 C. B. N. s. 588, 594.

the conclusion that precedents should be overruled when they become inconsistent with present conditions; and this has generally happened, except with regard to the construction of deeds and wills. On the other hand, it is very desirable to know as nearly as we can the standard by which we shall be judged at a given moment, and, moreover, the standards for a very large part of human conduct do not vary from century to century.

The considerations urged in this Lecture are of peculiar importance in this country, or at least in States where the law is as it stands in Massachusetts. In England, the judges at *nisi prius* express their opinions freely on the value and weight of the evidence, and the judges *in banc*, by consent of parties, constantly draw inferences of fact. Hence nice distinctions as to the province of court and jury are not of the first necessity. But when judges are forbidden by statute to charge the jury with respect to matters of fact, and when the court *in banc* will never hear a case calling for inferences of fact, it becomes of vital importance to understand that, when standards of conduct are left to the jury, it is a temporary surrender of a judicial function which may be resumed at any moment in any case when the court feels competent to do so. Were this not so, the almost universal acceptance of the first proposition in this Lecture, that the general foundation of liability for unintentional wrongs is conduct different from that of a prudent man under the circumstances, would leave all our rights and duties throughout a great part of the law to the necessarily more or less accidental feelings of a jury.

It is perfectly consistent with the views maintained in this Lecture that the courts have been very slow to withdraw questions of negligence from the jury, without distinguishing nicely whether the doubt concerned the facts or the standard to be applied. Legal, like natural divisions, however clear in their general outline, will be found on exact scrutiny to end in a penumbra or debatable land. This is the region of the jury, and only cases falling on this doubtful border are likely to be carried far in court. Still, the tendency of the law must always be to narrow the field of uncertainty. That is what analogy, as well as the decisions on this very subject, would lead us to expect.

The growth of the law is very apt to take place in this way. Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than of articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn a little farther to the one side or to the other, but which must have been drawn somewhere in the neighborhood of where it falls.[1]

In this way exact distinctions have been worked out upon questions in which the elements to be considered are few. For instance, what is a reasonable time for presenting negotiable paper, or what is a difference in kind and what a difference only in quality, or the rule against perpetuities.

An example of the approach of decisions towards each other from the opposite poles, and of the function of the jury midway, is to be found in the Massachusetts adjudica-

[1] 7 American Law Review, 654 *et seq.*, July, 1873.

tions, that, if a child of two years and four months is unnecessarily sent unattended across and down a street in a large city, he cannot recover for a negligent injury;[1] that to allow a boy of eight to be abroad alone is not necessarily negligent;[2] and that the effect of permitting a boy of ten to be abroad after dark is for the jury;[3] coupled with the statement, which may be ventured on without authority, that such a permission to a young man of twenty possessed of common intelligence has no effect whatever.

Take again the law of ancient lights in England. An obstruction to be actionable must be substantial. Under ordinary circumstances the erection of a structure a hundred yards off, and one foot above the ground, would not be actionable. One within a foot of the window, and covering it, would be, without any finding of a jury beyond these facts. In doubtful cases midway, the question whether the interference was substantial has been left to the jury.[4] But as the elements are few and permanent, an inclination has been shown to lay down a definite rule, that, in ordinary cases, the building complained of must not be higher than the distance of its base from the dominant windows. And although this attempt to work out an exact line requires much caution, it is entirely philosophical in spirit.[5]

The same principle applies to negligence. If the whole evidence in the case was that a party, in full command of

[1] *Callahan* v. *Bean*, 9 Allen, 401.
[2] *Carter* v. *Towne*, 98 Mass. 567.
[3] *Lovett* v. *Salem & South Danvers R. R. Co.*, 9 Allen, 557.
[4] *Back* v. *Stacey*, 2 C. & P. 465.
[5] Cf. *Beadel* v. *Perry*, L. R. 3 Eq. 465; *City of London Brewery Co.* v. *Tennant*, L. R. 9 Ch. 212, 220; *Hackett* v. *Baiss*, L. R. 20 Eq. 494; *Theed* v. *Debenham*, 2 Ch. D. 165.

his senses and intellect, stood on a railway track, looking at an approaching engine until it ran him down, no judge would leave it to the jury to say whether the conduct was prudent. If the whole evidence was that he attempted to cross a level track, which was visible for half a mile each way, and on which no engine was in sight, no court would allow a jury to find negligence. Between these extremes are cases which would go to the jury. But it is obvious that the limit of safety in such cases, supposing no further elements present, could be determined almost to a foot by mathematical calculation.

The trouble with many cases of negligence is, that they are of a kind not frequently recurring, so as to enable any given judge to profit by long experience with juries to lay down rules, and that the elements are so complex that courts are glad to leave the whole matter in a lump for the jury's determination.

I reserve the relation between negligent and other torts for the next Lecture.

HARVARD

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THE PATH OF THE LAW.[1]

WHEN we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

The means of the study are a body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years, and now increasing annually by hundreds. In these sibylline leaves are gathered the scattered prophecies of the past upon the cases in which the axe will fall. These are what properly have been called the oracles of the law. Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to

[1] An Address delivered by Mr. Justice Holmes, of the Supreme Judicial Court of Massachusetts, at the dedication of the new hall of the Boston University School of Law, on January 8, 1897. Copyrighted by O. W. Holmes, 1897.

generalize them into a thoroughly connected system. The process is one, from a lawyer's statement of a case, eliminating as it does all the dramatic elements with which his client's story has clothed it, and retaining only the facts of legal import, up to the final analyses and abstract universals of theoretic jurisprudence. The reason why a lawyer does not mention that his client wore a white hat when he made a contract, while Mrs. Quickly would be sure to dwell upon it along with the parcel gilt goblet and the sea-coal fire, is that he forsees that the public force will act in the same way whatever his client had upon his head. It is to make the prophecies easier to be remembered and to be understood that the teachings of the decisions of the past are put into general propositions and gathered into text-books, or that statutes are passed in a general form. The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies. One of the many evil effects of the confusion between legal and moral ideas, about which I shall have something to say in a moment, is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward. But, as I shall try to show, a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; — and so of a legal right.

The number of our predictions when generalized and reduced to a system is not unmanageably large. They present themselves as a finite body of dogma which may be mastered within a reasonable time. It is a great mistake to be frightened by the ever increasing number of reports. The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view. We could reconstruct the corpus from them if all that went before were burned. The use of the earlier reports is mainly historical, a use about which I shall have something to say before I have finished.

I wish, if I can, to lay down some first principles for the study of this body of dogma or systematized prediction which we call the law, for men who want to use it as the instrument of their business to enable them to prophesy in their turn, and, as bearing upon the study, I wish to point out an ideal which as yet our law has not attained.

The first thing for a business-like understanding of the matter is to understand its limits, and therefore I think it desirable at once to point out and dispel a confusion between morality and law, which sometimes rises to the height of conscious theory, and more often and indeed constantly is making trouble in detail without reaching the point of consciousness. You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.

I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men. When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law. For that purpose you must definitely master its specific marks, and it is for that that I ask you for the moment to imagine yourselves indifferent to other and greater things.

I do not say that there is not a wider point of view from which the distinction between law and morals becomes of secondary or no importance, as all mathematical distinctions vanish in presence of the infinite. But I do say that that distinction is of the first importance for the object which we are here to consider, — a right study and mastery of the law as a business with well understood limits, a body of dogma enclosed within definite lines. I have just shown the practical reason for saying so. If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. The theoretical importance of the distinction is no less, if you would reason on your subject aright. The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure

to do unless we have the boundary constantly before our minds. The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy. For instance, when we speak of the rights of man in a moral sense, we mean to mark the limits of interference with individual freedom which we think are prescribed by conscience, or by our ideal, however reached. Yet it is certain that many laws have been enforced in the past, and it is likely that some are enforced now, which are condemned by the most enlightened opinion of the time, or which at all events pass the limit of interference as many consciences would draw it. Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law. No doubt simple and extreme cases can be put of imaginable laws which the statute-making power would not dare to enact, even in the absence of written constitutional prohibitions, because the community would rise in rebellion and fight; and this gives some plausibility to the proposition that the law, if not a part of morality, is limited by it. But this limit of power is not coextensive with any system of morals. For the most part it falls far within the lines of any such system, and in some cases may extend beyond them, for reasons drawn from the habits of a particular people at a particular time. I once heard the late Professor Agassiz say that a German population would rise if you added two cents to the price of a glass of beer. A statute in such a case would be empty words, not because it was wrong, but because it could not be enforced. No one will deny that wrong statutes can be and are enforced, and we should not all agree as to which were the wrong ones.

The confusion with which I am dealing besets confessedly legal conceptions. Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that

he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.

Take again a notion which as popularly understood is the widest conception which the law contains; — the notion of legal duty, to which already I have referred. We fill the word with all the content which we draw from morals. But what does it mean to a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money. But from his point of view, what is the difference between being fined and being taxed a certain sum for doing a certain thing? That his point of view is the test of legal principles is shown by the many discussions which have arisen in the courts on the very question whether a given statutory liability is a penalty or a tax. On the answer to this question depends the decision whether conduct is legally wrong or right, and also whether a man is under compulsion or free. Leaving the criminal law on one side, what is the difference between the liability under the mill acts or statutes authorizing a taking by eminent domain and the liability for what we call a wrongful conversion of property where restoration is out of the question? In both cases the party taking another man's property has to pay its fair value as assessed by a jury, and no more. What significance is there in calling one taking right and another wrong from the point of view of the law? It does not matter, so far as the given consequence, the compulsory payment, is concerned, whether the act to which it is attached is described in terms of praise or in terms of blame, or whether the law purports to prohibit it or to allow it. If it matters at all, still speaking from the bad man's point of view, it must be because in one case and not in the other some further disadvantages, or at least some further consequences, are attached to the act by the law. The only other disadvantages thus attached to it which I ever have been able to think of are to be found in two somewhat insignificant legal doctrines, both of which might be abolished without much disturbance. One is, that a contract to do a prohibited act is unlawful, and the other, that, if one of two or more joint wrongdoers has to pay all the damages, he cannot recover contribution from his fellows. And that I believe is all. You see

how the vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our study, the operations of the law.

Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can. It was good enough for Lord Coke, however, and here, as in many other cases, I am content to abide with him. In Bromage *v.* Genning,[1] a prohibition was sought in the King's Bench against a suit in the marches of Wales for the specific performance of a covenant to grant a lease, and Coke said that it would subvert the intention of the covenantor, since he intends it to be at his election either to lose the damages or to make the lease. Sergeant Harris for the plaintiff confessed that he moved the matter against his conscience, and a prohibition was granted. This goes further than we should go now, but it shows what I venture to say has been the common law point of view from the beginning, although Mr. Harriman, in his very able little book upon Contracts has been misled, as I humbly think, to a different conclusion.

I have spoken only of the common law, because there are some cases in which a logical justification can be found for speaking of civil liabilities as imposing duties in an intelligible sense. These are the relatively few in which equity will grant an injunction, and will enforce it by putting the defendant in prison or otherwise punishing him unless he complies with the order of the court. But I hardly think it advisable to shape general theory from the exception, and I think it would be better to cease troubling ourselves about primary rights and sanctions altogether, than to

[1] 1 Roll. Rep. 368.

describe our prophecies concerning the liabilities commonly imposed by the law in those inappropriate terms.

I mentioned, as other examples of the use by the law of words drawn from morals, malice, intent, and negligence. It is enough to take malice as it is used in the law of civil liability for wrongs, — what we lawyers call the law of torts, — to show you that it means something different in law from what it means in morals, and also to show how the difference has been obscured by giving to principles which have little or nothing to do with each other the same name. Three hundred years ago a parson preached a sermon and told a story out of Fox's Book of Martyrs of a man who had assisted at the torture of one of the saints, and afterward died, suffering compensatory inward torment. It happened that Fox was wrong. The man was alive and chanced to hear the sermon, and thereupon he sued the parson. Chief Justice Wray instructed the jury that the defendant was not liable, because the story was told innocently, without malice. He took malice in the moral sense, as importing a malevolent motive. But nowadays no one doubts that a man may be liable, without any malevolent motive at all, for false statements manifestly calculated to inflict temporal damage. In stating the case in pleading, we still should call the defendant's conduct malicious; but, in my opinion at least, the word means nothing about motives, or even about the defendant's attitude toward the future, but only signifies that the tendency of his conduct under the known circumstances was very plainly to cause the plaintiff temporal harm.[1]

In the law of contract the use of moral phraseology has led to equal confusion, as I have shown in part already, but only in part. Morals deal with the actual internal state of the individual's mind, what he actually intends. From the time of the Romans down to now, this mode of dealing has affected the language of the law as to contract, and the language used has reacted upon the thought. We talk about a contract as a meeting of the minds of the parties, and thence it is inferred in various cases that there is no contract because their minds have not met; that is, because they have intended different things or because one party has not known of the assent of the other. Yet nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent. Sup-

[1] See Hanson *v.* Globe Newspaper Co., 159 Mass. 293, 302.

pose a contract is executed in due form and in writing to deliver a lecture, mentioning no time. One of the parties thinks that the promise will be construed to mean at once, within a week. The other thinks that it means when he is ready. The court says that it means within a reasonable time. The parties are bound by the contract as it is interpreted by the court, yet neither of them meant what the court declares that they have said. In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs, — not on the parties' having *meant* the same thing but on their having *said* the same thing. Furthermore, as the signs may be addressed to one sense or another, — to sight or to hearing, — on the nature of the sign will depend the moment when the contract is made. If the sign is tangible, for instance, a letter, the contract is made when the letter of acceptance is delivered. If it is necessary that the minds of the parties meet, there will be no contract until the acceptance can be read, — none, for example, if the acceptance be snatched from the hand of the offerer by a third person.

This is not the time to work out a theory in detail, or to answer many obvious doubts and questions which are suggested by these general views. I know of none which are not easy to answer, but what I am trying to do now is only by a series of hints to throw some light on the narrow path of legal doctrine, and upon two pitfalls which, as it seems to me, lie perilously near to it. Of the first of these I have said enough. I hope that my illustrations have shown the danger, both to speculation and to practice, of confounding morality with law, and the trap which legal language lays for us on that side of our way. For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.

So much for the limits of the law. The next thing which I wish to consider is what are the forces which determine its content

and its growth. You may assume, with Hobbes and Bentham and Austin, that all law emanates from the sovereign, even when the first human beings to enunciate it are the judges, or you may think that law is the voice of the Zeitgeist, or what you like. It is all one to my present purpose. Even if every decision required the sanction of an emperor with despotic power and a whimsical turn of mind, we should be interested none the less, still with a view to prediction, in discovering some order, some rational explanation, and some principle of growth for the rules which he laid down. In every system there are such explanations and principles to be found. It is with regard to them that a second fallacy comes in, which I think it important to expose.

The fallacy to which I refer is the notion that the only force at work in the development of the law is logic. In the broadest sense, indeed, that notion would be true. The postulate on which we think about the universe is that there is a fixed quantitative relation between every phenomenon and its antecedents and consequents. If there is such a thing as a phenomenon without these fixed quantitative relations, it is a miracle. It is outside the law of cause and effect, and as such transcends our power of thought, or at least is something to or from which we cannot reason. The condition of our thinking about the universe is that it is capable of being thought about rationally, or, in other words, that every part of it is effect and cause in the same sense in which those parts are with which we are most familiar. So in the broadest sense it is true that the law is a logical development, like everything else. The danger of which I speak is not the admission that the principles governing other phenomena also govern the law, but the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct. This is the natural error of the schools, but it is not confined to them. I once heard a very eminent judge say that he never let a decision go until he was absolutely sure that it was right. So judicial dissent often is blamed, as if it meant simply that one side or the other were not doing their sums right, and, if they would take more trouble, agreement inevitably would come.

This mode of thinking is entirely natural. The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic.

And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self-evident, no matter how ready we may be to accept it, not even Mr. Herbert Spencer's Every man has a right to do what he wills, provided he interferes not with a like right on the part of his neighbors.

Why is a false and injurious statement privileged, if it is made honestly in giving information about a servant? It is because it has been thought more important that information should be given freely, than that a man should be protected from what under other circumstances would be an actionable wrong. Why is a man at liberty to set up a business which he knows will ruin his neighbor? It is because the public good is supposed to be best subserved by free competition. Obviously such judgments of relative importance may vary in different times and places. Why does a judge instruct a jury that an employer is not liable to an employee for an injury received in the course of his employment unless he is negligent, and why do the jury generally find for the plaintiff if the case is allowed to go to them? It is because the traditional policy of our law is to confine liability to cases where a prudent man might have foreseen the injury, or at least the danger, while the inclination of a very large part of the community is to make certain classes of persons insure the safety of those with whom they deal. Since the last words were written, I have seen the requirement of such insur-

ance put forth as part of the programme of one of the best known labor organizations. There is a concealed, half conscious battle on the question of legislative policy, and if any one thinks that it can be settled deductively, or once for all, I only can say that I think he is theoretically wrong, and that I am certain that his conclusion will not be accepted in practice *semper ubique et ab omnibus.*

Indeed, I think that even now our theory upon this matter is open to reconsideration, although I am not prepared to say how I should decide if a reconsideration were proposed. Our law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like, where the damages might be taken to lie where they fell by legal judgment. But the torts with which our courts are kept busy to-day are mainly the incidents of certain well known businesses. They are injuries to person or property by railroads, factories, and the like. The liability for them is estimated, and sooner or later goes into the price paid by the public. The public really pays the damages, and the question of liability, if pressed far enough, is really the question how far it is desirable that the public should insure the safety of those whose work it uses. It might be said that in such cases the chance of a jury finding for the defendant is merely a chance, once in a while rather arbitrarily interrupting the regular course of recovery, most likely in the case of an unusually conscientious plaintiff, and therefore better done away with. On the other hand, the economic value even of a life to the community can be estimated, and no recovery, it may be said, ought to go beyond that amount. It is conceivable that some day in certain cases we may find ourselves imitating, on a higher plane, the tariff for life and limb which we see in the Leges Barbarorum.

I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said. When socialism first began to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England, yet it is certain that it is not a conscious factor in the decisions to which I refer. I think that something similar has led people who no longer hope to control the legislatures to look to the courts as expounders of the Consti-

tutions, and that in some courts new principles have been discovered outside the bodies of those instruments, which may be generalized into acceptance of the economic doctrines which prevailed about fifty years ago, and a wholesale prohibition of what a tribunal of lawyers does not think about right. I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.

So much for the fallacy of logical form. Now let us consider the present condition of the law as a subject for study, and the ideal toward which it tends. We still are far from the point of view which I desire to see reached. No one has reached it or can reach it as yet. We are only at the beginning of a philosophical reaction, and of a reconsideration of the worth of doctrines which for the most part still are taken for granted without any deliberate, conscious, and systematic questioning of their grounds. The development of our law has gone on for nearly a thousand years, like the development of a plant, each generation taking the inevitable next step, mind, like matter, simply obeying a law of spontaneous growth. It is perfectly natural and right that it should have been so. Imitation is a necessity of human nature, as has been illustrated by a remarkable French writer, M. Tarde, in an admirable book, "Les Lois de l'Imitation." Most of the things we do, we do for no better reason than that our fathers have done them or that our neighbors do them, and the same is true of a larger part than we suspect of what we think. The reason is a good one, because our short life gives us no time for a better, but it is not the best. It does not follow, because we all are compelled to take on faith at second hand most of the rules on which we base our action and our thought, that each of us may not try to set some corner of his world in the order of reason, or that all of us collectively should not aspire to carry reason as far as it will go throughout the whole domain. In regard to the law, it is true, no doubt, that an evolutionist will hesitate to affirm universal validity for his social ideals, or for the principles which he thinks should be embodied in legislation. He is content if he can prove them best for here and now. He may be ready to admit that he knows nothing about an absolute best in the cosmos, and even that he knows next to nothing

about a permanent best for men. Still it is true that a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words.

At present, in very many cases, if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition. We follow it into the Year Books, and perhaps beyond them to the customs of the Salian Franks, and somewhere in the past, in the German forests, in the needs of Norman kings, in the assumptions of a dominant class, in the absence of generalized ideas, we find out the practical motive for what now best is justified by the mere fact of its acceptance and that men are accustomed to it. The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal. For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. I am thinking of the technical rule as to trespass *ab initio*, as it is called, which I attempted to explain in a recent Massachusetts case.[1]

Let me take an illustration, which can be stated in a few words, to show how the social end which is aimed at by a rule of law is obscured and only partially attained in consequence of the fact that the rule owes its form to a gradual historical development, instead of being reshaped as a whole, with conscious articulate reference to the end in view. We think it desirable to prevent one man's property being misappropriated by another, and so we

[1] Commonwealth *v.* Rubin, 165 Mass. 453.

make larceny a crime. The evil is the same whether the misappropriation is made by a man into whose hands the owner has put the property, or by one who wrongfully takes it away. But primitive law in its weakness did not get much beyond an effort to prevent violence, and very naturally made a wrongful taking, a trespass, part of its definition of the crime. In modern times the judges enlarged the definition a little by holding that, if the wrongdoer gets possession by a trick or device, the crime is committed. This really was giving up the requirement of a trespass, and it would have been more logical, as well as truer to the present object of the law, to abandon the requirement altogether. That, however, would have seemed too bold, and was left to statute. Statutes were passed making embezzlement a crime. But the force of tradition caused the crime of embezzlement to be regarded as so far distinct from larceny that to this day, in some jurisdictions at least, a slip corner is kept open for thieves to contend, if indicted for larceny, that they should have been indicted for embezzlement, and if indicted for embezzlement, that they should have been indicted for larceny, and to escape on that ground.

Far more fundamental questions still await a better answer than that we do as our fathers have done. What have we better than a blind guess to show that the criminal law in its present form does more good than harm? I do not stop to refer to the effect which it has had in degrading prisoners and in plunging them further into crime, or to the question whether fine and imprisonment do not fall more heavily on a criminal's wife and children than on himself. I have in mind more far-reaching questions. Does punishment deter? Do we deal with criminals on proper principles? A modern school of Continental criminalists plumes itself on the formula, first suggested, it is said, by Gall, that we must consider the criminal rather than the crime. The formula does not carry us very far, but the inquiries which have been started look toward an answer of my questions based on science for the first time. If the typical criminal is a degenerate, bound to swindle or to murder by as deep seated an organic necessity as that which makes the rattlesnake bite, it is idle to talk of deterring him by the classical method of imprisonment. He must be got rid of; he cannot be improved, or frightened out of his structural reaction. If, on the other hand, crime, like normal human conduct, is mainly a matter of imitation, punishment fairly may be

expected to help to keep it out of fashion. The study of criminals has been thought by some well known men of science to sustain the former hypothesis. The statistics of the relative increase of crime in crowded places like large cities, where example has the greatest chance to work, and in less populated parts, where the contagion spreads more slowly, have been used with great force in favor of the latter view. But there is weighty authority for the belief that, however this may be, "not the nature of the crime, but the dangerousness of the criminal, constitutes the only reasonable legal criterion to guide the inevitable social reaction against the criminal."[1]

The impediments to rational generalization, which I illustrated from the law of larceny, are shown in the other branches of the law, as well as in that of crime. Take the law of tort or civil liability for damages apart from contract and the like. Is there any general theory of such liability, or are the cases in which it exists simply to be enumerated, and to be explained each on its special ground, as is easy to believe from the fact that the right of action for certain well known classes of wrongs like trespass or slander has its special history for each class? I think that there is a general theory to be discovered, although resting in tendency rather than established and accepted. I think that the law regards the infliction of temporal damage by a responsible person as actionable, if under the circumstances known to him the danger of his act is manifest according to common experience, or according to his own experience if it is more than common, except in cases where upon special grounds of policy the law refuses to protect the plaintiff or grants a privilege to the defendant.[2] I think that commonly malice, intent, and negligence mean only that the danger was manifest to a greater or less degree, under the circumstances known to the actor, although in some cases of privilege malice may mean an actual malevolent motive, and such a motive may take away a permission knowingly to inflict harm, which otherwise would be granted on this or that ground of dominant public good. But when I stated my view to a very eminent English judge the

[1] Havelock Ellis, "The Criminal," 41, citing Garofalo. See also Ferri, "Sociologie Criminelle," *passim*. Compare Tarde, "La Philosophie Pénale."

[2] An example of the law's refusing to protect the plaintiff is when he is interrupted by a stranger in the use of a valuable way, which he has travelled adversely for a week less than the period of prescription. A week later he will have gained a right, but now he is only a trespasser. Examples of privilege I have given already. One of the best is competition in business.

other day, he said: "You are discussing what the law ought to be; as the law is, you must show a right. A man is not liable for negligence unless he is subject to a duty." If our difference was more than a difference in words, or with regard to the proportion between the exceptions and the rule, then, in his opinion, liability for an act cannot be referred to the manifest tendency of the act to cause temporal damage in general as a sufficient explanation, but must be referred to the special nature of the damage, or must be derived from some special circumstances outside of the tendency of the act, for which no generalized explanation exists. I think that such a view is wrong, but it is familiar, and I dare say generally is accepted in England.

Everywhere the basis of principle is tradition, to such an extent that we even are in danger of making the rôle of history more important than it is. The other day Professor Ames wrote a learned article to show, among other things, that the common law did not recognize the defence of fraud in actions upon specialties, and the moral might seem to be that the personal character of that defence is due to its equitable origin. But if, as I have said, all contracts are formal, the difference is not merely historical, but theoretic, between defects of form which prevent a contract from being made, and mistaken motives which manifestly could not be considered in any system that we should call rational except against one who was privy to those motives. It is not confined to specialties, but is of universal application. I ought to add that I do not suppose that Mr. Ames would disagree with what I suggest.

However, if we consider the law of contract, we find it full of history. The distinctions between debt, covenant, and assumpsit are merely historical. The classification of certain obligations to pay money, imposed by the law irrespective of any bargain as quasi contracts, is merely historical. The doctrine of consideration is merely historical. The effect given to a seal is to be explained by history alone. — Consideration is a mere form. Is it a useful form? If so, why should it not be required in all contracts? A seal is a mere form, and is vanishing in the scroll and in enactments that a consideration must be given, seal or no seal. — Why should any merely historical distinction be allowed to affect the rights and obligations of business men?

Since I wrote this discourse I have come on a very good example of the way in which tradition not only overrides rational policy, but

overrides it after first having been misunderstood and having been given a new and broader scope than it had when it had a meaning. It is the settled law of England that a material alteration of a written contract by a party avoids it as against him. The doctrine is contrary to the general tendency of the law. We do not tell a jury that if a man ever has lied in one particular he is to be presumed to lie in all. Even if a man has tried to defraud, it seems no sufficient reason for preventing him from proving the truth. Objections of like nature in general go to the weight, not to the admissibility, of evidence. Moreover, this rule is irrespective of fraud, and is not confined to evidence. It is not merely that you cannot use the writing, but that the contract is at an end. What does this mean? The existence of a written contract depends on the fact that the offerer and offeree have interchanged their written expressions, not on the continued existence of those expressions. But in the case of a bond the primitive notion was different. The contract was inseparable from the parchment. If a stranger destroyed it, or tore off the seal, or altered it, the obligee could not recover, however free from fault, because the defendant's contract, that is, the actual tangible bond which he had sealed, could not be produced in the form in which it bound him. About a hundred years ago Lord Kenyon undertook to use his reason on this tradition, as he sometimes did to the detriment of the law, and, not understanding it, said he could see no reason why what was true of a bond should not be true of other contracts. His decision happened to be right, as it concerned a promissory note, where again the common law regarded the contract as inseparable from the paper on which it was written, but the reasoning was general, and soon was extended to other written contracts, and various absurd and unreal grounds of policy were invented to account for the enlarged rule.

I trust that no one will understand me to be speaking with disrespect of the law, because I criticise it so freely. I venerate the law, and especially our system of law, as one of the vastest products of the human mind. No one knows better than I do the countless number of great intellects that have spent themselves in making some addition or improvement, the greatest of which is trifling when compared with the mighty whole. It has the final title to respect that it exists, that it is not a Hegelian dream, but a part of the lives of men. But one may criticise even what one reveres. Law is the business to which my life is devoted, and I should

show less than devotion if I did not do what in me lies to improve it, and, when I perceive what seems to me the ideal of its future, if I hesitated to point it out and to press toward it with all my heart.

Perhaps I have said enough to show the part which the study of history necessarily plays in the intelligent study of the law as it is to-day. In the teaching of this school and at Cambridge it is in no danger of being undervalued. Mr. Bigelow here and Mr. Ames and Mr. Thayer there have made important contributions which will not be forgotten, and in England the recent history of early English law by Sir Frederick Pollock and Mr. Maitland has lent the subject an almost deceptive charm. We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws upon the present. I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. As a step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics. The present divorce between the schools of political economy and law seems to me an evidence of how much progress in philosophical study still remains to be made. In the present state of political economy, indeed, we come again upon history on a larger scale, but there we are called on to consider and weigh the ends of legislation, the means of attaining them, and the cost. We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.

There is another study which sometimes is undervalued by the practical minded, for which I wish to say a good word, although I think a good deal of pretty poor stuff goes under that name. I mean the study of what is called jurisprudence. Jurisprudence, as I look at it, is simply law in its most generalized part. Every effort to reduce a case to a rule is an effort of jurisprudence, although the name as used in English is confined to the broadest rules and most fundamental conceptions. One mark of a great lawyer is that he sees the application of the broadest rules. There is a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked

through the statutes and could find nothing about churns, and gave judgment for the defendant. The same state of mind is shown in all our common digests and text-books. Applications of rudimentary rules of contract or tort are tucked away under the head of Railroads or Telegraphs or go to swell treatises on historical subdivisions, such as Shipping or Equity, or are gathered under an arbitrary title which is thought likely to appeal to the practical mind, such as Mercantile Law. If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discern the true basis for prophecy. Therefore, it is well to have an accurate notion of what you mean by law, by a right, by a duty, by malice, intent, and negligence, by ownership, by possession, and so forth. I have in my mind cases in which the highest courts seem to me to have floundered because they had no clear ideas on some of these themes. I have illustrated their importance already. If a further illustration is wished, it may be found by reading the Appendix to Sir James Stephen's Criminal Law on the subject of possession, and then turning to Pollock and Wright's enlightened book. Sir James Stephen is not the only writer whose attempts to analyze legal ideas have been confused by striving for a useless quintessence of all systems, instead of an accurate anatomy of one. The trouble with Austin was that he did not know enough English law. But still it is a practical advantage to master Austin, and his predecessors, Hobbes and Bentham, and his worthy successors, Holland and Pollock. Sir Frederick Pollock's recent little book is touched with the felicity which marks all his works, and is wholly free from the perverting influence of Roman models.

The advice of the elders to young men is very apt to be as unreal as a list of the hundred best books. At least in my day I had my share of such counsels, and high among the unrealities I place the recommendation to study the Roman law. I assume that such advice means more than collecting a few Latin maxims with which to ornament the discourse, — the purpose for which Lord Coke recommended Bracton. If that is all that is wanted, the title "De Regulis Juris Antiqui" can be read in an hour. I assume that, if it is well to study the Roman law, it is well to study it as a working system. That means mastering a set of technicalities more difficult and less understood than our own, and studying another course of history by which even more than our own the Roman law must

be explained. If any one doubts me, let him read Keller's "Der Römische Civil Process und die Actionen," a treatise on the prætor's edict, Muirhead's most interesting "Historical Introduction to the Private Law of Rome," and, to give him the best chance possible, Sohm's admirable Institutes. No. The way to gain a liberal view of your subject is not to read something else, but to get to the bottom of the subject itself. The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what it is; and, finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price.

We have too little theory in the law rather than too much, especially on this final branch of study. When I was speaking of history, I mentioned larceny as an example to show how the law suffered from not having embodied in a clear form a rule which will accomplish its manifest purpose. In that case the trouble was due to the survival of forms coming from a time when a more limited purpose was entertained. Let me now give an example to show the practical importance, for the decision of actual cases, of understanding the reasons of the law, by taking an example from rules which, so far as I know, never have been explained or theorized about in any adequate way. I refer to statutes of limitation and the law of prescription. The end of such rules is obvious, but what is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time? Sometimes the loss of evidence is referred to, but that is a secondary matter. Sometimes the desirability of peace, but why is peace more desirable after twenty years than before? It is increasingly likely to come without the aid of legislation. Sometimes it is said that, if a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example. Now if this is all that can be said about it, you probably will decide a case I am going to put, for the plaintiff; if you take the view which I shall suggest, you possibly will decide it for the defendant. A man is sued for trespass upon land, and justifies under a right of way. He proves that he has used the way openly and adversely for twenty years, but it turns out that the plaintiff had granted a license to a person whom he reasonably supposed to be the defendant's agent, although

not so in fact, and therefore had assumed that the use of the way was permissive, in which case no right would be gained. Has the defendant gained a right or not? If his gaining it stands on the fault and neglect of the landowner in the ordinary sense, as seems commonly to be supposed, there has been no such neglect, and the right of way has not been acquired. But if I were the defendant's counsel, I should suggest that the foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser. Sir Henry Maine has made it fashionable to connect the archaic notion of property with prescription. But the connection is further back than the first recorded history. It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man. It is only by way of reply to the suggestion that you are disappointing the former owner, that you refer to his neglect having allowed the gradual dissociation between himself and what he claims, and the gradual association of it with another. If he knows that another is doing acts which on their face show that he is on the way toward establishing such an association, I should argue that in justice to that other he was bound at his peril to find out whether the other was acting under his permission, to see that he was warned, and, if necessary, stopped.

I have been speaking about the study of the law, and I have said next to nothing of what commonly is talked about in that connection, — text-books and the case system, and all the machinery with which a student comes most immediately in contact. Nor shall I say anything about them Theory is my subject, not practical details. The modes of teaching have been improved since my time, no doubt, but ability and industry will master the raw material with any mode. Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house. The most important improvements of the last twenty-five years are improvements in theory. It is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject. For the incompetent, it sometimes is true, as has been said, that an interest in general ideas means an

absence of particular knowledge. I remember in army days reading of a youth who, being examined for the lowest grade and being asked a question about squadron drill, answered that he never had considered the evolutions of less than ten thousand men. But the weak and foolish must be left to their folly. The danger is that the able and practical minded should look with indifference or distrust upon ideas the connection of which with their business is remote. I heard a story, the other day, of a man who had a valet to whom he paid high wages, subject to deduction for faults. One of his deductions was, "For lack of imagination, five dollars." The lack is not confined to valets. The object of ambition, power, generally presents itself nowadays in the form of money alone. Money is the most immediate form, and is a proper object of desire. "The fortune," said Rachel, "is the measure of the intelligence." That is a good text to waken people out of a fool's paradise. But, as Hegel says,[1] "It is in the end not the appetite, but the opinion, which has to be satisfied." To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas. If you want great examples read Mr. Leslie Stephen's "History of English Thought in the Eighteenth Century," and see how a hundred years after his death the abstract speculations of Descartes had become a practical force controlling the conduct of men. Read the works of the great German jurists, and see how much more the world is governed to-day by Kant than by Bonaparte. We cannot all be Descartes or Kant, but we all want happiness. And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food beside success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.

[1] Phil. des Rechts, § 190.

Federalist No. 83:

The Judiciary Continued in Relation to Trial by Jury

From McLean's Edition, New York

Alexander Hamilton
May 28, 1788

To the People of the State of New York:

THE objection to the plan of the convention, which has met with most success in this State, and perhaps in several of the other States, is THAT RELATIVE TO THE WANT OF A CONSTITUTIONAL PROVISION for the trial by jury in civil cases. The disingenuous form in which this objection is usually stated has been repeatedly adverted to and exposed, but continues to be pursued in all the conversations and writings of the opponents of the plan. The mere silence of the Constitution in regard to CIVIL CAUSES, is represented as an abolition of the trial by jury, and the declamations to which it has afforded a pretext are artfully calculated to induce a persuasion that this pretended abolition is complete and universal, extending not only to every species of civil, but even to CRIMINAL CAUSES. To argue with respect to the latter would, however, be as vain and fruitless as to attempt the serious proof of the EXISTENCE of MATTER, or to demonstrate any of those propositions which, by their own internal evidence, force conviction, when expressed in language adapted to convey their meaning.

With regard to civil causes, subtleties almost too contemptible for refutation have been employed to countenance the surmise that a thing which is only NOT PROVIDED FOR, is entirely ABOLISHED. Every man of discernment must at once perceive the wide difference between SILENCE and ABOLITION. But as the inventors of this fallacy have attempted to support it by certain LEGAL MAXIMS of interpretation, which they have perverted from their true meaning, it may not be wholly useless to explore the ground they have taken.

The maxims on which they rely are of this nature: ``A specification of particulars is an exclusion of generals"; or, ``The expression of one thing is the exclusion of another." Hence, say they, as the Constitution has established the trial by jury in criminal cases, and is silent in respect to civil, this silence is an implied prohibition of trial by jury in regard to the latter.

The rules of legal interpretation are rules of COMMONSENSE, adopted by the courts in the construction of the laws. The true test, therefore, of a just application of them is its conformity to the source from which they are derived. This being the case, let me ask if it is consistent with common-sense to suppose that a provision obliging the legislative power to commit the trial of criminal causes to juries, is a privation of its right to authorize or permit that mode of trial in other cases? Is it natural to suppose, that a command to do one thing is a prohibition to the doing of another, which there was a previous power to do, and which is not incompatible with the thing commanded to be

done? If such a supposition would be unnatural and unreasonable, it cannot be rational to maintain that an injunction of the trial by jury in certain cases is an interdiction of it in others.

A power to constitute courts is a power to prescribe the mode of trial; and consequently, if nothing was said in the Constitution on the subject of juries, the legislature would be at liberty either to adopt that institution or to let it alone. This discretion, in regard to criminal causes, is abridged by the express injunction of trial by jury in all such cases; but it is, of course, left at large in relation to civil causes, there being a total silence on this head. The specification of an obligation to try all criminal causes in a particular mode, excludes indeed the obligation or necessity of employing the same mode in civil causes, but does not abridge THE POWER of the legislature to exercise that mode if it should be thought proper. The pretense, therefore, that the national legislature would not be at full liberty to submit all the civil causes of federal cognizance to the determination of juries, is a pretense destitute of all just foundation.

From these observations this conclusion results: that the trial by jury in civil cases would not be abolished; and that the use attempted to be made of the maxims which have been quoted, is contrary to reason and common-sense, and therefore not admissible. Even if these maxims had a precise technical sense, corresponding with the idea of those who employ them upon the present occasion, which, however, is not the case, they would still be inapplicable to a constitution of government. In relation to such a subject, the natural and obvious sense of its provisions, apart from any technical rules, is the true criterion of construction.

Having now seen that the maxims relied upon will not bear the use made of them, let us endeavor to ascertain their proper use and true meaning. This will be best done by examples. The plan of the convention declares that the power of Congress, or, in other words, of the NATIONAL LEGISLATURE, shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension to a general legislative authority, because an affirmative grant of special powers would be absurd, as well as useless, if a general authority was intended.

In like manner the judicial authority of the federal judicatures is declared by the Constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits, beyond which the federal courts cannot extend their jurisdiction, because the objects of their cognizance being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive authority.

These examples are sufficient to elucidate the maxims which have been mentioned, and to designate the manner in which they should be used. But that there may be no misapprehensions upon this subject, I shall add one case more, to demonstrate the proper use of these maxims, and the abuse which has been made of them.

Let us suppose that by the laws of this State a married woman was incapable of conveying her estate, and that the legislature, considering this as an evil, should enact that

she might dispose of her property by deed executed in the presence of a magistrate. In such a case there can be no doubt but the specification would amount to an exclusion of any other mode of conveyance, because the woman having no previous power to alienate her property, the specification determines the particular mode which she is, for that purpose, to avail herself of. But let us further suppose that in a subsequent part of the same act it should be declared that no woman should dispose of any estate of a determinate value without the consent of three of her nearest relations, signified by their signing the deed; could it be inferred from this regulation that a married woman might not procure the approbation of her relations to a deed for conveying property of inferior value? The position is too absurd to merit a refutation, and yet this is precisely the position which those must establish who contend that the trial by juries in civil cases is abolished, because it is expressly provided for in cases of a criminal nature.

From these observations it must appear unquestionably true, that trial by jury is in no case abolished by the proposed Constitution, and it is equally true, that in those controversies between individuals in which the great body of the people are likely to be interested, that institution will remain precisely in the same situation in which it is placed by the State constitutions, and will be in no degree altered or influenced by the adoption of the plan under consideration. The foundation of this assertion is, that the national judiciary will have no cognizance of them, and of course they will remain determinable as heretofore by the State courts only, and in the manner which the State constitutions and laws prescribe. All land causes, except where claims under the grants of different States come into question, and all other controversies between the citizens of the same State, unless where they depend upon positive violations of the articles of union, by acts of the State legislatures, will belong exclusively to the jurisdiction of the State tribunals. Add to this, that admiralty causes, and almost all those which are of equity jurisdiction, are determinable under our own government without the intervention of a jury, and the inference from the whole will be, that this institution, as it exists with us at present, cannot possibly be affected to any great extent by the proposed alteration in our system of government.

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to, as a defense against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than beneficial, as all are satisfied of the utility of the institution, and of its friendly aspect to liberty. But I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty, and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions, have ever appeared to me to be the

great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the habeas-corpus act, seems therefore to be alone concerned in the question. And both of these are provided for, in the most ample manner, in the plan of the convention.

It has been observed, that trial by jury is a safeguard against an oppressive exercise of the power of taxation. This observation deserves to be canvassed.

It is evident that it can have no influence upon the legislature, in regard to the AMOUNT of taxes to be laid, to the OBJECTS upon which they are to be imposed, or to the RULE by which they are to be apportioned. If it can have any influence, therefore, it must be upon the mode of collection, and the conduct of the officers intrusted with the execution of the revenue laws.

As to the mode of collection in this State, under our own Constitution, the trial by jury is in most cases out of use. The taxes are usually levied by the more summary proceeding of distress and sale, as in cases of rent. And it is acknowledged on all hands, that this is essential to the efficacy of the revenue laws. The dilatory course of a trial at law to recover the taxes imposed on individuals, would neither suit the exigencies of the public nor promote the convenience of the citizens. It would often occasion an accumulation of costs, more burdensome than the original sum of the tax to be levied.

And as to the conduct of the officers of the revenue, the provision in favor of trial by jury in criminal cases, will afford the security aimed at. Wilful abuses of a public authority, to the oppression of the subject, and every species of official extortion, are offenses against the government, for which the persons who commit them may be indicted and punished according to the circumstances of the case.

The excellence of the trial by jury in civil cases appears to depend on circumstances foreign to the preservation of liberty. The strongest argument in its favor is, that it is a security against corruption. As there is always more time and better opportunity to tamper with a standing body of magistrates than with a jury summoned for the occasion, there is room to suppose that a corrupt influence would more easily find its way to the former than to the latter. The force of this consideration is, however, diminished by others. The sheriff, who is the summoner of ordinary juries, and the clerks of courts, who have the nomination of special juries, are themselves standing officers, and, acting individually, may be supposed more accessible to the touch of corruption than the judges, who are a collective body. It is not difficult to see, that it would be in the power of those officers to select jurors who would serve the purpose of the party as well as a corrupted bench. In the next place, it may fairly be supposed, that there would be less difficulty in gaining some of the jurors promiscuously taken from the public mass, than in gaining men who had been chosen by the government for their probity and good character. But making every deduction for these considerations, the trial by jury must still be a valuable check upon corruption. It greatly multiplies the impediments to its success. As matters now stand, it would be necessary to corrupt both court and jury; for where the jury have gone evidently wrong, the court will generally grant a new trial, and it would be in most cases

of little use to practice upon the jury, unless the court could be likewise gained. Here then is a double security; and it will readily be perceived that this complicated agency tends to preserve the purity of both institutions. By increasing the obstacles to success, it discourages attempts to seduce the integrity of either. The temptations to prostitution which the judges might have to surmount, must certainly be much fewer, while the co-operation of a jury is necessary, than they might be, if they had themselves the exclusive determination of all causes.

Notwithstanding, therefore, the doubts I have expressed, as to the essentiality of trial by jury in civil cases to liberty, I admit that it is in most cases, under proper regulations, an excellent method of determining questions of property; and that on this account alone it would be entitled to a constitutional provision in its favor if it were possible to fix the limits within which it ought to be comprehended. There is, however, in all cases, great difficulty in this; and men not blinded by enthusiasm must be sensible that in a federal government, which is a composition of societies whose ideas and institutions in relation to the matter materially vary from each other, that difficulty must be not a little augmented. For my own part, at every new view I take of the subject, I become more convinced of the reality of the obstacles which, we are authoritatively informed, prevented the insertion of a provision on this head in the plan of the convention.

The great difference between the limits of the jury trial in different States is not generally understood; and as it must have considerable influence on the sentence we ought to pass upon the omission complained of in regard to this point, an explanation of it is necessary. In this State, our judicial establishments resemble, more nearly than in any other, those of Great Britain. We have courts of common law, courts of probates (analogous in certain matters to the spiritual courts in England), a court of admiralty and a court of chancery. In the courts of common law only, the trial by jury prevails, and this with some exceptions. In all the others a single judge presides, and proceeds in general either according to the course of the canon or civil law, without the aid of a jury. [1] In New Jersey, there is a court of chancery which proceeds like ours, but neither courts of admiralty nor of probates, in the sense in which these last are established with us. In that State the courts of common law have the cognizance of those causes which with us are determinable in the courts of admiralty and of probates, and of course the jury trial is more extensive in New Jersey than in New York. In Pennsylvania, this is perhaps still more the case, for there is no court of chancery in that State, and its common-law courts have equity jurisdiction. It has a court of admiralty, but none of probates, at least on the plan of ours. Delaware has in these respects imitated Pennsylvania. Maryland approaches more nearly to New York, as does also Virginia, except that the latter has a plurality of chancellors. North Carolina bears most affinity to Pennsylvania; South Carolina to Virginia. I believe, however, that in some of those States which have distinct courts of admiralty, the causes depending in them are triable by juries. In Georgia there are none but common-law courts, and an appeal of course lies from the verdict of one jury to another, which is called a special jury, and for which a particular mode of appointment is marked out. In Connecticut, they have no distinct courts either of chancery or of admiralty, and their courts of probates have no jurisdiction of causes. Their common-law courts have admiralty and, to a certain extent, equity jurisdiction. In cases of importance, their

General Assembly is the only court of chancery. In Connecticut, therefore, the trial by jury extends in PRACTICE further than in any other State yet mentioned. Rhode Island is, I believe, in this particular, pretty much in the situation of Connecticut. Massachusetts and New Hampshire, in regard to the blending of law, equity, and admiralty jurisdictions, are in a similar predicament. In the four Eastern States, the trial by jury not only stands upon a broader foundation than in the other States, but it is attended with a peculiarity unknown, in its full extent, to any of them. There is an appeal OF COURSE from one jury to another, till there have been two verdicts out of three on one side.

From this sketch it appears that there is a material diversity, as well in the modification as in the extent of the institution of trial by jury in civil cases, in the several States; and from this fact these obvious reflections flow: first, that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the States; and secondly, that more or at least as much might have been hazarded by taking the system of any one State for a standard, as by omitting a provision altogether and leaving the matter, as has been done, to legislative regulation.

The propositions which have been made for supplying the omission have rather served to illustrate than to obviate the difficulty of the thing. The minority of Pennsylvania have proposed this mode of expression for the purpose ``Trial by jury shall be as heretofore'' and this I maintain would be senseless and nugatory. The United States, in their united or collective capacity, are the OBJECT to which all general provisions in the Constitution must necessarily be construed to refer. Now it is evident that though trial by jury, with various limitations, is known in each State individually, yet in the United States, AS SUCH, it is at this time altogether unknown, because the present federal government has no judiciary power whatever; and consequently there is no proper antecedent or previous establishment to which the term HERETOFORE could relate. It would therefore be destitute of a precise meaning, and inoperative from its uncertainty.

As, on the one hand, the form of the provision would not fulfil the intent of its proposers, so, on the other, if I apprehend that intent rightly, it would be in itself inexpedient. I presume it to be, that causes in the federal courts should be tried by jury, if, in the State where the courts sat, that mode of trial would obtain in a similar case in the State courts; that is to say, admiralty causes should be tried in Connecticut by a jury, in New York without one. The capricious operation of so dissimilar a method of trial in the same cases, under the same government, is of itself sufficient to indispose every well regulated judgment towards it. Whether the cause should be tried with or without a jury, would depend, in a great number of cases, on the accidental situation of the court and parties.

But this is not, in my estimation, the greatest objection. I feel a deep and deliberate conviction that there are many cases in which the trial by jury is an ineligible one. I think it so particularly in cases which concern the public peace with foreign nations that is, in most cases where the question turns wholly on the laws of nations. Of this nature, among others, are all prize causes. Juries cannot be supposed competent to investigations that require a thorough knowledge of the laws and usages of nations; and they will sometimes be under the influence of impressions which will not suffer them to pay sufficient regard

to those considerations of public policy which ought to guide their inquiries. There would of course be always danger that the rights of other nations might be infringed by their decisions, so as to afford occasions of reprisal and war. Though the proper province of juries be to determine matters of fact, yet in most cases legal consequences are complicated with fact in such a manner as to render a separation impracticable.

It will add great weight to this remark, in relation to prize causes, to mention that the method of determining them has been thought worthy of particular regulation in various treaties between different powers of Europe, and that, pursuant to such treaties, they are determinable in Great Britain, in the last resort, before the king himself, in his privy council, where the fact, as well as the law, undergoes a re-examination. This alone demonstrates the impolicy of inserting a fundamental provision in the Constitution which would make the State systems a standard for the national government in the article under consideration, and the danger of encumbering the government with any constitutional provisions the propriety of which is not indisputable.

My convictions are equally strong that great advantages result from the separation of the equity from the law jurisdiction, and that the causes which belong to the former would be improperly committed to juries. The great and primary use of a court of equity is to give relief IN EXTRAORDINARY CASES, which are EXCEPTIONS [2] to general rules. To unite the jurisdiction of such cases with the ordinary jurisdiction, must have a tendency to unsettle the general rules, and to subject every case that arises to a SPECIAL determination; while a separation of the one from the other has the contrary effect of rendering one a sentinel over the other, and of keeping each within the expedient limits. Besides this, the circumstances that constitute cases proper for courts of equity are in many instances so nice and intricate, that they are incompatible with the genius of trials by jury. They require often such long, deliberate, and critical investigation as would be impracticable to men called from their occupations, and obliged to decide before they were permitted to return to them. The simplicity and expedition which form the distinguishing characters of this mode of trial require that the matter to be decided should be reduced to some single and obvious point; while the litigations usual in chancery frequently comprehend a long train of minute and independent particulars.

It is true that the separation of the equity from the legal jurisdiction is peculiar to the English system of jurisprudence: which is the model that has been followed in several of the States. But it is equally true that the trial by jury has been unknown in every case in which they have been united. And the separation is essential to the preservation of that institution in its pristine purity. The nature of a court of equity will readily permit the extension of its jurisdiction to matters of law; but it is not a little to be suspected, that the attempt to extend the jurisdiction of the courts of law to matters of equity will not only be unproductive of the advantages which may be derived from courts of chancery, on the plan upon which they are established in this State, but will tend gradually to change the nature of the courts of law, and to undermine the trial by jury, by introducing questions too complicated for a decision in that mode.

These appeared to be conclusive reasons against incorporating the systems of all the States, in the formation of the national judiciary, according to what may be conjectured to have been the attempt of the Pennsylvania minority. Let us now examine how far the proposition of Massachusetts is calculated to remedy the supposed defect.

It is in this form: "In civil actions between citizens of different States, every issue of fact, arising in ACTIONS AT COMMON LAW, may be tried by a jury if the parties, or either of them request it."

This, at best, is a proposition confined to one description of causes; and the inference is fair, either that the Massachusetts convention considered that as the only class of federal causes, in which the trial by jury would be proper; or that if desirous of a more extensive provision, they found it impracticable to devise one which would properly answer the end. If the first, the omission of a regulation respecting so partial an object can never be considered as a material imperfection in the system. If the last, it affords a strong corroboration of the extreme difficulty of the thing.

But this is not all: if we advert to the observations already made respecting the courts that subsist in the several States of the Union, and the different powers exercised by them, it will appear that there are no expressions more vague and indeterminate than those which have been employed to characterize THAT species of causes which it is intended shall be entitled to a trial by jury. In this State, the boundaries between actions at common law and actions of equitable jurisdiction, are ascertained in conformity to the rules which prevail in England upon that subject. In many of the other States the boundaries are less precise. In some of them every cause is to be tried in a court of common law, and upon that foundation every action may be considered as an action at common law, to be determined by a jury, if the parties, or either of them, choose it. Hence the same irregularity and confusion would be introduced by a compliance with this proposition, that I have already noticed as resulting from the regulation proposed by the Pennsylvania minority. In one State a cause would receive its determination from a jury, if the parties, or either of them, requested it; but in another State, a cause exactly similar to the other, must be decided without the intervention of a jury, because the State judicatories varied as to common-law jurisdiction.

It is obvious, therefore, that the Massachusetts proposition, upon this subject cannot operate as a general regulation, until some uniform plan, with respect to the limits of common-law and equitable jurisdictions, shall be adopted by the different States. To devise a plan of that kind is a task arduous in itself, and which it would require much time and reflection to mature. It would be extremely difficult, if not impossible, to suggest any general regulation that would be acceptable to all the States in the Union, or that would perfectly quadrate with the several State institutions.

It may be asked, Why could not a reference have been made to the constitution of this State, taking that, which is allowed by me to be a good one, as a standard for the United States? I answer that it is not very probable the other States would entertain the same opinion of our institutions as we do ourselves. It is natural to suppose that they are

hitherto more attached to their own, and that each would struggle for the preference. If the plan of taking one State as a model for the whole had been thought of in the convention, it is to be presumed that the adoption of it in that body would have been rendered difficult by the predilection of each representation in favor of its own government; and it must be uncertain which of the States would have been taken as the model. It has been shown that many of them would be improper ones. And I leave it to conjecture, whether, under all circumstances, it is most likely that New York, or some other State, would have been preferred. But admit that a judicious selection could have been effected in the convention, still there would have been great danger of jealousy and disgust in the other States, at the partiality which had been shown to the institutions of one. The enemies of the plan would have been furnished with a fine pretext for raising a host of local prejudices against it, which perhaps might have hazarded, in no inconsiderable degree, its final establishment.

To avoid the embarrassments of a definition of the cases which the trial by jury ought to embrace, it is sometimes suggested by men of enthusiastic tempers, that a provision might have been inserted for establishing it in all cases whatsoever. For this I believe, no precedent is to be found in any member of the Union; and the considerations which have been stated in discussing the proposition of the minority of Pennsylvania, must satisfy every sober mind that the establishment of the trial by jury in ALL cases would have been an unpardonable error in the plan.

In short, the more it is considered the more arduous will appear the task of fashioning a provision in such a form as not to express too little to answer the purpose, or too much to be advisable; or which might not have opened other sources of opposition to the great and essential object of introducing a firm national government.

I cannot but persuade myself, on the other hand, that the different lights in which the subject has been placed in the course of these observations, will go far towards removing in candid minds the apprehensions they may have entertained on the point. They have tended to show that the security of liberty is materially concerned only in the trial by jury in criminal cases, which is provided for in the most ample manner in the plan of the convention; that even in far the greatest proportion of civil cases, and those in which the great body of the community is interested, that mode of trial will remain in its full force, as established in the State constitutions, untouched and unaffected by the plan of the convention; that it is in no case abolished [3] by that plan; and that there are great if not insurmountable difficulties in the way of making any precise and proper provision for it in a Constitution for the United States.

The best judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit that the changes which are continually happening in the affairs of society may render a different mode of determining questions of property preferable in many cases in which that mode of trial now prevails. For my part, I acknowledge myself to be convinced that even in this State it might be advantageously extended to some cases to which it does not at present apply, and might as advantageously be abridged in others. It is conceded by all reasonable men

that it ought not to obtain in all cases. The examples of innovations which contract its ancient limits, as well in these States as in Great Britain, afford a strong presumption that its former extent has been found inconvenient, and give room to suppose that future experience may discover the propriety and utility of other exceptions. I suspect it to be impossible in the nature of the thing to fix the salutary point at which the operation of the institution ought to stop, and this is with me a strong argument for leaving the matter to the discretion of the legislature.

This is now clearly understood to be the case in Great Britain, and it is equally so in the State of Connecticut; and yet it may be safely affirmed that more numerous encroachments have been made upon the trial by jury in this State since the Revolution, though provided for by a positive article of our constitution, than has happened in the same time either in Connecticut or Great Britain. It may be added that these encroachments have generally originated with the men who endeavor to persuade the people they are the warmest defenders of popular liberty, but who have rarely suffered constitutional obstacles to arrest them in a favorite career. The truth is that the general GENIUS of a government is all that can be substantially relied upon for permanent effects. Particular provisions, though not altogether useless, have far less virtue and efficacy than are commonly ascribed to them; and the want of them will never be, with men of sound discernment, a decisive objection to any plan which exhibits the leading characters of a good government.

It certainly sounds not a little harsh and extraordinary to affirm that there is no security for liberty in a Constitution which expressly establishes the trial by jury in criminal cases, because it does not do it in civil also; while it is a notorious fact that Connecticut, which has been always regarded as the most popular State in the Union, can boast of no constitutional provision for either.

PUBLIUS.

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1. It has been erroneously insinuated, with regard to the court of chancery, that this court generally tries disputed facts by a jury. The truth is, that references to a jury in that court rarely happen, and are in no case necessary but where the validity of a devise of land comes into question.

2. It is true that the principles by which that relief is governed are now reduced to a regular system; but it is not the less true that they are in the main applicable to SPECIAL circumstances, which form exceptions to general rules.

3. Vide No. 81, in which the supposition of its being abolished by the appellate jurisdiction in matters of fact being vested in the Supreme Court, is examined and refuted.

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LAW AND ITS DISCONTENTS: A CRITICAL LOOK AT OUR LEGAL SYSTEM

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The thirty-seventh Benjamin N. Cardozo Lecture was delivered at the House of the Association on November 9, 1982.

I am honored but also somewhat puzzled to have been asked to join the long line of Cardozo lecturers. Looking back over the roster of previous speakers, I see the names of eminent judges, scholars, and practitioners. What I do not find are fellow fugitives from the profession, persons like myself who have not taught a class, authored a law review article, or argued a case for more than a decade. Now why—I asked myself—would the leaders of your association wish to expose the membership to the views of so unlikely a speaker? And suddenly, the answer came to me. You probably consider me rather like an astronaut who has disappeared into the void on some exotic journey, leaving the world of law far behind. As you carry on, happily immersed in your legal careers, some of you must have thought that it would be amusing to contact me and ask how your planet looks from such a great distance.

If this is the case, I must take full advantage of the odd situation in which I find myself. None of us will profit if I talk about the details of the world you inhabit: the subtle shifts in Supreme Court opinions, the efforts to devise a new code of ethics for the bar, the competing views

* Mr. Bok is grateful to Gary Bellow, Frank Sander, and James Vorenberg for reading earlier versions of this paper.

on merger guidelines, or the puzzling dilemma of the insanity defense. My perspective must be a global one, emphasizing broad contours of a legal world only distantly perceived. And if I dare make generalizations, let alone offer prescriptions, my views should reflect my role as an educator, with opportunities to compare the needs and problems of several different professions.

A FLAWED SYSTEM

Looking over these professions, I think I know where to place the law and where to look for useful analogies. Our legal system reminds me of our health care system twenty years ago. At that time, the medical care offered to paying patients was rapidly becoming more complex, more sophisticated—and more expensive as well. But quality medicine was available only to the well-to-do or to those who happened to be covered by an adequate prepaid plan. Millions of people with modest incomes could not afford decent care; they visited doctors much less often and their mortality rates were distinctly higher.

From my distant perch, our legal system seems in much the same position today. As in medicine, there is much in our law that represents a triumph of the human spirit: the steadfast defense of individual freedom and civil liberties, the constant elevation of reason over prejudice and passion, the protections afforded to minority and disadvantaged groups. But there are other similarities of a darker kind. The laws that govern affluent clients and large institutions are numerous, intricate, and applied by highly sophisticated practitioners. In this sector of society, rules proliferate, law suits abound, and the cost of legal services grows much faster than the cost of living. For the bulk of the population, however, the situation is very different. Access to the courts may be open in principle. In practice, however, most people find their legal rights severely compromised by the cost of legal services, the baffling complications of existing rules and procedures, and the long, frustrating delays involved in bringing proceedings to a conclusion. From afar, therefore, the legal system looks grossly inequitable and inefficient. There is far too much law for those who can afford it and far too little for those who cannot. No one can be satisfied with this state of affairs.

If medicine faced a similar predicament at least two decades ago, what can we learn from its experience? Alas, not much. To be sure, Congress was reasonably successful in giving access to the needy. By enacting programs like Medicare and Medicaid, it did offer poor and elderly people the chance to enjoy quality care. But our legislators chose to reach their goal by simply shifting the burden of medical services from the sick to the taxpayer so that neither doctor nor patient had an incentive to keep costs down. Since quality care was expensive, the result was a massive rise in health costs. To curb these increases, lawmakers resorted to regulations to slow hospital construction and moderate the rise in room rates. But this strategy failed because the regulators never fully understood the problem and never succeeded in gaining the cooperation of doctors. Health care costs continued to rise more rapidly than the cost of living and now consume almost 10 percent of our gross national product—a larger share than in any other industrialized country of the world.

With this example before us, we should think hard about the problems of our legal system to avoid making similar mistakes. In this spirit, let us examine our problems and try to understand them clearly.

One half of our difficulty lies in the burdens and costs of our tangle of laws and legal procedures. Contrary to popular belief, the volume of litigated court cases per thousand people has probably not been rising rapidly, and the time required to process cases may have even declined, on the whole, over the past twenty years. Nevertheless, the complexity of litigation seems to be increasing. Moreover, the nation has experienced a marked growth of administrative regulation; the number of federal agencies jumped from twenty to seventy in the last two decades while the pages of federal regulations tripled in the 1970s alone. Paralleling these trends, the number of lawyers has risen by

more than 50 percent since 1960 so that the United States now boasts the largest number of attorneys per thousand population of any major industrialized nation—three times as many as in Germany, ten times the number in Sweden, and a whopping twenty times the figure in Japan. In sum, there is more legal work to do and many more attorneys to do it. Just what society pays for this profusion of law is hard to guess. Lloyd Cutler has put the figure at $30 billion a year,[1] but the truth is that no one has bothered to find out. Be that as it may, legal costs are primarily people costs, and if we mark the growth in the total number of lawyers and the average compensation of attorneys, it is clear that legal expenditures have been climbing more rapidly than the gross national product for many years.

But is it wrong to spend so much on legal services? After all, people pay a lot for underarm deodorants, television soap operas, liquor and drugs. If rules are passed by elected representatives and legal expenses are voluntarily incurred, is it clear that the nation is spending "too much"—on law?

The catch in this argument, of course, is the quiet assumption that rules and regulations are all freely chosen through something akin to a market process. In fact, that is far from being the case. Many rules are the work of judges or bureaucrats over whom the general public has little control. Most of our statutes and administrative regulations have been complicated by the efforts of pressure groups and lobbyists. If the general outlines of our laws are supported by the public, their details and complexities are hardly understood, let alone endorsed, by the average voter. Even rules that were widely approved when enacted often prove unexpectedly cumbersome and ineffective, yet efforts at reform quickly die from inertia or from the opposition of vested interests.

No, we cannot comfort ourselves by supposing that laws and legal services are freely chosen by the public like breakfast cereals and

[1] Cutler, *Conflicts of Interests*, 30 EMORY L.J. (1981).

automobiles. Nor do most laws seem to offer effective or efficient means of achieving the public good. Consider the two subjects that I know best: labor law and antitrust. After a dozen years of teaching, I would assert that large areas of the law in each of these fields rest so heavily on sheer guesswork that no one can be confident that our rules actually serve the public interest.

In antitrust, I would not go so far as to endorse the view, now fashionable among economists, that our laws seriously harm the economy. I do question whether many of the legal marathons and treble damage suits that clutter the field are truly worth the money and time they cost. To test this judgment, I recently approached an old acquaintance—one of the country's leading antitrust experts—and asked him whether he would dispute my claim—that over half of all antitrust decisions have no demonstrable effect in furthering accepted economic goals. Instead of chiding me for speaking rashly, my colleague replied that he would push the figure up to at least 75 percent.

In labor law, more than half the work of the National Labor Relations Board is devoted to defining the proper employee unit in which to hold elections and enforcing an intricate body of rules governing the electioneering behavior of unions and employers. Most unit determinations are fine-grained applications of assumptions so arbitrary that no one can be sure that a decision furthers the public interest. One can argue that these decisions cause little harm. But they do cost money and absorb large quantities of time and energy. At Harvard, for example, over a year of effort and several hundred thousand dollars were consumed in trying to decide whether to hold an election among the clerical workers in the entire University or only among those working in the Medical School. Even a rich country cannot afford to spend such sums on issues of this kind.

As for the electioneering rules, studies have shown that many of the Board's regulations have little or no effect on the voting behavior of employees or on the outcome of the elections themselves.[2] Much the

[2] GETMAN, GOLDBERG AND HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976).

same is true of other aspects of our labor laws. For example, numerous studies have found no reduction in accident rates resulting from the mass of regulations on work-place safety.[3] And yet, the law grinds on in an unceasing effort to build a consistent body of rules from what are often unproven or unrealistic premises.

A further cost of our cumbersome legal system is its inhibiting effect on entrepreneurship, creativity, and progress. Foreign businessmen express amazement at a system that relies so heavily on lawsuits rather than negotiation to settle business differences, a system that exposes the entrepreneur to legal challenge so easily and on so many different fronts, a system that lends itself so readily to harassment, obstruction, and delay.

If these observations are even half true, our legal system leads to much waste of money that could be put to more profitable uses. But even greater costs result from the diversion of exceptionally talented people into legal pursuits that often add little to the growth of the economy or the pursuit of culture or the enhancement of the human spirit. I cannot make this point too strongly. As I travel around the country looking at different professions and institutions, I am constantly struck by how complicated many jobs have become, how difficult many institutions are to administer, how pressing are the demands for more creativity and intelligence. However aggressive our educational system may be in searching out able youths and giving them a good education, the supply of exceptional people is limited. Yet far too many of these rare individuals are becoming lawyers at a time when the country cries out for more talented business executives, more enlightened public servants, more inventive engineers, more effective high school principals.

These points may seem carping or conjectural, but they are not without tangible effects. A nation's values and problems are mirrored in the ways in which it uses its ablest people. In Japan, a country only

[3] BREYER, REGULATION AND ITS REFORM (1982)

half our size, 30 percent more engineers graduate each year than in all the United States. But Japan boasts a total of less than 15,000 lawyers, while American universities graduate 35,000 *every year*. It would be hard to claim that these differences have no practical consequences. As the Japanese put it, "engineers make the pie grow larger; lawyers only decide how to carve it up."

The cumbersomeness of our laws and procedures does much to explain the other problem of the legal system—the lack of access for the poor and middle class. The results are embarrassing to behold. Criminal defendants are herded through the courts at a speed that precludes individual attention, leaving countless accused to the mercy of inexperienced counsel who negotiate their fate in hasty plea bargaining with the prosecution. On the civil side, the cost of hiring a lawyer and the mysteries of the legal process discourage most people of modest means from trying to enforce their rights. Every study of common forms of litigation, such as medical malpractice, tenant evictions, or debt collections, reveals that for each successful suit there are several others that could be won if the victims had the money and the will to secure a lawyer.

Congress has tried to address this problem by creating the Legal Services Corporation. But even in its palmiest days, the Corporation was only empowered to help the poor and had money enough to address but a small fraction of the claims of even this limited constituency. Since then, its budget has been cut severely. Middle-income plaintiffs often find that legal expenses eat up most of the amounts that they recover. In personal injury claims, contingent fees may help to overcome the cost barrier, but legal expenses consume a third or more of the average settlement in most proceedings and can often rise to 50 percent in cases going to trial. As many observers have testified, the costs and delays of our system force countless victims to accept inadequate settlements or to give up any attempt to vindicate their legal rights.

This state of affairs has become so familiar that it evokes little

concern from most of those who spend their lives in the profession. As I travel around the country, however, and talk to laymen in other walks of life, these problems loom so large as virtually to blot out every other feature of the legal system. The blunt, inexcusable fact is that this nation, which prides itself on efficiency and justice, has developed a legal system that is the most expensive in the world yet cannot manage to protect the rights of most of its citizens.

THE ROOTS OF OUR PREDICAMENT

How did this situation come about? The typical response is to lay most of the blame on legislators and public officials for enacting far too many rules while refusing to appropriate enough money for legal aid. There is much to be said for this view. But it is far from the whole truth. Even a brief glance at the record will show plenty of examples in which the cost of litigation and the volume of legal activity continue to rise although the legislature is inactive. In my own field of labor law, for example, the case load of the National Labor Relations Board has quadrupled over the last 30 years even though there have been no major new statutes and no growth at all in the size of the union movement. In largely common law fields, such as personal injury litigation, legal costs have grown steadily, often without new legislation, so that they now eat up more than half of the typical insurance premium.

All things considered, our difficulties would not end even if legislators stopped producing new rules and appropriated enough money to allow all poor and middle-class people to hire competent lawyers. In fact, the problems would probably grow much worse. Judges and other adjudicators would continue to create new precedents and rules. Moreover, beneath the visible mass of litigation lies a vast accumulation of festering quarrels and potential suits that never come to court because of fear, ignorance, and the inhibiting cost of legal services. If Congress provided enough funds for legal aid, or followed the suggestion of an earlier speaker in this series and paid as much to

legal defenders as we pay to the prosecution,[4] it could easily touch off a burst of litigation that would cost huge sums of money and add heavily to the burdens and delays of the legal system.

The roots of our predicament, then, are more complex than popular impressions would allow. Many factors contribute to the volume of disputes and the intricacies of legal rules. Industrialization and technology produce new forms of conflict and injury; new knowledge extends our understanding of causation and points to novel theories of liability; fresh government initiatives create new interests and limit private activity in ways that lead to legal controversy. Amid these contributing factors, however, one thread runs particularly vividly. At bottom, ours is a society built on individualism, competition, and success. These values bring great personal freedom and mobilize powerful energies. At the same time, they carry strong tendencies to shoulder aside one's competitors, to cut corners, to ignore the interests of others in the struggle to succeed. In such a world, much responsibility rests on those who umpire the contest. Whenever our standards of fairness and decency rise, the rules of the game tend to multiply and the umpire's burden grows heavier and heavier.

These tendencies are especially clear in an era such as the present. For at least twenty years, we have witnessed the steady growth of new interests aggressively pursued by blacks, women, older citizens, homosexuals, environmentalists, consumer activists, and many more. In struggling to protect their interests, these groups have argued their case by exposing widespread injustice, neglect, and bias in the society. In forcing the public to look upon these problems, they have lowered the level of trust in government and lessened confidence in established institutions and have thereby paved the way for new legal safeguards to check authority and prevent its abuse.

Faced with these pressures, judges and legislators have responded in ways that reflect our distinctive legal traditions. One hallmark of that

[4] BOTEIN AND GORDON, THE TRIAL OF THE FUTURE (1963).

tradition is a steadfast faith in intricate procedures where evidence and arguments are presented through an adversary process to an impartial adjudicator who renders a decision on the merits. Compared with procedures used in other advanced countries, ours are elaborate and hence relatively expensive. They also force the parties, rather than the state, to bear most of the cost of finding the facts, thus adding further to the burden of going to court.

Despite the expense, lawyers have such faith in these procedures that they often act as if virtually every human question could be resolved by gathering data, listening to arguments, and analyzing the issues with an eye to existing precedent and an ample dose of common sense. Thus, when Congress instructed the federal courts to invalidate corporate mergers that "tended substantially to lessen competition," judges refrained from establishing simple rules and began admitting all manner of evidence in a case-by-case review of disputed mergers even though the question they set out to resolve was almost surely unanswerable. In the personal liability field, judges expanded their proceedings by asking juries to assume the baffling task of trying to place a monetary value on pain and suffering although the predictable result was to encourage a rise in litigation and the growth of the most unsavory and deceptive practices to achieve generous awards from gullible juries. More recently, one learns from accounts of the Hinckley case that judges will periodically make a heroic effort to predict whether those who have successfully used the insanity defense still pose a threat to the safety of their fellow man. The law's response to disputes, therefore, is cumbersome and expensive even in the best of circumstances and is often extended to issues where the costs seem extremely hard to justify.

Another characteristic of adjudication is the tendency to concentrate on the immediate case at hand while giving less attention to the effects on a wider public. Professor Atiyah has eloquently shown how far this trend has proceeded in Anglo-American law over the past century.[5] The practice is understandable, but the results are trouble-

[5] Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Profession and the Use*, 65 IOWA L. REV. 1201 (1980).

some from several points of view, since legal proceedings and judicial opinions often have their greatest effects on people who are neither parties to the litigation nor even aware that it is going on. Decisions that emphasize the peculiarities of each case can give too little guidance to this wider public and thus can spread confusion. Worse yet, as law suits get more enmeshed in details, they cause greater expenses and delays that inhibit the poor and middle class from ever going to court, especially under an adversary system that places so many of the costs of fact-finding and litigation on the parties. Consider the problem of collecting debts. As matters now stand, only institutional creditors can normally afford to press their claims on an economical basis. As a result, up to 90 percent of the defendants in large cities never appear to argue their case, even though many of them have a strong defense.[6] To counteract this problem, the government may provide legal counsel free of charge, but that device merely reverses the tables, since it is uneconomical for institutional lenders to prepare sufficiently to resist a determined defendant unless the unpaid debt is very large. In both situations, the elements of fair process may be observed. In neither case will justice necessarily be done.

By concentrating so heavily on the immediate parties in dispute, judges are also more likely to reach results that affect other people in unexpected and undesirable ways. For example, suppose that judges in divorce cases begin to move away from the traditional presumption in favor of awarding custody to the mother. The principal impact of such rulings will not fall on disputing parents but on the vastly larger number of divorcing couples who agree on separation terms and only go to court to have their settlement approved. For these couples, the effect of the decisions may be far from what the judges actually intended. Instead of simply leading to more agreements giving custody to fathers, the new rules may strengthen the father's negotiating position and enable

[6] *See* CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT (1974).

him to push his anxious wife into accepting less money for support in order to be sure of keeping the children.[7]

Such examples can be multiplied endlessly. One can sympathize with judges, of course, since they have neither the staff nor the resources to study the full impact of their decisions. Even the law reviews do not provide much help, since legal scholars are rarely trained in the methods of empirical investigation and hence do not devote themselves to exploring the actual effects of legal rules on human behavior. Regardless of who is responsible, however, the results of this neglect are unfortunate. Not only will judges be more likely to reach decisions that are quixotic or perverse. I also suspect that the failure to examine the impact of legal rules can lead judges and regulators to have inflated and unrealistic notions about the capacity of their rulings to influence behavior and produce social change.

The problems just described might be contained if our legal system empowered someone to keep watch and make sure that the process as a whole is meeting the needs of those whom it purportedly serves. Unfortunately, such oversight and coordination do not exist. In principle, the legislature could exercise this authority, but it does so only occasionally and in a political environment that severely limits what can be done. Thus, power is divided among countless jurisdictions and tribunals, each intent upon the isolated fragments of human conflict that come before it. No one feels responsible for the operation of the entire system or worries whether the different parts fit together in a coordinated whole.

This environment produces a special kind of justice. It leads conscientious officials to exaggerate the power of legal rules to produce social change while underestimating the cost of establishing rules that can be actually enforced throughout the society. Since laws seem deceptively potent and cheap, they multiply quickly. Though most of them may be plausible in isolation, they are often confusing and burdensome in the aggregate, at least to those who have to take them seriously. Contrary to the views of left-wing legal scholars, the results

[7] *See* Mnookin and Kornhauser, *Bargaining In the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. (1979).

are not simply a form of exploitation to oppress poor, defenseless people; the wealthy and the powerful also chafe under the burden. For established institutions, in particular, the common result is a stifling burden of regulations, delays, and legal uncertainties that can inhibit progress and allow unscrupulous parties to misuse the law to harass and manipulate their victims. For those of modest means, results are even more dispiriting. Laws and procedural safeguards may proliferate, but they are of scant use to someone who cannot afford a lawyer. All too often their ultimate effect is to aggravate costs and delays that deny legal protection to large majorities of the population.

In fairness, I should acknowledge that much new thought is now being devoted to these problems. Rarely has this country seen a time of such creative experimentation to reduce costs, simplify laws, and improve access for the poor and middle class. Whole bodies of rules and litigation have been washed away through deregulation and no-fault legislation. Lawmakers have talked of sunset provisions and impact statements to attract greater attention to the costs and burdens of legal rules. All manner of efforts are under way to establish alternate forums to reduce the cost of resolving disputes. At the same time, prepaid plans are growing to bring legal services within the reach of the middle class, not to mention the support Congress has given to the Legal Services Corporation to provide attorneys for the poor.

Despite this burst of creativity and initiative, we have a long way to go even to see a glimmer of light at the end of the tunnel. Experiments may abound, but there is often no rigorous, comprehensive process for evaluating such ventures to decide which work well and under what circumstances. Lacking such data, one cannot know which remedies fit the various kinds of disputes that need to be resolved. Worse yet, only rarely do analysts or scholars look at entire categories of legal regulation either to define appropriate goals or to study the impact of rules on those whom the law purports to serve. As a result, in few fields of law can one find a thoughtful debate, let alone a consensus, on such questions as how clear the applicable rules should be, how elaborate

and costly the procedures should become, or how quickly disputes need to proceed to a hearing and final resolution. So long as this confusion persists, the effectiveness of the legal system will remain obscure. No complex human enterprise can succeed without some way of establishing objectives, coordinating the work of all constituent parts, and assessing the progress made toward accepted goals.

As for the poor and middle class, we again have no idea what kind of access the legal system should provide. On occasion, the Legal Services Corporation has suggested some specific goal, such as so-and-so many lawyers per 10,000 people. But targets of this kind are meaningless without a description of just what legal services and protections such representation would achieve. One sometimes reads that the poor have received legal help in 15 percent of the cases in which they needed assistance. But no one seems inclined to consider how much legal assistance the poor actually need, let alone what services society can afford to provide. Should they enjoy free legal service for any complaint they have? Presumably not. But then, what kinds of cases or legal rights are serious enough to make legal aid a legitimate national responsibility? The truth is that the issue is not discussed and since it is not discussed, we have no way of appraising how bad our present system is or what it would take to reach a reasonable goal.

In this state of ignorance, one constantly hears appeals for reforms that seem quite plausible but could lead to unexpected difficulties. For example, Chief Justice Burger periodically calls for massive improvements in the training of trial lawyers. At first glance, who could object to such a proposal? But it is probable that such a reform, standing by itself, would increase litigation, lengthen trials, and add significantly to the very burdens which the Chief justice wishes to lighten. More disturbing are the recurrent appeals to divert more federal funds to systems of judicare which represent the most costly of all likely methods of extending greater access to the poor. Put bluntly, present efforts at reform include some proposals that seem unwise or even dangerous along with others that represent, at best, little more than

random efforts to keep matters from getting worse. The result is hardly an adequate response to the problems that confront us.

An effective program of reform must involve an effort both to simplify rules and procedures and to give greater access to the poor and middle class. Access without simplification will be wasteful and expensive; simplification without access will be unjust. Such a program will presumably call for bolder steps along a number of lines already described. Lawmakers will need to adopt no-fault car insurance everywhere and extend the no-fault concept to new fields of liability. Legislatures will have to take a hard look at provisions for treble damages and other artificial incentives that stimulate litigation. Agency officials will want to mount a broad review of existing laws to simplify rules and eliminate regulations that do not serve a demonstrable public purpose. Simplification must be accompanied by larger appropriations to make legal counsel available to the poor. But money alone will not suffice. Judges will have to develop less costly ways of resolving disputes in recognition of the fact that expensive adversary trials in many kinds of cases ultimately deny access, and therefore justice, to countless deserving people. Lawyers will need to devise new institutions to supply legal services more cheaply, and that will undoubtedly force the organized bar to reexamine traditional attitudes toward fee-for-service and the unauthorized practice of law.

These steps will be difficult enough, but I suspect that even they will prove to be only palliatives. To make real progress, two further efforts will be needed.

To begin with, I doubt that a satisfactory legal system will emerge without a greater effort to plan and coordinate the work of all our separate courts and jurisdictions. In a system filled with different tribunals, each preoccupied with the random disputes that happen to pass before it, every judge can conscientiously perform his appointed task and still unwittingly subject many individuals to injustices and incongruous results. In some way, we need to develop mechanisms for reviewing whole bodies of law and their effects on the people they

purport to serve. Only then can the appropriate officials set objectives and develop coordinated strategies to allow fields of law such as personal liability or environmental protection or employment discrimination to meet the needs of those whose lives they affect.

In addition, judges, lawmakers, scholars will all have to recognize that our basic conception of the role and limits of law has fallen in disrepair. In its place, they will need to search for a new conception more realistic in appreciating the limitations and the costs of legal rules and procedures. This effort should entail fewer rules, but they will be more important, better understood, and more widely enforced throughout the society. Lacking such a vision, judges and regulators will continue to drift more and more toward a willingness to intervene whenever they feel that one person has suffered at the hands of another. That is the logical end of a process that concentrates on the plight of individual litigants and ignores the effects on the system as a whole. The result will be a spurious form of justice. In such a world, the law may seem enlightened and humane, but its constant stream of rules will leave a wake strewn with the disappointed hopes of those who find the courts too complicated to understand, too quixotic to command respect, and too expensive to be of any practical use.

THE ROLE OF LAW SCHOOLS

The prospects for achieving such reforms are daunting, I realize. A comprehensive attack on the defects of our legal system will call for help from every quarter: lawyers, judges, legislators, regulatory officials. I will not try to describe the contributions that each of these parties can make. The occasion does not allow it, and my qualifications are unequal to the task. If I have a comparative advantage, it lies in education, and it is there that I would concentrate my attention.

I have referred at various points to our ignorance about matters essential to enlightened reform. The public complains about the cost of legal services, but no one has discovered how much money we spend

each year on our legal system. Communities experiment with alternative forums for resolving disputes, but do not evaluate these experiments systematically to learn which ones work and how well. Though doctors are learning to assess the costs and benefits of medical procedures and new technologies, lawyers are not making a comparable effort to evaluate provisions for appeal, for legal representation, for adversary hearings, or for other legal safeguards to see whether they are worth in justice what they cost in money and delay. Scholars have shown little interest in the theories of cognition that might help decide whether rules of evidence permit judges to make more accurate decisions or merely accumulate useless data that add to legal expenses and delays. Nor has anyone troubled to explore the forces that encourage or inhibit litigation so that we can better predict the rise and fall of legal activity.

This stunted curiosity and limited knowledge seriously inhibit efforts to increase efficiency and access in the legal system. It is idle to talk of sunset provisions if lawmakers lack the methods to assess the costs and benefits of legislation. It is useless to create arbitration panels and mediation services if no one troubles to test their performance against predetermined criteria. It is reckless to offer proposals to ease congestion in the courts if even the proponents cannot tell whether such measures will achieve their goal or simply evoke more litigation much as wider highways often succeed in merely calling forth more cars.

Although these points seem obvious enough, law schools have not seized the opportunity to seek the knowledge that the legal system requires. In part, perhaps, this neglect results from the lawyer's skepticism about the usefulness of academic research. Over a century ago, Christopher Columbus Langdell was fond of asserting that law is a science and "that all of the available materials of that science are contained in printed books . . ."—law books. More recently, a witty law professor remarked: "All research corrupts, but empirical research corrupts absolutely."

It is easy to find examples to justify this skepticism. One's eyes

glaze over at the recollection of parking meter studies, scalograms to predict judicial behavior, game theories that purport to illumine litigation tactics. Yet we ignore the social sciences at our peril, for their techniques grow steadily more refined. Business school professors begin to have more intricate theories of competitive markets that might help legal analysts predict the effect of changes in our antitrust laws. Scholars in schools of public policy and education develop more sophisticated methods of program evaluation that could help implement sunset laws or detect the secondary and tertiary effects of legal rules on human behavior. Doctors work with statisticians to measure the costs and benefits of protracted hospitalization, of coronary bypass surgery, of mastectomy, of CAT scanning; one cannot help but wonder whether similar techniques might not help assess the usefulness of legal procedures as well.

As yet, this work is largely overlooked by our great schools of law. One can argue that such studies are not the proper province of the legal scholar and that it is better to wait for social scientists in other parts of the university to do the necessary research. But experience shows how empty this observation is. Law professors cannot stand idly by and expect others to investigate their problems. Social scientists have not done much of this work in the past nor will they in the future. If the necessary research is to go forward, legal scholars must help organize it and participate in it, albeit with the aid of interested colleagues from other disciplines.

If law schools are to do their share in addressing the basic problems of our legal system, they will need to adapt their teaching as well as their research. The hallmark of the curriculum still resides in its emphasis on training students to define the issues carefully and to marshall all of the arguments and counterarguments on either side. Law schools celebrate this effort by constantly telling students that they are being taught "to think like a lawyer." But one can admire the virtues of careful analysis and still believe that the times cry out for more than these traditional skills. After all, as I have tried to point out, the capacity to

think like a lawyer has produced many triumphs, but it has also helped to produce a legal system that is among the most expensive and least efficient in the world.

One example of this problem is the familiar bias in the law curriculum toward preparing students for legal combat. Look at a typical catalog. You will discover many courses in the intricacies of trial practice, procedure, litigation strategy, and the like—but few devoted to methods of mediation and negotiation. Professors spend vast amounts of time examining the decisions of appellate courts, but make little effort to explore new voluntary mechanisms that might enable parties to resolve various types of disputes without going to court in the first place. We have long debated whether lawyers exacerbate controversy or help to prevent it from arising. Doubtless, they do some of each. But no one can dispute that law schools train their students more for conflict than for the gentler arts of reconciliation and accommodation. This emphasis is likely to serve the profession poorly. Already, lawyers devote more time to negotiating conflicts than they spend in the library or the courtroom, and studies show that their efforts to negotiate are more productive for their clients. Over the next generation, I predict that society's greatest opportunities will lie in tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshalling cooperation and designing mechanisms which allow it to flourish, they will not be at the center of the most creative social experiments of our time.

Another glaring deficiency lies in the lack of attention given to the very problems of the legal system that I have discussed tonight. This neglect is particularly striking when one hears the repeated claims of established law schools that they are not training lawyers but preparing "leaders of the bar." If we are to take this assertion seriously, one would suppose that students in these schools would be studying ways of creating simpler rules, less costly legal proceedings, and greater legal protection for the poor and middle class. Yet even a cursory glance at

the law school catalog will serve to destroy this illusion. I cannot recall a single class, let alone an entire course, devoted to these issues during my three years of law study. Although the situation has improved since then, courses on the problems of the legal system are almost always relegated to elective slots where only a handful of students typically attend.

Leadership also calls for more than merely preparing leaders of the bar. Law schools will need to take the initiative in educating for a broader range of legal needs in our society. An efficient system of extending access to legal services throughout the society will demand the imaginative use of paralegal personnel. An effective system for extending legal protection to the poor must involve greater efforts to educate the disadvantaged about their rights, so that they can defend their interests without being exploited or having to go to court. A serious effort to provide cheaper methods of resolving disputes will require skilled mediators and judges, who are trained to play a much more active part in guiding proceedings toward a fair solution. In short, a just and effective legal system will not merely call for a revised curriculum; it will entail the education of entire new categories of people. It is time that our law schools began to take the lead in helping devise such training.

Beyond education and research, law schools can also help to create new institutions more efficient than traditional law firms in delivering legal services to the poor and middle class. As in medicine, these organizations will benefit if they are linked to a university so that they can offer teaching opportunities and intellectual stimulation to their attorneys while drawing upon the services of second- and third-year law students. Medical schools have long pioneered in similar efforts, first by helping create teaching hospitals, and then by developing outreach clinics in poorer neighborhoods and prepaid health plans for the middle class. By comparison, the record of our law schools is modest, despite the recent growth of clinical programs.

The points I have made need not be cast in the form of criticism;

they also represent opportunities to strike at the most persistent vexations that have troubled our law schools. For example, other faculties often look askance at law professors for devoting themselves to pedestrian forms of research, endlessly pecking at legal puzzles within a narrow framework of principles and precedent. In contrast, efforts to confront the larger problems of the legal system offer the chance to address a much broader range of issues using a wider array of research techniques.

Students have also complained for years about the sameness of legal instruction with its constant discussion of borderline cases and problems. Happily, the great issues confronting our profession provide opportunities to pursue a variety of experiments in teaching and learning—classes to study the methods of mediation and negotiation, supervised work in new institutions for delivering legal services, courses on the organization and deficiencies of the legal system and its institutions, seminars on new ways of resolving disputes and avoiding litigation.

A final problem for law schools is the striking lack of professional commitment displayed by many of their students. Unlike medicine, few young people decide to be lawyers early in life. Instead, law schools have traditionally been the refuge of able, ambitious college seniors who cannot think of anything else they want to do. With such lukewarm beginnings, it is not surprising that students grow apathetic toward their studies and seem unwilling after their first year to prepare their coursework or participate in class discussions. If law faculties wish to counter these attitudes, they should welcome the chance to motivate their students by giving them a larger vision of their calling, a sense of what a life of leadership in the bar might entail, an awareness of the urgent problems of the profession that they could help to resolve.

The law school that seizes these opportunities could become a more interesting place, experimenting with new methods of teaching, new forms of research, even new institutional settings for combining instruction with legal services. Fortunately, a handful of schools seem

ent upon exploring these opportunities. I am pleased that my own is mbered among them. If this movement does not grow and law ıools cannot rise to the challenge. I see little hope that we will ever 'mount the present afflictions of our legal system. In this, we may ain have something to gain from the experience of medicine. There ve been many mistakes in organizing health care, and ignorance on tical points is still profound. But we have surely learned one lesson. gardless of the number of rules, however elaborate the regulations, :re will be no reform of the health care system without the active)peration of the doctors. Only physicians can decide how to cut costs :hout endangering human life, and only physicians can make the 'riad of small decisions about medical treatment, medical tests, the)loyment of new technologies that ultimately fix the size of our ılth care bill.

The same is true of the legal system. Outsiders can voice concern l threaten drastic action. But only lawyers can devise the procedures, legislative reforms, the incentives that will increase efficiency, uce costs, and extend reasonable justice to all. In the end, we will make lasting progress without the help of the organized bar, and we hardly expect such help unless our law schools produce the ideas, knowledge, and the kind of leaders we need to take us to higher und. It is time we joined together to give this effort the attention it)lainly deserves.

THE COLLAPSE OF THE COMMON GOOD

HOW AMERICA'S LAWSUIT CULTURE UNDERMINES OUR FREEDOM

PHILIP K. HOWARD

(Originally titled *The Lost Art of Drawing the Line: How Fairness Went Too Far*)

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[1]

THE LOST ART OF DRAWING THE LINE

The double slide in Oologah, Oklahoma, donated to the town park by the Kiwanis Club, was a local landmark. For fifty years this slide, looking like two legs of a spider, had provided fun for the children of Oologah. In 1995, however, a child suffered minor injuries while playing unattended on the slide, and the parents made a claim against the town. "I knew it was going then," said Judy Ashwood, fifty-three, who herself had played on the slide as a child. "It's hard for me to think that people who live here would actually sue the city if their child fell off the slide." But the town board decided it had no choice, notwithstanding a citizen petition asking that the slide remain in the park. It auctioned off the slide to a resident of a nearby town, getting $326.50, and the Oologah park slide was carted away.

All across America, playgrounds are being closed or stripped of standard equipment. In 1997, Bristol, Connecticut, removed all of the seesaws and merry-go-rounds from its playgrounds. When told of the decision, the face of thirteen-year-old Jennifer Bartucca fell with disappointment. "Every time I come here, I ask a friend to go on the seesaws. It is one of my favorite things to do at the park,"

said Jennifer: "I love merry-go-rounds. My father would push me on them when I was a little kid." Nicole LaPierre, sixteen, was equally disappointed. "If you play right, you're not going to get hurt."

Being safe has come a long way since Ralph Nader pointed out the absence of safety guidelines for cars and other consumer products. Avoiding risk is now practically a religion. But it's not clear that the results are necessarily what most people want. Some towns, for example, have the resources to replace the playground equipment with new, safer alternatives, including transparent tubes to crawl through and a one-person seesaw that works on a spring. Can you wait? The new equipment is so boring, according to Lauri Macmillan Johnson, a professor of landscape architecture at the University of Arizona, that children make up dangerous games, like crashing into the equipment with their bicycles.

The headlong pursuit of safety is killing off the simple pleasures of life. Why take a risk on an activity that's not absolutely necessary? The town of Park City, Utah, had a proposal to make bicycles available for free to tourists and others, both to alleviate the traffic and to make the town more attractive. Most people old enough to ride a bicycle are aware of the hazards. But accidents happen, and after concerns were raised about the possibility of a horrible accident, the plan was stopped. Better safe than sorry. Larck Lake, in West Virginia, had been open to fishermen and picnickers since 1993. But the owners got scared because teenagers coming up to a party there often decided to go swimming. "We felt that, sooner or later, there would be an accident," said Fred Stottlemyer, an official with the

company that owns the lake, "so we decided to close the lake to recreational use." Bob Petryszak, who bought a house nearby because of the lake, was disappointed. "This is a great place to fish. The recreation it provides is a great asset to the area. There should be a way to keep it open."

Fun is optional, of course. The prophets of safety certainly practice a gloomy earnestness. But some activities that we've cut out are pretty important. Psychologists tell us, for example, that children need affection. Even before there were psychologists, most people, and animals as well, showed affection to their young. But in America, hugging or, indeed, even a pat on the back is now considered so dangerous that teachers can't do it. "Our policy is basically don't hug children," said Lynn Maher, speaking for the New Jersey chapter of the National Education Association (NEA). The guidelines of Pennsylvania's NEA chapter urge teachers to do no more than "briefly touch" a child's arm or shoulder. Michigan passed a law that forbade teachers to touch students for any reason. We're well on our way to a society where, as Ann Welch, a special-education teacher in Virginia, put it, "we tell children that karate is okay and hugs aren't."

Being safe, maybe extra-safe, is what we say is happening. But nobody really believes that. What's going on has little to do with risk to other people. It's mainly about avoiding legal risk for the person conducting the activity. "Ultimately, we came to the conclusion we were exposing ourselves to too much liability" by allowing people to keep using Larck Lake, said Mr. Stottlemyer. Charles Montgomery, who bought the double slide from the town of Oologah and set it up for his children in the backyard, put

his finger on the problem. "It's a shame," Mr. Montgomery said. "I just see a kind of dying part of most people's childhood. It's going away because of society and lawyers."

People talk about the "litigation explosion" whenever a headline announces a huge verdict on some ordinary accident, like the $2.9 million verdict against McDonald's (later reduced to $640,000) when an elderly lady spilled the hot coffee while pulling away from the drive-thru window. Exorbitant verdicts are the exception, however, and don't directly touch the lives of most Americans. But law has changed our culture. Instead of looking where we want to go, Americans are constantly looking over our shoulders.

The effects are sometimes tragic. Christopher Sercye, fifteen, was shot while playing basketball on a playground close to the Ravenswood Hospital in Chicago. With the help of two friends, the boy made it to within thirty feet of the hospital entrance. When Christopher collapsed, almost at the hospital door, his friends ran in to get help, but the emergency-room staff refused to come out. Hospital policy was that they should not leave the hospital because, as the explanation later indicated, of fear of possible legal liability for neglecting patients already in the hospital. But going thirty feet outside the hospital is not much different for staff than going thirty feet inside. As Christopher lay bleeding on the sidewalk, a policeman begged the staff to come out. But the hospital staff refused to budge and instead placed a call to 911. Christopher lay on the sidewalk for twenty-five minutes before a police sergeant arrived and commandeered a wheelchair to bring him in. The boy died shortly afterward.

Life-and-death decisions used to be more important than anything, certainly more important than legal niceties about duties to sick people thirty feet in one direction versus thirty feet in another. But Americans today act as if we're wearing legal blinders that block any sensible perspective. When a possible legal risk pops up before our narrow range of vision, however remote or ridiculous, we react like rats to an electric shock. Why take the legal risk?

A new medical school graduate, one week away from getting her license to practice, was recently driving in suburban New York when she came upon a motorcycle accident with the rider sprawled on the side of the road, obviously badly injured. After a brief discussion with her mother, she decided not to stop because she might be liable for practicing without a license. At first blink, her logic seems perfectly reasonable. But this only shows how warped we've become. How about helping out because you're a human being who happens to have the skills to save a life?

Some suggest that Americans are just being irrational, pumped up by scare tactics of corporations and greedy coconspirators wanting to undermine the American legal system. Put yourself in the position of the doctor whose patient has a bad headache. Is it aspirin, or a CAT scan? Pretend you're in charge of making decisions on the school playground equipment. Are you a little uneasy?

The air in America is so thick with legal risk that you can practically cut it and put it on a scale. A volunteer teacher in East Harlem was working with a group of nine-year-olds when one kept shoving the others, ignoring the teacher's repeated requests and commands that he stop. Fi-

nally, she put her hands on his shoulders to tell him that he would be sent home if he didn't stop. The response of this youthful aggressor? "You can't touch me, that's against the law."

The accepted wisdom is that America is a diverse country, and the values of Americans have changed. But do contemporary Americans really suffer from differing views of what's too risky and what's not? Do most Americans really disagree on whether the bleeding boy should be attended to? Is society really so fractured over, say, the risk of letting the public enjoy a mountain lake? If everyone generally knows what's right or sensible, why doesn't he or she just make that decision? Not many years ago, we felt comfortable with these decisions. Today it's unthinkable.

We accept this perpetual legal anxiety as we would an incurable disease. What do you do? After all, people have their legal rights. The relevant issue is whether you can prove your position. We barely even question the system because, well, that's how law works.

More powerful than any invading army, than any constitution, is an accepted frame of reference. Today, Americans believe that fairness to individuals is the goal of justice. Of course it is, you're probably thinking. This is America. But what does it mean to be fair? What's fair, as most adults know, depends on your point of view. The reason we know American justice is fair, unassailable in its fairness, is that it avoids anyone's point of view. American justice is neutral: Fairness in modern America comes not from asserting beliefs but from avoiding them.

Judges see their responsibility, as Professor Michael Sandel observed, to make a "morally neutral judgment."

Who, even a judge, has the right to decide what's fair or not? Justice, we've been taught, is a matter merely of determining entitlement. Written law sets forth the standards, and the person will either prove the claim or not.

This neutral ideal of fairness has become a creed of our enlightened culture. Our children are trained from an early age to avoid making what are pejoratively referred to as "value judgments." "Everyone's views," Wake Forest University president Thomas Hearn recently noted, are now "as legitimate as anyone else's." Alan Wolfe, in *One Nation, After All,* a study of contemporary American values, suggests that there is now "an eleventh commandment: Thou shalt not judge."

Neutral justice appeals to almost everyone. It has a pure quality, as if untouched by human hands. It is available to anybody, at any time, fitting neatly in the American tradition of self-help.

Most important, neutral justice neutralizes authority. Americans of every political persuasion cringe at the idea of people imposing their beliefs of right and wrong. Liberals see justice that is neutral of personal values as protection against bigoted southern sheriffs. Conservatives see it as protection against power-hungry bureaucrats. Even critics of American litigation never question the premise that every individual should have the right to his day in a court proceeding untainted by personal beliefs. We lean back and close our eyes, reassured that there's a perfectly neutral forum to hear our point of view if someone tries to do something to us. That's what makes American justice fair, fairer than any in the history of civilization.

But fair to whom? How teachers got to be so nervous is

easy to see. Just a charge of sexual harassment or abuse can ruin a career. An elementary school girl claimed sexual assault when a music teacher helped her position her fingers on a musical instrument. The teacher was cleared, "but the investigation and public embarrassment ended his life as he knew it." Some schools now require a second teacher or video surveillance in music and art class. The effect, according to an education official, is that "everyone's nervous" all the time, a kind of pedophilic version of the Red Scare.

Everyone was warmed up and ready to play in the Little League baseball game in Slingerlands, New York, but because of a scheduling glitch, the umpire didn't show. The coaches talked; several parents volunteered; everyone wanted to play, but the longer the discussion went on, the more nervous everyone got. "And what would happen if someone got hurt?" There might be legal liability, the coaches suggested, without the official umpire. The game was cancelled. Several teams of disappointed children went home.

Justice stands sentinel on the horizon of our daily choices and certainly looks fair with its perfectly neutral processes. First you argue, then I argue, and then the neutral decision. We like the fact that it's self-executing. It honors the right of each individual to make his case. But something is missing.

Law, we believe, is a system of individual rights. We almost can't imagine any other conception of fairness. But what about fairness to society as a whole? Stated differently, how about fairness to individuals as participants in society, like the players in Little League? Law serves a social function as well as an individual one. That used to be considered its main function. The rule of law was the main concern of our founders, but not, as one reformer put it, because they were expecting America to sue its way to greatness. Law is essential to a free society because it sets the rules we all abide by. As Justice Benjamin Cardozo put it, law must stand for "standard[s] of right conduct" that find expression in "the *mores* of the time."

When working properly, a law professor once said, justice is like the liver. You never notice it. People go through their lives comfortable with their instincts of right and wrong. We're not defensive. "Most of us live our lives in conscious submission to the rules of law," Cardozo noted, "without necessity to resort to courts to ascertain our rights and duties." Law is an instrument of freedom, not mainly as a forum to resolve disputes but because it allows us to act freely, confident that law will defend reasonable conduct. America's commercial law, generally well known and reliable, is the bedrock of our thriving economy. By letting everyone know where they stand, law liberates people to make free choices.

Social relations in America, far from steadied by law's sure hand, are a tangle of frayed legal nerves. Any dealings in public—whether in hospitals, schools, offices, or in the ebb and flow of daily life—are fraught with legal anxiety. An undertow pulls at us constantly, drawing us away from choices that we believe are reasonable. Legal fear has become a defining feature of our culture.

Americans today seem to abide by a kind of law by journalism, reacting to whatever risks newspapers write about. Several New York private schools instituted peanut-free

cafeterias after publicity about horrible reactions that can occur in people born with the peanut allergy. Nationally, only a few people every year die from allergic reactions to food of all kinds (estimates range from 5 to 120). Moreover, those with the peanut allergy know it, and most carry an antidote syringe at all times. But peanut butter is undoubtedly a terrible risk to a tiny fraction of the population, and after the newspapers spread the word, who will protect you from liability if the unlikely but terrible allergic reaction occurs? Try getting peanuts on most airlines now. In one fit of fear, the miracles of George Washington Carver are swept away.

Doing something wrong is not what scares most Americans. What we're afraid of is someone claiming we did. Who and for what? We don't know. It almost seems it could be anyone, in almost any situation. A sick person who gets sicker. A child who misrepresents a touch, or just wants to make a claim and see what will happen.

Litigation reforms are suggested all the time, and some are enacted, but without doing much to soothe raw nerves. The one suggestion no reformer has made, to my knowledge, is that America has too little law. Law, as everyone says, is all around us. We're tied up in legal knots. What's the effect, we constantly ask ourselves, on so-and-so's rights? But we don't pause to ask ourselves why the answer is almost never clear. Do we have too much law, or too little law that anyone can rely upon? While we talk about rights all the time, what kind of legal right is it that no one can identify with any clarity?

We can't get the notion out of our heads that justice is about being as fair as we can to every individual who

shows up at the courthouse. The allegorical figure of Justice is carved above the courthouse door. There she calmly sits, her eyes blindfolded to symbolize impartiality. Just the image gives us comfort. Justice has integrity. Nothing is rigged. Courts have always had to be impartial, of course, but our aspiration for neutrality goes much further than making sure judges have no personal stake in the controversy. Modern justice is almost monastic in its self-denial. Appear before an American court and you will be given every chance, every benefit.

But is that what it means to live under the rule of law? Justice Oliver Wendell Holmes, Jr., once defined law as "the prophesies of what courts will do." Maybe Justice Holmes has put his finger on our problem. Today in America, justice may be neutral, but nobody has any idea what a court will do. Our quest to achieve individual fairness through neutrality has had an unintended side effect: America, so proud of its rule of law, has lost the law needed for people to have a sense of what they can and can't do.

Archaeologists a thousand years from now will dig up our remains and give us a name. Instead of the Age of Reason, we'll be the Age Without Reason. Our amused descendants may not figure out that the seesaws disappeared in a fit of legal frenzy. What they'll see, in plain language, are the warning labels on every product. Then we'll be found out: We were the society that lost the guidance of law, and, with its demise, lost the ability to distinguish between what's reasonable and what's not. In the ruins at Yale Law School, they'll find plastic bags warning against throwing the "mortarboard" graduation caps up in the air.

Weren't Yale law students smart enough to deal with the hazard? All preconceived notions of our eating habits will be thrown for a loop when they find a federal form cautioning against eating the toner of the photocopier. They'll really wonder about the coffee. What did we mean by warnings on practically every cup about its being extremely "hot"? Was coffee some kind of aphrodisiac?

The test of justice, Justice Cardozo once observed, is how people feel about it. If our system of justice is fairer than it used to be, people sure are reacting in an odd way. Americans are scared, but they're not scared of vigilantes roaming free in a land without justice. Americans are scared of justice itself, because it no longer is based on law.

RIGHTS WITHOUT LAW

In the spring of 1996, in the sandbox at Charles River Park in Boston, Jonathan Inge, then three years old, kicked another three-year-old, Stacey Pevnev. Stacey's mother told Jonathan to stop in no uncertain terms. The mothers proceeded to have words. Jonathan's social graces left something to be desired, and there was a pushing incident. At this point, Stacey and her mother could have left the playground or gone to another area, but Stacey's mother had her own problems in the social interaction area, and she decided instead to call the police. The police punted. The Pevnevs then decided to go to court. Within days, they were arguing away in Suffolk County Court. Did the judge toss the case out with a laugh? In the new America, the judge actually adjudicated the dispute, granting a preliminary injunction requiring the parents "to keep each child

supervised and separated from each other while in the playground" and prohibiting the mothers from talking to each other.

Just think of the possibilities. Have you had an argument with anyone lately? Why deal with it face-to-face when you can go to court? Traditionally, courts were not official versions of *The Jerry Springer Show.* A Boston lawyer, Roderick MacLeish, observed dryly that "we need to take a serious look at what's going on in this country."

What people claim as their rights, at least from a distance, is pretty entertaining. A bank robber in New Jersey sued the teller for slander: He only demanded money at gunpoint and did not, as she testified, threaten also to shoot. How dare she draw that inference? Typical bank-teller prejudice. Boston judge Hiller Zobel has been asked to decide a custody fight over a dog, a claim over a missing prize in a Cracker Jack box, and a lawsuit over ownership of birth control pills between a fifteen-year-old and a thirteen-year-old. These claims usually don't succeed, but they are symptoms of a society-wide preoccupation with rights.

You can't do much that's significant, or even funny, without thinking about your or someone else's rights. Rights cruise back and forth through our consciousness like a police car on patrol. If the Gallup polls could register the thoughts that most often cross American minds, number one would be easy to predict. But rights would be right up there.

Any dispute immediately reverts to the language of rights. We can't think of the law except as a matter of individual rights. Law is rights, rights are law. My suggestion

that American society needs more law to let people know where they stand seems like a bad joke. We know where we stand: on a legal battlefield. Rights are everywhere.

But what is a right? For all we've thought about it, a right could be a quark. We can describe well enough individual rights that we learned about in civics class—basically constitutional rights against government abuse. There's the right of free speech, and no prosecutor can put us in jail on a whim. Our founders made sure Americans had rights to prevent government from using state power to interfere with our freedom. But these hallowed rights against government coercion—what philosopher Isaiah Berlin referred to as "negative liberties"—aren't the kinds of rights, happily, that most Americans worry about day to day.

Rights in our daily thoughts concern suing and being sued by other people. We can't readily describe what gives someone the right to sue someone else, but we know how this "right" operates: like a legal jack-in-the-box, ready to pop up whenever there's a misunderstanding, or an accident, or any bad event.

Because the theory of rights is one of legal entitlement, no one questions the ability to sue. A court will determine that a person either has the right or he doesn't. Rights are like a piece of property. That's why they're called rights. "A person's rights are what belong to him as his due, what he is entitled to," Professor Peter Weston stated, "hence what he can rightly demand of others."

Law as a whole, we've been taught, is like an interlocking puzzle of everyone's rights. This is a conception that philosophers like John Rawls advocated in the 1960s and 1970s. A just society doesn't impose its own views of right

or wrong in a particular dispute; it only provides "a framework of rights, neutral among ends." As Professor Mark Tushnet put it, we envision "a world of autonomous individuals each guided by his or her . . . goals, none of which can be adjudged more or less legitimate than those held by others."

Something obviously slipped between Rawls's theory, however, and the actual practice of his system of rights allocated around society. Most so-called rights that people assert look a lot more like selfishness dressed up in legal clothes.

A young couple in our neighborhood, a doctor and an actress, visited his parents on New Year's Eve. The sidewalk was icy, and just as they were getting to the front door, she slipped and broke her ankle. Her response came out of the new American playbook: She sued his parents. The goal was not to recover medical costs (apparently she was insured), and certainly not to hit up her in-laws. The idea was to go after a windfall from the parents' insurance company. The broken ankle would certainly affect her dancing abilities. She got a huge settlement from suing his parents. Now that's certainly ingenious. But isn't insurance supposed to be for real lawsuits? Doesn't that attitude just raise the costs of everyone else's insurance? Never mind. Accidents are assumed to be an occasion to make money. You almost feel like a chump if you don't at least threaten to sue.

Three employees of the Seattle Police Department got disability a few years ago for falling out of their swivel chairs. There's a new one. Actually not: A few years earlier the city of Miami had a rash of disability claims from em-

ployees for falling out of chairs, suffering paper cuts, and similar tragedies. But what do you do? The doctor's letter says it is an injury, and the injury happened in the line of duty. The legal logic is open and shut. Instead of telling the cops to get another job, Seattle dutifully replaced the suspect equipment with straight chairs. Now the employees can't swivel around to talk with their buddies, and they're complaining about cricks in their necks. Life has so many pitfalls. Maybe they should all collect disability or, better yet, call 911: "My chair did it."

The question in each case, we're told, is one of legal entitlement. But latching onto a legal principle doesn't seem that difficult. A depressive professor fired for abusing women sues under the Americans with Disabilities Act (ADA) to try to get his job back. When it passed the ADA, Congress had in mind accommodating the disabled who couldn't make it into the job market, not keeping abusive people on the job. But legal arguments soon spin a web that protects abusers against the abused.

Each dispute must be viewed on its own terms, evaluated against a neutral standard, and decided by a jury or other neutral decision maker. Individual rights, as Rawls suggested, are "not subject . . . to the calculus of social interests." There's no one with authority to, say, distinguish between a broken leg and a scrape, or between a self-indulgent creep and someone with multiple sclerosis. People are regarded "as isolated islands of individuality," as Professor Tushnet puts it, whose dealings with one another and society "can metaphorically be characterized as foreign affairs."

Rights have an almost theological power. Like primitive

people before a holy man, when someone asserts their rights are violated, we immediately shrink back, cowed by the possible forces that might be unleashed against us.

Even judges find themselves frozen by the power of someone's asserted rights. The judge knows that the sandbox case involving the three-year-olds is ridiculous, but if he furrows his brow and looks at the sandbox case as a matter of individual rights, the claim is perfectly logical, almost open-and-shut. How dare Jonathan Inge monopolize the sandbox with his bullying tactics. The sandbox is a public facility. The Pevnevs have just as much right to be there as he does. A dispute over three-year-olds sharing the sandbox is absurd, but what can he do? People have their rights.

Fairness is guaranteed whatever the result, we believe, because each party to the dispute had an equal right to make his arguments. But that view assumes that justice is only about fairness to the particular parties.

In 1995, confronting evidence that air bags could kill short adults or children, the federal government authorized a program that, by written permit, allowed air bags to be switched off. More than thirty thousand official federal permits were issued. But, after a year, barely one thousand cars had been modified. Dealers refused to make the modification because of fears of liability. Donna Nye, barely five feet tall, couldn't find anyone to turn off her air bags. "It's driving me berserk. What good is getting permission if no one will do it?" Janet Saker of Arlington, Massachusetts, four feet eleven inches tall, had the same problem: "I'm driving around with my heart in my mouth, and I'm afraid of the air bag blowing up and killing me."

Car dealers weren't trying to torture short people. They just perceived, correctly, that justice in America focuses on the predicament of the individual victim in the particular case, not on whether the dealers acted responsibly. After all, you never know when there'll be an accident or who'll be driving the car in the future. In the words of one Ford dealer in Rhode Island: "We're afraid, like everybody else. It's all fine and dandy until some attorney gets a hold of it."

In 1995, Harvard admitted an applicant on the basis of her excellent academic record and glowing recommendations from her high school. On an anonymous tip, Harvard learned that the student had killed her mother several years earlier by bludgeoning her with a lead crystal candlestick, and Harvard withdrew the acceptance. This fact, probably the most important event in the student's life, was omitted not only from her application but also from all of her recommendation letters. How could teachers and guidance counselors not have revealed this?

Guidance counselors are "afraid of telling the full truth" for fear of interfering with a student's rights, said Joyce Smith, executive director of the National Association for College Admission Counseling. "They'll write that Johnny took these courses and was a great student, but they won't tell you that Johnny burned down the gym. Whose job is it to tell admissions officers about that?"

Rights imply an interlocking puzzle where all entitlements fit, if not neatly, at least roughly, together. Consistency is, indeed, the indispensable feature of every system of law worthy of the appellation. The "basic moral principle, acknowledged by every legal system we know anything about," Professor Eugene Rostow once observed, "is that similar cases should be decided alike."

Justice based on individual rights, instead of striving for consistency, is closer to the opposite: single combat with an infinite line of potential claimants. In 1993, General Motors was found liable for $105.2 million when a GMC pickup exploded after being hit on the side. The explosion would not have occurred, the victim's lawyer pointed out, if the side-mounted gas tanks had been located somewhere else. Six years later, in 1999, General Motors was found liable for $4.9 billion (a dollar doesn't go as far nowadays) when a Chevrolet, stopped at a light, exploded when rear-ended by a car traveling at high speed. The argument was that the explosion might not have occurred if the gas tank were moved away from the rear. Practically everyone would be happy if vehicles used no gasoline, obviating the need for gas tanks altogether. But car design involves thousands of trade-offs of risks and costs. Where is a manufacturer supposed to put the tank?

There seem to be multiple rights at stake in each of these situations: the rights of the current car owner, and the rights of the future accident victim; the rights of the angry student, and rights of everyone else to an honest recommendation system. Whose right is more important?

Big companies just treat inconsistent claims as a cost of doing business, raising everyone's prices. But real people don't have that luxury. For most people, the possibility that a decision can be claimed to breach someone's rights is a good reason not to do it. Risk aversion is a powerful feature of human nature. Why take the chance?

For decades, reformers have given plaintive sermons about how people should act less like plaintiffs. Polls show that Americans bemoan selfish values, but every person, we believe, has the right to bring legal claims when they feel aggrieved. At least we know American justice is pure.

The more society frays, the tighter we cling to our ideal of neutral justice. A legal system that honors every individual's rights, we tell ourselves, will also protect us. Justice almost reeks of neutrality. Practically no claim is too extreme or disingenuous. Whenever there's a dispute, we reflexively drop to our knees before the altar of neutral process. Please, please, let justice be done.

Like ancient Mayans accepting human sacrifice or Catholics in the Middle Ages buying indulgences, Americans today accept that being sued is the price of freedom, and that diving for cover is the natural response to reasonable daily choices. Our faith in individual rights keeps us from pausing even to question this conception of justice. But should individual rights include the right to go to court over a sandbox disagreement involving three-year-olds, or to milk the system whenever there's a freak accident, or to scare towns and school systems out of seesaws and peanut butter? The idea of individual rights derives its moral force from the rhetoric of liberty. But is this what our founders had in mind when they organized a society around the freedom of each individual?

Actually, no. Our founding fathers would be shocked. There is no "right" to bring claims for whatever you want against someone else.

Suing is a use of state power. A lawsuit seeks to use government's compulsory powers to coerce someone else to do

something. Asserting individual rights sounds benign, like praying in the church or synagogue of your choice. Sticking a legal gun in someone's ribs, however, is not a feature of what our founders intended as individual rights. The point of freedom is almost exactly the opposite: We can live our lives without being cowed by use of legal power. The individual rights our founders gave us were defensive, to protect our liberty. Liberty, we somehow forgot, does not include taking away someone else's liberty.

We assume justice is neutral. But it doesn't feel neutral. How well would you sleep at night if you were sued for, say, $100,000 when a child falls off your swing and breaks his leg? Suing is not a neutral event any more than being indicted for a crime is a neutral event. Both involve the risk, coming down to that fateful verdict by a jury picked at random, that the power of the state will compel a person to do something. Putting someone at risk, even if the claim is weak or ridiculous, involves the exercise of state power over him.

Courts are not supposed to be commercial establishments where, for the price of a lawyer, anyone can buy a chance at a raffle. Courts supposedly represent the wisdom of law, overseeing when those powers can be used against others in a free society. There's no right to sue except as the state permits.

I can practically feel your confusion. How else can we organize justice? People obviously have the ability to go to court. But by what rules and standards? Our modern consciousness is so focused on individual rights that we can't conceive of another way to ensure fairness. But if lawsuits are recognized as an exercise of state power, perhaps the

state should make conscious judgments of who can sue for what. That's what legal rules and interpretations are for.

It's hard to remember, but until a few decades ago, people didn't go through the day worrying about suing or being sued. Students didn't threaten legal claims against teachers. Lawsuits were something only lawyers and judges worried about. Society wasn't perfect, but people felt free to make daily judgments based on what they believed was right.

People didn't used to talk about their rights to sue other people because law was considered a hurdle to surmount, not a free pass to a lottery. In a free society, you have no rights over another free citizen except when he affirmatively owes you a legal duty. Only when a court finds a legal duty is there a legal right to present a claim to a jury. You have a "right" to sue for breach of contract only because the contract imposes a duty. You have a right to sue a careless driver for a car accident because the law imposes a duty to drive like a reasonable person.

Looking at the sandbox dispute between the three-year-olds as a matter not of individual rights but of legal duty leads to a different result. In ordinary social interaction there is no legal duty to others. People are allowed to be rude, children are expected to be unreasonable. Citizens of a free society have to learn to deal with it. The case of three-year-old Jonathan Inge, and every case like it, must be dismissed unless there is a legal duty. Otherwise, we infect ordinary encounters with legal fear.

Medicine has been transformed. It's as if someone smashed the vial containing professional judgment. Legal fear has a "corrosive effect" on the doctor-patient relationship, according to Professor Robert Kagan, as "physicians, in a corner of their minds, regard patients as potential medical malpractice claimants." "We know we don't need [X rays]," one doctor admitted, "but you have to prove it in court." Medical students learn defensive practices, according to Professor Marshall Kapp, sometimes even "to falsify records": " 'A skillful lawyer could come back. . . . So you pad it a little.' "

Another common reaction, according to Dr. Christine Cassel, former president of the American College of Physicians, is that in critical situations doctors "turn over critical decisions to the family, which then makes the family feel like it's their fault when the patient dies." A doctor, Dr. Cassel says, should be "brave enough to put her arm around someone's shoulder and say medical science cannot keep your mother alive much longer, but she will not suffer and we will take good care of her." One study found that thousands of unconscious elderly people are kept alive by feeding tubes, not because people believe that's the right thing to do, but because doctors and relatives are legally afraid to make humane choices. One doctor described a patient who for six years "has not moved, spoken, or given any indication of consciousness," while "being supported by a tube in her windpipe attached to a respirator, by a tube in her stomach to continuously feed her, and by around-the-clock nursing care."

Legal fear has also poisoned professional relations, causing what Professor Kapp describes as "moral paralysis." In Phoenix a few years ago, three doctors resigned from a case because they believed another doctor was putting the patient's life in jeopardy with too high a medicine dosage.

But, fearing a lawsuit, they did not tell the patient or his family of their judgment. The patient went into shock and lapsed into a coma. As one of the doctors put it: "It is very difficult to intervene . . . because doctors are afraid the other doctors will sue them. And the supervising physicians and hospital administrators are also afraid to intervene because they might be sued later for letting the doctor have privileges in the first place."

Defenders of the current legal regime claim that, with the overhang of possible legal liability, doctors have an incentive to give the very best treatment. But if we consider patients in the waiting room and beyond, it's closer to a formula for medical meltdown. Every unnecessary half hour with one patient is time not spent with another, every CAT scan for someone who really doesn't need it is a CAT scan not available to someone who really does. Multiply the incidents by 700,000 doctors, making millions of choices every day, and the misdirection of medical resources is huge. Billions are squandered in unnecessary tests and treatments ordered by nervous doctors, and then partially recovered by managed care plans that resist treatment to all but the most insistent. The biggest losers are those who can least afford it, the weak and the elderly. Perhaps the ultimate irony is that, when called to account, bad doctors invoke the sanctity of their individual rights to keep practicing on unsuspecting patients.

Viewing justice through the lens of individual rights turns out to be an incomplete idea. The "rights" asserted by the parents of the child injured on the Oologah slide aren't the only rights that can be asserted. How about the "rights" of the parents who want to keep the slide for their children and grandchildren? They're not in the courtroom. Who's looking out for their interests?

A system of individual rights is almost irresistibly seductive. It empowers any individual to reach to the law. Everyone can do legal battle with, well, almost everyone. Anyone tries anything on us, and we can reach for its sword. It sounds so fair. It is so reassuring. But what if someone reaches for its sword to do something to us? What happens to us then? Organizing social relationships in a crowded society by individual rights is like handing out weapons to use whenever someone gets in the way, and then assuming everything will work out.

Individual rights don't exist in a vacuum. They're just "conclusions," as Professor Cass Sunstein observes, "masquerading as reasons." Allowing anyone to claim individual rights in a process that is value-neutral is not the rule of law. It's closer to a system of anti-law: a rhetorical society dedicated to individual self-interest.

NATURE ABHORS A VACUUM

American justice, I can hear the chorus, requires proof. You can't just drive straight to the bank. Making every litigant prove his claim is the foundation of modern American justice. That's why, we believe, a neutral system of justice is fair. Americans like the idea of proof. Making people prove their case sounds, well, like truth itself. Why is it, then, that modern justice generates such anxiety in our daily choices?

Several years ago, a homemaker brought the groceries home, put a large soda bottle next to a hot stove, and came

back some time later to open it. Instead of grabbing hold of the cap and twisting it off, as the top is designed, this particular consumer took a knife and began carving at the plastic perforations around the bottle top. Now superpressured by the heat of the stove, the soda popped. Shooting off like a rocket, the bottle top as a projectile caused her to lose an eye. Just look at her. Imagine the force. Did you know carbonated beverages could cause such damage? Why wasn't there a warning? How much would that have cost? Not even a penny. Don't these rich companies care?

Every day millions of people, including young children, successfully negotiate the opening of soda. Is carbonated soda an unreasonable risk of life? But the victim of a freak accident got rich. Take a closer look the next time you buy soda in a large plastic bottle. Joining all the other warning signs that litter the landscape, some bottlers now dutifully place warnings about the risks of soda popping.

Our ideal of neutral justice is guarded by layers of preconceptions. Pull away one, like the belief that law is an interlocking puzzle of individual rights, and you will encounter another, like our belief in proof. There were undeniably no warnings against the dangers of carbonation or against putting the bottle near heat. So what exactly needs to be proved? What it means to prove a claim has received about as little thought as the scope of individual rights.

Let's take a simple case. How do we prove whether the slide in Oologah is unreasonably dangerous? It's probably not a frivolous claim. After all, the slide is high, and children aren't always careful. We have the evidence of a child who was hurt. Does that mean that the slide is unreasonably dangerous?

Seesaws are even more of a red flag. I could argue that seesaws are *likely* to be misused by some children. I recall standing at the middle of the seesaw using it as a balancing bar. I don't remember any bad falls on seesaws, but I do remember at age six trying to walk the banister of a friend's front porch as a kind of tightrope, falling headfirst into the water spigot, and being driven to the emergency room with blood flowing down my face. Does that mean my friend's mother should be sued for letting us play unattended on the front porch? How about letting us climb trees? The mimosa tree in our front yard in Tifton, Georgia, was particularly user-friendly, with smooth bark and long, low-hanging branches that were almost like a ladder up to higher branches. All the risks from these activities are easily foreseeable, but does that mean that slides and seesaws (and trees?) are unreasonably dangerous?

Let's go to hot coffee. The poster case arose when Stella Liebeck got third-degree burns when the McDonald's coffee spilled as her daughter drove her away from the drive-thru window. How do we prove whether hot coffee is unreasonable? Hotter coffee brews better and stays warmer longer. It can also scald. Hundreds of people had complained about McDonald's coffee over the years. But billions of cups—over one billion cups per year—kept being sold, indicating some measure of market acceptance. Why should a drive-thru window sell such hot coffee? Why not, aren't drivers grown up? Where do you draw the line? You can argue it either way.

No objective facts, no dispositive logic, can get you to a correct answer to these questions. So how do we decide? We can't, at least not on any provable basis. None of these

cases hinges on proof. What's required is a value judgment. Value judgments, however, aren't provable. They're made of the one thing justice is trying so hard to avoid: what someone believes. Almost every claim involving a standard of safety or care, or fairness requires a value judgment. Do we think carbonated soda is an ordinary risk of life or not?

But someone has to decide who wins. What's wrong with a jury just making the value judgment? Juries, studies show, generally get to sensible results. But any claim that turns on a value judgment usually not only affects the immediate litigants but, as in medicine, has consequences that ripple out into society. Do we want doctors to feel they should give CAT scans for every bad headache or not? Making these societal decisions, however, has nothing to do with a jury's responsibilities. The jury's job in a civil case is to resolve disputed facts between the immediate parties. Juries don't even have the power to make rules for society. Consistency is impossible. Win or lose, nothing prevents someone else from bringing a similar, or contradictory, claim tomorrow. The jury usually brings community values, and perspective, and good sense. Nine out of ten juries might conclude that the playground equipment is reasonable, or that the car dealer is not liable for shutting off the airbags. But, who knows—maybe the next accident victim will get Johnnie Cochran on the case.

Let's look a little closer at why Americans are so scared. Being at risk of someone's self-interested value judgment feels far different from being at risk on a disputed fact. There's no way to disprove the claim. Each case boils down to a version of a playground spat: yes it is; no it isn't. Back and forth the lawyers go: the coffee is too hot; no, it's not. Doctors should order X rays for bad coughs; no, only if the cough persists. Where's the proof? It doesn't exist. You can't disprove a value judgment. It's just argument.

Does it seem to you that anyone can bring a claim for practically anything? They can. When justice turns on a value judgment, all anyone has to do is make up a theory. Nothing could be easier. Someone always could have done something differently. A canoe rental company on the Delaware River was found liable on the theory that it should have stationed lifeguards for miles along the riverbanks. Literally any harmful event can be a lawsuit, even being struck by lightning, as the city of Denver recently learned when sued by a golfer.

We call it "proving" a claim, but letting any private person make claims based on their own value judgments is basically allowing anybody to make up their own proposed rule, and then present it to a jury. It's like law à la carte. America is no longer a nation of laws, but an ad hoc plebiscite, applied retrospectively on whatever theory anyone cares to invent. The air is thick with law, but it's not law that judges and legislators decided makes sense. Like the weather, this new law is changeable from jury to jury. Even if you win, what about next time? Juries are amazingly effective at keeping their fingers in the dike. But does it make the doctor breathe easier that the chances of losing a baseless claim are only, say, one in twenty? Those are the odds of a test pilot, not a caregiver.

For years, litigation anxiety has been casting a darker cloud over ordinary choices. Even if you're not sued, what could someone dream up? Every few weeks we read about lawsuits over some previously accepted part of life, like

soda pop or peanut butter. If America is based on a rule of law, how is it that new legal rights seem to be discovered at the pace of modern technology?

Most Americans probably believe that litigation has merely shifted to a new level that we tolerate in the name of individual rights. Without standards of what's reasonable and what's not, however, justice loses its footing. Claims become self-referential. Everyone else has a warning, why didn't you? Our fear becomes a substitute for law. Other schools don't allow touching children, why did your school? We wanted a system of justice based on proof, not anyone's personal beliefs. But our own anxiety is now supplying the proof. A gnat-sized theory makes otherwise sensible people turn tail. As soon as a few people start running, it's almost inevitable everyone else will. Billions of cautionary coffee cups, because of one jury verdict.

Nothing is sacred. In response to publicity about an unsuccessful litigation against a church after a parishioner committed suicide, churches have begun implementing policies discouraging counseling by ministers. Instead, parishioners are referred to psychologists and other therapists. The legal exposure to risk is too great, according to Reverend Charles Darwin, a minister at Park City's Baptist Church, an 8,500-member congregation in Dallas. "What I'm saying," said Reverend Glen Evans of Calvary United Methodist Church in Arlington, Virginia, "is that 'I'd like to see you, but I'm afraid you might sue me.' " When Michael and Theresa Dunne of San Diego sought counseling for marital problems, their church referred them to a therapist who advocated "leaving that God stuff outside the door." Reverend Darwin doesn't like it—"I don't really know what they're getting"—but feels safer diverting his parishioners to Freud than even thinking about possible legal liability.

Americans know opportunity when they see it. "An act is illegal," Professor Donald Black observed, "if it is *vulnerable* to legal action." Empowered by their own imagination, individuals with a certain predisposition grab hold of the magic cape of individual rights and fly over society, looking for someone who might be called to account for some accident or perceived grievance, or for whatever purpose suits them.

New industries are springing up to meet the demand. Vidal Herrera in Los Angeles pioneered 1-800-Autopsy. "Business is great," said Mr. Herrera, who has so much business that he tells prospective clients that autopsies are not generally necessary. "But so many people want to sue," he observed, "that they don't listen." One recent caller said that her ninety-two-year-old mother had been working in her garden two days before she died in a local hospital. On questioning, the daughter admitted that her mother was a smoker with diabetes, high blood pressure, and a variety of other ailments. But the daughter was insistent: "I think they killed her."

Approaching each disagreement as a matter of individual rights doesn't seem to bring out the best in anyone. The effect is more like stoking a bonfire. Believing in "an unattainable order of things," Vaclav Havel notes, people start trying to "confirm [their] identity by sounding off at others and demanding [their] rights." Whoever is asserting a right comes to believe it, and the sense of legal entitlement leads to bitter conflict.

Talk to principals. Parents, particularly in more affluent schools, often act like maniacs. Their anger is startling. One tried to run over a principal in a parking lot. The situation in Orange County, California, got so bad that the Capistrano Unified School District adopted a civility code, which can result in misdemeanor charges against parents who scream at school staff or use obscenities. This attitude of sometimes violent entitlement is apparently a reason the principals are quitting and retiring in record numbers. "We're no longer educators," said one. "We're legal targets."

Right and wrong, as practically everyone has noticed, are increasingly defined in legal terms, not moral ones. Reputation seems almost like a quaint concept, replaced by an analysis of individual legal rights, as if, Professor Mary Ann Glendon notes, we "roam at large in a land of strangers." But this new legalistic morality, once legal claims are understood as self-created, can be reduced to a more straightforward understanding: It's no morality at all.

A schizophrenic strain has crept into the society, with people edging around the baseboards, looking this way and that before doing anything in the common realm, but then, when they can, aggressively using law to gain a personal advantage. There's a "litigation neurosis," Chief Justice Warren Burger noted almost twenty years ago, developing "in otherwise normal, well-adjusted people." The wife of a doctor who is probably paranoid about legal liability doesn't hesitate to milk the system by suing his parents. Like savages, rather than citizens of a great civilization, we pounce when there's an opening and cower in our caves the rest of the time.

Americans are constantly told that justice purged of personal values is an essential condition of a diverse society, just part of a social structure that must accommodate different interests and values. We trudge along like self-flagellants repeating the mantra, "Who am I to judge?" But most Americans probably share basic values of social interaction, like not making unreasonable demands and being considerate of others. Perhaps the common mores of decency and proportion have eroded not because of diversity but because successive generations have learned what they can get away with. If people see others getting away with selfish conduct, they become cynical, and some become selfish themselves. We keep bending over backward to accommodate selfish and antisocial conduct, and then wonder why our social fabric is disintegrating.

THE ABDICATION OF LEGAL AUTHORITY

There was "a massive redefinition of freedom" in the 1960s, historian Eric Foner has observed, "as a rejection of all authority."

Our philosophy of individual rights sits high on a pedestal, bathed in the light of universal acceptance notwithstanding its corrosive effect on our culture, because it keeps authority at bay. The rhetoric of modern justice is individual rights, but its foundation is avoidance of authority. Americans can't stand the idea of some unknown jerk having the power to make decisions. With neutral jus-

tice, we don't have to give anyone authority to make choices for the common good. Almost subconsciously, we can't bring ourselves to confront the need for authority in a free society.

Avoiding authority has preoccupied legal reformers for the past half century. How to protect free citizens against abuses of authority was already an urgent topic among legal scholars coming out of the struggle against dictators in World War II. Then America's awakening on racism took center stage. In 1954, when the Supreme Court in *Brown v. Board of Education* overturned laws and court rulings supporting segregated education, it set off a chain reaction causing Americans to question their own beliefs. People in power could identify those who abused their authority by looking in the mirror. A national crisis of confidence turned up the heat on existing legal structures past their melting point.

Law lost its authority. We had been taught by judicial leaders like Benjamin Cardozo and Oliver Wendell Holmes, Jr., that law was supposed to support the mores of society, but the *Brown* decision turned the spotlight onto America's pervasively racist mores. We were taught to trust judges to do justice, but *Brown* exposed generations of judges who had been uniformly unjust to race. How could the Supreme Court possibly have sanctioned the "separate but equal" doctrine for over half a century? Who can trust judges? Most of the rest of Americans also tolerated segregation and second-class status for blacks. Can we trust ourselves? The self-doubt then turned toward the structure by which laws are made. What is law if the Supreme Court can simply reverse direction at the snap of

a finger? The *Brown* opinion, viewed today as a ninety-year lag in enforcing the Fourteenth Amendment, relied on sociological facts of differences between black and white education. Where's the legal principle there?

In a famous 1959 article, "Towards Neutral Principles of Constitutional Law," Columbia law professor Herbert Wechsler agonized over the fact that *Brown* did not adhere to principle. Wechsler's article and the hubbub around it—literally hundreds of academic articles debated his call for "neutral principles"—were symptomatic of the broader crisis in authority that shook the mortar of our entire system of government.

Insulating state power from fallible human choices became the number one priority of legal reform. No error or bias could occur if officials no longer had discretion. For regulation, making law as precise as possible became the way to remove personal authority by government officials. The burgeoning regulatory state was constructed as a detailed instruction manual that admitted no human judgment. Every year, thousands of pages of detailed rules specified exactly what everyone had to do, like setting the height of factory railings at exactly forty-two inches. Regulators and factory managers walked around with their noses in the rule books, squinting at the fine print rather than trying to make sense of the particular situation. Pretty soon, the regulatory system began to function about as badly as the system of authoritarian central planning that everyone was trying to avoid.

But precise rules could not even try to address the infinite circumstances confronted by courts. How could we protect individuals against authority by judges? In an in-

fluential draft textbook, two Harvard law professors, Henry M. Hart and Albert M. Sacks, said that the central idea of justice should no longer be declaring rules of behavior but a "principle of institutional settlement." Judges would no longer decide right and wrong but would ensure instead a neutral process. "The first recourse of law in dealing with disputes," they said, "is not to seek final answers, but an agreeable procedure for getting an acceptable answer." To accommodate the "boundless and unpredictable variety" of views of a diverse society, the court should focus on the "greater importance of procedural arrangements."

Instead of looking to "considerations of social advantage," as Holmes had suggested, the new priority of law was to honor the right of each individual to make his argument. Judges lost their authority to interpret law on behalf of society. Legal philosopher H.L.A. Hart described the new individualistic philosophy this way: "The question is not 'maximization of . . . general welfare,' but a doctrine of basic human rights." Justice would be "content-neutral" and "transcend the conflict of particular views."

Diversity of belief, not uniformity of law, became the first goal of justice. In a 1957 decision, the Supreme Court admonished lower courts not to dismiss any claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to recover."

The first job of judges was to be beyond reproach, disregarding, to the extent possible, even their own beliefs: to bend over backward, and then bend over some more. Judges would safeguard a pristine process, and the decision would be made by a neutral decision maker, usually a jury of citizens picked at random. Deference to the jury, a right guaranteed by the Constitution, became how judges proved their neutrality. Judges basically ignored the Constitution's indication that in civil cases "the rules of the common law" override "fact[s] tried by a jury."

The cardinal sin for a judge was to make a decision just because the judge felt it was right. Perhaps the most ridiculed judicial statement of the period was by Justice Potter Stewart, reviewing a decision in Ohio under the First Amendment to ban Louis Malle's movie *The Lovers*. He said that "perhaps I could never succeed in intelligibly" defining pornography. "But I know it when I see it, and the motion picture involved in this case is not that."

"I know it when I see it" became a kind of joke in the legal academy, a shorthand catchphrase for everything law is not supposed to be. Belief was irrelevant, or worse, a synonym for bias. The point of justice, as Professor Michael Sandel put it, became to "respect people's freedom to choose their own values."

To our modern sensibility, giving someone authority to judge right and wrong is inconceivable. No mortal, we believe, should be able to assert rulings on behalf of the state. Federal judge Charles Wyzanski, one of the country's most respected trial judges, gave a lecture in 1973 in which he stated the prevailing gospel without a hint of doubt:

> Choosing among values is much too important a business for judges to do the choosing. That is something the citizens must keep for themselves.

Entire schools of legal academics are dedicated to explaining why judges have no basis to make decisions: They're not representative enough; they must make judgments only if "entirely rationalistic." Professor Paul Gewirtz summarizes the philosophy clearly: "Judicial power involves coercion over other people, and that coercion must be justified and have a legitimate basis." Justice is neutral, or it is not justice.

Americans did not intend to eliminate rules of fairness or reasonableness. We just didn't trust any human to make these choices. Americans do not distrust government as government, Robert Samuelson has noted. "They distrust concentrated power wherever it exists." Americans may be upset that we've lost our sense of right and wrong, but we know, as clearly as we know anything, that no one has the authority to decide right or wrong. The new authority, George Trow wrote in his 1981 essay "Within the Context of No Context," is "no authority."

Striving for neutrality, however, we unintentionally removed a critical element of justice. "Legal principle," Oxford philosopher P. S. Atiyah observed, has been "rejected as a form of authoritarianism."

FINDING LAW IN UNCOMFORTABLE PLACES

Baseball is a sport familiar to most Americans. Its rules are generally known, and so are its risks. The ball is batted in all kinds of unpredictable places by people swinging as hard as they can, and thrown at high velocity to make it difficult to hit or to cut down the runner. We love the game. It's our national pastime. So let's look at why justice seems

to have a hard time dealing with the accepted risks of baseball.

When the center fielder didn't show for the Little League game, the coach moved the all-star second baseman, Joey Fort, to center field. In the third inning, a high fly came toward Joey, but Joey lost it in the sun. Usually with a runner in scoring position, the coach's next choices, as one reporter put it, include bringing in the infield or setting up a special play. But Joey was injured when the ball hit him in the eye, and the coach in this case ended up hiring a lawyer. Joey's parents sued for injuries he sustained. The theory was that Joey, who had never played center field, should have been instructed about catching fly balls in the sun or given flip-down sunglasses. The coaches ended up settling the case for $25,000.

Sister Gale Rawson was on second base in a softball game when a fellow teammate hit a single up the middle. It would be a close play, but Sister Gale decided to try to score. The relay came. The catcher blocked the plate, ready to tag Sister Gale as she barreled in. The inevitable collision occurred, and the catcher dropped the ball. Safe! Not quite. The catcher fell the wrong way and broke her leg. She sued. For what? Sister Gale didn't break the rules, nor did anyone else.

Getting hit by a fly ball is a common risk of baseball. So is a collision at home plate. These claims shouldn't get to first base, except maybe in a peculiar situation that's hard to imagine. There's a venerable legal principle right on point, called "assumption of risk": If the risks are well known, those are the breaks.

A legal principle by itself never quite resolves a case,

however. You can practically feel the lawyer squirming his way out of it: "Joey Fort may have assumed the risk at second base, but he had never tried center field. Not once had he been instructed about judging long fly balls." We roll our eyes, but there in the courthouse sits Joey, one eye still blurry, looking pitiful. It's hard to blame Joey.

Try to find the law in this courtroom scene. There's the injured Joey and his angry parents; the nervous Little League coaches, living proof of the adage "no good deed goes unpunished"; and several lawyers engaging in a kind of hyperbole competition. The jury then receives this enlightening instruction from the judge:

> If you find that the plaintiff knew of the risk, and voluntarily decided to expose himself to it, then your verdict must be for the defendant. . . . If you find from a preponderance of the evidence that the defendants were guilty of negligence which proximately caused the injustice to the plaintiff, you must find for him.

Now that's really helpful. The jury has no idea how to read between the lines. It must be a serious claim, if all those important people wearing suits, even one in a black robe, go on and on about it. What are the jurors supposed to do? They look at the bereft mother. The coaches could have been a little more careful.

Where's the law? The law hasn't actually changed. Common law principles like assumption of risk have been around for generations. Common wisdom has it that what has changed is our diverse culture. Victims are less likely

to take it lying down. Jurors are more willing to give victims verdicts. That's the way justice should work. But no juror voted for the plaintiff. The case, like most, settled. Who wants to take the risk, however slight, of a huge verdict?

Hard cases make bad law, so the saying goes. But how about easy cases? We see the just result right in front of us: A fly ball is an ordinary risk of baseball. But like someone without hands, we can't grab hold of it. It used to be, as Justice Louis Brandeis once confidently observed, that only conduct on the edges created legal uncertainty, and lawyers could readily "tell clients where a fairly safe course lies." But we can no longer rely on our instincts of what's obvious. Today, any ordinary life event, even moving the second baseman to center field, could end up in a gut-wrenching trial.

Philosophy, to paraphrase Holmes, is only words. The same is true of law. Legal principles can be argued to mean anything. In Germany before World War II, judges used legal principles that had been applied fairly for generations to send innocent people to their deaths. Describing this phenomenon, Judge Richard Posner observed that he was struck by the "extraordinary plasticity of legal rhetoric, which enables a clever judge to find a plausible form of words to clothe virtually any decision, however barbarous."

Every day, in countless arguments in and out of court, Americans experience the reality that legal principles are just words. Concepts like reasonableness and assumption of risk have been argued beyond recognition. As often as not, the law is turned upside down. The manipulation is

not by judges: we solved the problem of official prejudice by taking away judges' point of view. Law exists only in hand-to-hand combat between the parties. No one has any clue where they stand.

Words only mean what someone says they mean. "Rules," a famous judge once said, "travel in pairs." A fly ball in the sun to a new center fielder can be an unreasonable risk, or it can be an assumption of risk. Which one it is depends on a ruling by someone.

So who decides? The legislature could pass laws trying to catalog what is reasonable or not, and, at this point, legislative action is undoubtedly needed in some areas. But the law books are already so thick no one knows what's in them. They would burst if a law were added for every ordinary life event. Just imagine it: This legislative session, we'll take up the risks of fly balls. Next session, whether graduation caps can be thrown in the air.

Where else can we find meaning for law? We look around the courtroom. There's the judge sitting sort of lonely up on the bench. It must be boring, parked up there all day long. We conjure up the image, basically accurate, of an aging male type in a black robe reciting legal platitudes to an equally bored jury. There he sits, feeling half-guilty for being a male (four out of five judges), being white (ditto), getting a privileged education, and for, he's told constantly, his unavoidable prejudices that represent the views of almost no one who needs justice. For years he's leaned over backward as far as he could to avoid interjecting any personal beliefs. That's his role, so he's told. He must keep values out of it as much as possible. Law has to be neutral, not polluted by his views of right and wrong.

It might be too scary, but let's look at what could happen if the judge actually leaned forward and decided something. The judge dusts off his gavel and, interpreting the principle of assumption of risk in this case, makes a legal declaration: "A fly ball in the sun is an ordinary risk of baseball. Case dismissed." What happens? The case is over except for an appeal to make sure the decision isn't out of left field. The jury doesn't even show up. A declaration of law is pinned up on the scoreboard for all to see. Once a few more courts make similar declarations, in the common law system, people begin to feel comfortable that they know where they stand.

But how does a judge decide how to apply a legal principle? The judge knows that changing positions is part of the risk of baseball, that the argument about long fly balls is just splitting hairs. But how does the judge know? He just knows. The judge can't prove it, because it's a value judgment about the nature of the game. The judge believes, in other words, that other people believe it. To quote Cardozo, it's "not what I believe to be right. It is what I may reasonably believe that some other man of normal intellect and conscience might reasonably look upon as right."

Courts are usually criticized for what they make us do, such as activist decrees that, in the name of integration, forced children to be bused hours away from their neighborhoods. Almost no one worries about what courts don't do, or makes the connection to daily choices we no longer make. But how can Little League coaches feel comfortable unless they know a judge has authority to declare as a matter of law that fly balls or other foreseeable accidents are an accepted risk of society?

Maybe the judge deciding about fly balls wasn't so scary after all. But what keeps a judge from acting like the German judges under Hitler? The judge is subject to scrutiny for how he applies the principles. The judge is not, as Cardozo put it, "a knight errant roaming at will." He gives reasons, which are the "salutary disinfectant" against arbitrary choices. But the judge's reasons are not provable. There is no proof, because these decisions of law will always be value judgments. The judge's reasons simply allow an appellate court, or the court of public opinion, to evaluate the wisdom of the decision.

What happens if the judge decides the other way, holding that Little League coaches must take precautions to protect Little Leaguers against the sun? Everybody now knows we'd better stock up on sunglasses. Even if the rule is stupid, at least Americans know where we stand. Instead of coaching Little League, people start to go fishing.

Having no rules means that fear becomes the rule. In 1999, major-league baseball issued a directive to players that, when picking up a foul ball, they should no longer throw it to fans in the stands. There might be legal liability if someone were hurt trying to recover a souvenir. Most players, thankfully, are just ignoring the new policy. It's hard to blame MLB. Foul ball litigation is increasingly common. It's only a matter of time before the major league fields are completely screened off.

Chief Justice Roger Traynor of the California Supreme Court, a famous liberal innovator of the 1960s—he created the doctrine of strict liability for manufacturers whose products fail—emphasized the need for judges to declare

rules even for the simplest accident, and not leave standards "to oscillating verdicts of juries." When a woman hit her head on an angled ceiling while walking down a staircase, Traynor insisted that the judge determine whether it was an unreasonable hazard: In that case, "the danger is so apparent that visitors could reasonably be expected to notice it." Holmes also was adamant that the judge make the value judgments presented by a case:

> Negligence . . . [is] a standard of conduct, a standard which we hold the parties bound to know beforehand, and which in theory is always the same upon the same facts and not a matter dependent upon the whim of the particular jury or the eloquence of the particular advocate.

Another renowned judge, Presiding Justice David W. Peck, in New York's Appellate Division, noted that a judge must be "mindful of the larger orbit than . . . the parties immediately before him." The judge, as Cardozo observed, must act as "the interpreter for the community of its sense of law and order."

Americans want a legal solution that's neutral, law that's served up exactly the same way everywhere, like a McDonald's Happy Meal. But no fast-law franchise exists to serve up, pre-prepared, what practically everyone knows is the right call: that a fly ball is an ordinary risk of baseball. No rule, as Wake Forest president Thomas Hearn observed, can "replace the judgment, which is required to apply principles . . . to the facts of the matter." To be

effective as guides for society, legal principles must be applied as most people would expect them to be. Otherwise, law is so much hocus-pocus, and no one knows what to do.

This human stewardship of law will strike many as almost unlawful, but that's because, like most generations, we don't look to history.

THE MYTH OF TRANSCENDENT LAW

Giving authority to duly elected or appointed officials, it is useful to remember, was the organizing idea of the American Republic. The personal beliefs of these officials were considered not an evil but the essential currency of government for the Republic. Elected representatives, for example, were given fixed terms so that they would have the breathing room to act on their own personal beliefs. Their authority, in a system of separated powers, would then be checked by other officials' authority.

Personal authority for judges was similarly not considered a problem but a key part of the solution. The job of judges, as Hamilton put it in *Federalist 83*, was not to be neutral but to "interpret the laws" and "declare the sense of the law." That was the traditional role of judges in the common law system that we inherited from England, in which courts announce and interpret legal principles of social interaction. The meaning of those principles evolves over time like, as Judge Learned Hand put it, "a monument slowly raised, like a coral reef, from the minute accretions of past individual decisions."

Courts are our bastion of sanity in this constitutional system because they can take the long view, free from

popular passion. To ensure their independence, federal judges were given lifetime tenure. Courts are like democracy in slow motion: Individuals of long tenure apply long-standing principles in the context of new cases and changing social needs.

In the early days of the Republic, judicial law making was not so slow. Judges immediately took the job of sorting out, under the Constitution, who had authority to do what. Did Congress have authority to establish a national bank? While the opinions of the Supreme Court in this period, like most judicial opinions, were written as if the conclusion were foreordained, these rulings were basically inventions by the remarkable individuals who were the chief justices of these courts: "It was Marshall, not law, who made the Constitution stand for nationalism. . . . It was Taney, not the writing on parchment, who made 'the police power' an instrument for control of the rising industrial system."

As the industrial revolution began transforming societal relationships, judges adapted the common law to an age of impersonal dealing. In an agrarian society, historian Arthur M. Schlesinger, Jr., notes in *The Age of Jackson*, social interactions had been "controlled by a feeling of mutual responsibility." New rules were obviously needed for a society made mobile by railroads and supplied by distant factories. A law of "contract" was invented which put emphasis on formal agreement rather than review of each agreement for fairness. The law of "negligence" was invented to resolve disputes over accidents with people who did not know each other.

The new rules generally reflected the laissez-faire bias of

the times, or, as Holmes approvingly put it, that the "loss from accident must lie where it falls." One infamous rule was the "Fellow Servant Rule," which barred recovery to workers injured on the job by a co-worker's negligence. The logic, in the words of its creator, Chief Justice Lemuel Shaw of the Massachusetts Supreme Court, was that the worker "takes upon himself a natural and ordinary risk inherent in the assignment . . . for which he is adequately compensated."

These rules would not be considered fair today any more than a Model T would be considered safe. But they were rules of society, declared by judges who, Schlesinger observes about Chief Justice Shaw, "had a very real sense of the imperatives of change" and "the requirements of the community." In the common law tradition, these rules continued to evolve over time to meet changing realities and social values.

Law has always held itself out to have a transcendent quality, better than just a bunch of people making it up. To maintain common respect for law, judicial rulings must indeed be "infuse[d] . . . with the glow of principle," as Cardozo observed, or they will not stand the test of time. But our longing for law that is immutable periodically causes law to rigidify, as judges and legislators adopt the "formalistic" approach of deciding based on abstract legal analysis instead of the purpose of the legal principle.

As the Civil War approached, the crisis over slavery drove judges toward formalism, in part as an excuse to ignore the purpose of laws. Judges like Lemuel Shaw, asked to return escaped slaves to their southern owners under the Fugitive Slave Act, found themselves in a moral dilemma.

Many, including Shaw, took the route of "seizing on minor technical lapses" to avoid enforcing the law. Judges, having reinvented law in the prior fifty years, began to take seriously again the idea that the words of law, not their own views of the law's purpose, marked the path to justice.

Formalism reached full bloom after the Civil War, when the mechanical age inspired legal thinkers to imagine that law was a "species of scientific truth" which judges discovered by careful study. Led by Christopher Columbus Langdell, the first dean of Harvard Law School, generations of late-nineteenth-century lawyers were trained to believe that any legal problem had only "one true answer": "In scientific law, the judge has no will, makes no value judgments." Although ridiculous in hindsight—a little skepticism surely must have crept into the minds of intelligent judges searching for "one true answer" in a close case—the power of accepted convention should never be underestimated. Judges flocked to scientific law in part because, in the words of Judge Richard Posner, it "shift[s] responsibility . . . to dead people." "The idea of a body of law fixed for all time and invested with an almost supernatural authority," as Professor Grant Gilmore put it, "is irresistibly attractive."

Formal law has a bad habit of elevating logic over good sense. During the reign of scientific law, a judge in Vermont dismissed a claim over a defective butter churn because, after exhaustive research, the judge could find no law specifically addressing butter churns. In 1928, Chief Justice William Howard Taft held that a wiretap on a telephone could not possibly be an unconstitutional search-and-seizure. Telephones did not exist when the Constitution

was written. Professor Gilmore characterized Dean Langdell as an "essentially stupid man who pursued his one idea with the tenacity of a genius."

Oliver Wendell Holmes, Jr., started the movement toward a "realist" conception of justice when, in 1881, he famously declared, "[T]he life of the law has not been logic; it has been experience." A remarkable man whose brilliance was equaled almost by his longevity, Holmes began his career left for dead as a wounded lieutenant in the cornfields of Antietam in 1862. Over seventy years later, in 1933, he was still sitting on the Supreme Court. Holmes spent much of his career looking down on formalism of law as a parent might observe children playing, explaining why law had to weigh "considerations of social advantage," and why this was not inconsistent with the idea of legal principle.

The nadir of post–Civil War formalism came in the 1905 *Lochner* case when, over Holmes's dissent, the Supreme Court declared unconstitutional a statute designed to limit to ten hours the shift of bakers working next to hot ovens. In a triumph of formalist reasoning over practical reality, the Court declared the statute, designed to preserve worker health, conflicted with the worker's freedom to contract with his employer.

Holmes eventually succeeded in returning to legislatures power over health and safety. Benjamin Cardozo, who replaced Holmes on the Supreme Court, led the modernization of contract and tort law while the Chief Judge in New York State. Among other innovations, Cardozo abandoned the common law requirement of direct contract "privity" in order to expand duties of manufacturers to

distant consumers. Until a Cardozo decision in 1923, for example, a car owner was barred from suing the manufacturer for defects causing an accident because the car, like all cars, had been bought through a dealer rather than directly from the maker.

Cardozo gave a series of lectures at Yale in the early 1920s in which he explained what judges a century earlier had taken for granted:

> The judge is under a duty . . . to maintain a relation between law and morals, between precepts of jurisprudence and those of reason and good conscience. "It is the function of courts to keep doctrines up to date with the *mores* by continual restatement. . . . This is judicial legislation, and the judge legislates at his peril. Nevertheless, it is the necessity and duty of such legislation that gives to judicial office its highest honor; and no brave and honest judge shirks the duty or fears the peril."

Holmes and Cardozo articulated the need for authority by judges that our founding fathers and their judicial appointees had assumed. But their famous wisdom was itself based on a critical assumption, largely unarticulated: Performing this role required a willingness to assert values of right and wrong. Even Dean Langdell believed that law should assert right and wrong; he just thought the choice preordained.

Every civilization has rules: Otherwise it wouldn't be civilized. Under our modern version of procedural formal-

ism, striving for neutrality above all else, we no longer acknowledge that society needs rules which reflect a deliberate choice about what should be encouraged or discouraged. Giving someone authority to assert social values, even if accountable to us or to a higher authority, strikes us as practically totalitarian. Our neutral formalism shares Dean Langdell's goal of avoiding judicial authority, but it goes one giant step further; in the name of individual rights, it tries to avoid values altogether.

Neutrality is illusory, however. People will interact one way or another. Values don't disappear; they reflect the law. Law and social behavior are linked like birds in a migrating flock. One or the other can lead, but they must stay together. Too much or too little law can have roughly the same effect on society. If legal exposure expands too much, people start tacking warning signs all over the landscape and spend half their time worrying about possible defenses. Without adequate law, people huddle in fear or are abused, as with child labor during the industrial revolution. Some people will exploit whatever they can. That's why law is essential for freedom.

For law to be effective, Archibald Cox once observed, it "must meet the needs of men and match their ethical sensibilities" or, as Holmes put it, "correspond with the actual feelings and demands of the community." To Holmes, this was "the first requirement of a sound body of law."

But Americans no longer believe in belief. We've certainly come, or gone, a long way. Democracy used to be the vehicle by which America strove confidently toward the "perfectibility of man." "We don't expect to change human nature," reformer Jane Addams said shortly before

her death, "but we do expect to change human behavior." It may well be, as many scholars suggest, that Americans no longer agree on right and wrong. But the absence of consensus only underscores the need for rules of interaction. How else do we know what's reasonable? Today, honoring neutrality, we're too insecure to tell someone trying to avoid work because of a paper cut to go get a Band-Aid instead.

Our founders would have been surprised. A Constitution designed to provide a government respecting common values is now invoked to avoid all values. Justice today is purposeless. Being purposeless is, indeed, its guiding purpose. The aim of modern justice, one scholar recently declared, is to elevate deliberations "to a level where power goes to the most persuasive." Justice has been reconceived as a kind of sporting contest. In Boston, the new federal courthouse is designed so that the bench is set only slightly above the floor. Judges are a part of a neutral process, just "part of the furniture" as Justice Stephen Breyer quipped. May the best lawyer win.

As with Dean Langdell's scientific justice, however, the steady deterioration of public confidence will require abandoning this hands-off approach. "How do we judge a wrong," William Bennett asks, "when we have gutted the concept of judgment itself?" Sooner or later, people have to be "empowered," as former Harvard president and law school dean Derek Bok suggested, "to keep watch and make sure the process as a whole is meeting the needs of society."

It may be "easier to conceal a diversity of values when principles are jettisoned in favor of individualized justice,"

Professor Atiyah suggests. "But how long can this process of concealment last?"

To liberate citizens to act on their reasonable beliefs, judges must embrace a philosophy they've spent fifty years trying to repudiate, and start asserting values when interpreting rules. No issue in a case, not even how much people can claim, should be exempt from a judge's constant scrutiny.

I KNOW IT WHEN I SEE IT

In 1992, Dr. Ira Gore, a dentist in Birmingham, Alabama, bought a new BMW. He was so proud of it that, after a few months, he took it to a customized paint enhancer named Mr. Slick. There he learned the terrible truth, otherwise not visible, that the paint on his BMW had been touched up because of the effects of acid rain on its voyage across the Atlantic. Dr. Gore sued and was awarded not only damages for alleged reduction in value ($4,000) but also $4 million in punitive damages for this unbelievably outrageous conduct. The punitive damages were calculated, if that's the right term, based on Dr. Gore's argument that the jury should teach BMW a lesson by paying him another $4,000 for each of one thousand cars it had retouched in the prior decade.

The case found its way to the United States Supreme Court, whose decision was considered so noteworthy that it received front-page attention. By the tightest of margins, five to four, the Supreme Court overturned the award as "grossly excessive." The argument among the justices illustrates how far away our legal leaders are from asserting

their beliefs of the legal principles that should govern our society. Justice Ginsburg's dissenting opinion accused her colleagues of a standardless decision, ridiculing their "raised eyebrow" test. Justice Ginsburg has a point. What kind of legal standard is "grossly excessive"? But why is the standard essentially standardless? Because punitive damages are inherently standardless. Why not $4 trillion?

The better question is not whether standardless judicial oversight is proper but why a rule of law tolerates wild, standardless assertions of damages. Going a step further, why in such a case should punitive damages be allowed at all? Touching up paint on a BMW is not a human rights abomination.

Making up a rule of law, whether to limit damages or to permit hot coffee, is an idea that is inconceivable to most judges today. Like a goldfish that has flopped out of its bowl, a judge asked to actually apply a legal principle is apt to gasp and feel helpless. He is used to swimming in legal process, and laying off the real-world responsibility of an actual verdict on jurors who come and go at random. It doesn't matter that the heroes of the judiciary like Holmes and Cardozo could hardly have been clearer.

In fairness, judges have always had a tendency to let claims go to the jury. When justice still labored under the fiction that law would be found under a holy grail, judges generally just let the jury find the grail. Avoiding responsibility, like avoiding risks, is a common human instinct. The judicial laissez-faire approach didn't much matter until recent decades, however, because people didn't bring lawsuits over fly balls or peanut butter. Social conventions—some for the better, some not—had the effect of limiting

what people made claims for. But these social conventions, as we've seen, have broken down.

Today, almost any dispute involving an accident goes to the jury, even if the circumstances themselves are not disputed. But there's a huge difference in the impact of a jury resolving a disputed fact, like who ran the red light or who is telling the truth, and deciding the legal consequences of some ordinary activity, like whether seesaws are unreasonably hazardous. Disputed facts generally involve only the parties in the particular case. A verdict that a seesaw is unreasonably dangerous—indeed, just letting a claim go to a jury—will affect whether seesaws stay in playgrounds all across America. Letting the jury decide means that one person's claim will dictate national policy.

Damages are perhaps the area of greatest judicial deference to juries. How much a defendant should pay is certainly not a legal question. Ergo, by judicial consensus, it must be a fact question for the jury to decide. But even traditional factual issues can spin out of control until they affect society as a whole. Without judicial standards, justice has lost its credibility with society here as well.

Like weeds in a rainy spell, claims have grown ever larger over the past few decades. First it was millions that took our breath away, then tens of millions, then hundreds of millions. Now it's billions. Pretty soon, one lucky victim may own the world. Not even Huxley or Orwell imagined this would be our end.

The standard operating procedure for any aspiring litigant is to sue for the moon. A young professional at Morgan Stanley, fired after several infractions and embarrassments (including having his nude photo appear in a men's magazine and allegedly planting racist e-mails), predictably sued. It had to be racism, not that his nudie shots brought disrepute to the company, especially since the company had paid someone to try to get him to admit to the e-mails. How much did he sue for? A sum of $1.35 billion. You never know with hot buttons like race and homosexuality. Even a small percentage would tide him over until the next photo shoot.

A great thing about bringing lawsuits in modern America is that it's so easy to threaten the adversary's entire livelihood. One stroke of a finger on the lawyer's word processor, and damages go from $100,000 to $1,000,000. Three more keystrokes, and we're suing for a billion dollars. This is fun.

What kind of justice system is it that allows someone to make up an amount of money to demand? Is that a fact to be "found" by a jury? It doesn't even qualify as a value judgment, which at least is a conclusion based on facts. Damages claimed today are completely arbitrary. Just stick your finger in the air and threaten someone with any number that comes to mind.

Judges treat damage claims almost as if they are property, and only with greatest reluctance intercede. In 1987, five-year-old Gregory Strothkamp climbed up several shelves to the top of the linen closet, got an unopened box of Q-Tips, and, while trying to use them, punctured his eardrum. His parents sued the maker of Q-Tips for, among other things, $20 million in punitive damages. Whatever the merits of the argument that Q-Tips should come in childproof packaging (which would raise everyone's cost), most people probably agree that making Q-Tips is not an

evil act. When the jury awarded young Gregory $20 million in punitive damages, the judge did what was obvious from the beginning and overturned the award.

The claim ended sensibly, but is this how justice should work? Sweating through trial and verdict to get to obvious justice, while the judge is sitting there the whole time, doesn't exactly instill confidence in the system. Do judges enjoy watching the Q-Tips company, or a Little League coach, or a doctor squirm on the end of a multi-million-dollar hook?

Lying dormant along the side of society is another important legal principle: that a person injured should be "made whole" by damages. Traditionally, this meant out-of-pocket losses, like lost wages or medical bills. In an unusual case, like a homemaker with no wages, claims were permitted in categories not actually calculable, like "pain and suffering." In cases of genuine evil, punitive damages were possible. Today the exceptions have engulfed the rule, with all kinds of side effects. Juries are regularly asked "to assume the baffling task of trying to place a monetary value on pain and suffering," Dean Bok observed, "although the predictable result [is] to encourage a rise in litigation and the growth of the most unsavory and deceptive practices."

Judges might concede the principle but can't imagine how to apply it; they need some objective legal post to hang on to. If $1.35 billion is too much, what is the right amount? The "exercise of judicial power is not legitimate," as one scholar put it, "if it is based on a judge's personal preference rather than law." So what do the judges

do? They abdicate. Judges look up at the allegorical figure of Justice and interpret her blindfold as impotence.

But Justice is also holding balanced scales. How does Justice achieve balance but through the values and wisdom of judges? Proportion is critical to justice. Equals should be treated alike, Aristotle believed, and unequals proportionally to their relative differences: "the unjust is what violates the proportion." These distinctions, Aristotle observed, can only be made with human wisdom.

Dead people can be so smart. "[T]o speak somewhat paradoxically," Cardozo observed, there are times "when nothing less than a subjective measure will satisfy an objective standard." Justice Potter Stewart had it right after all. Judges have to know it when they see it. One billion dollars for a wrongful dismissal case is absurd. Everyone knows it. The case should be dismissed unless the plaintiff comes back with some amount he can plausibly justify.

I wonder if judges ever ask themselves why it is that damage claims have escalated to a level where they are like a parody of a dysfunctional system of justice. The answer couldn't be more obvious. Judges sit on their hands and tolerate claims that make lotteries seem like small change. The reason people bring huge claims is not hard to divine: It's a form of extortion. Why else sue for such ridiculous amounts? Being sued for, say, $5 million for a regular accident may not cause you to fold your hand, but the possibility of ruin never strays far from your consciousness. Most million-dollar claims end up settling for thousands or less. But not all. All that it takes is for a jury to get mad. . . .

At this point in the discussion, all those black robes are rising up like a human wave in a baseball stadium, hands raised in collective powerlessness. Who are they to judge? Let's respond with a question. What gives a private individual the unilateral right to invoke the court's power to coerce someone else?

I can hear the next one coming. Judges aren't supposed to be activist. For decades, judges have indeed been criticized for being too activist. The federal court in Boston caused riots when it forced children to be bused hours away from home. The federal court in Kansas City took over the school system, spending almost $2 billion to little or no effect. Like dinner-party dilettantes, judges weighed in on legislative-type judgments where they had little responsibility and less wisdom. At the same time, courts across the land were deferring to ludicrous claims by private individuals. This apparent judicial inconsistency is only superficial. Both share a common foundation of abdicating to a system of individual rights. An individual has the right to trial by jury. Don't interfere. An individual has the right to go to school in an integrated setting. Turn the city upside down. Anything in the name of individual fairness. Nothing for the common good.

Judicial activism has a bad name. Experience teaches us that judges should be loath to take over management of government. But judges have a responsibility on behalf of free society to assert standards of reasonable behavior and to prevent the power of justice from being used by private parties as a form of extortion. That's their role in our constitutional system.

THE RISKS OF JUSTICE

At a reception at the White House on April 13, 1906, honoring the formation of the Playground Association of America (Theodore Roosevelt, honorary president; Jacob Riis, honorary vice president), it was clear the association's purpose was not to amuse children. Playgrounds would divert children away from the temptation and dangers of urban streets, but their main purpose was to help children prepare for the challenges, opportunities, and risks of life. The founders were trying to create "a new equilibrium . . . between individualism and cooperation, initiative and caution."

Even the simplest playground equipment, like seesaws, was intended to cultivate both a "sense of balance and a certain feeling of responsibility." Rowland Haynes, who led the playground movement in Milwaukee beginning in 1911, stressed that team games were even more important; they would help children "build up habits of quick thinking, initiative in dealing with new situations, self-control [and] the ability to work with others in the give-and-take of group activities." Baseball was considered an ideal activity for child development. As Henry Curtis, one of the founders of the playground movement, put it:

> One boy is on first, and another is on second. A fielder gets a liner in the middle field. Shall he throw the ball to first, or second, or third? Shall he try to touch the runner and make a double play? He must decide in a quarter of a second

> and act upon that decision instantly or he will never make a successful player. If his judgment is right, handkerchiefs are waved and he is generously applauded; if he makes a mistake, he is hissed and called a fool. . . . The game imparts to the mind an alertness and vivacity which are essential to any large success either in business or society.

For generations, this was the prevailing approach to healthy child development. John F. Kennedy's Council on Youth Fitness promoted the installation of monkey bars and other climbing equipment to develop children's strength and coordination.

The risks in these games were readily acknowledged, but, common sense told us, children were going to do something with all that energy, so why not make it worthwhile: "Children have always run and jumped and climbed, thrown and fended missiles, and played games. Play is the essential spirit of childhood and uses all things as its implements. Any equipment that is furnished can never be more than an incident to it."

No one supported activities with hidden dangers, such as the placement of a swing where it might strike unsuspecting passersby. But, as one of leaders of the movement wrote in 1917:

> It is reasonably evident that if a boy climbs on a swing frame and falls off, the school board is no more responsible for his action than if he climbed into a tree or upon the school building and falls. There can be no more reason for taking out play equipment on account of such an accident than there would be for the removal of the trees or the school building.

Lady Allen of Hurtwood, a leader of the playground movement in Britain, dealt with the risks in a typically English way: "Better a broken arm than a broken spirit."

Fast-forward to today. Reading the pamphlets on safe playgrounds produced by the federal government and others, it's amazing any of us survived to adulthood. As a brochure from the National Program for Playground Safety states: "Many of today's adults remember hours of fun and adventure spent on the playgrounds of their childhood. But, all too often, these memories are mixed with pain." The dangers of play include earth itself, not only under climbing apparatus, but almost everywhere. A federal handbook advises: "Earth surfaces such as soils and hard-packed dirt are not recommended because they have poor shock-absorbing properties." Grass and turf are undesirable because "wear and environmental conditions can reduce their effectiveness." Seesaws are not explicitly condemned, but reading between the lines, no prudent person would keep them: "Seesaw use is quite complex because it requires two children to cooperate and combine their actions." As a result, "there is a trend to replace [them] with spring-centered seesaws."

In 1993 a boy climbed to the top of a jungle gym in Detroit, jumped off, and broke his leg. One mother, after hearing of the accident, went on a crusade, finding virtually everywhere older equipment and an "almost total lack

of fall zones"—"all they had was hard-packed earth." She brought the dangers to the attention of all the schools, which, confronted with notice of a possible legal risk, jumped out of the way quicker than if a pitcher had thrown a beanball. How did they correct the problem? By removing fifty-four pieces of playground equipment.

Our modern goal is not to train children for life, including its risks, but simply to get rid of risk. New York City cut the limbs of trees near playgrounds so children would not be tempted—just the thought makes the heart flutter—to climb a tree. A school district in Southern California banned all running on school grounds. After all, someone might slip and fall. Who would be responsible then? A few years ago, to avoid perils of children interacting, a school district in Philadelphia banned recess altogether. How far can we go? Ban playing? How about children? W. C. Fields may have been onto something.

Focusing too hard on avoidance of risk, as the late Aaron Wildavsky tried to teach us, is calculated to increase the risks. Sooner or later you pay the price. Every opportunity—including safety itself—carries a risk. Safe playground equipment is boring, so children start playing dangerous games "that exceed the design limitations." Why would a five-year-old child be so interested in Q-Tips that he would climb up to the top of a closet in search of them? It turned out, although the fact was given no significance by the court, that the mother was so fastidious that she cleaned the child's ears several times a week. There is, as we know, pleasure in this activity. The opportunity carried a risk. In 1999, a mother sent a three-year-old to play

on the playground and, to be safe, made sure the child wore a bicycle helmet. Tragically, the child broke his neck and died when the helmet was caught in a ladder. Risk can never be eliminated. Risk must always be judged against the opportunity.

Like playgrounds, the American system of justice also is subject to the calculus of risk and opportunity. Avoiding authority, for example, carries the opportunity of reducing personal bias and prejudice. How much is hard to say, because someone driven to a certain result, whether out of hate or influence of popular opinion, is apt to figure out a plausible way of getting there. But avoiding authority, as we've seen, also carries high risk. As Professor Robert Kagan put it:

> The spirit of distrust of authority . . . can be used against the trustworthy, too. An equal opportunity weapon, it can be invoked by the misguided, the mendacious, and the malevolent, as well as by the mistreated.

Cardozo agreed that a judge, no matter how hard he tries, can never "eliminate altogether the personal measure of the interpreter," but understood that society can't function without a ruling by someone:

> You may say there is no assurance that judges will interpret the *mores* of their day more wisely and truly than other men. I am not disposed to deny this, but in my view it is quite beside the

point. The point is rather that this power of interpretation must be lodged somewhere.

Americans hate the idea of a single person of uncertain predisposition having authority to make rulings. Justice will never be perfect, Cardozo observed, but believed that judges who "act with conscience and intelligence . . . ought to attain . . . a fair average of truth and wisdom." Is it better to have no rulings? With no one in authority to defend reasonable conduct, it is difficult for anyone in society to be reasonable. Larck Lake in West Virginia, closed for over five years, can offer tranquillity and enjoyment, but only if someone on behalf of society is able to accept the risk that someone may be foolish in their use of it.

We say we honor the rule of law, not authority based on beliefs. Imagine, we're taught, what a madhouse that would be. In all the braying about neutral justice, however, I don't recall much discussion about what people think makes sense as a legal rule for, say, playgrounds.

We have the idea of justice backward. Is justice about avoiding our beliefs in the name of neutrality, or about asserting common beliefs in the name of law? We keep looking for some way of proving correctness or, as Havel puts it, "an objective way out of the crisis of objectivism." But nothing important in human affairs is provable. Law certainly can't be proved. Law isn't even supposed to be provable. We "cannot be fair," Professor Lon Fuller once noted, "in a moral and legal vacuum." Principles of law should be based not on what we can prove but on what we believe. That's what law is: our beliefs on the rules of society, memorialized in common law principles and statutes

and then, equally important, applied by judges who have the authority to make sense of them in accord with our beliefs. Belief isn't evil. What we believe is who we are.

The risk presented by belief is the risk of our own character: to distinguish right from wrong, to be tolerant, to be vigilant of those we give responsibility to. Taking risks used to define our national character. That's how we get anywhere. Whether in business, in personal relationships, or in justice, risk is a key component of life. Today in America, risk is also an evil concept. "You took a risk" is reason enough to get sued. Our pioneer forefathers, given a glimpse of the future as they set out across the plains in their Conestoga wagons, would have been shocked at their American descendants going through life scared of their shadows.

Only a society as wealthy and well meaning as ours could have come up with a philosophy so completely disconnected from reality. In a fit of self-indulgence, future historians will observe, Americans abandoned their self-confidence. Will Rogers once observed that Americans thought they were getting smarter because "they're letting lawyers instead of their conscience be their guide." Maybe what we need is not better leaders, but to look instead to our humorists.

The leader of the legal process movement, Professor Henry Hart, in one of his last classes at Harvard Law School, brought in a judge's decision that, contrary to ideals of neutral process, blocked local officials from prosecuting sit-in demonstrators in Little Rock. As everyone waited for the "devastating critique of which he was capable," Hart paused and finally said, "Sometimes, some-

times, you just have to do the right thing." Actually, that's what we're supposed to do all the time. Will Rogers could have told him that right at the start.

As it happens, Will Rogers came from Oologah, Oklahoma. What a field day he would have had with the removal of the double slide.

Adversarial Legalism

The American Way of Law

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American Legal Exceptionalism

Everywhere in the modern world legal control of social, political, and economic life is intensifying (Galanter, 1992; Dewees et al., 1991). Law grows from the relentless pressures of technological change, geographic mobility, global economic competition, and environmental pollution—all of which generate social and economic disruption, new risks to health and security, new forms of injustice, and new cultural challenges to traditional norms. Some citizens, riding the waves of change, demand new rights of inclusion, political access, and economic opportunity. Others, threatened by change, demand legal protection from harm and loss of control. Democratic governments pass laws and issue judicial rulings responsive to both sets of demands (Schuck, 2000: 42; Kagan, 1995).

In some spheres of activity, such as land use regulation and worker protection, Western European polities typically have more restrictive laws than does the United States. Compared to the United States, Japan has a more detailed and extensive set of legally mandated product standards and premarketing testing requirements (Edelman, 1988: 292; Vogel, 1990). Germany has stricter recycling regulations and much tighter legal restrictions on the opening and operating of new retail enterprises (Davis and Gumbel, 1995). Compared to most American states, Sweden has tougher laws, and tougher law enforcement, concerning fathers' obligations to provide child support. The Netherlands regulates how much manure a farmer can spread on his fields (Huppes and Kagan, 1989: 215) and, like Germany, has more stringent emission standards than the United States for some major air pollutants (Rose-Ackerman, 1995: 27–28). An increasing number of nations, as well as the European Union, now have active constitutional courts, supporting Torbjorn Vallinder's (1995: 13) claim of a worldwide trend toward the "judicialization of politics," defined as "(1) the expansion of the province of courts or the judges at the expense of politicians and/or the administrators . . . or . . . (2) the spread of judicial decision making methods outside the judicial province proper."

The United States, however, has a unique legal "style." That is the message of an accumulating body of careful cross-national studies, such as those listed in Table 1. Each study examines a specific area of public policy, law, or social problem-solving in the United States and at least one other economically advanced democracy. The studies focus not merely on the formal law but on how the law is implemented in practice. Cumulatively, the studies compare national systems for compensating injured people, regulating pollution and chemicals, punishing criminals, equalizing educational opportunity, promoting worker safety, discouraging narcotics use, deterring malpractice by police officers, physicians, and product manufacturers, and so on. For one social problem after another, the studies show, the American system for making and implementing public policy and resolving disputes is distinctive. It generally entails (1) more complex bodies of legal rules; (2) more formal, adversarial procedures for resolving political and scientific disputes; (3) more costly forms of legal contestation; (4) stronger, more punitive legal sanctions;[1] (5) more frequent judicial review of and intervention into administrative decisions and processes;[2] (6) more political controversy about legal rules and institutions; (7) more politically fragmented, less closely coordinated decisionmaking systems; and (8) more legal uncertainty and instability.

Comparative studies are hardly necessary, moreover, to show that in no other democracy is litigation so often employed by contestants in political struggles over the delineation of electoral district boundaries, the management of forests, the breakup of business monopolies, the appropriate funding level for inner-city versus suburban public schools, or the effort to discourage cigarette smoking. In no other countries are the money damages assessed in environmental and tort suits nearly so high, or have major manufacturers been driven into bankruptcy by liability claims, or have disagreements over tort law generated such intense interest group clashes in the legislatures. Notwithstanding the aggressive prosecution of governmental corruption by Italian and French magistrates, the United States leads the league of nations in the extent to which political parties' struggles for political advantage regularly include investigations and prosecutions arising from charges that the chief executive, his aides, cabinet members, or legislators have committed criminal violations (Ginsburg and Shefter, 1990). The United States has by far the world's largest cadre of special "cause lawyers" seeking to influence public policy and institutional practices by means of innovative litigation. In no other country are lawyers so entrepreneurial in seeking out new kinds of business, so eager to challenge authority, or so quick to propose new liability-

Table 1 Cross-national studies

Author	Policy area	Countries compared with U.S.
Badarraco (1985)	Exposure to polyvinyl chloride	France, Germany, Japan, U.K.
Bayley (1976)	Police behavior	Japan
Bok (1971)	Selection of labor representatives	Several West European
Boyle (1998)	Litigation in the licensing of nuclear power plants	France, Germany, Sweden
Braithwaite (1985)	Coal mine safety	Australia, Japan, Germany, France
Braithwaite (1993)	Nursing home care	Australia, U.K.
Brickman et al. (1985)	Hazardous chemicals regulation	Several West European
Charkham (1994)	Corporate governance	France, Germany, Japan, U.K.
Church & Nakamura (1993)	Hazardous waste cleanup	Denmark, Germany, Netherlands
Day & Klein (1987)	Nursing homes	U.K.
Feldman (2000)	Blood safety	France, Japan
Glendon (1987)	Regulation of abortion and child support	Several West European
Greve (1989b)	Public interest litigation in environmental regulation	Germany
Hoberg (1993)	Environmental regulation	Canada
Jacob et al. (1996)	Role of courts	France, Germany, Japan, U.K.
Jasanoff (1986)	Carcinogens regulation	Several West European
Johnson (1998)	Criminal prosecution	Japan
Kagan & Axelrad (2000)	Environmental and product safety regulation; patents; labor; debt collection	Germany, Japan, U.K., EU, Canada, Netherlands
Kelman (1981)	Workplace safety	Sweden
Kirp (1979)	Racial discrimination in schools	U.K.
Kirp (1982)	Special education	U.K.
Langbein (1979b)	Criminal adjudication	Germany
Langbein (1985)	Civil litigation methods	Germany
Litt et al. (1990)	Banking regulation	Japan
Lundqvist (1980)	Air pollution regulation	Sweden
Pizzi (1999)	Criminal adjudication	Germany, Netherlands, Norway, U.K.
Quam et al. (1987)	Medical malpractice compensation	U.K.
Schwartz (1991)	Products liability lawsuits	Several West European
Sellers (1995)	Land use decisionmaking	France, Germany
Tanase (1990)	Compensation for vehicle accidents	Japan
Teff (1985)	Pharmaceutical products regulation	U.K.
Vogel (1986)	Environmental regulation	U.K.
Wallace (1995)	Environmental regulation	Japan, several West European
Wokutch (1992)	Workplace safety regulation	Japan

expanding legal theories. Finally, referring merely to the last few years, the United States is remarkable in its propensity to stage highly publicized, knock-down-drag-out legal donnybrooks such as the investigation and impeachment trial of President Bill Clinton, the custody battle over the six-year-old Cuban refugee Elian Gonzales, the antitrust cases against Microsoft, and the multicourt battle over Florida's votes in the 2000 presidential election—struggles that inject huge televised doses of politicized legal argument into the nation's everyday experience.

What Is Adversarial Legalism?

All these legal propensities are manifestations of what I call "adversarial legalism"—a method of policymaking and dispute resolution with two salient characteristics. The first is *formal legal contestation*—competing interests and disputants readily invoke legal rights, duties, and procedural requirements, backed by recourse to formal law enforcement, strong legal penalties, litigation, and/or judicial review. The second is *litigant activism*—a style of legal contestation in which the assertion of claims, the search for controlling legal arguments, and the gathering and submission of evidence are dominated not by judges or government officials but by disputing parties or interests, acting primarily through lawyers. Organizationally, adversarial legalism typically is associated with and is embedded in decisionmaking institutions in which *authority is fragmented* and in which *hierarchical control is relatively weak*.

These defining features of adversarial legalism have two characteristic consequences. The first is *costliness*—litigant-controlled, adversarial decisionmaking tends to be particularly complex, protracted, and costly. The second is *legal uncertainty*—when potent adversarial advocacy is combined with fragmented, relatively nonhierarchical decisionmaking authority, legal norms are particularly malleable and complex, and legal decisions are particularly variable and unpredictable. It is the combination of costliness and legal uncertainty that makes adversarial legalism especially fearsome and controversial.

Table 2 contrasts adversarial legalism with other modes of policy implementation and dispute resolution.[3] The horizontal dimension refers to legal formality—the extent to which contending parties or interests, as well as government officials, invoke and insist on conformity to written legal procedures and preexisting legal rights and duties. At one end of the informal-formal continuum, policy elaboration and dispute resolution can be labeled *legalistic*, in the sense that they are controlled by formal legal rules and procedures rather than by discretionary judgment, bargaining, and informal processes. (This definition encompasses, but is broader than, the common use of "legalism" to refer only to mechanical or rigid adherence to legal rules.)[4]

Table 2 Modes of policy implementation and dispute resolution

Organization of decision-making authority	Decisionmaking style	
	INFORMAL ⟷	FORMAL
HIERARCHICAL	Expert or political judgment	Bureaucratic legalism
↕		
PARTICIPATORY	Negotiation/ mediation	Adversarial legalism

The vertical dimension of Table 2 concerns the extent to which the implementation or decisionmaking process is hierarchical—dominated by an official decisionmaker, applying authoritative norms or standards—as opposed to participatory—that is, influenced by disputing parties and their lawyers, their normative arguments, and the evidence they deem relevant. Taking each of these dimensions to their extreme form produces four "ideal types."

Negotiation/Mediation

A process in the lower left quadrant of Table 2 is adversarial in the sense that it is dominated by the contending parties, not by an authoritative governmental decisionmaker. But it is informal or nonlegalistic, since neither procedures nor normative standards are dictated by formal law. One example would be dispute resolution via negotiation, with or without lawyers; another would be policymaking by means of bargaining among politicians representing contending factions. The quadrant would also include mediation, whereby an "official" third party attempts to induce contending parties to agree on a policy or settlement but refrains from imposing a settlement based on law or official policy.

Expert/Political Judgment

The more an official decisionmaker or institution (as opposed to the contending interests) controls the process and the standards for decision, and the more authoritative and final the institution's decisions are, the more "hierarchical" the process. As suggested by the upper left quadrant in Table 2, hierarchical processes can be legally informal. For example, in many Western European countries decisions concerning eligibility for disability benefits and the extent of workers' compensation benefits are made by a panel of government-appointed physicians (or a mixed panel of physicians and social workers) without significant probability of intensive judicial review. In Japan disputes over fault in motor vehicle accidents typically are resolved by special traffic police who rush to the scene, question the parties, "hammer out a consensual story as to what happened," and file a detailed report on their findings (Tanase, 1990: 651, 673–674).

Bureaucratic Legalism

A policy-implementing or decisionmaking process characterized by a high degree of hierarchical authority and legal formality (the upper right quadrant of Table 2) resembles the ideal-typical bureaucratic process as analyzed by Max Weber. Governance by means of bureaucratic legalism emphasizes uniform implementation of centrally devised rules, vertical accountability, and official responsibility for fact-finding. The more hierarchical the system, the more restricted the role for legal representation and influence by affected citizens or contending interests. In contemporary democracies the pure case of bureaucratic legalism usually is softened in some respects, but it is an ideal systematically pursued, for example, by tax collection agencies. Also tending toward this ideal are German and French courts, where bureaucratically recruited and embedded judges—not the parties' lawyers and not lay juries—dominate both the evidence-gathering and the decisionmaking processes (Langbein, 1994). Similarly, in contrast to American criminal prosecutors' offices, in which individual assistant district attorneys usually make their own judgments about which charges to make and bargain with defense counsel about how much to reduce them in return for guilty pleas, prosecutors in Japan are subject to detailed rules and close hierarchical supervision concerning the investigation of facts, determination of the proper charge, and the recommendation of penalties (Johnson, 1998).

Adversarial Legalism

The lower right quadrant of Table 2 includes policy-implementing and decision processes that are procedurally formalistic but in which hierarchy is weak and party influence on the process is strong. American methods for compensating victims of highway and medical accidents, for example, prominently include a decentralized and adversarial tort law system driven by claimants and their lawyers, as contrasted with Western European compensation systems, which operate primarily through social insurance or benefit-payment bureaucracies. In American civil and criminal adjudication, the introduction of evidence and invocation of legal rules are dominated not by the judge (as in Europe) but by contending parties' lawyers. Even in comparison with the British "adversarial system," hierarchical, authoritative imposition of legal rules is relatively weak in the United States (Atiyah and Summers, 1987).

From a comparative perspective, American judges are more political, their decisions less uniform (Levin, 1972: 193–221; Rowland and Carp, 1983: 109–134). Law is treated as malleable, open to parties' novel legal arguments and pleas of extenuating circumstances. Lay jurors, whose decisions are not explained and largely shielded from hierarchical review, still play an important role in the American system, which reduces legal certainty and magnifies the influence of skillful legal advocacy.

Similarly, compared to European democracies, regulatory decisionmaking in the United States entails many more legal formalities—complex legal rules concerning public notice and comment, restrictions on ex parte and other informal contacts with decisionmakers, legalistically specified evidentiary and scientific standards, mandatory official "findings" and responses to interest group arguments. These legal devices facilitate interest group participation and judicial review of administrative decisions. But hierarchical authority is correspondingly weak. Policymaking and implementing authority is often shared by different agencies at the same or at different levels of government, with different interests and perspectives. Agency decisions are frequently challenged in court by dissatisfied parties and reversed by judges, who dictate further changes in administrative policymaking routines. Lawyers, scientists, and economists hired by contending industry and advocacy groups play a large role in presenting evidence and arguments. Overall, the clash of adversarial argument has a larger influence on decisions than in other countries' regulatory systems, where policy decisions are characterized by a combination of political and expert judgment and consultation with affected interests (Badaracco, 1985; Brickman et al., 1985).

No modern democratic legal system is characterized entirely by any of the quadrants in Table 2. National legal styles are not monolithic; ways of making, invoking, and enforcing law vary within nations (especially within the United States) and even across offices of the same legal institution. British libel law is more threatening to the press than American libel law, which has been restricted by judicial interpretations of the First Amendment (Weaver and Bennett, 1993). The German Constitutional Court, interpreting a more recent and detailed constitution than the U.S. Constitution, has been more activist than the U.S. Supreme Court in some important policy areas, thereby stimulating a good deal of constitutional litigation (Currie, 1990; Landfried, 1995: 113). Adversarial legalism can and does occur in more "cooperation"-oriented nations, such as the Netherlands and Japan (Niemeijer, 1989: 121–152; Upham, 1987). Privatization, deregulation, intensified economic competition, and the advent of transnational regulation by the European Union and the European Court of Justice all have increased the role of courts and litigation in the governance of European countries (Kagan, 1997a).

Conversely, Americans often refrain from and disparage adversarial legalism. Contrary to one popular belief, ordinary people often do not demand tougher laws, prosecutions, and lawsuits for every kind of offense.[5] Research indicates that accident victims, disappointed purchasers, and regulatory inspectors who encounter violations generally do *not* resort to lawsuits as their first recourse (Hensler et al., 1991; Miller and Sarat, 1981; Bardach and Kagan, 1982). They often are willing to submit to bureaucratic or expert judgment or negotiate solutions to their legal claims. Politicians and legal elites often devise less adversarial, less costly alternatives to adversarial litigation—juvenile courts, family courts, small claims courts, workers' compensation tribunals, commercial arbitration, mandatory mediation, negotiated regulatory rulemaking and compliance plans, and so on.

American judges and legislatures periodically issue rulings and enact statutes that are designed to *discourage* lawsuits and appeals; the 1980s and 1990s saw a wave of such efforts to dampen adversarial legalism. Moreover, in social arenas in which the processes of adversarial legalism often are invoked, full-scale legal contestation usually does not occur, largely because the extraordinary costs and delays associated with formal adversarial litigation impel most disputants to negotiate an informal plea bargain or settlement—even if it means abandoning valid claims or defenses (Feeley, 1979; Macaulay, 1979). Thus it is helpful to think of "adversarial legalism" as encompassing both *a method of policy implementation and dispute resolution* (characterized by a set of legal institutions, rights, and rules that facilitate or encourage adversarial, party-dominated legal contestation) and *the day-to-day practice of adversarial legal contestation,* a practice whose rate or incidence varies over time and across settings, depending on the motivations and resources of potential disputants. In principle and in practice, institutionalizing the methods or structures of adversarial legalism—that is, establishing the kinds of judiciaries, legal rules, and law firms that facilitate adversarial litigation—does not completely determine how often conflicting parties actually *use* those institutions.

Yet viewed in comparative perspective, the United States is distinctive in both dimensions. It is especially inclined to authorize and encourage the use of adversarial litigation to implement public policies and resolve disputes. And according to the comparative studies of particular policy fields listed in Table 1, adversarial legalism as a matter of day-to-day practice is far more common in the United States than in other democracies.[6] Furthermore, adversarial legalism as a matter of day-to-day practice is far more common in the United States today than it was thirty-five or forty years ago.

The dual aspect of adversarial legalism—as decisionmaking structure or method and as day-to-day practice—is crucial to understanding its social con-

sequences. It means that adversarial legalism's importance cannot be measured by litigation or adjudication rates alone, any more than the significance of nuclear weapons rests on the frequency of nuclear war. For example, even if only a small minority of aggrieved persons or organizations actually file lawsuits that result in jury trials, the mere threat of costly and potentially punitive adversarial litigation can deter malpractice by hospitals, business organizations, and governmental bodies. Even if only a small percentage of those who object to new waste disposal facilities challenge the permits in court, and even if only a handful of businesses mount legal appeals against new regulations, the legal rules and practices that facilitate such adversarial legal actions matter a great deal because the governmental officials who formulate solid-waste permits and new regulations cannot predict either the incidence or the outcomes of such actions. Because its structures always stand ready to be mobilized, adversarial legalism—lawyer-dominated, potentially costly contestation—is a barely latent, easily triggered potentiality in virtually all contemporary American political, economic, and administrative processes. It creates a set of incentives and expectations that have come to loom very large in American governmental, commercial, and social life.

The Roots of Adversarial Legalism

In the most immediate sense adversarial legalism is a product of American legal culture. In most other nations, legal elites place great emphasis on legal consistency and stability. Law is viewed as a set of authoritative rules and principles, carefully worked out over time. In the United States, in contrast, law is more often viewed as the malleable (and fallible) output of an ongoing political battle to make the law responsive to particular interests and values. Many, perhaps most, American lawyers, judges, legal scholars, and politicians (many of whom are lawyers) see adversarial litigation as a vital tool for righting wrongs, curtailing governmental and corporate arbitrariness, and achieving a just society. Every working day, American lawyers talk about law, legal ethics, and legal processes in ways that reemphasize those values—and American lawyers work unusually long days.

But there is a competing strain in American legal culture. Many lawyers, judges, law professors, and politicians disparage and discourage adversarial legalism. They work hard at promoting compromise and encouraging cooperation. They believe in judicial restraint, not activism. Moreover, judges and lawyers who do favor the institutions, rules, and practices of adversarial legalism, even if they are in the ascendance at a particular political moment, cannot work their will, at least for very long, without the support or acquiescence of other political elites and ultimately of the voting public (Peltason, 1955). The deeper roots of adversarial legalism, therefore, derive from broader American political traditions, attitudes, structural arrangements, and interest group pressures.

Students of comparative politics have long observed that in relation to other economically advanced democracies, the United States "has a strong society but a weak state"(Krasner, 1978: 61). Among the rich democracies, American government is the most easily penetrated by organized interest groups and extracts less tax revenue as a proportion of gross national product (Steinmo, 1993; Wilensky, 1975). In a comparative analysis of political cultures, Seymour Martin Lipset (1996: 21) writes that due to its long-standing emphasis on individualism and mistrust of government, "America began and continues as the most antistatist, legalistic, and rights-oriented nation." American government, accordingly, is designed to fragment and limit power. Both the federal and the state constitutions subject governmental power to crosscutting institutional checks and judicially enforceable individual rights. Thus, in comparison with most other economically advanced democracies, the national government in the United States shares more power with states and municipalities, and at every level of government chief executives share more power with legislatures, legislative party leaders with subcommittee chairs and back-benchers, administrative agencies with judges, and judges with lawyers and juries. A decentralized financial system, rooted in autonomous equity markets, deprives the American government of direct controls over the economy that, for good or for ill, many governments elsewhere in the world employ (Levy, Kagan, and Zysman, 1998).

A structurally fragmented state is especially open to popular and interest group demands. And in contemporary societies—far richer, better informed, and with higher expectations than any in human history—citizens demand a great deal of their government. They want and expect justice, economic security, and protection from harmful technologies and pollutants. They want and expect guaranteed health care and financial aid when disability, disaster, or unemployment strikes their families. But getting those things from an institutionally fragmented, tax-averse, "antistatist" political system, as in the United States, presents a problem.

American adversarial legalism, therefore, can be viewed as arising from a fundamental tension between two powerful elements: first, a *political culture* (or set of popular political attitudes) that expects and demands comprehensive governmental protections from serious harm, injustice, and environmental dangers—and hence a powerful, activist government—and, second, a set of *governmental structures* that reflect mistrust of concentrated power and hence that limit and fragment political and governmental authority.

Adversarial legalism helps resolve the tension. In a "weak," structurally

fragmented state, lawsuits and courts provide "nonpolitical," nonstatist mechanisms through which individuals can demand high standards of justice from government. Lawsuits and courts empower interest groups to prod the government to implement ambitious public policies. It is only a slight oversimplification to say that in the United States lawyers, legal rights, judges, and lawsuits are the functional equivalent of the large central bureaucracies that dominate governance in high-tax, activist welfare states.

Adversarial legalism gives the United States the most politically and socially responsive court system in the world. Compared to most national judiciaries, American judges are less constrained by legal formalisms; they are more policy-oriented, more attentive to the equities (and inequities) of the particular situation. In the decentralized American legal system, if one judge closes the door on a novel legal argument, claimants can often find a more receptive judge in another court. Adversarial legalism makes the judiciary and lawyers more fully part of the governing process and more fully democratic in character. But this kind of "responsive law," in the words of Philippe Nonet and Philip Selznick (1978), is a "high risk strategy" of governance. With its high costs and penalties, and with its responsiveness to private claims, adversarial litigation enables ideologues or opportunists to use the law as a tool for extortion. In its eagerness to put aside legal formalism in order to seek good outcomes, responsive law generates high levels of legal unpredictability, at least when it is implemented through adversarial legalism. Thus adversarial legalism is an extremely inefficient and hence often unfair way of meeting the public's demand for justice and protection. The world's most responsive legal system does not necessarily give Americans the world's most reliable legal system or the world's most responsive system of governance.

to reduce the private costs of civil justice. The American system is shaped more by an exceptionally large, entrepreneurial, and politically assertive legal profession, and less by national ministries of justice. A wider range of problems are taken to court in the United States, and as this chapter shows, its civil justice system has swallowed much larger doses of adversarial legalism. The chapter that follows this one explores in more detail adversarial legalism's effects in the realm of tort law, the most controversial form of civil justice in the United States.

The Two Faces of Adversarial Legalism in Action

By placing powerful tools of pretrial discovery in the hands of entrepreneurial lawyers, adversarial legalism provides more probing forms of fact-finding than do other civil justice systems, and it provides more flexible and potent remedies. The politically responsive American judiciary is quicker than its counterparts in other countries to endorse new causes of action and more willing to craft legal techniques with which to call governmental bodies and corporations to account for unjust decisions or heedless practices. On the other hand, adversarial legalism makes American civil litigation especially costly, unpredictable, and alienating.

Adversarial legalism's attractive face is illustrated by *Gilmore v. Columbia Falls Aluminum Company*. By 1985, according to a lengthy *New York Times* article by Jim Robbins (1998), Columbia Falls Aluminum Company, located in northwestern Montana, had become a perennial money loser. Its corporate owner, Atlantic Richfield Company (ARCO), sold the company to Brack Duker and Jerome Broussard for $1, plus $3 million for unsold inventory. As part of the deal, the parties agreed that Columbia Falls workers would be entitled to "at least 50 percent" of any future annual profit, an agreement referred to in a letter from ARCO to Duker. After taking over Columbia Falls Aluminum, Duker and Broussard embarked on a major cost-cutting program, persuading hundreds of workers to accept a 15 percent pay cut in return for the promise of a 50 percent share of future profits. Faced with the alternative—shutting down the plant—the workers consented. Beginning in 1986, Columbia Falls Aluminum started making money. The new owners split the $2.6 million in profits with Columbia Falls employees. Robbins goes on:

> But over the next five years, rather than splitting the take, [Duker and Broussard] funneled much of the money into offshore bank accounts. Before they cut off their union and salaried employees altogether, the two men had awarded $84 million to them and $231 million to themselves. . . .
>
> . . . In 1989, Mr. Duker and Mr. Broussard dismissed their chief financial officer after he raised concerns about their financial practices. . . . [Later] a 39-year-old accountant at the plant named Roberta Gilmore challenged the company's bookkeeping practices and was promptly told, she says, to keep her mouth shut.
>
> Instead, after fuming for a couple of years, she filed a [class action] lawsuit. . . . At one point, the two small-town lawyers she hired showed up in Federal Court in Missoula, Mont., wearing polar fleece jackets and Sorel boots. They were greeted by Mr. Duker—flanked by three bodyguards and 13 lawyers in finely tailored suits.
>
> Clearly, Mr. Duker had the upper hand in any [legal] war of attrition. And yet, five years and 10 months after the suit was filed [and after pretrial discovery and other investigation by the plaintiff's lawyers unearthed the diversion of funds noted above, plus a letter from ARCO memorializing the profit-sharing requirement] he threw in the towel. Just two weeks before Ms. Gilmore's lawsuit was scheduled for trial, he agreed to pay the [approximately 1,000] workers $97 million. . . . When she heard the news, Ms. Gilmore broke into sobs.

Gilmore's lawyers—who at one point had to take out an $800,000 bank loan to pay their expenses—were to receive $6 million of the $32 million settlement for salaried employees, and labor union lawyers were to receive 10 percent of the $65 million settlement for hourly employees. Duker's lawyer sued him, claiming that Duker had refused to pay a promised bonus of $3 million for holding the final settlement to $100 million or less (Robbins, 1998: 11).

Gilmore v. Columbia Falls Aluminum Company exemplifies the strengths of American adversarial legalism. By validating class actions and thereby offering the prospect of very large fees to plaintiffs' lawyers, the American civil justice system taps the energy of entrepreneurial lawyers, enabling legally inexperienced citizens such as Roberta Gilmore to pursue legal claims against economically powerful "repeat players." By authorizing wide-ranging, lawyer-guided pretrial discovery, adversarial legalism enables plaintiffs' lawyers to uncover even carefully concealed evidence of malfeasance. Gilmore and her lawyers gained courage from the distinctive "American rule" concerning attorneys' fees and court costs, for it holds that even if they had lost, they would not be responsible for Mr. Duker's massive lawyers' bills. In sum, in giving ordinary people extraordinary legal weapons, American adversarial le-

galism contrasts with civil justice systems that are cheaper and more expeditious but less creative and less threatening. Doris Marie Provine (1996: 239) writes:

> France has taken considerable pains to keep the fees for civil litigation at a reasonable level. A 1991 law, for example, makes civil litigation free to those who cannot afford it. The system encourages laypersons to represent themselves and a significant minority do, especially before administrative tribunals. Even when people do hire lawyers, self-imposed and court-imposed restrictions on the scope of their activities tend to keep the fees much lower than in the United States. What the system does *not* provide, however, is a check on the excesses of powerful institutions. The problem, as Cappelletti and Garth observe, is that "a right of individual access, however liberally granted, does not necessarily lead to the vindication of new rights on a very large scale."

Consider, however, the less attractive face of adversarial legalism, exemplified by *Johnson v. Johnson*. In 1983 Seward Johnson, heir to the Johnson & Johnson health care products fortune, died at the age of eighty-seven. Johnson's will, drafted in the last months of his life, left the bulk of his $400 million estate to his third wife, Basia. In 1968 Basia, a recent immigrant from Poland, had come to the Johnson home as a kitchen employee; three years later she married Johnson, forty years her senior. Johnson's will left nothing to his six children, from whom he had long been estranged (apparently for good reason); years earlier, however, he had given each child a trust containing tens of millions of dollars' worth of Johnson & Johnson stock (Margolick, 1993).

Seward Johnson's children challenged the validity of his will in the New York Surrogate's Court, claiming Basia—who had become increasingly imperious as Seward declined—used undue influence in getting Johnson to change the will in her favor. Their case, according to David Margolick's detailed account, was legally (as well as morally) weak: in a sequence of earlier wills, Johnson had similarly left nothing to his dissolute children on grounds that their trust funds were enough, and he had made successively more generous bequests to Basia (Margolick, 1993: 198, 268). But Johnson's children employed smart, aggressive lawyers from a big New York City firm. They conducted marathon pretrial depositions of Basia, the children, and Seward Johnson's lawyer (Goldsmith, 1987) and concocted enough of an argument, in the judge's view, to get a jury trial. Before and during the over-three-month trial, the presiding judge displayed "astonishing partiality" toward the claimants (Langbein, 1994: 2041). Before the trial ended, Basia agreed to a

settlement that gave about $40 million of the estate to the Johnson children and paid their legal fees. The legal fees for both sides amounted, amazingly, to $25 million (Goldsmith, 1987)—enough to pay the annual salaries and benefits of at least 500 new police officers, nurses, or schoolteachers.

Reviewing Margolick's account of the Johnson litigation, John Langbein (1994: 2043) points out that litigation based on claims of undue influence or unsound mind, "which occupy so prominent a place in American probate law, are virtually unknown both on the Continent and in English and Commonwealth legal systems."[1] "Anywhere else in the Western world," Langbein continues (id. at 2045), "the Johnson children's lawsuit would have been suppressed in short order. In the United States, it became a license to exploit the shortcomings of the procedural system. Skilled plaintiffs' lawyers extorted a multimillion-dollar payoff for themselves and their unworthy clients." The Johnson will litigation, with its huge stakes, is far from a typical case. But its costliness, legal unpredictability, and arbitrary outcome, Langbein suggests, are the legacies of two distinctive features of the American system of civil justice that characterize ordinary cases as well: a lawyer-dominated, intensely adversarial, and often manipulative system of evidence-gathering and presentation; and trial by jury and by politically appointed, highly autonomous judges.

Johnson v. Johnson does hint at some positive features of American adversarial legalism as well. In some European civil law systems courts are reluctant to look behind the words of a formal legal document (Hazard and Taruffo, 1993); adversarial legalism, with its potent weapons of pretrial discovery, wielded by self-interested and aggressive private attorneys, gives litigants more opportunity to uncover the human truths that lie behind the documentary mask. It is not difficult to find cases in American law reports in which courts thwarted a fortune hunter who really did subvert an ailing testator's mind, hoping to cheat deserving children of their birthright.[2] American judges, less carefully socialized to the bench and less closely supervised than their counterparts in many other countries, may be less predictable, but they also tend to be more flexible, more oriented to practical problem-solving.

Johnson v. Johnson reminds us, however, that adversarial legalism can be used by the unscrupulous, as well as against them, and that a politically selected judiciary, trial by jury, entrepreneurial lawyering, and aggressive pretrial discovery also have four disturbing implications. Viewed in comparative terms, litigation in the United States is extraordinarily *costly* to the parties, and it entails more legal *unpredictability*. Costliness and legal uncertainty often result in *injustice*, as parties (like Basia Johnson) feel compelled to abandon legally justified positions in order to avoid the costs and risks of adjudica-

tion. Another result is *inequality:* parties who can better withstand the costs and risks of litigation and can obtain better lawyering enjoy a greater advantage in the United States over parties who cannot.

These characteristics disturb even those who are sometimes in a position to benefit from them. In 1994 John Lande surveyed 143 American business executives, corporate "inside counsel," and "outside counsel." Asked to assess how the court system has been working on a five-point scale, half the executives and one-third of outside counsel said "poorly." A majority expressed severe doubts about its capacity to determine the truth correctly (Lande, 1998). It is important, therefore, to look more deeply into the dynamics of costliness, unpredictability, injustice, and inequality in American civil justice.

Adversarial Legalism and the Cost of Civil Litigation

If one were starting from scratch, it would be difficult to imagine, much less design, a mode of adjudication that, as in *Johnson v. Johnson,* would spend $25 million on lawyers to resolve a single dispute. The absolute size of the legal fees in the Johnson conflict was very unusual, to be sure; the fact that the "legal transaction costs" of both sides exceeded the amount actually paid to the claimant was not. In the average American product liability lawsuit, lawyers' fees for both sides, added together, are larger than the amount received by the plaintiff. Even in routine auto accident lawsuits, payments to lawyers account for more than 40 percent of total liability insurance payouts (Hensler et al., 1987: 27–28). The Wisconsin Civil Litigation Project, examining a systematic sample of 1,649 lawsuits in federal and state courts in the 1970s, found that in cases in which the plaintiffs' recoveries were less than $10,000, the median plaintiff's legal costs amounted to some 35 percent of the recovery when her lawyer took the case on a contingent fee basis and 46 percent when she paid her lawyer on an hourly basis (Trubek et al., 1983: 111). Defendants' legal fees generally are almost as large, which indicates that total transaction costs for both sides amount to well over 50 percent of the total settlement.

One 1988 study indicated that when employers were sued in wrongful discharge cases, their legal defense costs alone averaged over $80,000 (Dertouzos et al., 1988), those costs increasing to $124,000 in a 1994 study (Maltby, 1994: 107). The American Intellectual Property Law Association estimated in 1994 that in patent infringement cases the median litigation cost for each side was $280,000 through pretrial discovery and $518,000 through trial (Gerlin, 1994a: B1). According to a 1993 survey, in defending stockholders' fraud claims against their officers and directors, corporations paid law firms an average of $967,000 per case, this average including the

"less expensive" cases that the responding companies won without paying a settlement (Lambert, 1995: B6). Why does American adversarial legalism generate such enormous legal bills? Some cross-national comparisons will provide a large part of the answer.

Lawyer-Dominated versus Judge-Dominated Litigation

While interviewing Dutch representatives of cross-Atlantic shipping lines and marine insurance companies, I asked if the legal resolution of disputed cargo damage claims differs when the cargo damage is discovered in Rotterdam, and hence is subject to Dutch courts, rather than in New York. "Oh yes," I was invariably told. "You have to pay a great deal more in lawyers' bills if the cargo is in the United States." This was not merely because American lawyers charged higher hourly rates but also because they put in far more time—and hence more billable hours—on each case.

American lawyers do more because American judges do less. In civil cases filed in Rotterdam or in other continental European cities, the *judge* is primarily responsible for interrogating parties and witnesses, selecting expert witnesses, demanding production of relevant documents, identifying the relevant law, and summarizing the evidence. In American litigation those burdens are shouldered by opposing counsel. In continental Europe legal advocates for the contending parties play only a supporting role, identifying witnesses to be interrogated by the judge and suggesting avenues of inquiry or legal analysis the judge may have omitted (Langbein, 1985). Thus in comparative perspective continental European legal systems are "judge-heavy," while the American system is "lawyer-heavy" (id. at 846). A 1973 study indicated that California had about 18 practicing lawyers for each judge, compared to 8 in Italy, 3 in France, 2.5 in Germany, and 2 in Sweden (Council on California Competitiveness, 1992: 88).[3] The Swedish and West German governments spent more on courts, prosecutors, and legal-aid lawyers than their citizens spent on private legal services, but "public sector expenditures in the United States were about one-fourth to one-fifth of private expenditures" (Johnson and Drew, 1978: 10, 55).

Although there are no systematic comparative data, the European practice of allocating many costs of litigation to judges almost certainly results in a much less costly civil adjudication system not only for disputing parties but for society at large (Brookings Institution, 1989: 6). Richard Hulbert (1997: 747), who has practiced law both in the United States and in Paris, writes that when viewed from an American perspective, the French system of civil justice "is cheap. It is quick. It produces judgments that overall seem to be satisfying." In a widely cited article, John Langbein (1985) argued that

compared to civil justice in the United States, Germany's adjudicatory system is both cheaper and quicker, mainly because its fact-gathering process is far more efficient. "Probably no unbiased observer would disagree," says Herbert Bernstein (1988: 594), holder of law degrees from both countries. That conclusion is bolstered by considering some of the striking differences in European and American methods of civil litigation.

Redundancy

In strongly contested cases in the United States, separate lawyers for all parties participate in lengthy pretrial depositions, where parties and witnesses are first questioned by one lawyer, then cross-examined by another. In cases that go to trial, the lawyers, parties, and witnesses repeat virtually the same interrogation in open court. In high-stakes cases, lawyers meet with "their" parties and witnesses both before depositions and before trial for another run-through—a rehearsal of the anticipated interrogation (Reitz, 1990: 989). German civil litigation is remarkably different. Langbein (1985: 826) notes that "there is no distinction between pretrial and trial. . . . Trial is not a single continuous event. Rather, the court gathers and evaluates evidence over a series of hearings, as many as the circumstances require." The lawyers for each side nominate the witnesses they wish the judge to question (Bernstein, 1988: 592–593). Hence in contrast to American litigation, German parties and witnesses testify just once, when interrogated by a judge (Reitz, 1990: 989). Because witnesses are not coached in advance by lawyers and it is the judge's responsibility to assess the evidence, there is far less emphasis than in the United States on adversarial challenge—and hence less necessity to have lawyers for both sides present (and paid for) each time a piece of evidence is examined by or presented to the judge (Damaska, 1997a: 846).

All-at-Once versus Episodic Trials

American pretrial discovery is complex and costly, Langbein observes (1985: 831), partly because the sharp division between pretrial and trial encourages American lawyers to "investigate everything that could possibly come up at trial." Once trial begins, lawyers "can seldom go back and search for further evidence." In contrast, the episodic character of German fact-gathering, unfettered by the need to accommodate the jury, means that "if the case takes an unexpected turn, the disadvantaged litigant can count on developing his response in another hearing at a later time."

Dueling Expert Witnesses

In complex cases in which expert technical assessments are required, contending American litigants each hire and carefully coach their own expert witness; in a more hierarchical system such as Germany's, the court appoints a single "neutral" expert witness, who is not coached in advance by anyone (id. at 835–840).[4] A corporate counsel experienced in intellectual property disputes writes that "although European litigation also involves the use of experts; in the U.S. there are experts, experts, and still more experts" (Pantuliano, 1983; see also Somaya, 2000). Thus, according to patent attorney James Maxeiner (1991: 601, 604), "expert testimony in U.S. patent litigation is much more costly than in Germany." In French courts, practicing attorney Richard Hulbert (1997: 749) tells us, the judge appoints an expert for "controverted issues of fact, particularly facts of a technical nature." Then:

> The appointee will conduct an investigation outside the courtroom, under no formal rules of evidence or relevance, at sessions to which the parties are convoked with full freedom to present their views and those of their experts or other representatives, orally or in writing. The results of the *expertise* is a report that in principle the judge need not accept, but in the absence of other evidence, it is difficult to see how it could be rejected, provided that the judge is satisfied that the *expert* [whose investigative and reporting procedures are regulated by law] has done what he was commissioned to do and that no material procedural irregularities have been committed.

Trial by Jury

European courts (including British courts, which have abandoned the jury in most civil cases) avoid the extraordinary inefficiencies of the American civil jury trial, such as lengthy, adversarial jury selection (National Center for State Courts, 1988: 110; Kakalik et al., 1990) and legalistic wrangling over what evidence and arguments must be suppressed because they might mislead amateur decisionmakers. Civil trials in the United States that are conducted by only a judge tend to be at least 50 percent shorter than jury trials.[5] And because American jurors, in contrast to judges in Europe, are not given written summaries of the issues and evidence in advance, the whole story of the dispute must be presented to them orally. Each witness is questioned first by one set of lawyers, then cross-examined by another. Unlike a European judge, American jurors cannot comment during trial or indicate that they are satis-

fied on a certain point. Hence lawyers, uncertain which issues will be regarded as crucial, must cover all issues and, playing it safe, often call "extra" witnesses to testify (Reitz, 1990: 989; Langbein, 1985: 830). Overall, therefore, the average urban jury trial in the United States—in all likelihood a fairly routine motor vehicle accident or other personal injury case—takes about 13.5 hours, spread over several days, to conduct (National Center for State Courts, 1988). (The median for contract and nontort cases is about 14.5 hours.) In 1984 half of all jury trials in Los Angeles and Oakland, California, lasted more than thirty hours, spread over seven days (Kakalik et al., 1990: 110).[6]

Pretrial Discovery

In more than 95 percent of American civil lawsuits there is no trial (Heise, 2000: 823; Ostrom et al., 1996: 234), partly because trials are so costly. In many cases information gathered in pretrial discovery becomes the basis for a settlement. As the *Columbia Falls Aluminum* case teaches, adversarial pretrial discovery is a powerful tool for unmasking phony defenses and for undermining spurious claims. Nevertheless, even when it works well, the adversarial American pretrial discovery and negotiation process is costly, inefficient, and slow. Second Circuit Court of Appeals judge Ralph K. Winter (1992: 264), a member of the federal courts' Advisory Committee on Civil Rules, lamented: "In private conversations with lawyers and judges, I find precious few ready to argue that pretrial discovery involves less than considerable to enormous waste. . . . [The Advisory Committee found] a no-stone-left-unturned . . . philosophy of discovery governs much litigation and imposes costs, usually without corresponding benefits. . . . Second, discovery is sometimes used as a club against the other party . . . solely to increase the adversary's expenses."

Delay

Besides adversarial legalism's direct costs, American litigants must endure its extraordinary delays if they insist on a jury trial. According to Albert Alschuler (1990: 6), "the average civil case tried during 1988 in the Circuit Court of Cook County [Chicago] had been filed more than six years before." In Los Angeles the median time between filing and trial of a civil action, only 4.2 months in 1942, grew to 19 months in 1962 and 41.5 months (almost three and a half years) in 1982 (Selvin and Ebener, 1984: 27). More typically, in a 1987 study of thirty-seven urban jurisdictions, the median time from filing to jury trial was slightly more than two years, although in Detroit, it was more than three years, and in Providence, Rhode Island, almost five

(Goerdt, 1991: 296; Ostrom et al., 1996: 24).[7] In Germany half of civil court plaintiffs have a decision within six months, three-quarters within nine months, and summary proceedings are even faster (Blankenburg, 1994: 806).

The Decline of Adjudication

As a result of the costs and delays associated with adversarial legalism, only a small percentage of American litigants actually get their day in court or have their cases decided by the application of law to the facts by a judge or jury, except for cases that fall within the tight monetary limits for small claims courts. As noted, the percentage of civil cases resolved by trial (as opposed to settlement, withdrawal, or dismissal) is less than 5 percent. Alschuler (1990: 4) concludes: "The civil trial is on its deathbed, or close to it, because our trial system has become unworkable. The American trial has been bludgeoned by lengthy delays, high attorneys' fees, discovery wars, satellite hearings, judicial settlement conferences, and the world's most extensive collection of cumbersome procedures. Few litigants can afford the cost of either the pretrial journey or the trial itself."

The decline of adjudication, as Sam Gross and Kent Syverud (1996: 62) argue, stems from a political and legal system more intent on elaborating the tools of adversarial legalism than on investing in inexpensive, more expeditious methods of civil dispute resolution:

> The essence of adversarial litigation is procedure. . . . When we want to improve our judicial system we pass a procedural reform, which invariably means elaborating old procedural rules or adding new ones—rules that govern the presentation of evidence and arguments, rules that create opportunities to investigate and prepare evidence and argument. . . . The upshot is a masterpiece of detail, with rules on everything from special appearances to contest the jurisdiction of the court, to the use of exhibits during jury deliberation. But we cannot afford it. As litigants, few of us can pay the costs of a trial; as a society, we are unwilling to pay even a fraction of the cost of the judicial apparatus that we would need to try most civil cases. We have designed a spectacular system for adjudicating disputes, but it is too expensive to use.

What is left is a system of civil dispute resolution by negotiation between lawyers, in which nonlegal factors such as cost and delay and the parties' relative ability to sustain them play a major role. And even that system is too expensive for many.

Adversarial Legalism and Legal Unpredictability

In all legal systems most civil cases are settled before trial, as the litigants, advised by their lawyers, come to recognize what their chances would be in court. The cases that go to adjudication are likely to be those in which the litigants can't agree on the likely outcome. Hence in all countries the cases that reach adjudication involve a relatively large amount of legal uncertainty. Yet it appears that legal unpredictability in the civil justice systems of the United States, as exemplified by the *Johnson v. Johnson* case, is greater than in many other economically advanced democracies.

Johnson v. Johnson is far from unique in that regard. On January 4, 1984, Getty Oil and Pennzoil Corporation, a Houston-based company, announced Pennzoil's purchase of three-sevenths of Getty's stock for $112.50 per share; the press release described the proposed sale as an "agreement in principle" that was "subject to [the] execution of a definitive merger agreement" (Petzinger, 1987: 198; Mnookin and Wilson, 1989: 301). Pennzoil, however, apparently refused to withdraw its original tender offer of $100 per share until a final agreement was signed, sealed, and delivered (Baron and Baron, 1986: 256), and Getty Oil's bitterly divided board of directors continued to seek out a "white knight" who would not only increase the purchase price but would also support current management in its battle with minority shareholders. After being assured by leading corporate takeover professionals that Getty Oil was "free to deal," Texaco offered to buy all of Getty Oil's outstanding stock for $125 per share. Texaco's offer was formally accepted by the relevant parties on January 7, 1984.

Pennzoil sued Getty Oil in Delaware, but the judge declined to block the sale to Texaco. Pennzoil then filed a new lawsuit against New York-based Texaco in Houston, seeking a staggering $14 billion in compensation. Legal analysts agree, based on an independent analysis of the court file, that (1) no contract existed between Pennzoil and Getty under the law of New York, where the Texaco-Getty deal was negotiated; (2) even if Texaco were liable, under either New York or Texas law, Pennzoil's damages should not have exceeded $422 million (id. at 269, 279). Nevertheless, a Houston jury awarded Pennzoil $7.5 billion in "actual damages" and $3 billion in punitive damages. A Texas appeals court reduced the punitive damages to $1 billion, but even Texaco couldn't write an $8.5 billion check and filed for bankruptcy—which was temporary but resulted in a fire sale of $5.1 billion in assets, deeply strained business relationships, and the near collapse of a company that employs thousands of workers (Brown, 1988: H1, H7).

How could a sophisticated company such as Texaco, with its cadre of experienced attorneys and investment bankers, fail by such a wide margin to discern the legal risks to which it was exposed? The answer is that in the decentralized American legal system, constantly being shaped and reshaped by adversarial argument, the legal terrain is often unstable; the ostensibly solid path mapped by one's lawyer can suddenly turn to quicksand. This is not an endemic feature of all legal regimes. When asked about transatlantic cargo damage disputes that reach adjudication, the shipping line and insurance firm representatives whom I interviewed all asserted that results in the courts in Rotterdam are far more predictable than when the litigation occurs in the United States.

After analyzing the record in the Johnson estate case, Professor Langbein, along with David Margolick, the experienced legal correspondent who chronicled the litigation, felt certain that the Johnson children's case lacked legal merit (Margolick, 1993: 198, 268). But the lawyers representing the Johnson estate apparently were not sure that the court would recognize the legal merits of their defense, and Johnson's widow Basia acceded to the children's legal gamble, buying them off with a $40 million settlement. Langbein traces the source of this legal uncertainty (and the defendant's consequent vulnerability to extortionate demands) to two factors: the relatively nonprofessional, political character of the American judiciary, and the unique American insistence on using untrained citizen-jurors to resolve civil cases.

Professional versus Political Judiciaries

German courts have a specialized chamber that deals with commercial disputes and another that deals with patent disputes, along with specialized labor courts and specialized tribunals that deal with disputes concerning social benefits.[8] In the Netherlands cargo damage disputes are channeled into a chamber of the court system staffed by judges who specialize in maritime cases. The United States has specialized federal courts for bankruptcy and for patent appeals, but most litigation is before "generalist" judges. The U.S. District Court judge who hears a cargo damage dispute or a patent infringement case may not have dealt with such cases recently—and perhaps never.[9] She relies on the litigants' attorneys to point out the relevant statutes, precedents, facts, and arguments. Supported by a pragmatic, results-oriented legal culture, the "generalist" American judge is more likely to rely on her own judgment to reach a result that she thinks is just (Atiyah and Summers, 1987). That may sound appealing, but it also adds to legal uncertainty and unpredictability.

In the Netherlands (and in other hierarchically organized European legal systems) judges are recruited, socialized, and supervised in a manner explicitly designed to maximize adjudicative predictability. After a closely super-

vised apprenticeship, open only to law graduates who have done very well on a nationwide exam,[10] a young judge's progress to more responsible and prestigious posts depends on merit ratings she receives from senior judges in the chambers through which she rotates, as well as on periodic evaluations by the ministry of justice (Meador, 1983: 22–23).[11] The goal of this bureaucratically organized career-management system is to homogenize the judiciary, to make its decisions legally competent, uniform, and predictable.

The American judiciary is professional too, in its own way. All judges have had legal training. They almost uniformly state that their obligation as judges is to apply the law uniformly to all, regardless of their own beliefs. They are constrained by the possibility of appeal and reversal by higher American judges, or by criticism by lawyers and other judges for failure to apply the law in accordance with the conventions of legal reasoning (Cross and Tiller, 1998). Millions of potential disputes are resolved, therefore, when American lawyers tell their clients, with a high degree of conviction, that they will lose if they go to court. The point is not that American law is wholly unpredictable, but that its level of unpredictability is greater than in economically advanced democracies whose judiciaries are selected in a nonpolitical manner. Unlike their counterparts in England or Western Europe or Japan, American judges come to the bench after prior careers as practicing lawyers, prosecutors, or political activists.[12] Some have had little courtroom experience. In most American states, new judges get little formal training, and there is no systematic merit-oriented promotion system (Meador, 1983: 26). Compared to their European counterparts, American judges enjoy far more autonomy vis-à-vis their judicial superiors, both with respect to their career prospects and to their day-to-day legal decisionmaking, and most of the countless procedural decisions that American judges make in the course of pretrial hearings and trials are de facto unreviewable.

There is a method to this ostensible madness. Free from the homogenizing professionalism of hierarchically organized European legal bureaucracies, the American judiciary, precisely because it is politically responsive and less formalistic, is more pragmatic, quicker to invent new rights and remedies, and more willing to adapt the law to changing circumstances and new justice claims. But there is a madness to the method as well; its symptom is susceptibility to comparatively higher levels of legal inconsistency and unpredictability.

Comparing trial judges in England with their politically selected counterparts in the United States, Atiyah and Summers (1987: 164) observe: "It cannot be doubted that in England the judge brings on average a higher level of competence to the entire trial process. The judge is invariably a former barrister of many years' experience and high standing at the bar. . . . In America . . . the situation is much more variable" (see also Hazard and Taruffo, 1993: 68). As shown by an observational study of small claims courts, some American judges are narrowly legalistic, while others tend to act as mediators, and still others tend to decide cases according to their own notions of fairness and desert (Conley and O'Barr, 1987). Decisions by U.S. District Court judges appointed by Democratic presidents are demonstrably more liberal than those appointed by Republican presidents (Rowland and Carp, 1983), and similar findings recur for studies of other courts, both state and federal (Pinello, 1999; Cross and Tiller, 1998). Not surprisingly, American lawyers, as documented by Sarat and Felstiner's (1986) study of divorce lawyers, often tell their clients that the legal outcome will depend on which judge ends up hearing the case. Dutch divorce lawyers, a similar study showed, simply tell their clients what the law prescribes and hence what they can expect in court (Griffiths, 1986).

What's more, stories of seriously biased and incompetent American judges are far from rare (Brill, 1989). The Texas trial judge who instructed the jury in the Pennzoil-Texaco case acknowledged afterward that "there is a good chance that perhaps I read the cases wrong and not have applied [the law] correctly." In fact, he had adopted Pennzoil's proposed jury instructions nearly verbatim while ignoring Texaco's submissions (Petzinger, 1987: 463, 453). Similarly, day by day, the Johnson estate's lawyers saw what seemed to be an airtight case crumble, as the trial judge, a politically active former personal injury lawyer, repeatedly acted in a biased and improper manner (Margolick, 1993: 301–313). "Americans can only look with envy," Langbein (1985: 2044) asserts, "to the esteemed and meritocratic chancery bench that conducts probate adjudication in English and Commonwealth jurisdictions." The American judiciary, far from homogenized, is not even reliably pasteurized, and it is not always the cream that rises to the top. The result is a higher level of legal unpredictability.

Juries

"American law is unique," says Langbein (1985: 2043), "in undertaking to resolve will contests by means of civil jury trial" in which skillful lawyers strive "to evoke the jurors' sympathy for disinherited offspring and to excite their likely hostility towards a devisee such as Basia, who can so easily be painted as a homewrecking adventurer." Ironically, some scholars suggest, Americans have emphasized trial by jury because they fear the biases and inconsistencies of a politically appointed, nonprofessional judiciary (Schuck, 1993: 310). But the cure may be worse than the disease.

As George Priest (1993: 130) puts it, "The civil jury is an engine of incon-

sistency." In the jury system judgment is entrusted to an ever-changing cluster of individuals who are not told about the applicable rules of law until the trial is over, nor instructed how similar cases have been decided by other juries. Jurors are not expected to explain and justify their decisions, and thus one jury's decisions cannot be systematically compared with another's. That is not to say that juries usually or even frequently ignore the judge's instructions, or that they often reach decisions on the basis of emotion rather than evidence. On average, researchers have found, jurors regard plaintiffs' claims for money damages with some skepticism. Marc Galanter (1993: 70) concludes: "The literature, on the whole, converges on the judgment that juries are fine decisionmakers. They are conscientious, collectively they understand and recall the evidence as well as judges, and they decide on the basis of the evidence presented."[13] When researchers presented similar tort cases to over 500 mock juries, they found that individual jurors drawn from different states, ethnic groups, income levels, and age groups tended to make remarkably similar average judgments about the defendant's moral culpability and the severity of the harm (Schkade et al., 2000: 1156). Jury decisions thus are not random (Osborne, 1999). But that does not mean that the jury system yields legal predictability.

In the University of Chicago Jury Project in the 1950s, researchers asked judges who had presided over jury trials how they would have decided the case had it been a bench trial. The judge agreed with the jury's decision on liability in 79 percent of the cases (Kalven, 1964; Kalven and Zeisel, 1966: 56; Galanter, 1993).[14] That is only moderately encouraging. Legal uncertainty stems from two looming problems: first, one cannot tell in advance whether any particular jury will be the one in five or so that decides idiosyncratically, and second, the idiosyncratic judgment is likely to go uncorrected. A Philadelphia judge, referring to two asbestos cases he had presided over, commented: "[T]wo men had similar physical problems. They each had pleural thickening and some shortness of breath. In the case involving the man who counsel believed to be the sicker of the two, the jury awarded $15,000. For the other plaintiff, the jury awarded $1,200,000. These results make this litigation more like roulette than jurisprudence" (Hensler, 1985: 65).[15] To a legal scholar from another country, the striking point would be not only that the juries decided inconsistently, but that there was no mechanism for reconciling their judgments.[16]

Peter Huber (1990: 290) compared verdicts by different juries in a sequence of cases concerning claims of harm from Bendectin (a morning sickness drug), in another sequence of cases involving an alleged defect in Audi motor cars, and in sequences of cases involving several other allegedly dangerous products. Most juries, in accordance with the weight of the scientific

evidence presented, found that the product in question was not defective or not responsible for the plaintiffs' injuries. But, as Huber noted, "Every new case has a new jury, and one jury's finding is not binding on the next's." In each sequence of trials concerning a particular product, one or a few juries, hearing the same evidence as those that found no liability, decided otherwise and awarded the plaintiff massive compensatory and punitive damages. The modal jury award was nothing at all, but the mean award was in the millions of dollars. For each manufacturer in question, the result was inescapable legal uncertainty and enormous litigation expenses (id. at 278; Sugarman, 1985b: 599–602; Bork, 1996: A15).

In the above-mentioned study of more than 500 mock juries, the researchers found that in deliberating over the appropriate *monetary damage* award, juries were unpredictable, producing a wide range of results; moreover, jury deliberations often yielded awards far larger than the evaluations that most individual jurors had made before deliberation began, and sometimes larger than any juror had made before deliberating (Schkade et al., 2000: 1139). Judges ultimately reduce jury awards as legally unjustified in 20 to 25 percent of cases, more often for large verdicts (Peterson, 1983: ix–x; Broder, 1986); Ostrom et al., 1993; Adler, 1994: 244; Vidmar et al., 1998). But this does not produce legal predictability. The judges do not *always* reduce damage awards. Their decisions in that regard are not subject to definitive legal rules and are rarely reversible on appeal. Compounding the legal uncertainty, judges almost never reverse a jury decision for awarding *insufficient* damages or no damages at all.

Examining the inconsistent outcomes in the Bendectin trials, Joseph Sanders (1993) locates the problem not in the jury per se but in the organization of a jury-focused trial system dominated by the parties' lawyers. Information on causation was provided by conflicting, lawyer-coached expert witnesses, presenting different kinds of scientific evidence, not back-to-back but at widely separated points in the trial. The lawyers' cross-examination of the witnesses was designed more to generate contradictions and to obfuscate than to inform. No wonder, Sanders concludes, the result was a body of testimony that failed to enable the lay fact-finders to weigh properly the quality of experts or the scientific findings on Bendectin's effects.

Guessing what a jury will do is made even more difficult by the infrequency of jury decisions. Since only a tiny percentage of civil cases go to verdict, the jury system sends only weak and static-filled signals to the trial bar.[17] News media coverage of trial verdicts is selective, oversampling very large jury verdicts or cases in which juries find liability in unlikely situations (MacCoun, 1993; Aks et al., 2000). The result, as indicated by a number of studies summarized by Galanter (1993: 81–86), is that lawyers come up with widely di-

vergent pretrial estimates of a case's likely outcome at trial. When Douglas Rosenthal (1974) asked five experienced New York trial lawyers to read the files and estimate the recovery value of fifty-nine settled cases, their predictions were way off. The median recovery was about 75 percent of the experts' estimates, and 40 percent of recoveries were less than two-thirds of the experts' estimates. And in a study of 443 back and neck injury cases, Philip Hermann (1962) found that only one-sixth of the final demands and offers by plaintiffs and defendants came within 25 percent of the jury's actual verdict.

One might argue that these and similar studies (Danzon, 1985: 50; Kritzer, 1990: 31; Clermont and Eisenberg, 1992: 1170–1172; Priest, 1993: 129) reflect the incompetence of the average lawyer rather than any defect in the jury system. But a legal system in which the average lawyer is very poor at predicting outcomes, for whatever reason, is an unpredictable legal system. One might argue too that these studies focus on personal injury cases, in which both the substantive law and the law of damages are unusually vague, even by American standards, and in which clever appeals to jury sympathy might (but might not) sway the verdict. But legal uncertainty, as indicated by *Pennzoil v. Texaco* and *Johnson v. Johnson*, reigns in other spheres of civil litigation as well. An analysis of a broad sample of cases found substantial variation between attorneys' expectations and actual awards after trial by judges and juries (Osborne, 1999: 193).[18] Kent Syverud (1997: 1943) points to "the almost universal election of businesses and governments to opt out of fact finding by a civil jury when they are civil plaintiffs," because they perceive "that there is less predictability . . . in fact finding by a civil jury than in dispute resolution by other methods."

Legal unpredictability also pervades American family law (Ellman, 1999), in which judges, not juries, decide alimony, child custody, and marital property distribution disputes. The authors of a study of divorce and custody litigation in Wisconsin note: "Several of the lawyers we interviewed report that they have difficulty in discerning court standards and that they cannot predict the outcomes of court processes. . . . Even the lawyers . . . who do think there are set standards and who do say they can predict outcomes differ in their opinion of the content of those court standards" (Erlanger et al., 1987: 599). In a survey of attorneys (Lande, 1998: 32), one typical respondent said:

> I started out as a plaintiffs' trial attorney with a strong belief in the jury system. . . . I don't believe that anymore. I think . . . it behooves you to do anything possible to avoid it. . . . You can go through all of the different systems, whether it be family law through divorce, products claims, malpractice claims, securities litigation, you know, virtually every category of major litigation. . . . Is it predictable, reliable in terms of a rule? Are the transaction costs reasonable in terms of a result? Does it provide guidance for the future? Not a single one of these systems would even get a passing grade.

Because of the costs and delays of trials, many busy court systems have encouraged "managerial judging," whereby judges pressure the parties' lawyers to settle cases before trial. But this too adds to legal uncertainty, for judges differ in the intensity with which they apply pressures to settle and in their knowledge of the facts (Frankel, 1975: 1042; Resnick, 1982; Yeazell, 1994; Molot, 1998: 992). In European civil justice systems, where judges dominate the fact-gathering processes, settlement negotiations occur under the nose of a third party who is deeply familiar with the case. In both kinds of legal systems, pretrial settlements occur "in the shadow of the law." But the greater predictability of European adjudication means that the boundary of the shadow is far clearer.

Injustice

By making litigation and adjudication slow, very costly, and unpredictable, adversarial legalism often transforms the civil justice system into an engine of injustice, compelling litigants to abandon just claims and defenses. Dixie Flag Manufacturing Company, a firm in San Antonio, Texas, with sixty-three employees, makes and sells American flags. In 1991 Dixie Flag was sued by a person who had seen some men lowering a large flag in a parking lot, and then volunteered to help so that the flag would not touch the ground. As the volunteer grasped the flag, according to his subsequent legal complaint, a gust of wind billowed the massive banner high into the air. The plaintiff, apparently more patriotic than he was quick-witted, failed to let go, and the flag pulled him high off the ground. *Then* he let go. He crashed to the ground and was injured. His patriotism now tempered by avarice, he sued Dixie Flag for compensatory damages. The company's president spent considerable time combing old company records but could find no evidence that his company had even made that particular flag. Nevertheless, Dixie Flag's liability insurance carrier paid the plaintiff $6,000 to settle the suit, much to its client's outrage. The insurers explained that it would have cost $10,000 in attorneys' fees to prevail in court (Van de Putte, 1995: A14).[19]

The Dixie Flag settlement is far from unique. In a 1992 survey of 234 municipal government attorneys, "over 80% acknowledge that on occasion they settle cases that would be winnable . . . just to save money in the short term" (McManus, 1993: 835). Conversely, the costs and unpredictability of ad-

versarial legalism induce potential plaintiffs to back away from asking the courts to vindicate entirely just legal claims when they are met with questionable but costly-to-rebut legal defenses. California collection agencies, the president of their trade association estimated, take no more than 20 percent of their debt default cases to court, largely because of litigation expenses, complexities, and delays (Kagan, 1984: 338). Charles Ruhlin found that a major multinational bank with credit card operations in the United States and Germany is more reluctant to sue delinquent debtors in the United States because German courts deal with collection cases far more efficiently and reliably (Ruhlin, 2000). The bank ends up writing off a significantly larger proportion of unpaid debt here than it does in Germany.

Manipulative Lawyering

As the Dixie Flag and the Johnson estate cases suggest, adversarial legalism's expense and unpredictability also encourage and reward manipulative lawyering and extortive demands. An experienced corporate counsel, comparing patent litigation in the United States and in Europe, observed that one is much more likely to encounter hyperaggressive lawyering and obstructionist defenses in the United States (Pantuliano, 1983). Dutch and American shipping company and insurance officials told me that if settlement negotiations in cargo damage claims take place in the shadow of Dutch courts, they are "more logical" than negotiations that occur in New York, where the lawyers are more likely "to see what they can get away with" or to take an uncompromising stand based on a legalistic reading of the bill of lading. The American lawyer's goal, in the claims agents' view, was not to work out a reasonable agreement based on the facts and the law but to manipulate the law and its cumbersome processes so as to extort concessions from the other side.

In terms of personal character, Rotterdam lawyers may be no less Machiavellian, on average, than are New York lawyers. But compared with the United States, professional codes of ethics in the Netherlands, as in England and other countries in Western Europe, more strongly enjoin lawyers to temper one-sided advocacy in the search for objective legal truth (Osiel, 1990: 2019; Atiyah and Summers, 1987: 163). Moreover, in the decentralized, adversarial American court system—with its long delays before adjudication, its weak hierarchical controls over lawyer-controlled pretrial discovery, its legal uncertainty, and its opportunities for forum shopping—lawyers have much stronger *incentives* to "see what they can get away with" than they do in Holland. Because litigation in Holland is less costly and more legally predictable, Dutch litigants have less reason to succumb to a settlement that departs from the law solely in order to avoid the costs of further pretrial discovery and the risks of going to trial.

To be sure, manipulative American lawyers run some risk that their adversaries will haul them before a judge, where they can be sanctioned for pretrial discovery abuse or for making factually unfounded legal claims. Within some tight-knit communities of lawyers, reputational networks discourage excessively adversarial litigation activity (Gilson and Mnookin, 1994). In cases in which the monetary stakes are small, neither side, typically, invests much in legal maneuvering (Trubek et al., 1983). Many, perhaps most, American lawyers prefer an ideal of gentlemanly interaction to that of the warrior litigator (Kagan and Rosen, 1985). Nevertheless, studies suggest that superaggressive, manipulative lawyering—explicitly designed to increase the other side's litigation bills and thereby to induce them to compromise their claims or defenses—is sufficiently common that any potential litigant would rationally be afraid of encountering it (Garth, 1993: 939–945, 949). Chicago lawyers who frequently are involved in large-stakes litigation admitted to a researcher that they had used discovery tools in 40 percent or more of their cases simply to impose work burdens or economic pressure on their adversaries. More than 80 percent said they had sometimes done so, employing discovery tactics in order to slow down the progress of the suit, shipping huge numbers of documents to opponents in hopes of obscuring crucial information, or tutoring witnesses to give evasive answers in depositions (Brazil, 1980a: 857).

It is all quite logical. The more a disputing party has to spend in defending or asserting a just position, the greater her incentive to compromise her legal claims or defenses and make concessions to settle the case, simply to avoid further legal costs. In a regime of adversarial legalism, disputing parties' litigation costs are higher than in more hierarchically organized, less adversarial legal systems; hence the incentives to compromise just claims and defenses are greater. In the United States, moreover, because even a party who wins at trial generally must pay her own legal fees, lawyers and disputing parties have greater incentives to inflict litigation costs or delays on their adversaries in order to induce them to make greater concessions. In the absence of a "loser pays" rule, lawyers also have incentives to make and cling to legally weak claims and defenses, for even weak legal arguments force one's adversary to expend resources to rebut them, and hence may have some "settlement value" (Molot, 1998: 992).[20] In consequence, in the United States, parties' relative capacity to bear the costs of litigation plays a much larger role in case disposition than in judge-dominated adjudicatory systems.

Large Stakes and Extortive Settlements

The extortive settlement in *Johnson v. Johnson* did not stem from one party's eagerness to avoid pretrial discovery burdens or other *litigation* costs. Rather, it stemmed from the explosive combination of very large financial

Uncertain Deterrence

With its energetic plaintiffs' lawyers—fueled by contingency fees, far-reaching powers of pretrial discovery, and the prospect of large money damages—American tort law is uniquely capable of exposing and penalizing those responsible for unsafe products and negligent practices (Speiser, 1980). It stands to reason, defenders of the system argue, that "reforms" that diminish tort law's fierceness or replace it with a more efficient, nonfault-based compensation system would weaken tort law's regulatory and condemnatory function and therefore make life in the United States more dangerous. Accurately assessing the regulatory effects of American tort law, however, is not easy. As Stephen Sugarman (1989) has pointed out, besides the threat of tort liability, individuals and organizations are simultaneously subject to other, often more salient, inducements for safe and responsible behavior. Pilots and motor vehicle drivers are motivated by the instincts of *self-preservation*. The precautions taken by physicians and product engineers are motivated primarily by *professional ethics*. For airlines and product manufacturers, *market forces* provide strong inducements to construct multiple layers of precautions because serious fatal accidents, dramatized on television news programs, can destroy a company's reputation and market share. Finally, *direct governmental regulation*, with its roadway speed limits, factory inspections, and permit systems (plus the threat of criminal penalties for willful violations that result in accidents), provides more immediate and more specific instructions than tort law on how to prevent harm.

Moreover, Sugarman argues, *the liability system's deterrent threat is muted by liability insurance and by the uncertainty and delayed effects of tort liability*. Then there is the stubborn persistence of human incompetence, inattentiveness, and calculated corner-cutting, which lead truck drivers, emergency room doctors, and the crew of the Exxon *Valdez* to make mistakes, no matter how large the potential tort liability. After surveying American corporate product design staffs, George Eads and Peter Reuter (1984: 263–294) wrote, "Although product liability exerts a powerful influence on product design decisions, it sends an extremely vague signal. Because the linkage between good design and a firm's liability exposure remains tenuous, the signal says only, 'Be careful, or you will be sued.' Unfortunately, it does not say how to be careful, or, more important, how careful to be."[27]

Consequently, efforts to sort out how much tort law really adds to the regulatory equation generally have been rather inconclusive (Schwartz, 1994:

379; Deweese and Trebilcock, 1992: 59–60; ALI, 1991: 32). For example, a comprehensive study concluded that American tort law had stimulated "broad-based improvements in the institutional environment and procedures through which medical care is delivered" (Weiler, 1991: 91). Physicians report having adopted new standard procedures following well-publicized court cases (Weiler, 1991: 127; Givelber et al., 1984; Wiley, 1981). Indeed, some studies indicate that American malpractice law sometimes may "overdeter," leading not only to sensible extra precautions but also to unnecessary hospitalizations, lab tests, and other defensive procedures.[28] On the other hand, Dewees and Trebilcock (1992: 83) observe that while the level of medical malpractice claims in Canada is 20 percent that of the United States, "there appears to be no evidence that Canadian physicians are more careless than their U.S. counterparts." Yet no detailed study analogous to those conducted in the United States has examined the incidence of medical malpractice in Canada or Western Europe. For the same reason, disagreement arises about whether the substitution of social insurance for medical malpractice law in New Zealand adversely affected the quality of care.[29]

Overall, it is by no means clear that life is more dangerous in economically developed countries where tort suits are far less common and less fearsome than in the United States. Nor do other democratic countries, comparing their accident and injury rates with those in the United States, seem inclined to emulate American adversarial legalism. Yet it is hard to believe that the deterrence argument is wholly wrong. Some safety-enhancing measures in the United States—such as warning beepers on trucks and construction machines that are put in reverse gear, improved helmets for football players, softer surfaces under climbing structures in children's playgrounds—probably were stimulated by tort cases that imposed liability on companies or municipalities that had failed to institute those improvements. Recall the midwestern city managers quoted in Chapter 2, who recounted improvements in municipal safety inspections, personnel training, and supervision that had been stimulated by lawsuits (Epp, 1998). In a 1987 study by an international consulting firm, more than half of 101 top corporate executives surveyed said that their companies had added safety features to their products as a result of the threat of lawsuits (Zehnder, 1987; Schwartz, 1994: 480).

Yet systematic studies of particular industries have found little evidence that American tort law consistently or significantly affects product design or safety. In the 1970s and 1980s crashes of small airplanes almost routinely led to lawsuits against the aircraft manufacturers, alleging that the crash stemmed from product defects. Two analyses of safety improvements in small aircraft, however, concluded that litigation and escalating liability insurance costs did not lead to improved aircraft design or lower accident rates (Martin, 1991; Craig, 1991).[30] Meanwhile, sales plummeted, and by the late 1980s domestic production of light aircraft had virtually ceased. Thousands of workers were laid off. Flying probably became riskier, not safer, since users kept flying (rather than retiring) older used planes. Finally, in 1994 Congress enacted the General Aviation Revitalization Act, which limited lawsuits involving planes more than eighteen years old.[31]

Multinational motor vehicle manufacturers claim that no other country comes close to the United States in terms of the incidence and cost of product liability litigation (Kagan, 2000). A major Japanese auto manufacturer asserted that with twice as many of its cars on the road in Japan than in the United States, "[i]ts American operations lead to about 250 product liability claims against the company each year. By contrast, in Japan the number of annual product liability filings averages about two" (Schwartz, 1991: 51). But two careful analyses of the development of particular safety improvements in motor vehicles (ergonomics, braking, lights, crashworthiness) contend that American product liability law—as compared to direct government safety regulation—has made only negligible or, at best, secondary contributions to better design (Graham, 1991; Mackay, 1991). By the time a company's engineers hear that an American jury has found "defects" in their design for a model currently on the road, they usually have completed work on new designs and safety features for subsequent model years.[32]

On the other hand, as in the small aircraft example, American tort law sometimes "overdeters," inducing precautions that make products and services unnecessarily expensive or suppressing the provision of products and services that would actually reduce the risk of harm. In the mid-1980s lawsuits led some manufacturers of the DPT vaccine to exit the business, threatening the supply of a product that has all but wiped out childhood diphtheria, whooping cough, and tetanus, diseases that killed thousands of children in previous generations (Burke, 2001).[33] According to a 1992 survey of 500 public accountancy partnerships in the United States, more than half had limited their audit services, or had shunned certain clients engaged in higher risk markets, in order to protect themselves from lawsuits by disappointed investors (Berton and Lublin, 1992; Berton, 1995).[34] At a congressional hearing a lawyer for Wyeth, a manufacturer of birth control pills, testified that the threat of liability lawsuits was the primary reason that it and other companies had been unwilling to market a "morning after" birth control pill in the United States (although these companies have done so for years in Europe) (Lewin, 1996: A1, A10).[35] A 1995 survey by the Society for Resource Management found that 63 percent of personnel managers declined to make negative evaluative comments when asked for an assessment of a former employee, for fear of landing in court (Louis, 1987: C1).[36]

Overall, therefore, the spotty existing evidence suggests that American tort law has an erratic effect on safety. Potential target groups vary in their attentiveness. Some manufacturers, physicians, corporate personnel officers, and others *overestimate* the actual risk of being sued, perhaps because of the publicity accorded unrepresentative jury verdicts (Bailis and MacCoun, 1996: 419–429; Edelman et al., 1992: 47–83; Songer, 1988: 585–605), but others do not. Hence tort law sometimes deters. Sometimes it overdeters, compelling adoption of precautions that reduce overall social welfare. Often tort law is too uncertain and unpredictable to affect behavior very much at all, or is far less salient than other inducements to responsible behavior. All in all, therefore, critics of the system have argued that American tort law's regulatory effects are too mixed, uncertain, and scattered to justify an adversarial system that generates large economic costs, pours a great deal of money into lawyers' bills, and fails to provide just and reliable compensation.

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

Tomlinson (FC) (Original Respondent and Cross-appellant) v. Congleton Borough Council and others (Original Appellants and Cross-respondents)

[2003] UKHL 47

LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. For the reasons he gives, with which I agree, I would allow this appeal.

LORD HOFFMANN

My Lords,

The accident

2. In rural south-east Cheshire the early May Bank Holiday week-end in 1995 was unseasonably hot. John Tomlinson, aged 18, had to work until midday on Saturday 6 May but then met some of his friends and drove them to Brereton Heath Country Park, between Holmes Chapel and Congleton. The Park covers about 80 acres. In about 1980 Congleton Borough Council acquired the land, surrounding what was then a derelict sand quarry, and laid it out as a country park. Paths now run through woods of silver birch and in summer bright yellow brimstone butterflies flutter in grassy meadows. But the attraction of the Park for John Tomlinson and his young friends was a 14 acre lake which had been created by flooding the old sand quarry. The sandy banks provided some attractive beaches and in hot weather many people, including families with children, went there to play in the sand, sunbathe and paddle in the water. A beach at the far end of the lake from the car park was where in fine weather groups of teenagers like John Tomlinson would regularly hang out. He had been going there since he was a child.

3. After sitting in the hot sun for a couple of hours, John Tomlinson decided that he wanted to cool off. So he ran out into the water and dived. He had done the same thing many times before. But this time the dive was badly executed because he struck his head hard on the sandy bottom. So hard that he broke his neck at the fifth vertebra. He is now a tetraplegic and unable to walk.

4. It is a terrible tragedy to suffer such dreadful injury in consequence of a relatively minor act of carelessness. It came nowhere near the stupidity of Luke Ratcliff, a student who climbed a fence at 2.30 am on a December morning to take a running dive into the shallow end of a swimming pool (see *Ratcliff v McConnell* [1999] 1 WLR 670) or John Donoghue, who dived into Folkestone Harbour from a slipway at midnight on 27 December after an evening in the pub (*Donoghue v Folkestone Properties Ltd* [2003] 2 WLR 1138). John Tomlinson's mind must often

recur to that hot day which irretrievably changed his life. He may feel, not unreasonably, that fate has dealt with him unfairly. And so in these proceedings he seeks financial compensation: for the loss of his earning capacity, for the expense of the care he will need, for the loss of the ability to lead an ordinary life. But the law does not provide such compensation simply on the basis that the injury was disproportionately severe in relation to one's own fault or even not one's own fault at all. Perhaps it should, but society might not be able to afford to compensate everyone on that principle, certainly at the level at which such compensation is now paid. The law provides compensation only when the injury was someone else's fault. In order to succeed in his claim, that is what Mr Tomlinson has to prove.

Occupiers' liability

5. In these proceedings Mr Tomlinson sues the Congleton Borough Council and the Cheshire County Council, claiming that as occupiers of the Park they were in breach of their duties under the Occupiers' Liability Acts 1957 and 1984. If one had to decide which of the two councils was the occupier, it might not be easy. Although the Park belongs to the Borough Council, it is managed on their behalf by the Countryside Management Service of the County Council. The Borough Council provides the funds to enable the Countryside Management Service to maintain the Park. It is the County which employs the Rangers who look after it. But the two Councils very sensibly agreed that one or other or both was the occupier. Unless it is necessary to distinguish between the County Council and the Borough Council for the purpose of telling the story, I shall call them both the Council.

Visitor or trespasser?

6. The 1957 Act was passed to amend and codify the common law duties of occupiers to certain persons who came upon their land. The common law had distinguished between invitees, in whose visit the occupier had some material interest, and licensees, who came simply by express or implied permission. Different duties were owed to each class. The Act, on the recommendation of the Law Reform Committee (Third Report: *Occupiers' Liability to Invitees, Licensees and Trespassers*, Cmd. 9305 (1954)), amalgamated (without redefining) the two common law categories, designated the combined class "visitors" (section 1(2)) and provided that (subject to contrary agreement) all visitors should be owed a "common duty of care". That duty is set out in section 2(2), as refined by subsections 2(3) to (5):

> "2 (2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
> (3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—
> (*a*) an occupier must be prepared for children to be less careful than adults; and
> (*b*) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.
> (4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)—
> (*a*) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from

liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and

(*b*) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another)."

7. At first Mr Tomlinson claimed that the Council was in breach of its common duty of care under section 2(2). His complaint was that the premises were not reasonably safe because diving into the water was dangerous and the Council had not given adequate warning of this fact or taken sufficient steps to prevent or discourage him from doing it. But then a difficulty emerged. The County Council, as manager of the Park, had for many years pursued a policy of prohibiting swimming or the use of inflatable dinghies or mattresses. Canoeing and windsurfing were allowed in one area of the lake and angling in another. But not swimming; except, I suppose, by capsized canoeists or windsurfers. Notices had been erected at the entrance and elsewhere saying "Dangerous Water. No Swimming". The policy had not been altogether effective because many people, particularly rowdy teenagers, ignored the notices. They were sometimes rude to the Rangers who tried to get them out of the water. Nevertheless, it was hard to say that swimming or diving was, in the language of section 2(2), one of the purposes "for which [Mr Tomlinson was] invited or permitted by the occupier to be there". The Council went further and said that once he entered the lake to swim, he was no longer a "visitor" at all. He became a trespasser, to whom no duty under the 1957 Act is owed. The Council cited a famous *bon mot* of Scrutton LJ in *The Calgarth* [1927] P. 93, 110: "When you invite a person into your house to use the staircase, you do not invite him to slide down the banisters". This quip was used by Lord Atkin in *Hillen v ICI (Alkali) Ltd* [1936] AC 65, 69 to explain why stevedores who were lawfully on a barge for the purpose of discharging it nevertheless became trespassers when they went onto an inadequately supported hatch cover in order to unload some of the cargo. They knew, said Lord Atkin (at pp. 69-70) that they ought not to use the covered hatch for this purpose; "for them for such a purpose it was out of bounds; they were trespassers". So the stevedores could not complain that the barge owners should have warned them that the hatch cover was not adequately supported. Similarly, says the Council, Mr Tomlinson became a trespasser and took himself outside the 1957 Act when he entered the water to swim.

8. Mr Tomlinson's advisers, having reflected on the matter, decided to concede that he was indeed a trespasser when he went into the water. Although that took him outside the 1957 Act, it did not necessarily mean that the Council owed him no duty. At common law the only duty to trespassers was not to cause them deliberate or reckless injury, but after an inconclusive attempt by the House of Lords to modify this rule in *British Railways Board v Herrington* [1972] AC 877, the Law Commission recommended the creation of a statutory duty to trespassers: see its *Report on Liability for Damage or Injury to Trespassers and Related Questions of Occupiers' Liability* (1976) Cmnd. 6428. The recommendation was given effect by the Occupiers' Liability Act 1984. Section 1(1) describes the purpose of the Act:

"1. (1) The rules enacted by this section shall have effect, in place of the rules of the common law, to determine—
(*a*) whether any duty is owed by a person as occupier of premises to persons other than his visitors in respect of any risk of their suffering injury on the premises by reason of any danger due to the state of the premises or to things done or omitted to be done on them; and
(*b*) if so, what that duty is."

9. The circumstances in which a duty may arise are then defined in sub-section (3) and the content of the duty is described in subsections (4) to (6):

"(3) An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in subsection (1) above if—
(*a*) he is aware of the danger or has reasonable grounds to believe that it exists;
(*b*) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether he has lawful authority for being in that vicinity or not); and
(*c*) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.
(4) Where, by virtue of this section, an occupier of premises owes a duty to another in respect of such a risk, the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned.
(5) Any duty owed by virtue of this section in respect of a risk may, in an appropriate case, be discharged by taking such steps as are reasonable in all the circumstances of the case to give warning of the danger concerned or to discourage persons from incurring the risk.
(6) No duty is owed by virtue of this section to any person in respect of risks willingly accepted as his by that person (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another)."

10. Mr Tomlinson says that the conditions set out in sub-section (3) were satisfied. The Council was therefore under a duty under subsection (4) to take reasonable care to see that he did not suffer injury by reason of the danger from diving. Subsection (5) shows that although in appropriate circumstances it may be sufficient to warn or discourage, the notices in the present case had been patently ineffectual and therefore it was necessary to take more drastic measures to prevent people like himself from going into the water. Such measures, as I shall later recount in detail, had already been considered by the Council.

11. The case has therefore proceeded upon a concession that the relevant duty, if any, is that to a trespasser under section 1(4) of the 1984 Act and not to a lawful visitor under section 2(2) of the 1957 Act. On one analysis, this is a rather odd hypothesis. Mr Tomlinson's complaint is that he should have been prevented or discouraged from going into the water, that is to say, from turning himself into a trespasser. Logically, it can be said, that duty must have been owed to him (if at all) while he was still a lawful visitor. Once he had become a trespasser, it could not have meaningful effect. In the Court of Appeal, Longmore LJ was puzzled by this paradox:

"At what point does he become a trespasser? When he starts to paddle, intending thereafter to swim? There was no evidence that Mr Tomlinson in fact swam at all. He

> dived from a position in which swimming was difficult, if not impossible. I would be troubled if the respondents' duty of care differed depending on the precise moment when a swim could be said to have begun."

12. In the later case of *Donoghue v Folkestone Properties Ltd* [2003] 2 WLR 1138, 1150 Lord Phillips of Worth Matravers MR said that he shared these reservations about the concession:

> "What was at issue in the case was whether the Council should have taken steps which would have prevented Mr Tomlinson from entering the lake, that is, whether a duty of care was owed to him before he did the unauthorised act."

13. As a matter of logic, I see the force of these observations. But I have nevertheless come to the conclusion that the concession was rightly made. The duty under the 1984 Act was intended to be a lesser duty, as to both incidence and scope, than the duty to a lawful visitor under the 1957 Act. That was because Parliament recognised that it would often be unduly burdensome to require landowners to take steps to protect the safety of people who came upon their land without invitation or permission. They should not ordinarily be able to force duties upon unwilling hosts. In the application of that principle, I can see no difference between a person who comes upon land without permission and one who, having come with permission, does something which he has not been given permission to do. In both cases, the entrant would be imposing upon the landowner a duty of care which he has not expressly or impliedly accepted. The 1984 Act provides that even in such cases a duty may exist, based simply upon occupation of land and knowledge or foresight that unauthorised persons may come upon the land or authorised persons may use it for unauthorised purposes. But that duty is rarer and different in quality from the duty which arises from express or implied invitation or permission to come upon the land and use it.

14. In addition, I think that the concession is supported by the high authority of Lord Atkin in *Hillen v ICI (Alkali) Ltd* [1936] AC 65. There too, it could be said that the stevedores' complaint was that they should have been warned not to go upon the hatch cover and that logically this duty was owed to them, if at all, when they were lawfully on the barge.

15. I would certainly agree with Longmore LJ that the incidence and content of the duty should not depend on the precise moment at which Mr Tomlinson crossed the line between the status of lawful visitor and that of trespasser. But there is no dispute that the act in respect of which Mr Tomlinson says that he was owed a duty, namely, diving into the water, was to his knowledge prohibited by the terms upon which he had been admitted to the Park. It is, I think, for this reason that the Council owed him no duty under the 1957 Act and that the incidence and content of any duty they may have owed was governed by the 1984 Act. But I shall later return to the question of whether it would have made any difference if swimming had not been prohibited and the 1957 Act had applied.

16. It is therefore necessary to consider the conditions which section 1(3) of the 1984 Act requires to be satisfied in order that any duty under section 1(4) should exist. But before looking at the statutory requirements, I must say something more about the history of the lake, upon which Mr Braithwaite QC, who appeared for Mr Tomlinson, placed great reliance in support of his submission that the Council owed him a duty with which it failed to comply.

The history of the lake

17. The working of the sand quarry ceased in about 1975 and for some years thereafter the land lay derelict. People went there for barbecues, camp fires, open air parties and swimming. The Borough Council bought the land in 1980 and most of the work of landscaping and planting was finished by 1983. The land was reclaimed for municipal recreation. But the traditions established in the previous anarchic state of nature were hard to eradicate. From the beginning, the County Council's Management Plan treated swimming as an "unacceptable water activity". The minutes of the County Council's Advisory Group of interested organisations (anglers, windsurfers and so forth) record that on 21 November 1983 the managers proposed to put up more signs to dissuade swimmers: "The risk of a fatality to swimmers was stressed and agreed by all". The windsurfers in particular were concerned about swimmers getting in their way; perhaps being injured by a fast-moving board. The chairman summed up by saying that although the lake with its sandy beaches was a great attraction to visitors, it was also a management problem because of misuse and dangerous activities on the water.

18. In the following year, 1984, the management reported that larger notice boards had prevented the swimming problem from getting any worse: "Every reasonable precaution had now been taken, but it was recognised that some foolhardy persons would continue to put their lives at risk."

19. The management report for 1988 stated that a major concern was?

> "the unauthorised use of the lake and the increasing possibility of an accident; this is swimming and the use of rubber boats. Warnings are ignored by large numbers who see Brereton as easy, free access to open water. On busy days the overwhelming numbers make it impossible to control this use of the lake, and it is difficult to see how the situation can change unless the whole concept of managing the park and the lake is revised."

20. In 1990 there was an inspection by Mr Victor Tyler-Jones, the County Council's Water Safety Officer. He reported that the swimming problem continued, due to the ease of access, the grassy lakeside picnic areas and the beaches and the long history of swimming in the lake. His recommendation was to reduce the beach areas by planting them with reeds. His guidelines for the entire county said that swimming in lakes, rivers and ponds should be discouraged:

> "We do not recommend swimming as a suitable activity for any of our managed sites. Potential swimmers could be dissuaded by noticeboard reference to less pleasant features e.g. soft muddy bottom, danger of contracting Weil's Disease, presence of blue-green algae."

If this did not have the desired effect, ballast should be dumped on beaches and banks to make them muddy and unattractive and reeds and shrubs should be planted.

21. The money to implement these recommendations had to be provided by the Borough Council, which was under some financial pressure. But impetus was provided in the summer of 1992 by a number of incidents. Over Whitsuntide there were three cases of "near drowning resulting in hospital visits". The only such incident of which more details are available concerned a man who "was swimming in lake, after drinking, and got into difficulty". He was rescued by a relative, resuscitated by an off-duty paramedic and taken to hospital. Two men cut their heads by hitting them on something when diving into the lake; there is no information about where they dived. Mr Kitching, the County Council's Countryside Manager, prepared a paper for the

Borough Council at the end of the first week in June. He said that the Park had become very popular:

> "The total number of visitors now exceeds 160,000 per annum...The lake acts as a magnet to the public and has become heavily used for swimming in spite of a no swimming policy due to safety considerations...Advice has been sought from the County Council's Water Safety Officer as to how the problem should be addressed and this has been carefully followed. Notices are posted warning of the dangers and leaflets are handed to visitors to emphasise the situation. Life belts and throwing lines are provided for use in emergencies.
> In spite of these actions the public continue to ignore the advice and the requests of the rangers not to swim. The attitude is that they will do what they want to do and that rangers should not interfere with their enjoyment. There have been several occasions when small children have been out in the middle of the lake and their parents have been extremely rude to staff when approached about this.
> As a result of the general flaunting of the policy there have been a number of near fatalities in the lake with three incidents requiring hospital treatment in the week around Whitsun. Whilst the rangers are doing all they can to protect the public it is likely to be only a matter of time before someone drowns."

22. In July 1992 the Borough Council's Leisure Officer visited the Park and concluded that the notices and leaflets were not having the desired effect. On 23 July 1992 he proposed to other officers the preparation of a report to the Borough Council recommending the adoption of Mr Tyler-Jones's scheme for making the beaches less hospitable to visitors:

> "I want the water's edge to be far less accessible, desirable and inviting than it currently is for children's beach/water's edge type of play activities. I personally find this course of action a regrettable one but I have to remind myself that Council policy was to establish a Country Park and not specifically to provide a swimming facility, no matter how popular this may have become in consequence. To provide a facility that is open to the public and which contains beach and water areas is, in my view, an open invitation and temptation to swim and engage in other water's edge activities despite the cautionary note that is struck by deterrent notices etc., and in that type of situation accidents become inevitable. We must therefore do everything that is reasonably possible to deter, discourage and prevent people from swimming or paddling in the lake or diving into the lake...Work should be prepared for the report with a view to implementation of a scheme at the earliest opportunity, bearing in mind that we shall require a supplementary estimate for the exercise."

23. As a result of this proposal, the Borough Leisure Officer was asked to prepare a feasibility report with costings. £5,000 was provided in the draft estimates for the Borough's Amenities and Leisure Services Committee, but it was one of many items deleted at the Committee's meeting on 1 March 1993 to achieve a total saving of £200,000. In 1994, the officers tried again. It was listed as a "desirable" growth bid in the budget (below "essential" and "highly desirable"). But the bid failed. When it came to the 1995 budget round, the officers presented a strongly-worded proposal:

> "Cheshire Countryside Management Service has now taken all reasonable steps with regard to providing information and attempting to educate the public about the dangers of bathing in the lake. This has had a limited effect on the numbers entering the water for short periods but there are still numbers of people, including young children, swimming,

paddling and using inflatable rafts and dinghies whenever the weather is warm and sunny. We have on average three or four near drownings every year and it is only a matter of time before someone dies.
The recommendation from the National Safety Water Committee, endorsed by County Councils, is that something must now be done to reduce the 'beach areas' both in size and attractiveness. If nothing is done about this and someone dies the Borough Council is likely to be held liable and would have to accept responsibility."

24. The Borough Council found this persuasive and in 1995 £5,000 was allocated to the scheme. But the work had not yet begun when Mr Tomlinson had his accident. At that time, the beach to which he and his friends had been accustomed to go since childhood was still there. The diggers, graders and planters arrived to destroy it a few months later.

The scope of the duty under the 1984 Act

25. The conditions in section 1(3) of the 1984 Act determine whether or not a duty is owed to "another" in respect of "any such risk as is referred to in subsection (1)". Two conclusions follow from this language. First, the risks in respect of which the Act imposes a duty are limited to those mentioned in subsection (1)(a) - risks of injury "by reason of any danger due to the state of the premises or to things done or omitted to be done on them." The Act is not concerned with risks due to anything else. Secondly, the conditions have to be satisfied in respect of the claimant as "another"; that is to say, in respect of a class of persons which includes him and a description of risk which includes that which caused his injury.

A danger "due to the state of the premises"

26. The first question, therefore, is whether there was a risk within the scope of the statute; a danger "due to the state of the premises or to things done or omitted to be done on them". The judge found that there was "nothing about the mere at Brereton Heath which made it any more dangerous than any other ordinary stretch of open water in England". There was nothing special about its configuration; there were no hidden dangers. It was shallow in some places and deep in others, but that is the nature of lakes. Nor was the Council doing or permitting anything to be done which created a danger to persons who came to the lake. No power boats or jet skis threatened the safety of either lawful windsurfers or unlawful swimmers. So the Council submits that there was no danger attributable to the state of premises or things done or omitted on them. In *Donoghue v Folkestone Properties Ltd* [2003] 2 WLR 1138, 1153 Lord Phillips of Worth Matravers MR expressed the same opinion. He said that he had been unable to identify the "state of the premises" which carried with it the risk of the injury suffered by Mr Tomlinson:

> "It seems to me that Mr Tomlinson suffered his injury because he chose to indulge in an activity which had inherent dangers, not because the premises were in a dangerous state."

27. In making this comment, the Master of the Rolls was identifying a point which is in my opinion central to this appeal. It is relevant at a number of points in the analysis of the duties under the 1957 and 1984 Acts. Mr Tomlinson was a person of full capacity who voluntarily and without any pressure or inducement engaged in an activity which had inherent risk. The risk was that he might not execute his dive properly and so sustain injury. Likewise, a person who goes mountaineering incurs the risk that he might stumble or misjudge where to put his weight. In neither case can the risk be attributed to the state of the premises. Otherwise any premises can be said to be dangerous to someone who chooses to use them for some dangerous activity. In the

present case, Mr Tomlinson knew the lake well and even if he had not, the judge's finding was that it contained no dangers which one would not have expected. So the only risk arose out of what he chose to do and not out of the state of the premises.

28. Mr Braithwaite was inclined to accept the difficulty of establishing that the risk was due to the state of the premises. He therefore contended that it was due to "things done or omitted to be done" on the premises. When asked what these might be, he said that they consisted in the attraction of the lake and the Council's inadequate attempts to keep people out of the water. The Council, he said, were "luring people into a deathtrap". Ward LJ said that the water was "a siren call strong enough to turn stout men's minds". In my opinion this is gross hyperbole. The trouble with the island of the Sirens was not the state of the premises. It was that the Sirens held mariners spellbound until they died of hunger. The beach, give or take a fringe of human bones, was an ordinary Mediterranean beach. If Odysseus had gone ashore and accidentally drowned himself having a swim, Penelope would have had no action against the Sirens for luring him there with their songs. Likewise in this case, the water was perfectly safe for all normal activities. In my opinion "things done or omitted to be done" means activities or the lack of precautions which cause risk, like allowing speedboats among the swimmers. It is a mere circularity to say that a failure to stop people getting into the water was an omission which gave rise to a duty to take steps to stop people from getting into the water.

29. It follows that in my opinion, there was no risk to Mr Tomlinson due to the state of the premises or anything done or omitted upon the premises. That means that there was no risk of a kind which gave rise to a duty under the 1957 or 1984 Acts. I shall nevertheless go on to consider the matter on the assumption that there was.

The conditions for the existence of a duty

(i) Knowledge or foresight of the danger

30. Section 1(3) has three conditions which must be satisfied. First, under paragraph (a), the occupier must be aware of the danger or have reasonable grounds to believe that it exists. For this purpose, it is necessary to say what the relevant danger was. The judge thought it was the risk of suffering an injury through diving and said that the Council was aware of this danger because two men had suffered minor head injuries from diving in May 1992. In the Court of Appeal, Ward LJ described the relevant risk much more broadly. He regarded all the swimming incidents as indicative of the Council's knowledge that a danger existed. I am inclined to think that this is too wide a description. The risk of injury from diving off the beach was in my opinion different from the risk of drowning in the deep water. For example, the Council might have fenced off the deep water or marked it with buoys and left people to paddle in the shallows. That would have reduced the risk of drowning but would not have prevented the injury to Mr Tomlinson. We know very little about the circumstances in which two men suffered minor cuts to their heads in 1992 and I am not sure that they really provide much support for an inference that there was knowledge, or reasonable grounds to believe, that the beach posed a risk of serious diving injury. Dr Penny, a consultant occupational health and safety physician with long experience of advising organisations involved in acquatic sports (and himself a diver) said that the *Code of Safety for Beaches*, published in 1993 by the Royal Life Saving Society and the Royal Society for the Prevention of Accidents, made no mention of diving risks, no doubt assuming that, because there was little possibility of high diving from a beach, the risk of serious diving injuries was very small compared with the risk of drowning. I accept that the Council must have known that there was a possibility that some boisterous teenager would injure himself by horseplay in the shallows

and I would not disturb the concurrent findings that this was sufficient to satisfy paragraph (a). But the chances of such an accident were small. I shall return later, in connection with condition (c), to the relevance of where the risk comes on the scale of probability.

(ii) Knowledge or foresight of the presence of the trespasser

31. Once it is found that the risk of a swimmer injuring himself by diving was something of which the Council knew or which they had reasonable grounds to believe to exist, paragraph (b) presents no difficulty. The Council plainly knew that swimmers came to the lake and Mr Tomlinson fell within that class.

(iii) Reasonable to expect protection

32. That leaves paragraph (c). Was the risk one against which the Council might reasonably be expected to offer the claimant some protection? The judge found that "the danger and risk of injury from diving in the lake where it was shallow were obvious." In such a case the judge held, both as a matter of common sense and following consistent authority *(Staples v West Dorset District Council* [1995] PIQR 439; *Ratcliff v McConnell* [1999] 1 WLR 670; *Darby v National Trust* [2001] PIQR 372), that there was no duty to warn against the danger. A warning would not tell a swimmer anything he did not already know. Nor was it necessary to do anything else. "I do not think", said the judge, "that the defendants' legal duty to the claimant in the circumstances required them to take the extreme measures which were completed after the accident". Even if Mr Tomlinson had been owed a duty under the 1957 Act as a lawful visitor, the Council would not have been obliged to do more than they did.

33. The Court of Appeal disagreed. Ward LJ said that the Council was obliged to do something more. The gravity of the risk, the number of people who regularly incurred it and the attractiveness of the beach created a duty. The prohibition on swimming was obviously ineffectual and therefore it was necessary to take additional steps to prevent or discourage people from getting into the water. Sedley LJ said: "It is only where the risk is so obvious that the occupier can safely assume that nobody will take it that there will be no liability." Longmore LJ dissented. The majority reduced the damages by two-thirds to reflect Mr Tomlinson's contributory negligence, although Ward LJ said that he would have been inclined to reduce them only by half. The Council appeals against the finding of liability and Mr Tomlinson appeals against the apportionment, which he says should have been in accordance with the view of Ward LJ.

The balance of risk, gravity of injury, cost and social value.

34. My Lords, the majority of the Court of Appeal appear to have proceeded on the basis that if there was a foreseeable risk of serious injury, the Council was under a duty to do what was necessary to prevent it. But this in my opinion is an oversimplification. Even in the case of the duty owed to a lawful visitor under section 2(2) of the 1957 Act and even if the risk had been attributable to the state of the premises rather than the acts of Mr Tomlinson, the question of what amounts to "such care as in all the circumstances of the case is reasonable" depends upon assessing, as in the case of common law negligence, not only the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measures. These factors have to be balanced against each other.

35. For example, in *Overseas Tankship (UK) Ltd v Miller Steamship Pty Ltd (The Wagon Mound (No. 2))* [1967] 1 AC 617 , there was no social value or cost saving in the defendant's activity. Lord Reid said (at p 643):

> "In the present case there was no justification whatever for discharging the oil into Sydney Harbour. Not only was it an offence to do so, but it involved considerable loss financially. If the ship's engineer had thought about the matter, there could have been no question of balancing the advantages and disadvantages. From every point of view it was both his duty and his interest to stop the discharge immediately."

36. So the defendants were held liable for damage which was only a very remote possibility. Similarly in *Jolley v Sutton London B.C.* [2000] 1 WLR 1082 there was no social value or cost saving to the Council in creating a risk by leaving a derelict boat lying about. It was something which they ought to have removed whether it created a risk of injury or not. So they were held liable for an injury which, though foreseeable, was not particularly likely. On the other hand, in *The Wagon Mound (No. 2)* Lord Reid (at p. 642) drew a contrast with *Bolton v Stone* [1951] AC 850 in which the House of Lords held that it was not negligent for a cricket club to do nothing about the risk of someone being injured by a cricket ball hit out of the ground. The difference was that the cricket club were carrying on a lawful and socially useful activity and would have had to stop playing cricket at that ground.

37. This is the kind of balance which has to be struck even in a situation in which it is clearly fair, just and reasonable that there should in principle be a duty of care or in which Parliament, as in the 1957 Act, has decreed that there should be. And it may lead to the conclusion that even though injury is foreseeable, as it was in *Bolton v Stone*, it is still in all the circumstances reasonable to do nothing about it.

The 1957 and 1984 Acts contrasted

38. In the case of the 1984 Act, there is the additional consideration that unless in all the circumstances it is reasonable to expect the occupier to do something, that is to say, to "offer the other some protection", there is no duty at all. One may ask what difference there is between the case in which the claimant is a lawful visitor and there is in principle a duty under the 1957 Act but on the particular facts no duty to do anything, and the case in which he is a trespasser and there is on the particular facts no duty under the 1984 Act. Of course in such a case the result is the same. But Parliament has made it clear that in the case of a lawful visitor, one starts from the assumption that there is a duty whereas in the case of a trespasser one starts from the assumption that there is none.

The balance under the 1957 Act

39. My Lords, it will in the circumstances be convenient to consider first the question of what the position would have been if Mr Tomlinson had been a lawful visitor owed a duty under section 2(2) of the 1957 Act. Assume, therefore, that there had been no prohibition on swimming. What was the risk of serious injury? To some extent this depends upon what one regards as the relevant risk. As I have mentioned, the judge thought it was the risk of injury through diving while the Court of Appeal thought it was any kind of injury which could happen to people in the water. Although, as I have said, I am inclined to agree with the judge, I do not want to put the basis of my decision too narrowly. So I accept that we are concerned with the steps, if any, which should have been taken to prevent any kind of water accident. According to the Royal Society for

the Prevention of Accidents, about 450 people drown while swimming in the United Kingdom every year (see *Darby v National Trust* [2001] PIQR 372, 374). About 25-35 break their necks diving and no doubt others sustain less serious injuries. So there is obviously some degree of risk in swimming and diving, as there is in climbing, cycling, fell walking and many other such activities.

40. I turn then to the cost of taking preventative measures. Ward LJ described it (£5,000) as "not excessive". Perhaps it was not, although the outlay has to be seen in the context of the other items (rated "essential" and "highly desirable") in the Borough Council budget which had taken precedence over the destruction of the beaches for the previous two years.

41. I do not however regard the financial cost as a significant item in the balancing exercise which the court has to undertake. There are two other related considerations which are far more important. The first is the social value of the activities which would have to be prohibited in order to reduce or eliminate the risk from swimming. And the second is the question of whether the Council should be entitled to allow people of full capacity to decide for themselves whether to take the risk.

42. The Court of Appeal made no reference at all to the social value of the activities which were to be prohibited. The majority of people who went to the beaches to sunbathe, paddle and play with their children were enjoying themselves in a way which gave them pleasure and caused no risk to themselves or anyone else. This must be something to be taken into account in deciding whether it was reasonable to expect the Council to destroy the beaches.

43. I have the impression that the Court of Appeal felt able to brush these matters aside because the Council had already decided to do the work. But they were held liable for having failed to do so before Mr Tomlinson's accident and the question is therefore whether they were under a legal duty to do so. Ward LJ placed much emphasis upon the fact that the Council had decided to destroy the beaches and that its officers thought that this was necessary to avoid being held liable for an accident to a swimmer. But the fact that the Council's safety officers thought that the work was necessary does not show that there was a legal duty to do it. In *Darby v National Trust* [2001] PIQR 372 the claimant's husband was tragically drowned while swimming in a pond on the National Trust estate at Hardwick Hall. Miss Rebecca Kirkwood, the Water and Leisure Safety Consultant to the Royal Society for the Prevention of Accidents, gave uncontradicted evidence, which the judge accepted, that the pond was unsuitable for swimming because it was deep in the middle and the edges were uneven. The National Trust should have made it clear that swimming in the pond was not allowed and taken steps to enforce the prohibition. But May LJ said robustly that it was for the court, not Miss Kirkwood, to decide whether the Trust was under a legal duty to take such steps. There was no duty because the risks from swimming in the pond were perfectly obvious.

Free will

44. The second consideration, namely the question of whether people should accept responsibility for the risks they choose to run, is the point made by Lord Phillips of Worth Matravers MR in *Donoghue v Folkestone Properties Ltd* [2003] 2 WLR 1138, 1153 and which I said was central to this appeal. Mr Tomlinson was freely and voluntarily undertaking an activity which inherently involved some risk. By contrast, Miss Bessie Stone, to whom the House of Lords held that no duty was owed, was innocently standing on the pavement outside her garden gate at 10 Beckenham Road, Cheetham when she was struck by a ball hit for 6 out of the

Cheetham Cricket Club ground. She was certainly not engaging in any activity which involved an inherent risk of such injury. So compared with *Bolton v Stone*, this is an a fortiori case.

45. I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang gliding or swim or dive in ponds or lakes, that is their affair. Of course the landowner may for his own reasons wish to prohibit such activities. He may be think that they are a danger or inconvenience to himself or others. Or he may take a paternalist view and prefer people not to undertake risky activities on his land. He is entitled to impose such conditions, as the Council did by prohibiting swimming. But the law does not require him to do so.

46. My Lords, as will be clear from what I have just said, I think that there is an important question of freedom at stake. It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty to safeguard irresponsible visitors against dangers which are perfectly obvious. The fact that such people take no notice of warnings cannot create a duty to take other steps to protect them. I find it difficult to express with appropriate moderation my disagreement with the proposition of Sedley LJ (at para. 45) that it is "only where the risk is so obvious that the occupier can safely assume that nobody will take it that there will be no liability". A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees, or some lack of capacity, such as the inability of children to recognise danger (*British Railways Board v Herrington* [1972] AC 877) or the despair of prisoners which may lead them to inflict injury on themselves (*Reeves v Commissioner of Police* [2000] 1 AC 360).

47. It is of course understandable that organisations like the Royal Society for the Prevention of Accidents should favour policies which require people to be prevented from taking risks. Their function is to prevent accidents and that is one way of doing so. But they do not have to consider the cost, not only in money but also in deprivation of liberty, which such restrictions entail. The courts will naturally respect the technical expertise of such organisations in drawing attention to what can be done to prevent accidents. But the balance between risk on the one hand and individual autonomy on the other is not a matter of expert opinion. It is a judgment which the courts must make and which in England reflects the individualist values of the common law.

48. As for the Council officers, they were obvious motivated by the view that it was necessary to take defensive measures to prevent the Council from being held liable to pay compensation. The Borough Leisure Officer said that he regretted the need to destroy the beaches but saw no alternative if the Council was not to be held liable for an accident to a swimmer. So this appeal gives your Lordships the opportunity to say clearly that local authorities and other occupiers of land are ordinarily under no duty to incur such social and financial costs to protect a minority (or even a majority) against obvious dangers. On the other hand, if the decision of the Court of Appeal were left standing, every such occupier would feel obliged to take similar defensive measures. Sedley LJ was able to say that if the logic of the Court of Appeal's decision was that other public lakes and ponds required similar precautions, "so be it". But I cannot view this prospect with the same equanimity. In my opinion it would damage the quality of many people's lives.

49. In the particular case of diving injuries, there is little evidence that such defensive measures have had much effect. Dr Penny, the Council's expert, said that over the past decade there had

been little change in the rate of serious diving accidents. Each year, as I have mentioned, there are about 25-35 fracture-dislocations of the neck. Almost all those affected are males and their average age is consistently around 25 years. In spite of greatly increased safety measures, particularly in swimming pools, the numbers (when Dr Penny gave evidence) had remained the same for a decade:

> "This is probably because of the sudden, unpredictable nature of these dangerous dives, undertaken mostly by boisterous young men...hence the common description the "Macho Male Diving Syndrome."

50. My Lords, for these reasons I consider that even if swimming had not been prohibited and the Council had owed a duty under section 2(2) of the 1957, that duty would not have required them to take any steps to prevent Mr Tomlinson from diving or warning him against dangers which were perfectly obvious. If that is the case, then plainly there can have been no duty under the 1984 Act. The risk was not one against which he was entitled under section 1(3)(c) to protection. I would therefore allow the appeal and restore the decision of Jack J. It follows that the cross-appeal against the apportionment of damages must be dismissed.

LORD HUTTON

My Lords,

51. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann and I gratefully adopt his account of the background facts to the tragic injury which Mr Tomlinson suffered in the lake in Brereton Heath Country Park in Cheshire. I agree with your Lordships that the appeal brought by Congleton Borough Council and Cheshire County Council should be allowed, but as I was attracted for a considerable time during the hearing of the appeal by the respondent's argument supporting the reasoning of Ward LJ in the Court of Appeal (with which Sedley LJ agreed) that Mr Tomlinson was entitled to recover damages, I wish to add some observations of my own.

52. I approach the case on the basis that Mr Tomlinson was, in strict law, a trespasser at the time he dived and struck his head on the bottom of the lake. It is clear that he was invited by the appellants to come to the country park but it is also clear that swimming in the lake was expressly prohibited by the appellants and, as the trial judge found, Mr Tomlinson was fully aware of this prohibition. Therefore when he began to dive he became a trespasser because, as Lord Atkin stated in *Hillen and Pettigrew v ICI (Alkali) Ltd* [1936] AC 65, 69:

> "So far as he sets foot on so much of the premises as lie outside the invitation or uses them for purposes which are alien to the invitation he is not an invitee but a trespasser, and his rights must be determined accordingly."

However I agree with Lord Hoffmann that even if the respondent had not been a trespasser at the time of his dive but had been a visitor within the meaning of the Occupiers' Liability Act 1957, he would still not have been entitled to recover damages.

53. In relation to section 1(1)(a) of the Occupiers' Liability Act 1984 I recognise that there is force in the argument that the injury was not due to the state of the premises but was due to the respondent's own lack of care in diving into shallow water. But the trial judge found that Mr Tomlinson could not see the bottom of the lake and, on balance, I incline to the view that dark

and murky water which prevents a person seeing the bottom of the lake where he is diving can be viewed as "the state of the premises" and that if he sustains injury through striking his head on the bottom which he cannot see this can be viewed as a danger "due to the state of the premises". If water were allowed to become dark and murky in an indoor swimming pool provided by a local authority and a diver struck his head on the bottom I consider that the danger could be regarded as "due to the state of the premises", and whilst there is an obvious difference between such water and water in a lake which in its natural state is dark and murky, I think that the term "the state of the premises" can be applied both to the swimming pool and to the lake.

54. Section 1(3) and (4) provide:

> "(3) An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in subsection (1) above if—
> (a) he is aware of the danger or has reasonable grounds to believe that it exists;
> (b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in that vicinity or not); and
> (c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.
> (4) Where, by virtue of this section, an occupier of premises owes a duty to another in respect of such a risk, the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned."

55. There is no doubt from the reports and proposals of the appellants' officials to the Borough's Amenities and Leisure Services Committee and to the Borough Council which Lord Hoffmann has described that paragraphs (a) and (b) of section 1(3) are satisfied. If section 1(3) were satisfied and the risk was one against which, in all the circumstances of the case, the appellants might reasonably be expected to offer the respondent some protection, I consider that there would be an argument of some force that they were in breach of the duty specified in section 1(4), because the minutes of the meetings showed that they knew that there were dangers to persons swimming or diving in the lake (there had been two cases of swimmers sustaining head injuries) and they knew that the dangers might lead to death or serious injury, but they had decided not to take the recommended steps such as planting reeds on the beach, which would probably have stopped swimming, because of financial constraints, although the cost of these precautionary measures would have been only in the region of £15,000.

56. Therefore I think the crucial question is whether the respondent has established that the risk was one to which section 1(3)(c) applies. On this point the reasoning of Ward LJ was contained in paragraph 29 of his judgment:

> "Here the authorities employed rangers whose duty it was to give oral warnings against swimming albeit that this met with mixed success and sometimes attracted abuse for their troubles. In addition to the oral warnings, the rangers would hand out safety leaflets which warned of the variable depth in the pond, the cold, the weeds, the absence of rescue services, waterborne diseases and the risk of accidents occurring. It seems to me that the rangers' patrols and advice and the handing out of these leaflets reinforced the ineffective message on the sign and constituted 'some protection' in fact given and reasonably expected to be offered in the circumstances of this case."

57. I thought for a time that this reasoning was persuasive, but I have concluded that it should not be accepted because I consider that it is contrary to a principle stated in the older authorities which is still good law. In *Stevenson v Glasgow Corporation* 1908 SC 1034, 1039 Lord M'Laren stated:

> "in a town, as well as in the country, there are physical features which may be productive of injury to careless persons or to young children against which it is impossible to guard by protective measures. The situation of a town on the banks of a river is a familiar feature; and whether the stream be sluggish like the Clyde at Glasgow, or swift and variable like the Ness at Inverness, or the Tay at Perth, there is always danger to the individual who may be so unfortunate as to fall into the stream. But in none of these places has it been found necessary to fence the river to prevent children or careless persons from falling into the water. Now, as the common law is just the formal statement of the results and conclusions of the common sense of mankind, I come without difficulty to the conclusion that precautions which have been rejected by common sense as unnecessary and inconvenient are not required by the law."

58. In *Glasgow Corporation v Taylor* [1922] 1 AC 44, 61 Lord Shaw of Dunfermline stated:

> "Grounds thrown open by a municipality to the public may contain objects of natural beauty, say precipitous cliffs or the banks of streams, the dangers of the resort to which are plain."

Lord Shaw then cited with approval the words of Lord M'Laren in *Stevenson* that "in a town, as well as in the country, there are physical features which may be productive of injury to careless persons or to young children against which it is impossible to guard by protective measures". I think that when Lord M'Laren referred to physical features against which "it is impossible to guard by protective measures" he was not referring to protective measures which it is physically impossible to put in place; rather he had in mind measures which the common sense of mankind indicates as being unnecessary to take. This statement echoed the observation of the Lord President in *Hastie v Magistrates of Edinburgh* 1907 SC 1102, 1106 that there are certain risks against which the law, in accordance with the dictates of common sense, does not give protection— such risks are "just one of the results of the world as we find it".

59.

Stevenson and *Hastie* (which were not concerned with trespassers) were decided almost a century ago and the judgments are couched in old-fashioned language, but I consider that they express a principle which is still valid today, namely, that it is contrary to common sense, and therefore not sound law, to expect an occupier to provide protection against an obvious danger on his land arising from a natural feature such as a lake or a cliff and to impose a duty on him to do so. In my opinion this principle, although not always explicitly stated, underlies the cases relied on by the appellants where it has been held that the occupier is not liable where a person has injured himself or drowned in an inland lake or pool or in the sea or on some natural feature.

60. In *Cotton v Derbyshire Dales District Council* (20 June, 1994, unreported) the Court of Appeal upheld the decision of the trial judge dismissing the plaintiff's claim for damages for serious injuries sustained from falling off a cliff. Applying the judgment of Lord Shaw in *Glasgow Corporation v Taylor* the Court of Appeal held that the occupiers were under no duty to provide protection against dangers which are themselves obvious.

61. In *Whyte v Redland Aggregates Ltd* [1997] EWCA Civ 2842 the appellant dived into a disused gravel pit and alleged that he had struck his head on an obstruction on the floor of the pit. The Court of Appeal dismissed his appeal against the judgment of the trial judge who held that he was not entitled to damages. Henry LJ stated:

> "In my judgment, the occupier of land containing or bordered by the river, the seashore, the pond or the gravel pit, does not have to warn of uneven surfaces below the water. Such surfaces are by their nature quite likely to be uneven. Diving where you cannot see the bottom clearly enough to know that it is safe to dive is dangerous unless you have made sure, by reconnaissance or otherwise, that the diving is safe ie. that there is adequate depth at the place where you choose to dive. In those circumstances, the dangers of there being an uneven surface in an area where you cannot plainly see the bottom are too plain to require a specific warning and, accordingly, there is no such duty to warn (see Lord Shaw in *Glasgow Corporation v Taylor* [1922] 1 AC 44, 60. There was no trap here on the judge's finding. There was just an uneven surface, as one would expect to find in a disused gravel pit."

62. In *Bartrum v Hepworth Minerals & Chemicals Limited*, unreported, the claimant dived from a ledge on a cliff. In order to avoid shallow water he knew that he had to dive out into the pool but he failed to do so and fractured his neck. Turner J dismissed his claim for damages and stated:

> "So far as the Act is concerned, by section 1(3) the defendants were under a duty to those whom they had reasonable grounds to believe would be in the vicinity of the danger, that is on the cliff for the purpose of diving, and the risk was one which, in all the circumstances, [they] may be reasonably expected to offer some protection. In my judgment the danger here was so obvious to any adult that it was not reasonably to be expected of the defendants that they would offer any protection."

63. In *Darby v National Trust* [2001] PIQR 372 the claimant's husband was drowned whilst swimming in a pond on National Trust property. The Court of Appeal allowed an appeal by the National Trust against the trial judge's finding of liability and May LJ stated at p 378:

> "It cannot be the duty of the owner of every stretch of coastline to have notices warning of the dangers of swimming in the sea. If it were so, the coast would have to be littered with notices in places other than those where there are known to be special dangers which are not obvious. The same would apply to all inland lakes and reservoirs. In my judgment there was no duty on the National Trust on the facts of this case to warn against swimming in this pond where the dangers of drowning were no other or greater than those which were quite obvious to any adult such as the unfortunate deceased. That, in my view, applies as much to the risk that a swimmer might get into difficulties from the temperature of the water as to the risk that he might get into difficulties from mud or sludge on the bottom of the pond."

64. I also think that the principle stated by Lord M'Laren in *Stevenson* is implicit in paragraph 34 of the judgment of Lord Phillips of Worth Matravers MR in *Donoghue v Folkestone Properties Ltd* [2003] 2 WLR 1138. In that case the claimant dived from a slipway into Folkestone harbour after midnight in mid-winter. He struck his head on a grid pile under the water adjacent to the harbour wall and broke his neck. The Court of Appeal allowed an appeal by

the defendant against the trial judge's finding of liability. The Master of the Rolls stated at pages 1147-1148:

> "33 The obvious situation where a duty under the 1984 Act is likely to arise is where the occupier knows that a trespasser may come upon a danger that is latent. In such a case the trespasser may be exposed to the risk of injury without realising that the danger exists. Where the state of the premises constitutes a danger that is perfectly obvious, and there is no reason for a trespasser observing it to go near it, a duty under the 1984 Act is unlikely to arise for at least two reasons. The first is that because the danger can readily be avoided, it is unlikely to pose a risk of injuring the trespasser whose presence on the premises is envisaged.
> 34 There are, however, circumstances in which it may be foreseeable that a trespasser will appreciate that a dangerous feature of premises poses a risk of injury, but will nevertheless deliberately court the danger and risk the injury. It seems to me that, at least where the individual is an adult, it will be rare that those circumstances will be such that the occupier can reasonably be expected to offer some protection to the trespasser against the risk."

Lord Phillips then went on to state that where a person was tempted by some natural feature of the occupier's land to engage in some activity such as mountaineering which carried a risk of injury, he could not ascribe to "the state of the premises" an injury sustained in carrying on that activity. However in the present case, as I have stated, I incline to the view that the dark and murky water can be viewed as "the state of the premises".

65. Therefore I consider that the risk of the respondent striking his head on the bottom of the lake was not one against which the appellants might reasonably have been expected to offer him some protection, and accordingly they are not liable to him because they owed him no duty. I would add that there might be exceptional cases where the principle stated in *Stevenson* and *Taylor* should not apply and where a claimant might be able to establish that the risk arising from some natural feature on the land was such that the occupier might reasonably be expected to offer him some protection against it, for example, where there was a very narrow and slippery path with a camber beside the edge of a cliff from which a number of persons had fallen. But the present is not such a case and, for the reasons which I have given, I consider that the appeal should be allowed.

LORD HOBHOUSE OF WOODBOROUGH

My Lords,

66. In this case the trial judge after having heard all the evidence made findings of fact which are now accepted by the claimant:

> There was nothing about the mere which made it any more dangerous than any other stretch of open water in England. Swimming and diving held their own risks. So if the mere was to be described as a danger, it was only because it attracted swimming and diving, which activities carry a risk. Despite having seen signs stating "Dangerous Water: No Swimming", the claimant ignored them. The danger and risk of injury from diving in the lake where it was shallow was obvious. At the time of the accident, the claimant was 18 years of age and had regularly been going to the park since he was a small child. He knew it well. The accident occurred when he waded into the water until the water was a

little above his knees and threw himself forward in a dive or plunge. He knew that he shouldn't. He could not see the bottom. In fact it was a smooth sandy surface without any obstruction or hazard. He dived deeper than he had intended and his head hit the sandy bottom causing his injury. Besides the notices already referred to, visitors were handed leaflets warning them of the dangers of swimming in the mere. Wardens patrolled the park and told people further that they should not swim in the mere. However it was the fact that visitors often took no notice and very many people did bathe in the mere in summer.

67. The claimant has made his claim for personal injuries under the Occupiers' Liability Act 1984 on the basis that at the time that he suffered his injury he was a trespasser in that he was swimming in the mere and swimming was, as he was aware, forbidden. This seems to me to be a somewhat artificial approach to the case; since paddling was apparently allowed but not swimming and the claimant was at the material time in water which only came a little above his knees. However, under the Occupiers' Liability Act 1957 (and at common law) when an invitee or licensee breaches the conditions upon which he has entered the premises, he ceases to be a visitor and becomes a trespasser: s.2(2). The claimant was permitted to enter the park on the condition that (*inter alia*) he did not swim in the mere. If he should swim in the mere, he broke this condition and as a result ceased to be a visitor. However, like all of your Lordships, I consider that whether he makes his claim under the 1984 Act or the 1957 Act, he does not succeed.

68. The two Acts apply the same general policy and the 1984 Act is a supplement to the 1957 Act. The earlier Act was the result of a re-examination of the common law relating to occupiers' liability. Its primary purpose was to simplify the law. It had previously been based upon placing those coming on another's land into various different categories and then stipulating different standards of care from the occupier in respect of each category. This was the historical approach of the common law to the question of negligence and found its inspiration in Roman law concepts (as was the case in the law of bailment: *Coggs v Bernard* 2 Lord Raym. 909). By 1957, the dominant approach had become the 'good neighbour' principle enunciated in *Donoghue v Stevenson* [1932] AC 562. But special rules still applied to relationships which were not merely neighbourly. One such was occupiers' liability. The relevant, indeed, principal simplification introduced in the 1957 Act was to introduce the 'common duty of care' as a single standard covering both invitees and licensees: see s.2(2). The 1957 Act applied only to visitors, *ie* persons coming onto the land with the occupier's express or implied consent. It did not apply to persons who were not visitors including trespassers. The 1984 Act made provision for when a duty of care should be owed to persons who were not visitors (I will for the sake of convenience call such persons "trespassers") and what the duty should then be, that is, a duty of care in the terms of s.1(3), more narrow than that imposed by the 1957 Act. Thus the duty owed to visitors and the lesser duty which may be owed to trespassers was defined in appropriate terms. But, in each Act, there are further provisions which define the content of the duty and, depending upon the particular circumstances, its scope and extent.

69. The first and fundamental definition is to be found in both Acts. The duty is owed "in respect of dangers due to the state of the premises or to things done or omitted to be done on them". In the 1957 Act it is s.1(1). In the 1984 Act it is in s.1(1)(a) which forms the starting point for determining whether any duty is owed to the trespasser (see also s.1(3)) and provides the subject matter of any duty which may be owed. It is this phrase which provides the basic definition of 'danger' as used elsewhere in the Acts. There are two alternatives. The first is that it must be due to the state of the premises. The state of the premises is the physical features of the premises as they exist at the relevant time. It can include foot paths covered in ice and open mine

shafts. It will not normally include parts of the landscape, say, steep slopes or difficult terrain in mountainous areas or cliffs close to cliff paths. There will certainly be dangers requiring care and experience from the visitor but it normally would be a misuse of language to describe such features as "the state of the premises". The same could be said about trees and, at any rate, natural lakes and rivers. The second alternative is dangers due to things done or omitted to be done on the premises. Thus if shooting is taking place on the premises, a danger to visitors may arise from that fact. If speed boats are allowed to go into an area where swimmers are, the safety of the swimmers may be endangered.

70. In the present case, the mere was used for a number of activities - angling, board-sailing, sub-aqua, canoeing and sailing model yachts - but none of these was suggested to have given rise to any danger to the claimant or others. Therefore the claimant has to found his case upon a danger due to the "state of the premises". His difficulty is that the judge has found that there was none and he has accepted that finding. Therefore his case fails *in limine*. If there was no such danger the remainder of the provisions of the Acts all of which depend upon the existence of such a danger cannot assist him. The claimant clearly appreciated this when he brought his claim since his Statement of Claim specifically pleaded that there had been "an obstruction under the surface of the water" on which he struck his head. The judge found that there was no such obstruction.

71. Section 2 of the 1957 Act deals with the content of the duty (if any). Thus s.2(2) defines the common duty of care as one "to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there". If swimming is not one of those purposes, the duty of care does not extend to him while he is swimming. Section 2(3) deals with what circumstances are relevant to assessing any duty owed. They include "the degree of care, and of want of care, which would ordinarily be looked for in such a visitor". Examples are given: "(a) An occupier must be prepared for children to be less careful than adults." A skilled visitor can be expected to appreciate and guard against risks ordinarily incident to his skilled activities: s.2(2)(b). An obvious instance of the second example is a steeple jack brought in to repair a spire or an electrician to deal with faulty wiring. Here, the claimant was an 18 year old youth who ought to be well able to appreciate and cope with the character of an ordinary lake. He can take care of himself; he does not need to be looked after in the same way as a child.

72. Turning to the 1984 Act, one can observe the same features. The basic requirement of a "danger due to the state of the premises" is there. Section 1(2) contains a cross-reference to s.2(2) of the earlier Act. Section 1(3) depends upon the existence, and knowledge, of a danger coming within s.1(1). The risk of personal injury arising from that danger must further be one against which, in all the circumstances, it is reasonable to expect the occupier "to offer the [trespasser] some protection". The equivalent phrase "reasonable in all the circumstances" is used in subsections (4) and (5). Subsection (5) specifically permits the use of warnings and discouragements against incurring the relevant risk.

73. It is an irony of the present case that the claimant has found it easier to put his case under the 1984 Act than under the 1957 Act and argue, in effect, that the occupier owed a higher duty to a trespasser than to a visitor. This is because the inclusion of the words in s.2(4), duty "to see that he does not suffer injury on the premises by reason of the danger concerned". The claimant did suffer injury whilst on the premises; the defendants failed to see that he did not. Whilst this argument in any event fails on account of the fundamental point that the state of the premises did not give rise to any danger, it would be perverse to construe these two Acts of Parliament so as to give the 1984 Act the effect which the claimant contends for. (See also the quotation from the

Law Commission Report by Brooke LJ in his judgment in *Donoghue v Folkestone Properties* [2003] 2 WLR at pp.1157-8.) The key is in the circumstances and what it is reasonable to expect of the occupier. The reference to warnings and discouragements in subsection (5) and the use of the words "some protection" in subsection (3)(c) both demonstrate that the duty is not as onerous as the claimant argues. Warnings can be disregarded (as was the case here); discouragements can be evaded; the trespasser may still be injured (or injure himself) while on the premises. There is no guarantee of safety any more than there is under the 1957 Act. The question remains what is it reasonable to expect the occupier to do for unauthorised trespassers on his land. The trespasser by avoiding getting the consent of the occupier, avoids having conditions or restrictions imposed upon his entry or behaviour once on the premises. By definition, the occupier cannot control the trespasser in the same way as he can control a visitor. The Acts both lay stress upon what is reasonable in all the circumstances. Such circumstances must be relevant to the relative duties owed under the two Acts.

74. Returning to the facts of this case, what more was it reasonable to expect of the defendants beyond putting up the notices and issuing warnings and prohibitions? It will not have escaped your Lordships that the putting up of the notices prohibiting swimming is the peg which the claimant uses to acquire the status of trespasser and the benefit of the suggested more favourable duty of care under the 1984 Act. But this is a case where, as held by the judge, all the relevant characteristics of this mere were already obvious to the claimant. In these circumstances, no purpose was in fact served by the warning. It told the claimant nothing he did not already know. (*Staples v W Dorset* [1995] PIQR 439, *Whyte v Redland* (1997) EWCA Civ 2842, *Ratcliffe v McConnell* [1999] 1 WLR 670, *Darby v National Trust* [2001] PIQR 372.) The location was not one from which one could dive into water from a height. There was a shallow gradually sloping sandy beach. The bather had to wade in and the claimant knew exactly how deep the water was where he was standing with the water coming up to a little above his knees. The claimant's case is so far from giving a cause of action under the statute that it is hard to discuss coherently the hypotheses upon which it depends. There was no danger; any danger did not arise from the state of the premises; any risk of striking the bottom from diving in such shallow water was obvious; the claimant did not need to be warned against running that risk; it was not reasonable to expect the occupier to offer the claimant (or any other trespasser) any protection against that obvious risk.

75. Faced with these insuperable difficulties and with the fact that they had failed to prove the pleaded case, counsel for the claimant put the argument in a different way. They pointed to the internal reports and minutes disclosed by the defendant councils. Passing over a minute of 22nd November 1984 which under the heading "Swimming" accurately stated

> "Probably as a result of the larger notice boards the problems of swimming were no worse than in previous years and perhaps marginally better. Every reasonable precaution had now been taken, but it was recognised that some foolhardy persons would continue to put their lives at risk.",

they referred to an undated report of some time in 1992 concerning swimming in the mere. It reported many instances of swimming during hot spells with up to 2,000 people present and as many as 100 in the water. It referred to the popularity of the extensive beach areas with families where children paddled and made sand castles and groups picnicked, adding "not unnaturally many [people] will venture into the water for a swim". The "hazards" pointing to the likelihood of future problems were stated to include "lakeside grassy picnic area". The recommendations were directed at the beach areas: "Suggest cutting down on beach area by increasing reed zones".

"Signs should indicate the nature of the hazard e.g. 'Danger - Water 5m. deep'. It is clear that accidents such as that suffered by the claimant were not in the writer's mind. Other similar reports are referred to in the Opinion of my noble and learned friend Lord Hoffmann and it is otiose to quote from them again.

76. In July of the same year a departmental memorandum referred to the council's policy to stop all swimming. It therefore called upon the council to engage on a scheme of landscaping to make "the water's edge to be far less accessible, desirable and inviting than it currently is for children's beach/water's edge type of play activities". The solution called for was to remove or cover over the beaches and replace them by muddy reed beds. Part of the reasoning was that with attractive beaches "accidents become inevitable" and "we must therefore do everything that is reasonably possible to deter, discourage and prevent people from swimming or paddling in the lake or diving into the lake." An estimate of cost was asked for.

77. Funds were short but in 1994 a request for finance was presented. It was based upon the public's disregard of the embargo on bathing in the lake despite having "taken all reasonable steps" to educate the public. The request states that "we have on average three or four near drownings every year and it is only a matter of time before someone dies". "If nothing is done about [the landscaping] and someone dies the Borough Council is to be held liable and would have to accept responsibility." This was the nub of the claimant's case. The situation was dangerous. The defendants realised that they should do something about it - remove the beaches and make the water's edge unattractive and not so easily accessible. They recognised that they would be liable if they did not do so. This reasoning needs to be examined.

78. The first point to be made is that the councils were always at liberty, subject to the Local Government Acts, to have and enforce a no swimming policy. Indeed this had all along been one of the factors which had driven their management of this park. Likewise, subject to the same important qualification, they were at liberty to take moral responsibility for and pay compensation for any accident that might occur in the park. It is to be doubted that this was ever, so stated, their view. But neither of these factors create any legal liability which is what is in question in the present case. If they mistakenly misunderstood what the law required of them or what their legal liabilities were, that does not make them legally liable.

79. The second point is the mistreatment of the concept of risk. To suffer a broken neck and paralysis for life could hardly be a more serious injury; any loss of life is a consequence of the greatest seriousness. There was undoubtedly a risk of drowning for inexperienced, incompetent or drunken swimmers in the deeper parts of the mere or in patches of weed when they were out of their depth although no lives had actually been lost. But there was no evidence of any incident where anyone before the claimant had broken his neck by plunging from a standing position and striking his head on the smooth sandy bottom on which he was standing. Indeed, at the trial it was not his case that this was what had happened; he had alleged that there must have been some obstruction. There had been some evidence of two other incidents where someone suffered a minor injury (a cut or a graze) to their head whilst diving but there was no evidence that these two incidents were in any way comparable with that involving the claimant. It is then necessary to put these few incidents in context. The park had been open to the public since about 1982. Some 160,000 people used to visit the park in a year. Up to 200 would be bathing in the mere on a fine summer's day. Yet the number of incidents involving the mere were so few. It is a fallacy to say that because drowning is a serious matter that there is therefore a serious risk of drowning. In truth the risk of a drowning was very low indeed and there had never actually been one and the accident suffered by the claimant was unique. Whilst broken necks can result from incautious or

reckless diving, the probability of one being suffered in the circumstances of the claimant were so remote that the risk was minimal. The internal reports before his accident make the common but elementary error of confusing the seriousness of the outcome with the degree of risk that it will occur.

80. The third point is that this confusion leads to the erroneous conclusion that there was a significant risk of injury presented to the claimant when he went into the shallow water on the day in question. One cannot say that there was no risk of injury because we know now what happened. But, in my view, it was objectively so small a risk as not to trigger s.1(1) of the 1984 Act, otherwise every injury would suffice because it must imply the existence of some risk. However, and probably more importantly, the degree of risk is central to the assessment of what reasonably should be expected of the occupier and what would be a reasonable response to the existence of that degree of risk. The response should be appropriate and proportionate to both the degree of risk and the seriousness of the outcome at risk. If the risk of serious injury is so slight and remote that it is highly unlikely ever to materialise, it may well be that it is not reasonable to expect the occupier to take any steps to protect anyone against it. The law does not require disproportionate or unreasonable responses.

81. The fourth point, one to which I know that your Lordships attach importance, is the fact that it is not, and should never be, the policy of the law to require the protection of the foolhardy or reckless few to deprive, or interfere with, the enjoyment by the remainder of society of the liberties and amenities to which they are rightly entitled. Does the law require that all trees be cut down because some youths may climb them and fall? Does the law require the coast line and other beauty spots to be lined with warning notices? Does the law require that attractive water side picnic spots be destroyed because of a few foolhardy individuals who choose to ignore warning notices and indulge in activities dangerous only to themselves? The answer to all these questions is, of course, no. But this is the road down which your Lordships, like other courts before, have been invited to travel and which the councils in the present case found so inviting. In truth, the arguments for the claimant have involved an attack upon the liberties of the citizen which should not be countenanced. They attack the liberty of the individual to engage in dangerous, but otherwise harmless, pastimes at his own risk and the liberty of citizens as a whole fully to enjoy the variety and quality of the landscape of this country. The pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of the citizen. The discussion of social utility in the Illinois Supreme Court is to the same effect: *Bucheleres v Chicago Park District* 171 Ill 2d 435, at 457-8.

82. I cannot leave this case without expressing my complete agreement with the reasoning of the judgment of Lord Phillips, the Master of the Rolls, in *Donoghue v Folkestone Properties* [2003] 2 WLR 1138.

83. For these reasons and those given by my noble and learned friend Lord Hoffmann, and in agreement with the judgment of Longmore LJ, I too would allow this appeal.

LORD SCOTT OF FOSCOTE

My Lords,

84. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann. Subject to one reservation I am in complete agreement with the reasons he gives for allowing this appeal. But I find myself in such fundamental disagreement with the approach to

this case by the majority in the Court of Appeal that I want to add, also, a few comments of my own.

85. My reservation is that the Act which must be applied to the facts of this case in order to decide whether the Council is under any liability to Mr Tomlinson is, in my opinion, the Occupiers' Liability Act 1957, not the 1984 Act.

86. The 1957 Act regulates the duty of care which an occupier of premises owes to visitors to the premises (section 1(1)). "Visitors" are persons who would, at common law, be invitees or licensees (section 1(2)). The 1984 Act, on the other hand, applies to persons on the premises who are not visitors but are trespassers. It lays down the criteria for deciding whether the occupier of the premises owes any duty of care at all to the trespasser in question in relation to the type of injury he has suffered (section 1(3)). If a duty of care is owed, the Act describes the duty (section 1(4)).

87. Mr Tomlinson's case against the Council is based on an alleged breach of the duty of care they owed him. There is no doubt at all that he was a visitor at the Park. The Park was open to the public and he was entitled to be there. Wearing the shoes of a visitor, he was owed the duty of care prescribed by the 1957 Act.

88. The notices prominently displayed at various places in the Park forbade swimming in the lake. But entry into the water was not forbidden. Visitors to the Park were entitled to paddle and splash in the shallows of the lake. Many did so, particularly children. They were entitled to run into the water and splash one another. They were entitled to lie in the shallows and let the cool water lap over them. In doing these things they were visitors and were owed the 1957 Act duty of care. All they were forbidden to do was to swim. If they had started swimming, using the lake for a purpose which was forbidden, they would have lost their status as visitors and become trespassers. The 1984 Act would then have applied.

89. Mr Tomlinson did not suffer his tragic accident while swimming in the lake. He ran into the water and, when the depth of the water was at mid thigh level, executed the disastrous "dive" and suffered the accident. At no stage did he swim. It may be that his "dive" was preparatory to swimming. But swimming in water not much above knee level, say 2 feet 6 inches deep, is difficult. There might be some element of flotation but I do not think the activity would normally justify the use of the verb "swim". In any event, Mr Tomlinson's injury was not caused while he was swimming and cannot be attributed in any way to the dangers of swimming. His complaint against the Council is that the Council did not take reasonable care to discourage him while in the shallows of the lake from executing a "dive". If the "dive" was, which I regard as doubtful for the reasons given, a preliminary to an attempt to swim, the complaint may be regarded as a complaint that the Council failed to prevent him from becoming a trespasser. But this must necessarily, in my view, have been a duty owed to him while he was a visitor.

90. An analogous situation might arise in relation to the trees in the Park. Suppose there were notices forbidding the climbing of trees. Nonetheless a visitor to the Park climbs a tree, falls from it, injures himself and sues the Council. He would have been a trespasser vis-à-vis the tree. But a claim under the 1984 Act would be hopeless. The proposition that the Council owed him a duty to make the tree easier or safer to climb would be ridiculous. But the injured climber might contend that the presence of the tree posed an enticing, exciting and irresistible challenge to those visitors to the Park who, like himself, were addicted to the adrenalin surge caused by climbing high trees and that, consequently, the Council owed a duty to make it impossible for him, and others like

him, to succumb to the temptation, to prevent him from becoming a trespasser vis-à-vis the tree. This duty, if it were owed at all, would be a duty owed to him, a visitor, under the 1957 Act. The contention would, of course, be rejected. The Council's 1957 Act duty of care to its visitors would not require the trees to be cut down or the trunks and lower branches to be festooned with barbed wire in order to prevent visitors to the Park from disobeying the notices and turning themselves into trespassers by climbing the trees. For present purposes, however, the point I want to make is that the climber's contention would engage the 1957 Act, not the 1984 Act.

91. In the present case it seems to me unreal to regard Mr Tomlinson's injury as having been caused while he was a trespasser. His complaint, rejected by the trial judge but accepted by the majority in the Court of Appeal, was that the Council ought to have taken effective steps to discourage entry by visitors into the waters of the lake. The notices were held to be inadequate discouragement. But, if there was this duty, it was a duty owed to visitors. The people who read the notices, or who could have read them but failed to do so, would have been visitors. These were the people to be discouraged. The alleged duty was a 1957 Act duty.

92. The Council's duty under the 1957 Act to its visitors was a duty "to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted .... to be there" (section 2(2)). The purpose for which visitors were invited or permitted to be in the Park was general recreation. This included paddling and playing about in the water. The proposition that in order to discharge their 1957 Act duty to visitors the Council had to discourage them from any entry into the water and, in effect, to prevent the paddling and playing about that so many had for so long enjoyed is, in my opinion, for the reasons so cogently expressed by Lord Hoffmann, wholly unacceptable. There was no breach by the Council of its 1957 Act duty. The question whether it owed any 1984 Act duty did not, in my opinion, arise. If, wrongly in my opinion, the 1984 Act were to be regarded as applicable, the case would be a fortiori.

93. There are two respects, in my opinion, in which the approach of the courts below to the facts of this case have been somewhat unreal. First, the action of Mr Tomlinson that brought about his tragic injury has been described as a "dive". I think it is misdescribed. A dive into water, as normally understood, involves a hands-arms-head-first movement from a standpoint above the water down into the water. A dive is dangerous if the depth of the water is unknown for the obvious reason that if the depth is inadequate the head may strike the bottom of the pool or the lake before the diver is able to check his downwards trajectory and curve out of the dive. There had, apparently, been two previous occasions over the past five years or so on which a person diving into the lake had suffered head injuries. The evidence did not disclose the details but it seems reasonable to assume that these occasions had involved dives properly so-called. Mr Tomlinson did not execute a dive in the ordinary sense. He ran into the lake and, when he thought he was far enough in to do so, he threw himself forward. His forward plunge may, for want of a better word, be called a "dive" but it should not be confused with the normal and usual dive. Mr Tomlinson was not diving from a standpoint above the lake down into water of uncertain depth. His feet were on the bottom of the lake immediately before he executed his forward plunge. He knew how deep the water was when he began the plunge. He must have expected the downward shelving of the bottom of the lake to continue and there is no evidence that it did not. The accident happened because the trajectory of his forward plunge was not sufficiently shallow. This was not a diving accident in the ordinary sense and there was no evidence that an accident caused in the manner in which Mr Tomlinson's was caused had ever previously occurred at the lake.

94. Second, much was made of the trial judge's finding that the dangers of diving or swimming in the lake were obvious, at least to adults. No one has contested that finding of fact. But I think its importance has been overstated. Mr Tomlinson was not diving in the normal sense, nor was he swimming. He simply ran into the water and when he could not run any further, because the water was above his knees and the galloping action that we all adopt when running into water on a shelving beach had become too difficult, he plunged forward. This is something that happens on every beach in every country in the world, temperature and conditions permitting. Mr Tomlinson would not have stopped to think about the dangers of swimming or diving in the lake. He was not taking a pre-meditated risk. It would not have occurred to him, if he had thought about it, that he was taking a risk at all. He was a high spirited young man enjoying himself with his friends in a pleasant Park with a pleasant water facility. If he had set out to swim across the lake, it might have been relevant to speak of his taking an obvious risk. If he had climbed a tree with branches overhanging the lake and had dived from a branch into the water he would have been courting an obvious danger. But he was not doing any such thing. He was simply sporting about in the water with his friends, giving free rein to his exuberance. And why not? And why should the Council be discouraged by the law of tort from providing facilities for young men and young women to enjoy themselves in this way? Of course there is some risk of accidents arising out of the joie de vivre of the young. But that is no reason for imposing a grey and dull safety regime on everyone. This appeal must be allowed.

Source: http://www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd030731/tomlin-1.htm

Risk and the State
Prime Minister Tony Blair
Institute of Public Policy Research
May 26, 2005

In eight years as Prime Minister, I don't know that you accumulate much wisdom, but you certainly accumulate experience. I want to talk today about a particular problem my experience has led me to identify. It is an issue that seems more of a talking point than an issue of policy; that has many different facets to it; that is little discussed in the way I'm about to discuss it; but which, on the basis of my experience, if it goes wrong, has the capacity to do serious damage to our country.

It is what I call a sensible debate about risk in public policy making. In my view, we are in danger of having a wholly disproportionate attitude to the risks we should expect to run as a normal part of life. This is putting pressure on policy-making, not just in Government but in regulatory bodies, on local government, public services, in Europe and across parts of the private sector - to act to eliminate risk in a way that is out of all proportion to the potential damage. The result is a plethora of rules, guidelines, responses to 'scandals' of one nature or another that ends up having utterly perverse consequences.

First of all, let my argument itself not lose its sense of balance.

Health and safety legislation is necessary to protect people at work. Food standards are necessary to protect people from harm. Protections are necessary for children from the danger of predatory adults. These are things against which, historically, the state has underwritten the risk. The pooling of such risks is still the fundamental basis of our case for publicly funded public services.

Workplace fatalities have fallen by around two-thirds since the 1970s. Higher environmental standards have helped deliver cleaner air and water. Since 1990 sulphur dioxide emissions have fallen by 75% and water pollution fell by 65% in the 5 years to 2001.

And not every new regulation has the detrimental consequences that are claimed for it. The National Minimum Wage did not lead to millions of job losses, as some had predicted but helped over 1 million low paid workers. In fact, Britain compares favourably with its competitors on regulation. As the OECD and the IMF have recently said, the UK is very lightly regulated by international standards.

But something is seriously awry when teachers feel unable to take children on school trips, for fear of being sued; when the Financial Services Authority that was established to provide clear guidelines and rules for the financial services sector and to protect the consumer against the fraudulent, is seen as hugely inhibiting of efficient business by perfectly respectable companies that have never defrauded anyone; when pensions protection inflates dramatically the cost of selling pensions to middle-income people; where health and safety rules across a range of areas is taken to extremes. Europe has

done itself more damage through what is perceived as unnecessary interference than all the pamphlets by Eurosceptics could ever do.

The development of new science adds a different dimension to the problem.

'Science' is often taken to be a synonym for 'certainty'. So, when a scientist admits to uncertainty it can often be taken as an admission that there is probably a problem. In fact, in the scientific world ambiguity, uncertainty, the wisdom that comes with failing and changing your mind, are all essential to progress. Often there is no obvious right or wrong answer. The most likely outcome changes all the time, in response to new evidence.

This is a major challenge both to politicians and the media. The structure of political combat tends to invite certainty, or at least a show of certainty, when that idiom is entirely inappropriate for discussing fine-grained risks and the balance of probability. There are trade-offs, dilemmas, balances between costs and benefits in every decision. Unless we find a viable way of discussing these risks a mature national conversation on important policy questions like GM science will be impossible.

So, for example, one piece of research into a supposed link between autism and the MMR single jab, starts a scare that, despite the vast weight of evidence to the contrary, makes people believe a method of vaccination used the world over, is unsafe. The result is an increase in risk to our children's health under the very guise of limiting that risk.

And before we all just complain about the regulators, the public servants or indeed the Government, let us just pause for a moment in sympathy. A civil servant or regulator who fails to regulate a risk that materialises will be castigated. How many are rewarded when they refuse to regulate and take the risk?

Bodies set up to guard the public interest have one-way pressures. It is in their interest never to be accused of having missed a problem. So, it is a one-sided bet. They will always err on the side of caution.

It seems to be part of the DNA of regulatory bodies that they acquire their own interests and begin to grow. Max Weber famously noted the tendency of bureaucracies to tidiness.

Today, a lot of this is reinforced by what arises from Europe. About 50% of regulations with a significant impact on business now emanate from the EU. And it often seems to want to regulate too heavily without sufficient cause. The EU vitamins directive is a good example. There may be a case for ensuring the public are properly informed and that some rules and order are brought to what is today a major industry. But the way it has been done is wholly out of proportion to the risks run.

Then there are the legal claims. People are entitled to sue. And often the most outlandish cases that are brought are dismissed. But their headlines live on, create a myth and the myth is acted upon.

Here in Britain, whatever the actual state of the so-called compensation culture, the perception of it and the effects of that perception are real. In England in 2003 there were between 7 and 10 million pupil visits on school trips. Sadly, there was one fatality. But only one.

Between 2000 and 2005 the overall number of accident claims fell by 5.3%. Over the same period, accident claims against local authorities, schools, volunteering organisations and other public sector bodies fell by 7.5%. In 2000, the cost of litigation in the UK as a percentage of GDP was less than a third of that in the US. Tort costs in the UK in 2000 were 0.6% of GDP. This is the lowest of any developed nation except Denmark.

But the facts too often do not prevail. You may recall the stories of the girl who sued the Girl Guides Association because she burnt her leg on a sausage or the man who was injured when he failed to apply the brake on a toboggan run in an amusement park.

Neither of these cases produced big compensation awards in the courts. But this is not the impression that is left. The headlines have an after-life. They leave behind the sense that, not only are such cases being brought all the time, but that huge sums of money are being wasted.

This impression, in turn, has genuine effects. Public bodies, in fear of litigation, act in highly risk-averse and peculiar ways. We have had a local authority removing hanging baskets for fear that they might fall on someone's head, even though no such accident had occurred in the 18 years they had been hanging there. A village in the Cotswolds was required to pull up a seesaw because it was judged a danger under an EU Directive on Playground Equipment for Outside Use. This was despite the fact that no accidents had occurred on it.

And in case we think we alone are subject to this, countless examples can be found even in the most 'open market' economies. The response of the US Congress to the Enron and Worldcom scandals shows what governments can do wrong. In 2002 the Sarbanes-Oxley Act was, in the words of The Economist, 'designed in a panic and rushed through in a blinding fervour of moral indignation'.

The point about Sarbanes-Oxley was not that the underlying problems it was addressing were not real. It was quite right to put some distance between a company's auditors and its managers, between whom a severe conflict of interest had arisen. The problem was that the Act was not limited to the remedy of that specific defect.

Inspired by the need for Congress to be seen to do something dramatic, Sarbanes-Oxley has imposed the threat of criminal penalties on managers and substantial new costs on American business: an average of $2.4m extra for auditing for each company. The burden is especially heavy on smaller companies, the real risk-takers in the market. Firms with a revenue of less than $100m per annum now pay out more than 2.5% of turnover in compliance costs. Cumulatively the costs run into billions of dollars.

There is a delicious irony in this which illustrates the unintended consequences of regulation. Sarbanes-Oxley has provided a bonanza for accountants and auditors, the very professions thought to be at fault in the original scandals.

Behind all of this, the big examples and the small, there is something new here. The pace of change in the world can be bewildering and breeds insecurity. Recent advances in science - from the human genome project to the work on cloning - seem to come along at a rate and on a scale unknown to previous generations. Business is more globally competitive than it has ever been. With these new opportunities come new risks, new dilemmas.

A natural but wrong response is to retreat in the face of this change. To regulate to eliminate risk. To restrict rather than enable. But we pay a price if we react like this. We lose out in business to India and China, who are prepared to accept the risks. We are unable to exploit our scientific discoveries. We seek protection from risks that are exaggerated or even imagined. We allow the conspiracy theorists to dictate the argument without a basis in fact.

Likewise in more mundane areas of public service the idea that it is the job of Government to elimitate risk can lead to the elimination of common sense. In her book The Moral State We're In, Julia Neuberger claims that, if an old person falls on the floor, the regulations currently decree that the care worker cannot help them to their feet. They have to go and find some hoists before they can help. No doubt, most care-workers help anyway but if basic human acts of care like this are being prevented by intrusive regulation, it is absurd. We cannot guarantee a risk-free life.

So what to do? First, recognise the problem. Some public discussion of it helps engender a more sensible debate. Instead of the 'something must be done' cry that goes up every time there is a problem or a 'scandal', we make it clear we will reflect first and regulate only after reflection. Second, start to roll back the tide of regulation in specific areas: here, in Europe, in respect of the regulatory bodies themselves. Third, replace the compensation culture with a common sense culture.

Fourth, start a proper, serious debate with the media about how some of these issues are addressed and how the public is better informed.

Here are the practical steps we will take as a Government.

Better regulation will be a central theme of the UK Presidency of the EU later this year. The Commission has produced an action plan on better regulation which includes commitments to impact assessments for all new measures in 2005. These assessments enable us to have a proper debate about the costs and benefits of proposed measures. For example, we have so far reduced the costs of the proposed Chemicals Directive by £6bn and we want to go further. We will also continue to resist attempts to remove the opt-out from the Working Time Directive. We are taking this work forward in the context of the

Presidency initiative with Holland, Ireland, Luxembourg, Austria and Finland to deliver better regulation in Europe.

When we assume the Presidency of the EU next month, we want to go further. Our priorities for the Presidency will include:

- Working to ensure that comprehensive impact assessments are undertaken for all new EU legislation
- Further proposals for the simplification of EU regulations
- Improving the consultation process in Europe to ensure there is an effective dialogue with business and other interested parties. This will be the theme of a major conference we are hosting in Edinburgh in September.
- Consulting on applying a risk-based approach to the UK's implementation of the financial services action plan.

Domestically, we are tackling gold-plating and over-zealous enforcement. We recently published revised guidelines for the transposition of European legislation into UK law to ensure that the UK implements EU laws in the clearest and least burdensome way possible. This guidance establishes the principle that transposed UK laws should mirror, as closely as possible, the wording of the original EU directive. It also puts in place more checks and balances against over-implementation.

We are also committed to putting into effect the recent Hampton and Arculus reviews of regulation. As the Chancellor of the Exchequer announced this week, when he launched the Better Regulation Action Plan, risk is the governing concept in all the changes we will introduce to reduce regulatory burdens on business. We will implement the reforms recommended by the Hampton Review, such as fewer regulatory bodies and risk-based enforcement by local authorities.

In July 2005 we will begin consultation on the Better Regulation Bill which will contain statutory requirements for regulators to use a rigorous risk-based approach and powers to reform penalties acccording to risk-based principles.

We will also implement the recommendations made by the Better Regulation Task Force to reduce administrative burdens and toughen up the scrutiny of new measures by using the principle of "one in-one out". There is a clue in the name - this principle means simply that we need to look for a regulation to be removed when new measures are introduced.

We are also acting to ensure that public sector entrepreneurs are not discouraged by unecessary interference. Inspection has been an important part of the way we have improved standards in public services but inspection needs to evolve to reflect that success. Crucially, modern inspection, as David Bell of OFSTED has been arguing, needs to be proportionate to the risks faced. We announced in the Budget that we will create four new inspectorates to replace the current eleven. The new inspectorates will be actively charged with ensuring those doing well get a light touch approach.

The new Compensation Bill will do two things. It will limit the work of claims management companies or "claims farmers". Claims farmers capture claims and typically sell them on to solicitors, sometimes having already signed the consumer up for a package of insurance. Many claims farmers indulge in high-pressure selling and aggressive marketing including approaching vulnerable people in public places, such as hospitals. Many consumers have been misled into making claims where their cases are weak.

The Bill will also clarify the existing common law on negligence to make clear that there is no liability in negligence for untoward incidents that could not be avoided by taking reasonable care or exercising reasonable skill. Simple guidelines should be issued. Compliance should avoid legal action. This will send a strong signal and it will also reduce risk-averse behaviour by providing reassurance to those who may be concerned about possible litigation, such as volunteers, teachers and local authorities.

We can also act to ensure that, when valid cases are brought, they are settled quickly. The big lesson from public consultations is that what the public frequently demand is not direct personal compensation. They want to know that, where something has gone wrong, lessons have been learnt and that the same mistake won't be made in the future to someone else. So, wherever possible, we want claims settled informally and quickly, without going to court.

The NHS Redress Bill will give quicker redress to patients earlier in the process for low monetary value clinical negligence cases. The Bill will allow for compensation but it will offer a real alternative to litigation and avoid the delays and costs that are part of the current system. It will ensure greater consistency in the way claims are dealt with across the NHS.

These are sensible, practical, proposals for specific defects in the system. But we cannot pretend that by itself legislation is the answer.

We also need a far more rational, balanced and intelligent debate as to how 'risk' is debated. Not every 'scandal' requires a regulatory response. Bad people will find a way round the law no matter how good the law is. Spending hundreds of millions of pounds to reduce the risk to zero may be a foolish way of prioritising expenditure.

We struggle with the aftermath of BSE - incidentally spending still hundreds of millions of pounds on the OTMS. We nearly got Sudan B completely out of proportion.

And as science becomes ever more far-reaching, it is time to have a proper dialogue about how science and its risks are evaluated and reported. Bio-technology is probably the coming industry of the world. Britain and Europe should be world leaders. We are in grave danger of blowing our chance. If we do, we will rue it bitterly. We need calm, considered debate about technology, science and risk. Government has a clear responsibility here: to be open, to provide the evidence we have, not to overclaim.

The media have a responsibility. MMR is one example. The present debate on mobile phones is another. We only narrowly avoided massive expenditure on SARS.

We need to involve the media in a better dialogue about risk. To that end, I have asked John Hutton to invite newspaper and broadcast editors to discuss with the Chief Medical Officer and the Government's Chief Scientist the best and most appropriate forum for ensuring that risk is communicated effectively so that the maximum information can be put into the public domain with the minimum of unnecessary alarm.

We need to involve the public more directly. In our manifesto we made a commitment to explore innovative ways of engaging with the public, particularly on matters of scientific uncertainty. There are already some good examples of public consultation which will improve the quality of decision making and increase the public appreciation of the risks involved.

- The National Institute for Clinical Excellence (NICE) has established a Citizens' Council to discuss the value judgements that underlie medical decisions.
- The Environment Agency has on-going public discussions about flood risk and coastal defences
- The new Genetics Knowledge Parks have been charged with engaging the public properly in discussions about the benefits of their research.

We should understand the nature of the decisions we take together, have a mature, reasoned debate between government, experts and people; a conversation between adults taking responsibility for the risks they face.

So: there needs to be a proper and proportionate way of assessing risk and the response to it. Government cannot eliminate all risk. A risk-averse scientific community is no scientific community at all. A risk-averse business culture is no business culture at all. A risk-averse public sector will stifle creativity and deny to many the opportunities to be creative while supplying a few with compensation payments.

There is usually a seductive logic to any new regulation. There is almost always a case that can be made for each specific instrument. The problem is cumulative. All these good intentions can add up to a large expense, with suffocating effects.

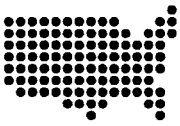
Sometimes, we need to pause for a moment and think whether we will not do more damage with a hasty response than was done by the problem itself. We cannot respond to every accident by trying to guarantee ever more tiny margins of safety. We cannot eliminate risk. We have to live with it, manage it.

Sometimes we have to accept: no-one is to blame.

Such an approach is easy to state; hard to do.

But at least if we start to debate the problem, there is a chance we can begin addressing it.

Source: http://www.number-10.gov.uk/output/Page7562.asp



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The Modern Transformation of Civil Law

George L. Priest*

This paper addresses the transformation of civil law that began in this country roughly around the mid-1960s changing a legal system that intervened in the lives of citizens only on occasions of serious moral dereliction into the most extensive and powerful regulatory mechanism of modern society. Prior to the 1960s, civil law served a modest role in U.S. affairs. It enforced property rights and policed boundary disputes through property law, enforced promises as well as disclaimers of liability through contract law, and provided damages for personal injury through negligence law (tort law) where an individual was injured by an egregious breach of standards of normal behavior. Though the negligence standard proved loose enough to allow substantial subsequent expansion, prior to the 1960s courts employed that standard only where a party had shown clear moral culpability substantially antagonistic to social norms. Standards determined by private contract were far more significant with respect to the determination of the obligations of citizens.

Since the 1960s, however, our civil law has changed dramatically. Contract law, property law, and especially personal injury law have been transformed both in function and effect. The transformation occurred neither through some sudden change in legal doctrine nor through legislative statute or popular referendum. Instead, it occurred through the triumph of a set of ideas: the acceptance by the judiciary of the proposition that civil damage judgments can serve as the most effective public policy instrument for regulating the level of harm suffered by citizens in the society.

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* John M. Olin Professor of Law and Economics, Yale Law School. I have studied this subject for many years. See generally, Priest, The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law, 14 J. Legal Studies 461 (1985); Priest, Strict Products Liability: The Original Intent, 10 Cardozo L. Rev. 2301 (1989); Priest, The New Legal Structure of Risk Control, 119 Daedalus 207 (1990); Priest, The Culture of Modern Tort Law, 34 Valparaiso L. Rev. 573 (2000). This paper draws variously from this work.

It is surely not coincidental that the outset of the transformation of civil law was roughly contemporaneous with the creation of various federal regulatory agencies charged with controlling levels of harm, such as the Occupational Health and Safety Administration (created in 1971), the Environmental Protection Agency (1970), the National Highway Traffic Safety Administration (1970), and the Consumer Product Safety Commission (1972). In many respects, however, the transformation of civil law developed in ways that gave it a far more ambitious and extensive regulatory authority than any of these agencies. All regulatory agencies have limited budgets and, as a consequence, are constrained to thresholds of concern. Thus, even agencies with broad authority—such as OSHA or EPA—can effectively regulate the decisions of only a limited number of corporations. Other regulatory agencies—such as NHTSA—possess jurisdiction over only a single industry (auto manufacture).

Our modern civil justice system, in contrast, aspires to regulate the sources of harm with respect to all activities of the society. Our civil courts can entertain the question of whether a victim should receive compensation from the party that caused it harm as long as it is economically worthwhile for a person feeling victimized to initiate litigation. And all of such claims will be entertained. Indeed, to perfect the system, the incentives for initiating litigation have themselves been enhanced by various statutes awarding attorneys' fees and shifting litigation costs as well as by expansive notions of "harm", for example by awarding damages for medical monitoring to individuals who only suspect or fear that they have been harmed. As a result, our courts today employ civil damage judgments to regulate all activities implicating harm, made within every industry, indeed, by every citizen. Through the daily aggregation of civil damage judgments (or the settlement of lawsuits informed by expected judgments), our courts provide fine-tuned control of all societal behavior.

How did this transformation of civil law come about?[1] In the 19th and early 20th Centuries, the basic doctrines of civil law remained generally stable. Yet, there was serious debate in the legal academy as well as in the public policy community generally over the role of civil law with respect to harms suffered in the society. An important initial step in the transformation of civil law occurred in the early years of the 20th Century when civil law was abandoned as a mechanism for dealing with injuries suffered by workers during the course of their employment. The adoption by state legislatures of worker compensation statutes during the period roughly 1907-1915—creating mandatory employer insurance programs—represented the rejection of both tort law and contract law as means of regulating the sources of worker injuries.

Prior to the establishment of workers' compensation insurance, injured workers could seek recovery against their employers in tort law where they could show employer negligence as a cause of the injury. Employers could defend such claims, however, by showing that the worker had been contributorily negligent, that the worker had assumed the risk of injury, or that the worker's injury resulted from the negligence of a fellow worker, according to what is called the fellow-servant doctrine. Workers could sue their fellow workers for negligence, but recovery was not likely to be substantial given workers' limited resources. Thus, it became widely accepted that tort law was largely ineffective in providing recovery to injured workers, and tort law was rejected as a mechanism for recovery. In its place, workers' compensation statutes compelled employers to provide insurance for worker injuries and, at the same time, prohibited workers from suing employers in tort.

Though somewhat less sharply, workers' compensation insurance also represented a rejection of contract law as a mechanism for dealing with injuries. Few believed that workers, individually, were able to negotiate safer working conditions, and only a small portion of the

[1] For a more thorough account of this history, see Priest, The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law, 14 J. Legal Studies 461 (1985) (hereafter, "Priest, Invention"). Priest, Strict Products Liability: The Original Intent, 10 Cardozo L. Rev. 2301 (1989).

working class was unionized. In addition, the concept of compensating wage differentials was not widely understood. Contract law, therefore, was not an answer. To the contrary, employer-provided insurance was necessary if workers were to receive compensation for injuries.

Besides serving the ambition of increasing payments to injured workers, workers' compensation insurance came to be justified by a concept that derived from economics: the concept of internalizing costs.[2] According to this concept, if a party engaging in some activity fails to take into account the full costs that the activity generates, the party is likely to engage in more of the activity than is appropriate for the society. Where the costs are injury costs, there will result higher levels of injurious activities and thus larger numbers of injuries than societally appropriate. If injury costs are internalized, however, the party causing the harm will be led to prevent losses where possible and otherwise to readjust its activity level to reduce the aggregate number of injuries. Compelling employers to provide insurance for all injuries suffered by workers during the course of employment serves to internalize the costs of worker injuries to employers.[3]

The adoption of workers' compensation programs was widely praised in the legal academy. Indeed, some academics thought the concept so meritorious that they sought to extend such insurance programs more broadly, to provide compensation for all injuries suffered in the society. Fleming James was a prominent promoter of this idea.[4] The ambition of James and others to have enacted general societal accident insurance, however, never found success. First, a general social insurance program is a program, basically, of socialism, to which there was deep

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[2] See A. C. Pigou, Wealth and Welfare (1912); Pigou, The Economics of Welfare (1920).

[3] By contrast, failing to compensate workers for their injuries, say, by enforcement of the common law tort defenses of contributory negligence, assumption of risk or the fellow-servant doctrine, serves to internalize worker injury costs to the workers themselves. Many years later, Ronald Coase would show that, with respect to activity levels, internalizing injury costs to workers will have economic effects equivalent to internalizing those costs to employers. This profound idea, however, remains foreign to the debate today. Ronald H. Coase, The Problem of Social Cost, 3 J. Law & Economics 1 (1960).

[4] James' work is described in more detail in Priest, Invention, supra.

political opposition. (Note that even during the New Deal, insurance programs were established only with respect to particular risks—such as crop insurance, savings and loan insurance, and Social Security.[5]) Secondly, general social insurance is at heart inconsistent with the internalizing costs rationale. General social insurance is not self-contained as is insurance for workplace injuries. To provide general insurance for injuries does not serve to internalize costs to the specific activities that generated the injuries. General social insurance would provide compensation to injured parties—sufficient grounds for support to James and others—but it would not serve to create incentives for reducing the accident rate.

Faced with the failure of their social insurance proposals and with no serious prospect of future success, many academics pressed for the expansion of civil law as a means of providing broader compensation to injured parties. James, again, was the most prominent toward this end. In a set of roughly fifty articles, James urged the expansion of tort liability in all of its forms and the restriction of available defenses, moving toward a standard of absolute liability.

For many years, James' advocacy had little effect. An opening wedge appeared, however, in the early 1960s with regard to the subject of manufacturer liability. Until the 1960s, recovery for injuries resulting from product use was chiefly determined by contract law. Contract law allowed the specific purchaser of the product to recover according to the terms of the express product warranty or of the implied warranty of merchantability. Recovery was available to the specific purchaser and, generally, only to the specific purchaser, because that person was the only party to the contract of sale (a legal doctrine known as privity of contract). Virtually all product warranties at the time, however, disclaimed liability for any personal injury associated with use of the product.[6] Thus, according to contract law and the terms of product contracts, there was no recovery for personal injury.

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[5] Franklin Roosevelt justified Social Security as providing protection for the "risk of old age".

[6] The central warranty remedy then (as now) was repair and replacement if a product were found to be defective. There are good economic reasons for manufacturers to disclaim liability for personal injury—

There had been some concern about the operation of these contract doctrines prior to the 1960s, but it remained chiefly academic. Some few jurisdictions recognized an action in negligence by a victim not a party to the contract. MacPherson v. Buick[7] was decided in 1916, but it extended negligence liability only to manufacturers of products regarded as "imminently dangerous", and only where it could be shown that the purchaser or an intermediate dealer would not inspect the product for defects. Over the four decades that followed MacPherson, some jurisdictions extended the scope of the negligence doctrine, in particular to cases involving spoiled foodstuffs, although the jurisdictions were far from unanimous. Thus, through the late 1950s and early 1960s, defective product cases were controlled by contract law with its privity requirement and, to a substantially lesser extent, by negligence law.

This was to change, however, and change dramatically in the early 1960s and 1970s first in the then-limited field of product liability. In my judgment, there were two conceptual forces leading to this change. The first was the delegitimation of contract law—in particular, warranty law—as a means for dealing with product injuries. The second was the growing belief that the expansion of tort liability in the context of personal injuries could have beneficial effects on the society.

The delegitimation of contract law followed from the work of another law professor, Friedrich Kessler.[8] Kessler was a German scholar who had fled the Hitler regime to the United States. Kessler had no specific interest in product-related injuries. His attack on contract law was far more expansive. Kessler believed that fundamental changes had occurred in the character of Western economies that deeply threatened democratic societies and the individual freedoms that had been achieved in modern times. Kessler attributed these social changes to the "decline of the

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chiefly because manufacturer-provided insurance is a very poor insurance mechanism—though these reasons were never articulated at the time. See Priest, A Theory of the Consumer Product Warranty, 90 Yale L. J. 1297 (1981).

[7] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (Ct. App. 1916).

free market system,"[9] which he saw as a consequence of "the innate trend of competitive capitalism toward monopoly."[10] Kessler's criticism of the capitalistic world was quite pointed. He described the modern industrial culture as a form of fascism. "The rise of fascism in our industrial world has made us realize that democratic freedom is not inevitable."[11] According to Kessler, single firms are now able "to control and regulate the distribution of goods from producer all the way down to the ultimate consumer."[12]

Quite curiously, Kessler saw the principal mechanism for this new means of fascist control to be contract law. The formation of "large industrial empires" had been made possible by contract and by standardized contracts in particular.[13] Standardized contracts—such as insurance policies or consumer product warranties—were the equivalent of the forms of bondage typical of the feudal era. According to Kessler, "[s]tandard contracts . . . [have] become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals."[14]

Kessler's most influential article with respect to the transformation of modern civil law is the classic "Contracts of Adhesion—Some Thoughts about Freedom of Contract". The article presents a moral narrative that contrasts the ancient to the modern, the good to the evil, the redeemable to the unredeemable that possesses a persuasive power that continues to command acceptance today. Kessler contrasts a "society of small enterprisers, individual merchants and

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[8] Kessler's work is described in detail in Priest, Invention, supra.

[9] Friedrich Kessler, Natural Law, Justice and Democracy—Some Reflections on Three Types of Thinking about Law and Justice, 19 Tulane L. Rev. 32, 33 (1944) (hereafter, "Kessler Natural Law").

[10] Friedrich Kessler, Contracts of Adhesion—Some Thoughts about Freedom of Contract, 43 Colum. L. Rev. 629, 641 (1943) (hereafter, "Kessler, Contracts of Adhesion").

[11] Kessler, Natural Law at 33.

[12] Kessler, Contracts of Adhesion, at p. 632.

[13] Id.

[14] Id. at 640.

independent craftsmen" for whom 19th Century contract law was designed, with large-scale enterprise and monopoly capitalism characteristic of modern times. Freedom of contract may have had meaning in the earlier world. Today, however, the prototypical modern contract is a standardized form employed by enterprises with strong bargaining power against weaker parties—consumers—in need of necessary goods and services. Modern contracts are contracts of adhesion that consumers must take or leave without ever understanding their terms at all. In this context, the enforcement of contract terms according to the principle of freedom of contract serves only to protect "the unequal distribution of property."[15]

The second principal conceptual force toward the transformation of civil law was the insistence by James and others that an expansion of tort liability would substantially improve social welfare. James, as mentioned, was principally concerned with providing compensation to injured parties. He supported general social insurance and, in its absence, the expansion of tort liability to achieve that end. His ambition was valuably aided, however, by judicial opinions that focused more sharply on the positive societal gains from expanded tort liability.

Judicial acceptance of the broader role of tort law toward these ends first appeared in 1944 in California Supreme Court Justice Roger Traynor's concurring opinion in Escola v. Coca Cola Bottling Co.[16] Traynor's opinion sets forth the grounds for the strict liability standard for product defects that later was adopted by the California Supreme Court and virtually all other states. The case was simple. A waitress at a restaurant was moving some bottles of soda pop when one of them exploded, injuring her. (The context of the incident was never made clear. The California Supreme Court, and Traynor, approached the issue as if the bottle exploded spontaneously. Whether the waitress dropped the bottle, hit the bottle against something, or stumbled and fell was not present before the Court.) The majority of the California Supreme

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[15] Id. at 640, 632.

[16] 24 Cal. 2d 453, 150 P.2d 436 (1944).

Court also found the case simple: they invoked the tort doctrine of res ipsa loquitur (roughly, the event speaks for itself) to hold that, despite the terms of any contractual arrangement between the distributor and the restaurant (in fact, the Court did not even discuss the contractual arrangement), the manufacturer should be liable because Coke bottles should not explode.

Justice Traynor's concurrence was more subtle and more policy oriented. He concurred with the Court's finding of liability, but provided deeper grounds for the appropriateness of shifting the costs of the waitress's injury to Coca-Cola. Traynor embraced a theory of strict liability in tort of the manufacturer. Strict liability was to be distinguished from negligence liability—in which the victim has to show that the defendant committed some negligent act. Traynor analogized the strict liability standard to the standard of res ipsa loquitor: if there is something defective with respect to the product, the manufacturer is to blame. That analogy, however, important for many courts in the future, was not Traynor's principal point. Traynor argued that there were important social grounds to extend liability to manufacturers for product-related injuries. First, such liability would lead manufacturers to invest to prevent product-related injuries in the future. Second, tort liability, resulting in the payment of compensatory damages to injured consumers, would provide a form of insurance to the injured that could be passed along in the product prices paid by all consumers. The expansion of tort liability, thus, would—like workers' compensation insurance—serve to internalize injury costs to the firms that generated them. In 1944, however, Traynor's concurrence was only a concurrence, and received little notice, though that would later change.

These ideas—contract law is perverted by market power, and tort law is a means of encouraging investments in accident prevention and insurance for resulting losses—transformed modern civil law. The first applications, again, were in the products liability field. In 1960, in the case Henningsen v. Bloomfield Motors, Inc., the New Jersey Supreme Court marked the effective end of the relevance of contract law in defective product actions involving personal

injury.[17] The decision repudiates the basic principles of contract law applicable to product defect cases. Henningsen involved an action brought by the wife of the purchaser of a car, injured when the car veered off the road without an adequate explanation, though there was testimony suggesting a mechanical defect. Even putting aside the privity of contract problem, the automobile manufacturer's warranty provided only for repair or replacement of any defective part and disclaimed implied warranties that might extend liability further, including to personal injury damages. The New Jersey Supreme Court held that the privity doctrine as well as the express disclaimer of implied warranties were invalid as a matter of law—quoting from and relying heavily on Kessler's "Contracts of Adhesion". According to the Court, contract law should not be read to "authorize the automobile manufacturer to use its grossly disproportionate bargaining power to relieve itself from liability . . . An instinctively felt sense of justice cries out against such a sharp bargain."[18] The Court held that Mrs. Henningsen could recover under the Court's interpretation of the implied warranty of merchantabilty.

The permanent shift from contract to an expanded tort law as the basis for the resolution of product defect claims occurred in 1963 in the California Supreme Court decision in Greenman v. Yuba Power Products.[19] The case involved personal injury from an allegedly defectively designed machine tool.[20] The manufacturer-defendant believed that its strongest defense was the failure of the victim to provide notice of the alleged breach of warranty within a reasonable time. The strict notice requirement of contract law, however, had been flagged as illustrative of the outdated character of warranty law in many treatments of the product defect question, including those by James and a scholar writing in a similar vein, William Prosser. In Greenman, it seemed

[17] 32 N.J. 358, 161 A. 2d 69 (1960).

[18] 32 N.J. at 404, 388, 161 A. 2d at 95, 85.

[19] 59 Cal. 2d 57, 377 P. 2d 897, 27 Cal. Rptr. 697 (1963).

[20] The product was a wood lathe in which a piece of wood being turned had detached and injured the plaintiff. The Court gave no attention as to whether Mr. Greenman had fastened the piece of wood adequately prior to turning on the lathe.

to trigger the final acceptance by a majority of the California Supreme Court of Traynor's strict liability argument first presented nearly two decades earlier in Escola.

In Greenman, the court, in a Traynor opinion, announced the standard of strict liability in tort, applicable to a manufacturer whenever "an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." The purpose of strict liability, according to the court, "is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[21] For a further elaboration of justifications of strict liability, the reader was referred to James, Prosser and Traynor's concurring opinion in Escola.

Henningsen and Greenman were important moments in the transformation of civil law. One further event, however, vastly accelerated the transformation by jurisdictions skittish of the cutting edge. In 1964, the American Law Institute adopted Section 402A of its second Restatement of Torts, which extended strict liability to sellers of all products defective and unreasonably dangerous without regard to the seller's fault. The Reporter of the Restatement, William Prosser,[22] represented to the Institute that 16 separate jurisdictions had adopted strict liability or some standard resembling it, citing 40 different cases. This was blatant exaggeration. A rereading today shows that there were only three cases actually supporting Prosser's recommendation: Henningsen, Greenman, and a 1963 New York decision, Goldberg v. Kollsman Instrument Co.[23] But Prosser's recommendation was sufficient for the Institute, and the Institute's adoption of the strict liability standard was sufficient for the various states to adopt the

[21] 59 Cal. 2d. at 62, 63, 377 P. 2d 900, 901, citing Henningsen.

[22] James and Traynor, among others, were Advisers to Prosser on the Restatement project.

[23] 12 N.Y. 2d 432, 191 N.E. 2d 81 (N.Y. 1963).

standard as well. Within a little more than a decade following the Institute's adoption of the strict liability standard, forty-one of fifty jurisdictions had adopted the rule.

As mentioned, the change in the legal standards regarding product liability was only an opening wedge in the more general transformation of modern civil law though, surely, a significant wedge. The broader transformation of the law resulted from the extension of the underlying ideas that had motivated the change in products liability, first, to all other areas of civil law and, second, conceptually by the acceptance of the proposition that civil law could serve as a mechanism for regulating all risks faced by the society.

First, although the strict liability standard itself has been limited to the products field, the concept of cost internalization that underlies it has been extended across the various fields of civil law. Thus, the internalization policy has been extended to justify awarding damages in pollution cases,[24] in sexual harassment cases,[25] and in false arrest, malicious prosecution and Section 1983 civil rights violation cases,[26] among others. In these various contexts, as with product manufacture, it appears evident to which party costs should be internalized: to the manufacturer rather than the consumer; similarly, to the polluter, to the party harassing the victim, and to the official committing misconduct.

The second extension of the concept involved its application to contexts in which it is less clear to which party costs should be internalized. In contexts such as these, extension of the

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[24] E.g., Atlas Chem. Indus., Inc. v. M.P. Anderson, 514 S.W. 2d 309, 316 (Tex. Civ. App. 1974) ("the costs of injuries resulting from pollution must be internalized by industry as a cost of production and borne by consumers or shareholders, or both, and not by the injured individual.")

[25] Horn v. Duke Homes, 755 F.2d 599, 605 (7th Cir. 1985) ("[G]oods produced by the entrepreneurs who do not assume the costs of remedying a tort (in this case sexism) are artificially cheap; forcing them to internalize the costs of the tort regardless of fault, eliminates incentives to be sexist and insures proper allocation of societal resources.")

[26] Dobson v. Camden, 705 F.2d 759, 765 (5th Cir. 1983) ("If the person contemplating an action will reap the benefits but will not pay the costs, we have no assurance that the socially correct decision will be made. . . . Cost internalization provides us with a mechanism for reaching the correct level of deterrence for official misconduct. If people acting under color of state law know that they will bear the consequences of their actions, they will be deterred from violating a person's federal rights, but will not be over-deterred. The 'correct' level of deterrence will be established.")

cost internalization concept requires consideration of losses viewed as risks attending the activity in question. Thus, all losses suffered in the society represent the outcome of some probabilistic process. The actions of one party or another can be viewed as contributing to the probability of occurrence of a loss, arrayed upon a continuum from losses the probability of which is 100 percent—intentionally caused harms—to losses the probability of which is zero.

With this extension, the basic foundation of civil law is transformed into controlling risks through cost internalization. The question before the court becomes which party to the litigation is in the best position to control the risk of loss. Again, in many contexts—such as product manufacture—it may seem obvious which party is in the superior position to control risks.[27] In other contexts, however, determining which party is in the superior position to bear the risk of loss from the activity is more complicated and requires a seemingly more sophisticated analysis of the relative abilities of the parties before the court to prevent or to bear those risks.

The adoption of risk control as the central purpose of civil law shifts sharply the focus of legal controversy in each of its various subfields. In the field of contract law, for example, contract litigation only a few decades ago turned chiefly on differing interpretations in terms of standard English of the provisions of underlying written contracts. In modern contract litigation, in contrast, the issues have been completely reoriented around the question of risk. The fact that some change in underlying conditions led one of the parties to breach the contract is only the beginning of the inquiry. The issue before the court is which party should bear the risk of the change in conditions that impelled the breach. Today, courts summon sophisticated theories of economics and risk bearing to determine whether it is more consistent with the long-term interests of the parties to assign the risk of the specific change of conditions that animated the breach to the breaching party or to the victim of the breach itself.

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[27] In fact, from an economic point of view, this conclusion—though embraced in modern civil law—is not so obvious. See, Priest, The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform, 5 J.Econ. Perspectives 31 (1991).

Similarly, in earlier years the law of corporations and of mergers and acquisitions was defined almost exclusively by the terms of corporate documents. Today, the papers of incorporation are often treated as only other obstacles that must be surpassed as part of the analysis of how to allocate risks that affect corporate ownership and structure. In recent highly publicized litigation involving mergers and acquisitions, for example, the issue before the court is whether the market for corporate control will be facilitated by assigning the risk and the commensurate benefits of some novel method of hostile takeover to current shareholders, to current management, or to the corporate raiders who have initiated the struggle.

The development of risk control as the central function of civil law has been most prominent in fields involving personal injury. As in other fields, this development has led to an extensive redefinition of legal issues. In cases involving claims of medical malpractice, for example, modern litigation extends far beyond the earlier relatively simple inquiry into whether the doctor was morally culpable for breaching standards of community practice. In the most sophisticated malpractice litigation today, the issue is one of risk and its control: Did the attending surgeon have sufficient control over the determinants of the risk of the medical maloccurrence to justify liability, or should that risk be assigned to supporting physicians or to the hospital vicariously through a judgment against its staff?

An important implication of the adoption of risk control as the principal function of civil law is that issues of motive and volition central to the legal regime that prevailed until the 1960s are rendered largely irrelevant. In modern contract law, for example, the decision of a party to intentionally breach a contract has little legal significance. It is acknowledged that the risks are omnipresent that changes in conditions will occur that might unsettle contracts and, thus, that it is inevitable that some contracts will be breached. The role of a court, as a result, is no longer to punish breach of contract, but to allocate between the parties the risks of such changes in underlying conditions. Similarly, though in earlier years it was necessary to demonstrate that a manufacturer had acted with bad motives or had behaved recklessly or negligently, such issues

today are largely ignored. The concern of the courts has extended beyond specific bad motives to the broader risks of product injury. Thus, a manufacturer may have organized its production process with deep humanitarian concern for the welfare of its consumers, but if the company has miscalculated the risks and benefits of safety design, liability will follow immediately.

Many believe the derogation in civil law of issues of motive and volition as indicating a decline in commitment to individual responsibility or, perhaps, a shift of expectations toward an impersonal or a collective responsibility. The shift in standards of law may indirectly have that effect as citizens revise their expectations of the ultimate consequences of misoccurrences that afflict them. But I believe that the stimulus for the shift toward risk control as the central purpose of civil law is different and that it did not derive from a diminished conviction of the importance of individual responsibility.

The legal regime that prevailed from the 19th Century through the mid-1960s functioned chiefly by categorizing certain actions that generated loss as so particularly extreme or egregious as to deserve liability for any harm that resulted. Actions subject to legal liability were those for which there was a dramatically greater chance than normal that loss would result. According to this regime, prototypical candidates for liability were harms caused intentionally and those close to the intentional because of the high likelihood of injury.

Resolving disputes according to the standards of risk control is entirely different and implies vastly different methods of legal analysis. A property law whose focus is boundary disputes, a contract law whose focus is breach of promise, and a personal injury law whose focus is serious moral dereliction are each regimes in which the law defines a clear demarcation between acts subject to liability and acts immune from it. If the property line is transgressed, a trespass action will follow. If the contract is not performed, or if the injurer is morally culpable, damages will follow.

According to this earlier conception of the role of civil law, there are certain clear actions for which liability will apply, but equally clear sets for which liability is unavailable. Indeed,

there are large sets of injuries suffered by property owners, parties to contracts, and injured victims that not only do not justify liability, but do not justify even judicial scrutiny. For example, under such a regime, a consumer injured by a product who cannot show that the product was intentionally or recklessly mis-manufactured or who cannot show clear moral negligence in the manufacturing process cannot recover damages. From the standpoint of the law, the product-related injury remains one of life's hazards to be suffered as best as possible according to the victim's resources, but without reference to the legal system. As another example, if a farmer promised to provide a broker 1,000 bushels of corn but because of drought can only provide 500, the farmer has breached the contract and must pay damages to the broker for the remainder. According to the law, the farmer must suffer the loss because it was the farmer, not the broker, who promised to deliver the corn.

This is not to suggest that the earlier regime was totally indifferent to conditions generating losses. If the probability of injury from product use were exceptionally high, the law could conclude that the manufacturer should have known of the product danger and find the manufacturer liable despite its claim of ignorance. Similarly, if the drought itself were so extreme that it prevented the farmer from delivering any of the 1,000 bushels, the law could relieve the farmer by rescinding the contract by finding it impossible to perform. Nevertheless, the method of analysis under the regime, even in these examples, was one of comparing the extremity of the factual context of the loss to some standard of normal or expected behavior.

According to this approach, some actions differ so dramatically from the normal—reckless manufacture or breach of contract—that legal liability is justified. Legal analysis under such a regime consisted of categorizing acts as either qualifying as sufficiently abnormal to justify liability or not. Obviously, intentional harm-causing actions justified liability. Beyond the intentional, unusually egregious actions may have justified liability. In almost all other cases, however, liability was unavailable, and the law allowed the loss to lie where it had fallen.

The adoption of risk control as the central goal of civil law rejects this categorical method of legal analysis. A law concerned with risk perceives losses as occurring probabilistically, with greater or lesser likelihood. Actions become subject to potential legal liability if they increase the occurrence of loss by some sufficient amount.

This shift does not reject, but builds upon, the liability of the previous regime. Losses caused intentionally or that are especially egregious remain subject to liability *a fortiori*. The frontier of liability, instead, is extended to disputes involving actions that increase the probability of loss by some dimension, though they may not make the loss inevitable or even highly likely. Thus, a manufacturer is made responsible for avoiding more than recklessly or egregiously negligent production methods; the manufacturer must monitor all potential sources of product risk and will be held liable whenever a risk eventuates that the manufacturer could readily have controlled. Thus, manufacturers of automobiles are routinely held liable for failing to design safety features in autos that would protect even drunk drivers from injuries resulting from the accidents they cause.

Similarly, liability for breach of contract induced by a drought will turn not on the simple issue of whether it was the farmer or the broker who breached the promise. Rather, the breach of promise is viewed as a probabilistic outcome of the drought. The issue in the case shifts to the question of the appropriate assignment of the risk of drought: Is it better to allocate the risk of drought to the individual farmer, locked into the specific climatic position of the farm, or to the broker, who can diversify drought risk by entering contracts with geographically disparate farmers?

A law concerned with risk control rejects a discrete demarcation between actions regarded as extreme and those regarded as normal. All actions can be arrayed on a continuum of contribution toward loss. Thus, central concepts of causation are changed dramatically. The earlier regime that imposed a sharp distinction between particularly extreme sources of harm and all others was necessarily committed to a very strict conception of causation. Actions were

subject to liability for causing harm chiefly if they constituted the sole or exclusive source of the harm. In contrast, our modern civil law, devoted to risk control, focuses less upon strict causation than upon contribution to the occurrence of the harm. Some action may generate liability because of its contribution to the risk of occurrence, though it was only one of many simultaneously contributing sources of the loss.

The new regime of risk control thus vastly expands the opportunity for the attachment of legal liability as well as the importance of civil law as an instrument of social control. Many decry what they perceive as the increased litigiousness of modern society. But the level of litigiousness is only a function of the underlying legal rules in force. Our modern civil law encourages litigation as an instrument for internalizing costs to control risks. Because in our society intentionally or egregiously caused harms are infrequent, the earlier legal regime that focused only upon such harms was a regime of very limited scope. In contrast, our modern legal regime, focused upon every contribution to risk, is a regime of dramatically greater dimension. Such a regime aspires to impose legal controls on all activities in the society that contribute to risk in any way. Thus, virtually every action by every citizen becomes subject to potential legal review because every action will increase the risk of some loss in some way.

To my mind, far from incorporating a diminished view of individual responsibility, the shift of the law's purpose toward risk control represents a vastly expanded commitment to standards of individual liability, though expanded liability is somewhat different than enhanced individual responsibility. Under the new regime, an individual may be held liable not only for intentionally or maliciously harmful behavior, but for all behavior that increases the risk of loss, though the loss itself may be remote. Under earlier law, an individual needed to make certain only that his or her actions caused no direct injury to another individual. Under modern law, in contrast, an individual must make certain that his or her actions do not increase the risk of loss in any way. Thus, for each citizen, the potential of civil liability is vastly increased. The law charges each citizen to carefully monitor every action for its potential contribution to risk of loss.

From the standpoint of the control of risk, it is difficult to define a truly solitary act—an act that does not in some way implicate risks to others. The gardener spraying plants or the recluse reading silently before the fireplace may not be subject to liability personally for the increase in the collective social risk from pesticides or particulates, but will suffer the attachment of liability as pesticide or firewood prices rise or as the society proscribes such enjoyments directly. It is equally difficult in a society concerned with risk to truly shield or isolate oneself from others. The gardener's yield will be affected by the acidity of the rain, just as book prices will reflect the shift to acid-free paper. The centrality of risk effectively prevents all efforts of social escape.

Beyond increasing the scope of individual responsibility, the regime of risk control dramatically changes the substantive content of that responsibility. The focus of modern law on risk control diminishes the importance of moral standards in the evaluation of harm-causing activities. It is no longer useful in such a regime to distinguish between the guilty and the innocent or the culpable and the blameless. Almost every human action will increase the probability of some loss by some amount; empirically, it would be extremely rare for an action to contribute zero toward the probability of occurrence of all losses in all contexts. It follows, therefore, that under the modern conception of risk, no action is ever truly innocent. Each of us must recognize that all of our actions are likely to harm others in the society in some way. As a consequence, every citizen stands in a position of continuous potential interaction with the law since every action is potentially subject to liability. Indeed, each of us must be aware that many of our specific actions may well lie close to the point on the risk continuum at which the attachment of legal liability becomes socially worthwhile.

Once it is accepted that all actions can be arrayed at some point upon the risk-contribution continuum, sharp moral distinctions lose moment. It is no longer possible to clearly separate the moral quality of one's personal actions from the quality of the actions of others. On the risk-contribution continuum, there are no clear qualitative differences between actions

whatsoever; all actions contribute something to risk. The only question is the extent of the contribution.

The decline in the importance of moral standards as grounds for comparing loss-contributing actions, however, should not be interpreted to suggest that our new legal regime of risk control lacks moral foundation. The moral foundation of the new regime is relentlessly utilitarian. The objective of controlling risk as effectively as possible prevails over all else. Civil law serves to internalize costs, first, to create incentives to reduce the risk level as much as is practicable placing liability on that party in the relatively better position to prevent it. Second, if the injury could not have been practicably prevented, liability will be placed on that party in the relatively better position to spread the risks of the injury as if an insurer.

The adoption of these two utilitarian principles of risk control has subtly changed the nature of modern adjudication. Modern trials have been transformed from disputes between individuals to occasions for judicial social engineering. In earlier days, the function of adjudication was to resolve specific controversies between often embittered parties. In such cases, the particular moral qualities of the parties or of their actions were of central importance, as issues of motive and goodwill were crucial. In modern litigation, in contrast, the court must evaluate, not how one individual or another behaved in a moment of crisis, but whether one party or another, as representatives of generic categories of actors, was in a better position to prevent injuries or to spread the costs of them. In litigation of this nature, the qualities of the actual litigants become irrelevant because the issue before the court is how best to fashion incentives for parties in such positions in the future. An obstetrician and a nurse-midwife may have dedicated their lives to serving others; in the incident before the court, they may have exerted great effort to help the injured child and suffered as deeply as the parents over the subsequent injury. But if the court determines that the risk of injury was within their control, that it was affected in any way by some technical decision made or ignored, or that the two professionals or their insurers were in

the best position to spread such injury costs, liability for a lifetime of losses may be placed upon them.

In modern adjudication, the dispute between the specific litigants is of secondary, even trivial, importance to the exercise. The concern of the courts is how best to fashion broader incentives to maximize social welfare. The parties themselves and the loss one of them has suffered become mere informational inputs to the process of judicial revision of controlling rules of law. The legal claim serves only as an empirical example of a social problem for which a more specific legal rule defining behavior is needed. Frequently in modern litigation, the parties are unwitting instruments of this broader judicial purpose. But increasingly in recent years, the adversarial character of litigation has become pretended rather than real. The requirements of procedure compel the parties to defend contesting positions. Yet often the litigants and their attorneys play out their roles, not as hostile adversaries, but as characters, knowing that the drama being staged serves only to determine which of their insurers should foot the bill.

The new purpose of the law has led courts to adopt many novel and interesting rules that seem bizarre from the vantage point of earlier years. An example is the 1982 decision of the New Jersey Supreme Court in Beshada v. Johns-Manville, a relatively early case in the transformation of civil law.[28] The case involved a claim by a worker that an asbestos manufacturer should be liable for damages because the manufacturer had failed to warn the worker that asbestos could cause cancer. The manufacturer sought to defend the claim by proving that, at the time the worker contracted cancer, it was not known and could not have been known scientifically that asbestos causes cancer. More perceptive of the contours of our modern regime, the plaintiffs challenged the defense as irrelevant as a matter of law. The court concurred, holding that the manufacturer was liable for breaching its duty to warn the worker that asbestos causes cancer

[28] 90 N.J. 191, 447 A. 2d 539 (1982).

though the court accepted that, at the time of the breach, it was impossible scientifically to have known that asbestos causes cancer

The notion of liability for breach of a duty with which it was impossible to comply seems to strain the most basic notions of responsibility. But responsibility in a regime of risk control has a very unusual meaning. According to the court, the manufacturer should be liable for the loss for two reasons. First, the decision improved incentives for accident avoidance: "By imposing on manufacturers the costs of failure to discover hazards, we create an incentive for them to invest more actively in safety research." Second, regardless of the information available at the time of injury, holding the manufacturer liable will serve to distribute the risks of product injuries broadly, because manufacturers can include expected injury costs in the prices of their products. Responsibility under the regime of risk control, thus, can mean a responsibility imposed ex post facto to reduce or to spread the risks of injuries.[29]

Many disapprove of the contours of modern civil law. But can those contours be changed? In my judgment, it is fanciful to imagine a return to the categorical analysis of civil law that prevailed until the 1960s. In retrospect, that legal regime was simplistic. There is a probabilistic character to all societal losses. All societal activities do implicate risks that some individuals will be harmed in some way.

The concept of internalizing costs to address those losses, however, can be substantially sharpened. As suggested earlier, Ronald Coase explained now forty years ago that, with respect to activity levels, injury costs are always internalized. Civil law is not needed to achieve the

[29] The Beshada opinion generate substantial criticism, and the New Jersey Supreme Court limited its scope to asbestos cases in Feldman v. Lederle Labs, 97 N.J. 429, 479 A. 2d 374 (1984). Several other jurisdictions, however, have adopted the approach.

economic effect.[30] The question that remains is whether and how aggregate social welfare can be enhanced by shifting injury costs, which is to say, by changing the method of cost internalization.

Many have shown that employing civil law to provide insurance is counterproductive. Civil law may continue to possess a role, however, in creating incentives to directly reduce accident rates. Perhaps oddly, despite over forty years of experience with the expanded liability created by modern civil law, there are no empirical studies that have demonstrated that the expansion of liability has reduced the level of harm. Of course, there are strong market forces that generate greater levels of safety. No one has been able to show that legal liability serves to increase safety further.

Still, it remains possible that expanded liability enhances safety and thus that civil law can serve a regulatory role. It is an entirely separate question whether that regulation is sensibly administered through our adversarial process with the final decision delegated to lay juries, selected intentionally because their members know nothing about the subject before them. Put differently, we cannot imagine a regulatory agency such as, say, NHTSA setting standards for auto safety based upon the presentation of a claim by a single seriously injured individual with respect to that person's single accident, delegating the ultimate decision to laypersons.

Our modern regime of civil law, nevertheless, remains deeply entrenched both in terms of economic interests (note the to-date successful efforts of the trial bar and the unions to thwart the rejection of civil law with respect to asbestos-related injuries) and in popular conception. To change that legal regime in a serious way will require a substantial demonstration of the harms that it causes.

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[30] Although Coase's article is widely known and universally accepted, this point remains not fully understood even among economists. For a prominent example, see Steven Shavell, Strict Liability Versus Negligence, 9 J. Legal Studies 1 (1980), discussed in Priest, Internalizing Costs (forthcoming).

How Did We Get Here? What Litigation Was, What It is Now, What It Might Be

By Stephen B. Presser[1]

Introduction: Law and Litigation on a Pernicious Precipice

In America, litigation is now a multi-billion dollar business.[2] This country has more lawyers as a percentage of the population than any other – a fact which is now notorious[3] – but less well understood is that our current civil justice system is not at all the way it used to be. We hardly blink at multi-billion dollar verdicts in class actions against corporations, and it is now common place for state attorneys general to seek million or billion dollar settlements against whole industries, an undertaking that New York Attorney General Spitzer, for example, has perfected to a high art. The suggestion that I will make here is that this is a departure from our heritage, and a marked change in

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[1] Raoul Berger Professor of Legal History, Northwestern University School of Law, Professor of Business Law, Kellogg School of Management, Legal Affairs Editor, Chronicles: A Magazine of American Culture, Member, Common Good Advisory Board.

[2] See, e.g. http://www.insurancejournal.com/news/national/2004/09/13/45775.htm: "Today, the average family of four pays a $3,236 annual "tort tax," a cost added to the price of products and services needed to cover the costs of litigation. No other industrialized country reportedly pays more as a percentage of its Gross Domestic Product." (American Tort Reform Association's estimate, quoted on September 13, 2004). With the United States Population estimated at about 300, 000,000, this would work out to be 242.7 Billion dollars.

[3] See, e.g., http://www.answers.com/topic/lawyer:

> The United States Department of Labor's Bureau of Labor Statistics estimates that in 2001, there were 490,000 practicing lawyers in the U.S.
> It is frequently said that there are more lawyers per capita in the US than in any other country in the world.. . . .

the perception of what civil justice was supposed to be all about. Our English common law heritage was that lawsuits were supposed to be about settling intractable disputes between private parties about private rights, but the lawsuit, and particularly the class action, has now become more of an effort for wholesale vindication of purported constitutional or statutory policies.[4]

Our boast used to be that ours was a government of laws not men,[5] but the prejudices of particular litigants, the cooperation of complacent judges, and the misunderstandings of regulators and legislators have undermined what we used to have. Instead of a government of laws designed to protect the property and civil rights of individual citizens we may now have institutionalized lawsuit oppression and redistribution through the civil justice system. Instead of a civil justice system concerned with the preservation of individual liberty, and, in particular the liberty of entrepreneurs who furthered the economic well-being of society, we now have a civil justice system in which entrepreneurial actors can never be certain that they can avoid ending up as defendants in unpredictable lawsuits.[6]

How we got to the pernicious precipice on which we now stand is not an easy thing to discern, as it happened slowly and almost imperceptively as a part of a broader

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[4] For the classic piece discovering a change in the conception of litigation in the twentieth century, see Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1282,1284 (1976) (Contrasting the traditional view of lawsuits as settling private rights with the recent conception of lawsuits as policy-vindicating devices.) See also William Wiecek, The Lost World of Classical Legal Thought: Law and Ideology in America 1886-1937 8 (1998) ("In nineteenth-century law . . . the individual was the exclusive focus of concern in legal, moral, and political reasoning. Lawyers of the time did not think of society as a congeries of groups, which is the assumption of interest-group pluralism that dominates twentieth-century political analysis.")

[5] See, e.g. John Marshall's famous opinion in Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.")

[6] On this lawsuit unpredictability, see, e.g. Philip Howard, The Death of Common Sense: How Law is Suffocating America (1996), and, on related developments in criminal law see, e.g. Gene Healy, ed., Go Directly to Jail: The Criminalization of Almost Everything (2004).

cultural change. Having no monarchy, no aristocracy, and no established church, we Americans have had only our law to bind us together, and, from the beginning, as Toqueville famously observed, the law was a vulgar tongue in this country.[7] Legislation and enlightened judges were early relied on to transform our English common law heritage into a body of doctrines and rules suitable for a young republic,[8] and the constitutional system of checks and balances, federalism, and judicial review in particular were supposed to ensure that the work of legislatures and trial courts did not undermine the protection of life, liberty, and property for which our revolution was fought and our Constitution ratified.[9] It does not go too far to say that the American Revolution ought to be conceived of as Englishmen fighting Englishmen for the rights of Englishmen, for the preservation of the rule of law and the English Common Law's protection of individuals against arbitrary power. The post-revolutionary institutions, and, in particular the federal Constitution ratified in 1789 had as its aim the preservation of the rule of law in general, and of individual liberty and private ownership of property in particular.[10]

Somehow, however, in the second half of the Twentieth Century, these checks and balances, that system of federalism, and the institution of judicial review came loose from their original moorings. The federal government, which had been set up as a means of protecting the rights of Americans, began instead seriously to encroach on them. It had been the early theory of the framers that the state and local governments ought to be the

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[7] I Alexis de Toqueville, Democracy in America (1840, Reeve, tr.), Chapter 31 ("The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that the whole people contracts the habits and the tastes of the magistrate.")

[8] See, e.g. William Nelson, The Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society 1760-1830 (1975).

[9] Probably the best introduction to understanding this conception of the federal constitution is Gordon Wood, The Creation of the American Republic 1776-1787 (reprint ed. 1998).

[10] See generally, Wood, supra, and for a recent brief treatment of this theme see, e.g. John Phillip Reid, Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries (2004).

primary regulators, since the notion was that the government closest to the people would be most responsive to it.[11] From the fourth decade of the twentieth century, however, the administrative agencies spawned in the New Deal, and the federal courts combined to set national policy in a manner that began more seriously to restrict what state and local governments could do, and which rendered private property and individual liberty more precarious.

Expansively interpreting the Fourteenth Amendment and the bill of Rights, the federal courts decided that state legislatures had failed substantially to deliver justice to all, and the federal legislature, federal agencies,[12] and the federal courts subsequently emerged as major policy-makers for the nation.[13] Simultaneously, a significant part of the legal profession, which had formerly seen its role primarily as the preservers of property and the guardians of the civil rights of the citizenry now tended to become advocates against those running publicly-held corporations. Taking advantage of the

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[11] See, e.g. the Tenth Amendment, which provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," giving rise to the notion that the federal government is one of limited and enumerated powers, reserving the others to the state and local governments, those closest to the people. The idea that the government closest to the people was best appears to have been early associated with Jeffersonian Republicans, but most recently it has been embraced by the modern Republican party. See e.g. the remarks of Senator Fred Thompson, made on May 3, 1995:

> I would remind many of my Republican brethren that we ran for office and were elected last year on the basis of our strong belief that the government that is closest to the people is the best government; that Washington does not always know best; that more responsibility should be given to the States because that is where most of the creative ideas and innovations are happening. Whether it be unfunded mandates, welfare reform, or regulations that are strangling productivity, we took the stand that the States and local government should have a greater say about how people's lives are going to be run, and the Federal government less.

141 CONG. REC. S6047 (1995). Quoted in Robert M. Ackerman, "Tort Law and Federalism: Whatever Happened to Devolution?," 14 Yale L. & Pol'y Rev. 429, n.4 (1996).

[12] On the manner in which federal agencies and their regulations can stifle American business, see, e.g. Philip Howard, The Death of Common Sense: How Law is Suffocating America (1994).

[13] There are dozens of works telling the tale of what the federal courts have done since the New Deal to change the nature of the allocation of legal powers among the local, state, and federal governments. My own attempt is Stephen B. Presser, Recapturing the Constitution: Race, Religion, and Abortion Reconsidered (1994). See also Stephen B. Presser & Jamil S. Zainaldin, Law and Jurisprudence in American History (5th ed. 2003).

contingency fee system unavailable in other industrialized nations, plaintiffs' lawyers proceeded to transform the nature of litigation.[14] In order to understand the magnitude of the change it is important to understand what litigation once was, and what it might perhaps once again become.

What Litigation Once Was

Litigation as we now know it did not exist in our colonial past nor in our mother country. It is true that seeking redress through the courts is as old as the beginnings of British North America. The Massachusetts body of liberties agreed to by the colonists of Massachusetts Bay in 1641 provided that there was a "right of every citizen with a grievance to have some court adjudicate it," but the focus was very much on the individual rights of citizens,[15] and not on any group of similarly situated litigants. The common law, our English heritage of following precedents previously laid down, evolved a system of "common law" pleading whereby causes of action were clearly defined, and each one had a designated "writ" that would begin proceedings, and each one had particular pleadings that were to be filed as the proceedings were contested and litigated.

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[14] Walter Olson, The Litigation Explosion 38 (1991) (indicating that contingency fees first arose as a means of ensuring that worthy and impecunious plaintiffs might still be able to gain redress, but that eventually contingency fees encouraged litigation that might well be meritless, but was driven by the possibility that lawyers might make more money.)

[15] To similar effect see III William Blackstone, commentaries on the Laws of England 2 (1768) ("The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined, and wrongs prohibited."), and Id, at 23 "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, but suit or action at law, whenever that right is invaded." See also the Massachusetts Constitution of 1780, Declaration of Rights, Article XI, "Every subject of the Commonwealth ought to find a certain remedy by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character. He ought to obtain right and justice freely, and without being obliged to purchase it; compleatly, and without any denial; promptly, and without delay; conformably to the laws."

It was a maxim that for every wrong there was a remedy at law, but the truth was that there were a myriad of matters that simply were outside the court system. Acts of God, inevitable accidents, sickness, death, and many other matters simply did not give rise to private causes of action. If one's case did not fit in the narrow definitions of trespass, trespass on the case, trover, replevin, assumpsit or the rest, one was simply out of luck.

Rather than seeking to eliminate this specialized system of redress for some, but clearly not all grievances, Americans as diverse as Alexander Hamilton, Thomas Jefferson, Joseph Story, and Abraham Lincoln all praised the wisdom of the common law and wished to preserve it for America, although abandoning the elements of the common law that sustained the English Aristocracy and Monarchy. Those parts of the common law that dealt with what we would now call contracts, property, torts, and civil rights, however, were preserved entire and intact. Thus, in a famous passage in Thomas Jefferson's Notes on Virginia, he reports that when, in 1776, he was assigned the task of suggesting revisions to the law of the new state of Virginia, he wanted to abolish slavery, to diminish the number of crimes that were punished capitally, and to set up an hierarchical public school system, but he wanted to preserve wholesale these parts of the common law of contracts, property, torts, and civil rights[16] (although he objected to the English practice of wearing of wigs in court).

It probably does not go too far to say that the old common law system of pleading, through specialized writs and arcane practices, because it required the assistance of lawyers, was designed to preserve and protect that class, and the

[16] Jefferson describes these as "The Common law of England, by which is meant, that part of the English law which was anterior to the date of the oldest statutes extant," which Jefferson stated was "the basis" of the 1776 revisal of the laws of Virginia. Thomas Jefferson, Notes on the State of Virginia (1781), excerpted in Stephen B. Presser and Jamil S. Zainaldin, Law and Jurisprudence in American History 123 (5th ed. 2003).

obfuscatory character of common law pleading led some Americans even to suggest that lawyers ought not to be a necessary class in our republic.[17] Nevertheless, common law pleading, in some form, persisted until the first third of the twentieth century. One suspects that not only did common law pleading protect and advance the interest of lawyers, but this specialized system, by raising the costs of litigation, and by narrowing the bases for it, actually discouraged going to court. It was originally a mainstay of the Anglo-American legal culture that one should try one's best to resolve disputes out of court, that litigation was something of an evil, [18] and that it ought to be resorted to only if all other means failed. A litigious society was a fractured society, and many Americans valued community enough to erect roadblocks to discourage recourse to the courts. Common law pleading was a part of that, as were the old common law doctrines of champerty and maintenance that punished lawyers who actively stirred up litigation.[19] Indeed, Sir William Blackstone, the greatest Eighteenth Century commentator on the English Common Law, railed against those who promoted litigation, seeking to bargain for what we would now label contingency fees, calling them "the pests of civil society, that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels."[20]

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[17] The most famous such assertion is Honestus [pseud. of Benjamin Austin], Observations on the Pernicious Practice of the Law (Boston, 1819), reprinted in 13 Am. J. Legal Hist. 241 (1969) (Arguing that lawyers are simply not a "necessary order" in a republic.)

[18] See, e.g. Olson, supra note __, at 2, where he observes that litigation in America was originally seen as an evil.

[19] Olson, supra note ___ , at 17 observes that "ambulance chasing," was punished by a 1-3 year jail term as late as 1954.

[20] IV William Blackstone, Commentaries on the Laws of England 135-136 (1769), discussing champerty, "being a bargain with a plaintiff or defendant . . . to divide the land or other matter sued for between them, if they prevail at law," as a species of "maintenance," "an offence [that consists of] officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it."

One of America's greatest lawyer-presidents made a similar point when he wrote, in an apparently undelivered law lecture, that good lawyers should

> [d]iscourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.
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> Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife, and put money in his pocket? A moral tone ought to be infused into the profession which should drive such men out of it.[21]

Code Pleading and Other Changes in Litigation

Somehow all of that began to change in the twentieth century, if not before. As early as the middle of the nineteenth century David Dudley Field (the lawyer who founded the first modern great law firm, Sherman and Sterling) successfully convinced New York legislators to replace the system of common law pleading with "code pleading."[22] This was a simplified procedure, dictated by statute rather than the common law, whereby litigants were no longer bound by the forms of action, but could much more simply state their cases and reply to their adversary's charges. The Field Code of Civil Procedure was adopted in whole or in part in twenty-four other states (and also in

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[21] From a document fragment dated July 1, 1850 by Lincoln's White House secretaries and later biographers, John Nicolay and John Hay, available on the web at http://www.hatwhite.com/lincoln.html.
[22] On Field see, e.g. Henry M. Field, The Life of David Dudley Field (Originally published 1898, reprint ed. 1995), Alison Reppy, ed. David Dudley Field: Centenary Essays Celebrating One Hundred Years of Legal Reform (1949), Daun Van Ee, David Dudley Field and the Reconstruction of the Law (1986).

England and Ireland),[23] but common law pleading lingered well into the twentieth century, and, oddly enough, was still being taught to first-year law students in one civil procedure classes at Harvard in the fall of 1968.[24]

By 1937, however, the pressure to do away with common law pleading was irresistible, and in that year rules were promulgated for the federal courts that obliterated the writ system.[25] These new federal rules, or something like them, were soon adopted by many state courts as well, and the foundation for what Walter Olson has called "the litigation explosion"[26] was beginning to be erected. The notion that lawyers shouldn't encourage litigation was dealt a fatal blow by two key decisions, Bates v. State Bar of Arizona (1977),[27] in which the United States Supreme Court, in an opinion by justice Blackmun, who apparently wanted to encourage lawsuits and deplored the "underutilization" of lawyers' services,[28] held that the First Amendment protected lawyers "commercial speech" rights to advertise the availability and price of routine legal services, and Zauderer v. Office of Disciplinary Counsel (1985)[29], in which the Court permitted lawyers to solicit specific legal business against particular manufacturing defendants.[30]

Decisions such as Bates and Zauderer, and the increased availability of class actions, created a situation in which it was open season on assorted purported corporate

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[23] David Ray Papke, "Codification," in Kermit L. Hall, et.al. eds., The Oxford Companion to American Law 121 (2002).

[24] I know, it was mine, and taught by the great evidence scholar James Chadbourne. His method was to compare the common law forms of action to code pleading and to the federal rules of civil procedure. Contrary to what is implicitly argued in this essay, Chadbourne thought code pleading was a huge advance for the law.

[25] See generally, Stephen N. Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective," 135 U. PA. L. REV. 909 (1987).

[26] Walter Olson, The Litigation Explosion: What Happened When America Unleashed the Lawsuit (1991).

[27] 433 U.S. 350.

[28] Olson, supra note ___, at 29.

[29] 471 U.S. 626.

[30] See generally Olson, supra note ___, at 21, 23-24.

wrongdoers. Litigation, in effect, became a pro-active means of redistribution, if not class warfare. With the rise of "public interest" lawfirms, or private or publicly-funded "legal aid" clinics, groups of lawyers were subsidized not by their potential clients, but by taxpayer or charitable contributions, and, as a result, even more litigation against particularly unfavored corporate or institutional defendants became possible.[31] Lawyers, rather than clients often came to control and encourage litigation. Blackstone and the old common lawyers would have been horrified.

Cultural Change led to Litigation Change

The changes in the nature of litigation undoubtedly were part of much broader cultural changes in this country, cultural changes which accelerated during the sixties and seventies. The story is a familiar one to those of us who lived through it, but since Americans tend to have little appreciation for their history, even their recent history, it may not be amiss to review some of those developments. Probably as a result of the deeply unpopular Vietnam conflict and the nearly contemporaneous Watergate affair (which still captures the imagination of many, as the recent revelation of "Deep Throat" shows) most Americans, and certainly most of what we now call the "mainstream media," appear to have come to believe that government could not be trusted, and that this was also true generally of large purportedly impersonal corporations. Perhaps as a

[31] Cf. Chayes, supra note ___, at 1291, observing that the class action "responds to the proliferation of more or less well-organized groups in our society and the tendency to perceive interests as group interest, at least in very important aspects." See, to similar effect, Olson, supra note ___, at 52-53, concluding that lawsuits were originally understood to be a dispute between two private citizens over private rights, but came to be understood as a tool to liberate people whose rights had been taken away, and to prevent such rights from being taken away in the future.

result of the culture becoming increasingly dominated by the "baby boom" generation, and because that generation was characterized by much less religious and civic commitment than prior generations, and by a rather hedonistic individualism, it is not surprising that the law and legal institutions changed as well. As Americans searched for "self-actualization," as the conservative aspects of the legal profession which discouraged litigation began to erode, and as "public interest" law firms arose to become, as it were, professional plaintiffs, the law itself was eventually dramatically altered.

In particular, it became more and more difficult to argue that those who suffered any kind of harm, especially from use of commercially-manufactured products, were not entitled to compensation from the corporations who manufactured those items. Thus it was that "strict products liability" replaced negligence as the basis for manufacturer's liability to consumers, tenants became more easily able to look to landlords for any injury suffered by renters, and consumers found it easier to escape from contracts by arguing that businesses had taken "unconscionable" advantage of them.[32]

In the nineteenth century, in a period dominated by a culture of self-sacrifice and religious obligation, it may have been believed that limiting the liability of active individuals and organizations eventually redounded to the benefit of all, and by limiting such liability there would be more investment in productive enterprise, which would eventually result in greater overall wealth for the citizenry.[33] These were the days of "laissez-faire" when law and lawyers apparently believed that it was best to leave entrepreneurs substantially alone, and to let the market rather than the state or federal

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[32] For these developments See generally, Presser and Zainaldin, supra note ___, Chapter VII.

[33] For some classic accounts of the story of how Nineteenth Century American law favored the active individual and limited his or her liability, see, e.g. Roscoe Pound, The Formative Era of American Law (1938), James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States (1956) , Morton J. Horwitz, The Transformation of American Law, 1780-1860 (1977).

governments regulate enterprise.[34] New private law doctrines, however, seemed to have been spawned by a legal culture that favored regulation over acquiescence, and redistribution over private enterprise.

These private law developments, principally in the state courts, were the analogues of the public law developments, primarily in the federal courts, which also signaled major cultural change. Thus the Warren Court struck down school prayer and bible riding in the public schools in the states, mandated an end to racial segregation, declared that population was the only permissible basis for elections to either branches of the state legislature (even though the United States Senate itself furnished a glaring argument to the contrary), and dictated the reformation of state criminal procedure in order to prevent police abuse of criminal defendants, many of whom were believed to be members of disadvantaged minorities. Much of this was accomplished through the work of organizations formed at least in part to promote litigation, such as the American Civil Liberties Union (ACLU), and the National Association for the Advancement of Colored People (NAACP). Litigation, formerly a tool of last resort for individuals, now became a first choice method of social transformation for groups. None of this is necessarily to suggest that many or most of these individual decisions did not advance the cause of justice in their particular cases, but, taken together they contributed to a culture in which many more actors were subject to lawsuits, and in which bureaucracy could (even unintentionally) stifle enterprise.[35]

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[34] For some important studies of this period see Morton J. Horwitz, The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy (1994); Arnold M. Paul, Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench 1887-1895 (Peter Smith ed., 1965); William M. Wiecek, The Lost World of Classical Legal Though: Law and Ideology in America 1886-1937 (1998).

[35] For the manner in which adherence to regulations promulgated by state and federal bureaucrats paralyze entrepreneurs, see generally Philip Howard, The Death of Common Sense: How Law is Suffocating America (1995), and for further evidence that the current lawsuit culture has lost its way, see Philip

Where We Are Now

The last few years have seen the culmination of many of these efforts in even more daring judicial decisions, such as those that have found prohibitions in the Constitution against restricting abortions[36] and against punishing consensual homosexual acts,[37] or those that have read the Fourteenth Amendment to require mandatory busing of students to achieve racial balance in the schools,[38] or to permit affirmative action on the basis of race, at least in college and graduate school admissions.[39] All of these were United States Supreme Court decisions, but dramatic decisions in the state courts, such as that of the Supreme Judicial Court of Massachusetts which found in the Massachusetts state constitution a right to gay marriage,[40] were similar in spirit. In the Massachusetts gay marriage case, in fact, the Court relied heavily on the so-called "mystery passage" from one of the United States Supreme Court's abortion decisions, which stated that "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not

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Howard: The Collapse of the Common Good: How America's Lawsuit Culture Undermines our Freedom (2001).

[36] See, e.g. Roe v. Wade, 410 U.S. 113 (1973) (Finding a Fourteenth Amendment right for women to terminate pregnancies, particularly in the first trimester of pregnancy), Planned Parenthood v. Casey, 505 US 833 (1992) (Redifining the constitution's protection for abortions in a manner that prohibited regulations which impose an "undue burden" on a woman's right to terminate pregnancy), Stenberg v. Carhart, 530 US 914 (2000) (In effect removing all abortion regulation, even as to "partial birth" abortions, which did not allow abortions to preserve the "health" of the mother.)

[37] Lawrence and Garner v. Texas. 539 US 558 (2003).

[38] Swann v. Charlotte-Mecklenburg Bd. of Ed. 402 US 1 (1971).

[39] Grutter v. Bollinger, 123 S. Ct. 2325 (2003) and Gratz v. Bollinger, 123 S. Ct. 2411 (2003), read together indicated that while racial quotas were impermissible, considering race as one of many factors used to achieve "diversity" in the classroom was permissible. This was widely perceived as a green light for affirmative action based on race in college and law school admissions. For a critique of the decisions see, e.g. Stephen B. Presser, "A conservative comment on Professor Crump," 56 Fla. L. Rev. 789-817 (2004) (Arguing the arbitrariness and disingenuousness of these decisions).

[40] Goodridge v. Dept. of Public Health, 798 NE2d 941 (Mass. 2003).

define the attributes of personhood were they formed under the compulsion of the state."[41] A more naïve or more extreme statement of hedonistic individualism would be difficult to articulate, and it summed up in few words the legal ethos of the age.

Again, however, it should be noted that the wisdom of the policies favoring abortion, the legalization of consensual homosexual acts, or gay marriage are not the issue addressed here. Instead it is the attitude of the Supreme Court that it should be the ultimate authority on these matters, guided by the philosophy encapsulated in the "mystery passage," and by a sense that it should authoritatively expand and alter the meaning of the Constitution in order to keep it in tune with the times. The mystery passage's philosophy leads to a view of society in which there is little common purpose, and an invitation to litigate against all traditional practices, instead of leaving matters to be worked out on a state-by-state basis through the emergence of a consensus among the people.

The reforms of Rule 23 which led to the class action as we know it were undoubtedly instituted because of a belief that an approach to litigation that enabled groups that had formerly been the subject of discrimination to join in seeking remedies would result in a more just society. Unfortunately, because of all the other cultural factors suggested here, the net effect of current class action practice may be to produce more harm than good.

Once the restrictive characteristics of the forms of action had been abandoned, and once an individualistic philosophy of the kind expressed in the mystery passage had taken hold, it might have been expected that a plethora of new causes of action would be created, and it was only a matter of time before the lawsuit as political tool could come

[41] Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

into being. All that was needed was the abandonment of traditional institutional and cultural restraints on litigating.

This came when the individualistic philosophy of the mystery passage, for most purposes, obliterated an older Athenian or Judeo-Christian ethos, still dominant in the Nineteenth Century, which understood reversals of fortune or accidental bereavement as occasions for spiritual growth, rather than opportunities for seeking redress in the courts. As the federal courts continued to render decisions which all but obliterated the legitimacy of religious expressions in the public square,[42] the restraining character of religion eroded, and the "litigation explosion" occurred.

And thus we have the current situation where plaintiffs' lawyers, in effect, manufacture classes suffering injury, often in an effort to seek settlements for their "nuisance value," rather than actually to recover compensation for purported victims. Similarly, as indicated earlier, we have state attorneys general pursuing actions against whole industries, as has been done, for example, against the tobacco industry, seeking to enhance state revenues through spectacular recoveries, or, as New York Attorney General Eliot Spitzer has done against the Insurance and Mutual Fund industries, to reinforce his political standing and solidify a possible bit for higher office (or so his critics suggest).[43]

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[42] See, e.g., Lee v. Weisman. 505 US 577 (1992) (Holding, by a 5-4 majority, that middle-school graduations could not include a prayer delivered by a clergyman selected by the school), Santa Fe Independent School Dist. v. Doe. 530 US 290 (2000) (Prohibiting, in a 6-3 ruling, school-endorsed student-led prayer at high school football games. Chief Justice William H. Rehnquist, in his dissenting opinion, joined by Justices Antonin Scalia and Clarence Thomas, observed that "even more disturbing than its holding is the tone of the Court's opinion; it bristles with hostility to all things religious in public life. Neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause, when it is recalled that George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God." 530 U.S., at 318.

[43] Attorney General Spitzer recently lost a high-profile case brought against a former Bank of America Corporation broker whom Spitzer accused of improperly trading mutual funds. The Wall Street Journal observed:

In short, litigation conceived as a remedy for the redress of individual grievances has become a political device to be used by ambitious office-holders as well as an instrument of intimidation by ambitious private lawyers.

Some Ameliorative Efforts

There have been some successes in reigning in the bringing of lawsuits and the activities of professional plaintiffs in the securities fraud area, in medical malpractice awards, and in other areas of civil justice reform, but there are still difficulties unique to the American legal system at the moment, and utterly unknown to the common law.

The most prominent of these has already been mentioned; the ability of plaintiffs' lawyers to take on cases on a contingent fee basis, and to advertise for clients, thus generating litigation on their own. Another is that we have not yet adopted the English "loser pays" rule, requiring that successful litigants have their counsel fees reimbursed by the unsuccessful party. Still another difficulty is our extraordinary system of pre-trial discovery, in which depositions, interrogatories, requests for document production, and other means of obtaining evidence from adversaries can easily run the costs of litigation

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> The acquittal is a high-profile setback for Mr. Spitzer, who has made a name for himself while largely avoiding the courtroom. He has extracted multi-million dollar settlements from corporate defendants, forced executives to resign and launched sweeping changes of practices on Wall Street and in the mutual fund and insurance industries. Buoyed by his victories and the cheers of supporters, Mr. Spitzer has announced plans to run for governor in 2006.
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> But critics have complained that he uses tough and headline-grabing tactics to damage businesses, charges he vigorously disputes. . . .

Kara Scannell and Arden Dale, Sihpol Verdict Deals a Blow to Spitzer: In Crucial Courtroom Test, Jury Spurns Prosecutors on Claims of Criminal Acts, The Wall Street Journal, Friday June 10, 2005, page A1. For another fine description of Spitzer and his tactics, see, e.g. Daniel Gross, Eliot Spitzer: How New York's attorney general became the most powerful man on Wall Street, Slate, October 21, 2004, http://slate.msn.com/id/2108509/.

for large publicly-held corporations into the millions, and can serve as powerful incentives to settle even meritless cases.

The United States Supreme Court, and some state legislatures have begun to take steps to reduce the colossal punitive damage verdicts we have seen in recent years,[44] but these efforts, especially by the state legislatures have sometimes been frustrated by state courts.[45] For the time being it is likely that the possibility of colossal punitive damages will continue to threaten corporate defendants, and, when the threat of punitive damages is combined with adverse inferences to be drawn from a failure to produce items for discovery, as recently occurred in the Morgan Stanley case,[46] it can be understood what a distance we have traveled from the time when litigation was about compensation, and compensation to individuals, not punishment of purported corporate miscreants.

Conclusion: What Ought to be Done

The organization that has sponsored this conference, Common Good, is devoted to reminding us of what our American ancestors understood, that social problems can be exacerbated rather than ameliorated by excessive litigation. As Philip Howard has recently demonstrated, for example, the encouragement of litigation by school children and their parents has resulted in a situation where order simply cannot be maintained in

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[44] See, e.g. BMW of North America v. Gore, 517 U.S. 559 (1996) (Holding that excessive punitive damages can amount to a violation of due process).

[45] See, e.g., State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St.3d 451 (1999), and Best v. Taylor Machine Works, 179 Ill. 2d 267, 689 NE2d 1057 (1997), in which the Supreme Courts of Ohio and Illinois, respectively, overturned legislative civil justice reform efforts on the basis of questionable interpretations of their states' constitutions.

[46] The Supreme Court does seem to have begun to understand that adverse inferences because of failures to produce may have gone too far, or at least this is one interpretation of the recent decision the Arthur Andersen case, where a unanimous court threw out a criminal prosecution based on jury instructions which condemned a possibly lawful document destruction policy.

the classroom – where it is necessary to bring in the police to handcuff and cart away young miscreants lest some teacher be sued for an attempt physically to restrain an unruly child.[47] The lack of order in classrooms, of course, impedes their educational mission, and while encouraging litigation against educators was suppose to improve education, it has had the opposite effect.

Similarly, to the extent that class action litigation against corporations, along with its attendant evils of contingency fees, excessive discovery expenses, the threat of punitive damages, the capricious behavior of juries, and the bringing of class-action lawsuits with the aim of settlement for their nuisance value,[48] continues, the competitive position of American corporations in the global economy will be undermined, and those who depend on such corporations for their livelihood, employees, creditors, consumers and stockholders will suffer. There will continue to be a few spectacular winners in the "lawsuit lottery," but most Americans may be worse, rather than better off.

Congress may have begun to travel the appropriate road to recovery with the recent reform regarding class actions,[49] but this has yet to be tested in the courts, and

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[47] Phillip K. Howard, "Class War," The Wall Street Journal, Page A12, May 24, 2005.

[48] As one of the leading civil procedure scholars, my colleague Martin Redish has observed "Though on its face the class action appears to be nothing more than an elaborate procedural joinder device, in recent years it has become the focal point of much political and legal debate. Courts have noted 'the intense presser to settle' caused by the very filing of a class action, while others believe the procedure amounts to 'judicial blackmail.'" Martin H. Redish, "Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals," 2003 The University of Chicago Legal Forum 71. (footnotes omitted). Redish does go on to observe, however, that "Those who take a more positive view of the class action consider it to be an effective means of policing corporate behavior and an assurance that injured victims will be compensated in the most efficient manner." Id. (footnote omitted). Redish's own view is that current class action practice is inconsistent with popular sovereignty, or "the essential democratic precepts of accountability and representation." Id., at 137.

[49] The Class Action Fairness Act of 2005, which passed the House in a 279-149 vote and the Senate by a vote of 72-26, would move lawsuits seeking over $5 million, and thus "shift most large class-action lawsuits involving parties from different states to federal courts." The goal of the measure is to lessen the perceived arbitrary behavior of state court judges and juries. See generally William Branigin, "Congress Changes Class Action Rules," Washington Post, February 17, 2005. The new law does not, however, prevent the bringing of any class actions in federal courts, nor did it have any retroactive effect. In addition to shifting some class action lawsuits to federal courts the new law also should have the effect of

other Congressional measures, such as Sarbanes-Oxley, suggest that our legislators may still be imposing measures whose costs far exceed their benefits.[50] One recent estimate "puts investors' loss in stock value on passage of that act at around $1.4 trillion, an expensive bit of retribution for a few multi-million dollar defalcations."[51] There is no denying that transparency in American entrepreneurial activity is a worthy goal, and the disclosure mandated by our securities laws and the efforts of the SEC and the courts to ferret out and punish securities fraud are certainly laudable. Nevertheless, it is time for intelligent leaders in and out of the Congress boldly to seek to change not only the pernicious practices and rules that have encouraged lawsuit abuse, but perhaps the very culture that has spawned them.[52]

As indicated above, there was a time when lawsuits were discouraged, and when the legal rules clearly favored the American active entrepreneur. There has always been some uncertainty to American law, dictated by its need simultaneously to implement

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reducing the recovery of counsel's contingency fees in class action litigation that results in coupons being distributed to members of the class. The contingency fees are to be figured on the basis of the value of the coupons redeemed rather than on the aggregate value of the coupons issued. "The Class Action Fairness Act was drafted and ultimately passed into law in response to a growing belief that class action lawsuits were nothing but vehicles for attorney abuse and large fees." Ruth Bahe-Jachna, Frank Citera and Collin Williams, "GT Alert:New Federal Legislation: The Class Action Fairness Act of 2005 (March 2005), available on the web at http://www.gtlaw.com/pub/alerts/2005/0302.asp.

[50] For this line of criticism against Sarbanes/Oxley see, e.g. Thomas J. Donohue, "Opening Keynote Address," Securities Industry Association, March 3, 2005, http://www.uschamber.com/press/speeches/2005/050303tjd_securities.htm ("When CEOs spend more time on regulatory compliance than they do strategizing, expanding, developing new product lines, and hiring new workers, the pendulum has swung too far . . .When qualified and responsible board directors are resigning their posts for fear of being held liable for a bad outcome, the pendulum has swung too far. . . When board members become overly concerned with protecting themselves and have less time and incentive to aggressively pursue the interests of the company and its shareholders, the pendulum has swung too far."), and Henry Manne, "Life After Donaldson," Wall Street Journal, June 6, 2005, Page A10 (Decrying the former Chairman of the SEC's championing of strick enforcement of Sarbanes/Oxley "in spite of mounting evidence that it is costly beyond any conceivable benefits.")

[51] Manne, supra note ___, referring to "The most widely discussed of these new estimates, a careful and scholarly work by Ivy Xiying Zhang of the University of Rochester."

[52] See, to similar effect, Redish, supra note ___, who argues that "it is important to keep in mind a central fact often ignored in modern procedural scholarship: the class action was never designed to serve as a free-standing legal device for the purpose of 'doing justice,' nor is it a mechanism intended to serve as a roving policeman of corporate misdeeds or as a mechanism by which to redistribute wealth." 2003 The University of Chicago Legal Forum, at 74.

popular sovereignty, economic development, restraints on arbitrary power, and the securing of a maximum amount of freedom from government regulation.[53] Before the middle of the twentieth century our legal and cultural regime discouraged litigation, and entrepreneurs had the freedom successfully to develop our economy to the point where it became the envy of the world.

That economy still flourishes, but it now does so in a climate in which no entrepreneur, and perhaps no American can be confident that he or she will not find themselves the subject of a lawsuit brought by a disgruntled competitor, an ambitious politician, or misguided government regulators. Surely at some point this climate will discourage the kinds of activities that Americans must engage in if we are to remain competitive in an increasingly-global economy. It is time for a change. We Americans tend to believe that one can't turn back the clock, but, as C.S. Lewis reminded us, when the clock fails to give you the correct time, that is precisely the move one should make.[54] If we really do want to alter a culture in which entrepreneurial actors and ordinary Americans, instead of being protected by law may too often end up its victims, there are lessons we could surely learn from our past.

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[53] On these four aims as dominating American law, see generally, Stephen B. Presser, "Legal History" or The History of Law: A Primer on Bringing the Law's Past into the Present, 35 Vanderbilt Law Review 849 (1982).

[54] see C.S. LEWIS, We have Cause to Be Uneasy, in MERE CHRISTIANITY (1952), excerpted in THE ESSENTIAL C.S. LEWIS 309 (Lyle W. Dorset er., 1988) ("First, as to putting the clock back. Would you think I was joking if I said that you can put a clock back, and that if the clock is wrong it is often a very sensible thing to do? But I would rather get away from that whole idea of clocks. We all want progress. But progress means getting nearer to the place where you want to be. And if your have taken a wrong turning, then to go forward does not get you any nearer. If you are on the wrong road, progress means doing an about-turn and walking back to the right road . . . .").

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WASHINGTON, D.C. 20506

OFFICE OF THE LEGAL ADVISER

FAX TRANSMITTAL COVER SHEET

DATE: Nov. 28, 2005	
TO: Neil Gorsuch Aloma Shaw	FROM: Francesca Shanaberger
PHONE NO.: 202-514-9500	PHONE NO.: (202) 456-9111
FAX NO.: 202-514-0238	FAX NO.: (202) 456-9110

COMMENTS:

Please confirm receipt of this fax.

Thank you!

Francesca

NUMBER OF PAGES (including cover page): 2

11/29/05 att Mtg.
9:30-10:30

Detainee Legislation

PURPOSE: to discuss proposed Rumsfeld letter to conferees on National Defense Authorization Act, as well as our broader legislative strategy on detainee legislation.

DATE: Tuesday, November 29, 2005

TIME: 0930 – 1030

LOCATION: WHSR

WH SIT Room
9:15 out
10:35 pick up

PROPOSED ATTENDEES:
Harriet Miers
Mike Allen
Sandy Hodgkinson
Steve Slick
DOJ - Steve Bradbury and Neil Gorsuch
DOD - Jim Haynes or designee
State - John Bellinger or designee
CIA - Jon Rizzo or designee
DNI - Corin Stone
OVP - David Addington

U.S. Department of Justice

Justice Management Division

Departmental Ethics Office

Washington, D.C. 20530

JUL 12 2005

MEMORANDUM

TO: Neil M. Gorsuch, Principal Deputy Associate Attorney General
Office of the Associate Attorney General

FROM: Janice M. Rodgers, Deputy Director
Departmental Ethics Office

SUBJECT: Public Financial Disclosure Report

I have attached a copy of the final version of your annual public financial disclosure report. This copy reflects any annotations made during the review process.

Please call me if I can be of any further assistance to you.

Attachment

U.S. Department of Justice — **Accountable Officer Signature Form**

Section I - Identification

[X] New Action [ ] Change Authority [ ] Cancel Authority [ ] Name Change

Previous Accountable Officer Name Used

NAME: Neil M. Gorsuch

TITLE: Principal Deputy Associate AG

PHONE NO. 202-514-9500

OFFICE: Associate Attorney General

COST CENTER CODES: 0A770101

Attach additional sheet if necessary.

ACKNOWLEDGMENT: I acknowledge that I may be held personally liable and/or subject to disciplinary action for the loss or improper payment of funds under my authority.

ACCOUNTABLE OFFICER SIGNATURE

Section II - Designation

[X] Approving Officer [ ] Subcertifier Invoice/Voucher [ ] Third Party Payment Disbursing Officer* [ ] Delegated Procurement Authority (Attach copy)

* Disbursing Officers authorized to sign third party checks must have a cash management signature card on file with the third party contractor, the Financial Operations Service, Finance Staff, JMD, and the third party payment site.

Section III - Authority The Designation(s) indicated in Section II apply to the following actions:

[X] Travel Authorizations [X] Travel Advances [X] Travel Payment Vouchers [ ] Vendor Payment Vouchers

[X] Imprest Fund Type Transactions (including employee reimbursements) [X] Other Authorities (Please Specify Below):

Section IV - Approval of Accountable Officer

I verify that the signature appearing above is that of the individual named in Section I and that this individual is an Accountable Officer subject to the authorities and limitations indicated.

NAME: Robert D. McCallum, Jr. TITLE: Associate Attorney General

SIGNATURE

DATE: as of 6-14-05

Form OBD-234
Rev. 9/99

Shaw, Aloma A

From: Shaw, Aloma A
Sent: Tuesday, October 18, 2005 9:18 AM
To: Teets, Edward W
Cc: Gorsuch, Neil M
Subject: Notification

Neil Gorsuch, Principal Deputy Associate Attorney General, made a speech at the British Embassy on September 20, 2005, prior to his security briefing on October 6, 2005. He has occasional contact with Kathy Culpin, Events Coordinator of the British Council, Cultural Department of The British Embassy. Ms. Culpin is a friend of Mr. Gorsuch's wife, who is from England. Mr. Gorsuch will be traveling to England on vacation, sometime in November.

If you have any questions or require additional information regarding this notification, please contact me.

Thank you,
Aloma Shaw
6-9474

cc: Neil Gorsuch

U.S. Department of Justice
Office of the Associate Attorney General

Oct 17, 2005

Ilona – This arrived here today. Please share it with our Security Office + let them know I made a speech at the Embassy prior to my security briefing. Also – please let them know I have occasional contact with Kathy Culpin b/c she is a friend of my wife.

Finally, I will be traveling to England next month; please let them know.

Thanks, NMG

BRITISH COUNCIL
United States

British Council
Cultural Department
The British Embassy
3100 Massachusetts Avenue NW
Washington, DC 20008-3600
USA

T + 1 202 588 6500
F + 1 202 588 7918

www.britishcouncil-usa.org

Neil M. Gorsuch
Principal Deputy Associate Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 5706
Washington, D.C. 20530

Friday, 23rd September 2005

Dear Neil,

Just a quick note to thank you for taking the time out to talk to the departing Marshall Scholars. They thoroughly enjoyed your guided tour through the UK as a whole and the idioms of Oxford. Those who were Oxford bound had a very interesting time explaining some of the language to their peers who were headed towards the far flung environs of Scotland, York and even East Anglia.

This is only my second year of working on this particular British initiative and it is clear that all of us involved with the programme owe a debt to those of you who are prepared to help and ensure that the Orientation Programme is fun, interesting and enlightening.

Craig Schiffries, the Chair of the Washington DC Regional Selection Committee for the Marshall Scholarships, very much enjoyed meeting you and indicated he would welcome you as a Selection Committee Member in the future. Perhaps if the planets align we might be able to schedule this at some point in the not too distant future – do hope so.

✳ Thanks again, best to Louise and les petites. ✳

Kathy

Kathy Culpin
Events Co-ordinator
British Council USA

TEL: 202 588 7844
Kathy.culpin@us.britishcouncil.org

BRITISH COUNCIL
United States

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The British Embassy
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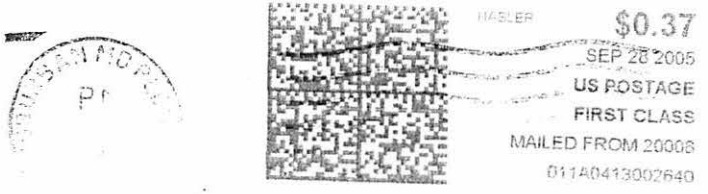
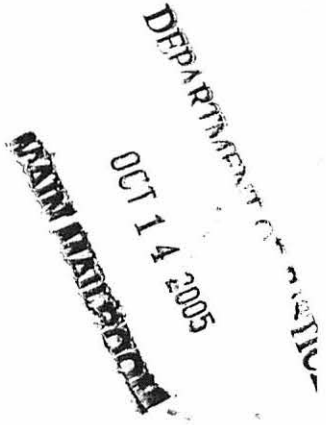
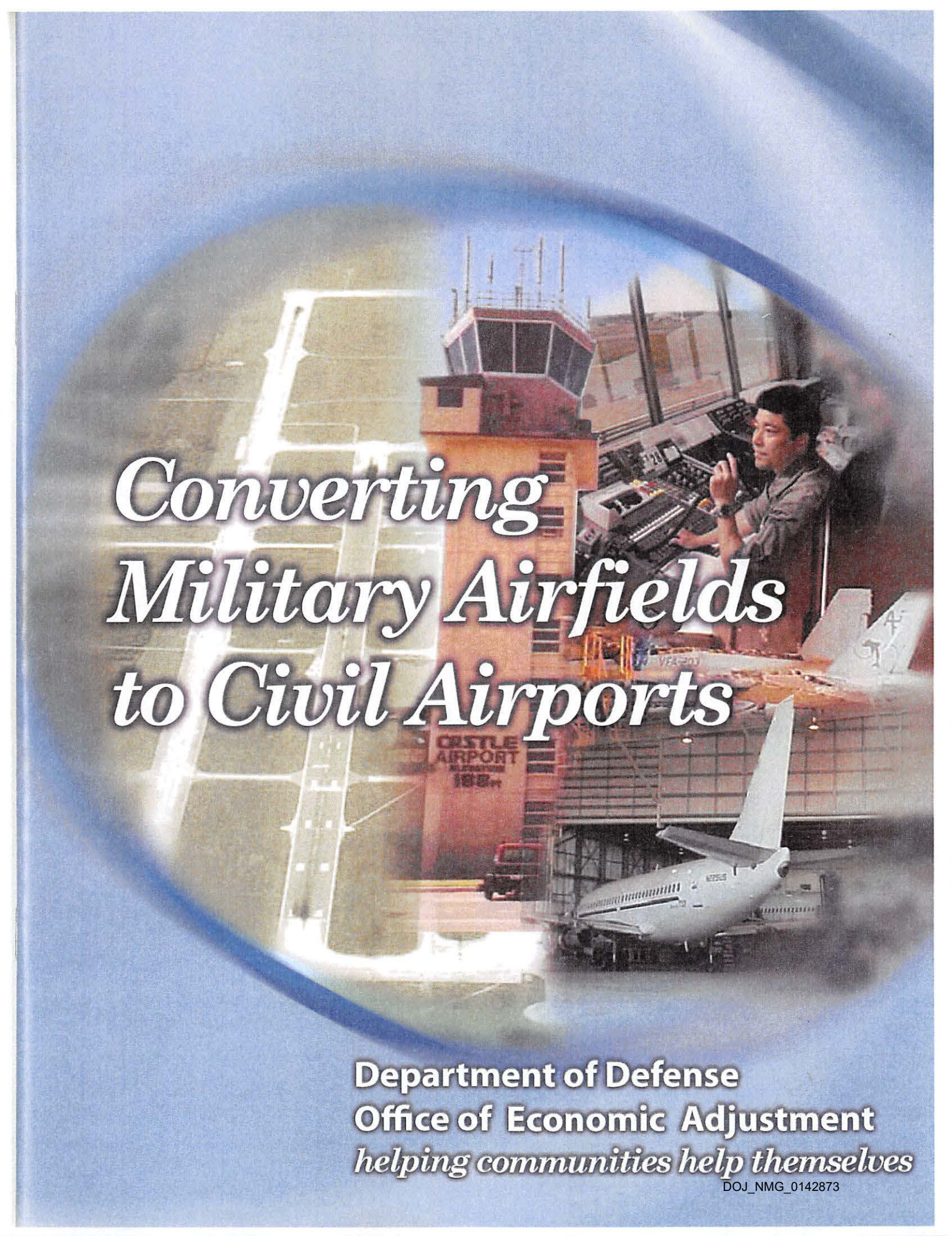


Neil M. Gorsuch
Principal Deputy Associate Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 5706
Washington, D.C. 20530





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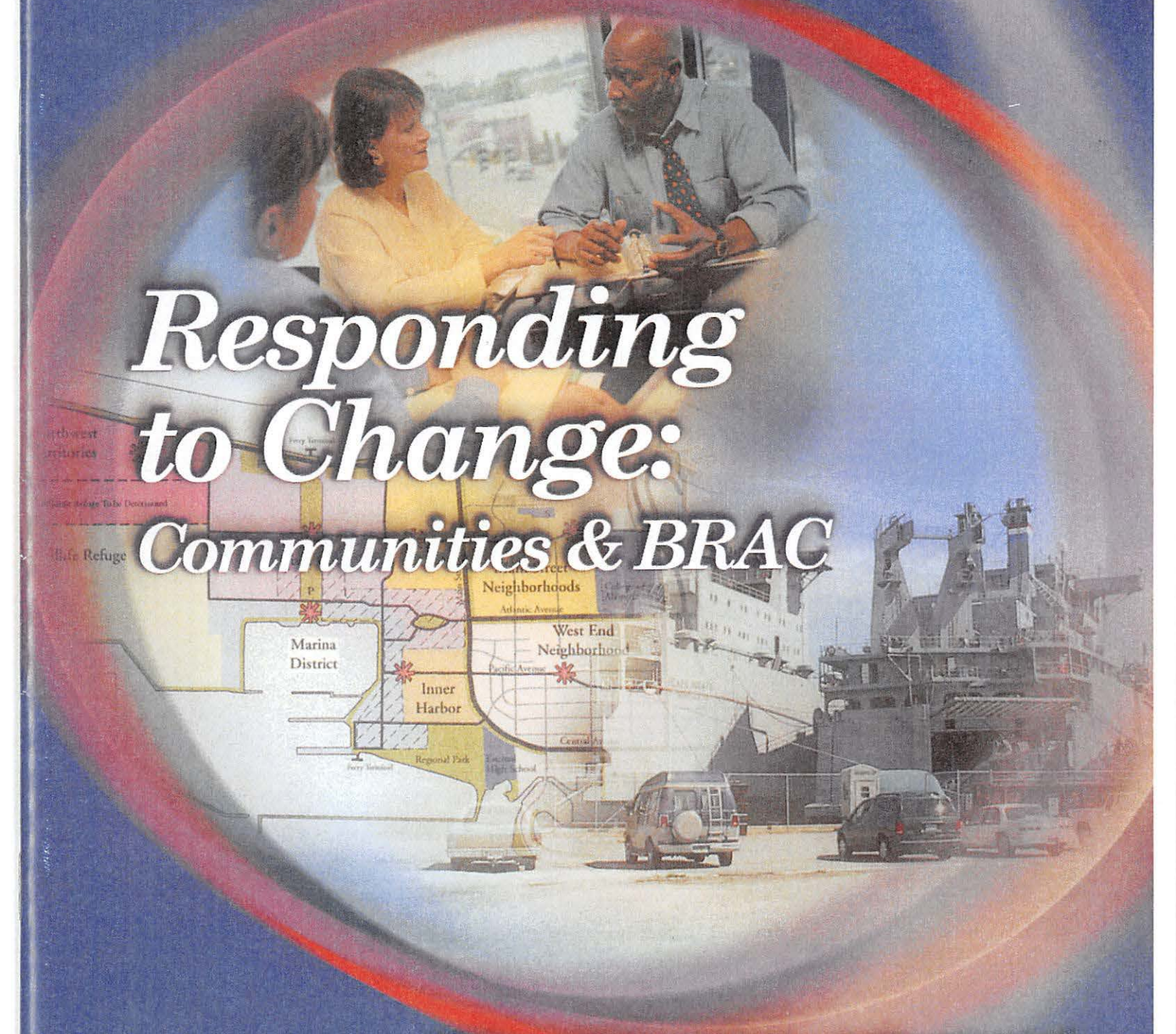

Responding to Change: Communities & BRAC

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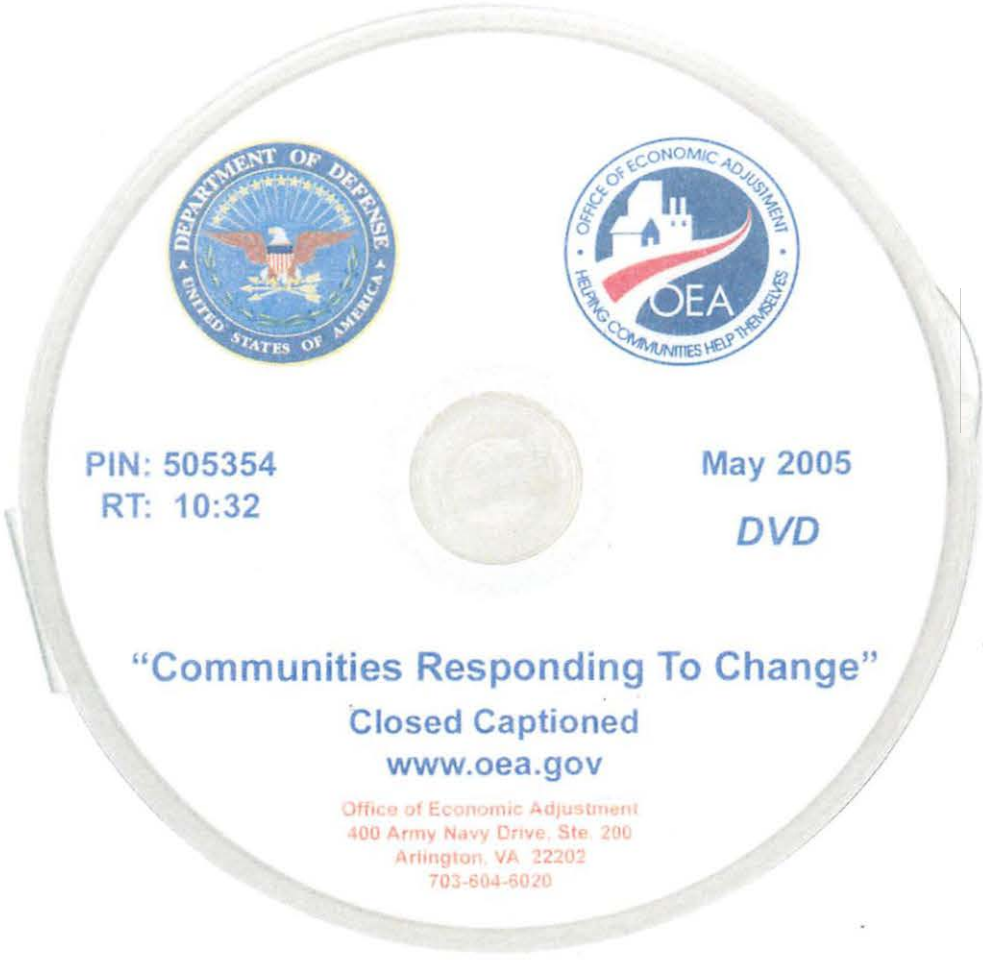
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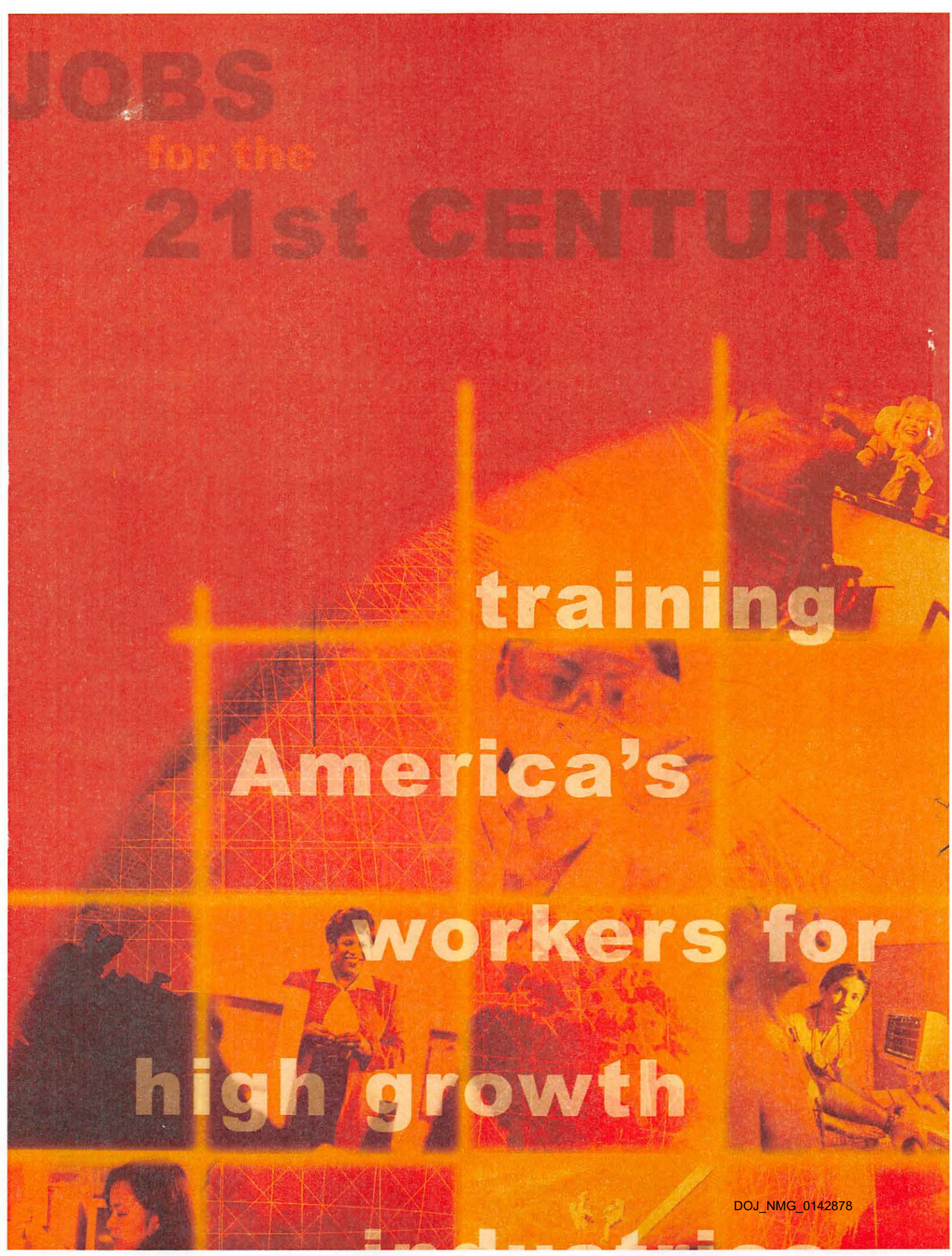

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eta

EMPLOYMENT AND TRAINING ADMINISTRATION
UNITED STATES DEPARTMENT OF LABOR

IMMIGRATION ADDENDUM TO THE SF-86 (TO BE USED WHEN APPOINTEE, COTENANTS AND/OR RELATIVES ARE BORN OUTSIDE THE U.S. BUT RESIDE IN THE U.S. OR ARE NATURALIZED U.S. CITIZENS)

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DATE NATURALIZED _____

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ON THE REVERSE SIDE, SPACES ARE PROVIDED FOR INFORMATION ON YOUR RELATIVES AND COTENANTS. FILL IN AS MANY AS NECESSARY FOR ALL RELATIVES AND COTENANTS BORN OUTSIDE THE U.S. AND WHO NOW LIVE IN THE U.S. OR ARE U.S. CITIZENS. "RELATIVES" INCLUDES YOUR PARENTS, YOUR STEPPARENTS, YOUR SPOUSE AND ANY OF YOUR BROTHERS, SISTERS, STEPBROTHERS, STEPSISTERS, HALF BROTHERS OR HALF SISTERS WHO ARE EIGHTEEN YEARS OF AGE OR OLDER. "COTENANTS" INCLUDES ANYONE WHO LIVES WITH YOU OVER THE AGE OF EIGHTEEN, To INCLUDE EMPLOYEES. DO NOT INCLUDE DATA FOR PEOPLE UNDER AGE EIGHTEEN IN-LAWS, OR PEOPLE BORN ABROAD TO AMERICAN PARENTS. THE REVERSE SIDE SHOULD BE COPIED IF NECESSARY FOR ADDITIONAL RELATIVES AND COTENANTS.

_____ _____
SIGNATURE DATE

(OVER)

RELATIVE/COTENANT # __

NAME _____

RELATIONSHIP TO YOU _____

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ALIEN REGISTRATION OR VISA # (IF NOT A U.S. CITIZEN) _____

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RELATIVE/COTENANT # __

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WAS U.S. CITIZENSHIP DERIVED FROM PARENTS? YES NO IF YES, PROVIDE DETAILS

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THE WHITE HOUSE

WASHINGTON

MEMORANDUM FOR PROSPECTIVE APPOINTEES

FROM: OFFICE OF THE COUNSEL TO THE PRESIDENT

SUBJECT: FBI Clearances

Before a final decision on your appointment can be made, certain background investigations and conflict-of-interest reviews must be completed. Accordingly, enclosed is a package of security clearance forms and questionnaires for your completion. The FBI cannot begin its full-field investigation until we receive your completed and signed forms.

A complete package should consist of:

Item	What We Need
1. Questionnaire for Sensitive Positions (SF-86) plus any attachments.	One original and three copies, all with original signatures. (Note: the SF-86 requires two signatures.)
2. Tax Check Waiver.	One signed original and one copy.
3. Fingerprint cards.	Two signed cards, with fingerprints (obtainable at police station or local FBI office.)
4. FBI Consent.	Because the consent is time sensitive, please hold this form; do not sign and date it until you are requested to do so by the White House or Justice Department.

send to us with other forms

U.S. Department of Justice

Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

March 17, 2006

Mr. Neil Gorsuch
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 5706
Washington, D.C. 20530

Dear Mr. Gorsuch: Neil –

The Department of Justice has received your name as among those we should consider recommending to the President for nomination to the federal judiciary. The Department's recommendations are based upon careful investigation and evaluation of your qualifications and background. To facilitate the investigation, kindly provide the information requested below as soon as possible, and in no event later than the deadlines set forth below.

In the enclosed packet of security documents, please find a Questionnaire for National Security Positions and related supplemental and waiver forms. This questionnaire, the supplements and associated waivers need to be returned immediately so that the Federal Bureau of Investigation can commence its background investigation.

Also enclosed are questionnaires from the White House and the United States Senate. In preparing your response to these forms, please restate the question to which each answer relates. We must have your response to both questionnaires within one week so that the Department can begin its process of evaluating your professional qualifications.

Additionally, please provide five examples of your legal writing that reflect your legal and written communication skills. Please be mindful of any need to protect client privilege and as necessary delete any portions that are deemed privileged. If you do not have five samples of legal writing, please provide other examples of your written communication skills.

Finally, we have enclosed a medical evaluation, to be completed by your physician after a physical examination, and the Financial Disclosure Report required by the Ethics in Government Act of 1978. Please return the medical evaluation and Financial Disclosure Report as soon as practicable.

Thank you for your continued patience with this important evaluation process and for your cooperation in strictly observing the deadlines prescribed above. Please return the completed documents, preferably using an overnight delivery service, to Mr. David T. Best, Office of Legal Policy, U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Room 4229, Washington, DC 20530. Should you have any questions, please feel free to contact me at 202-514-4601 or Mr. Best at 202-514-1607.

Sincerely,

Rachel L. Brand
Assistant Attorney General

Enclosures

THE WHITE HOUSE
WASHINGTON

Date _____

To: Federal Bureau of Investigation
Attn: ☐ EADSU (Room 4965) ☐ SIGBIU (Room 4371)

From: The White House
☐ EOP Security Office
☐ White House Counsel's Office

Subject's full name _____

Other names used (including birth, prior married, and nicknames) _____

Social Security Number _____ Date of birth _____ Place of birth _____

Permanent address
(also current residence, if different) _____

Current employer(s) _____

SUBJECT'S CONSENT: I hereby authorize the FBI to provide the information specified below to the White House.

_____ _____
(Subject's Signature) (Date)

Request of FBI (Use of this form to request information developed by the FBI or contained in FBI files requires the subject's consent. Exceptions will only be permitted as authorized by the Attorney General/Deputy Attorney General.)

☐ Name check (EADSU) ☐ Copy of previous report (EADSU)
☐ Expanded name check (SIGBIU)
☐ Full field investigation (SIGBIU) ☐ Level 1 ☐ Level 2 ☐ Level 3
☐ 5-year reinvestigation (SIGBIU) ☐ Level 2 ☐ Level 3
☐ Limited update investigation (SIGBIU)
☐ Other (specify) _____

The applicant is being considered for:
☐ Presidential appointment ☐ Position requiring Senate confirmation
☐ White House staff position
☐ Access: ☐ Detailee/other government employee ☐ Contractor ☐ Intern ☐ Volunteer
☐ Presidential recognition
☐ Other (specify) _____

Attachments: ☐ SF-86 ☐ SF-86 Supplement ☐ SF-87 Fingerprint Card

Remarks/
special instructions: _____

I certify, subject to 18 U.S.C. § 1001, that the above is sought for official purposes only and I understand that obtaining this information under false pretenses or any unauthorized disclosure may be a violation of the Privacy Act, 5 U.S.C. § 552a.

Requested by: _____
(Signature)

This request has been reviewed and approved by the White House Counsel's Office.

Approved by: _____
Signature (White House Counsel's Office)

1 - Original - To FBI
2 - Canary - To FBI (Return to White House)
3 - Pink - To FBI (Office of the General Counsel)
4 - Gold - White House Origination Copy

THE WHITE HOUSE

WASHINGTON

PRIVACY ACT PROTECTED INFORMATION
(When Completed)

Disclosure and Authorization
Pertaining to Consumer Reports
Pursuant to the Fair Credit Reporting Act

This is a release for the Federal Bureau of Investigation and/or the Office of Counsel to the President, acting on the President's behalf, to obtain one or more consumer/credit reports about you in connection with consideration of your appointment to a position within the Executive Branch, or in the course of your employment with the Federal Government. One or more reports about you may be obtained for employment purposes, including evaluating your fitness for employment, promotion, reassignment, retention, or access to classified information.

I, _____, hereby authorize the Federal Bureau of Investigation and/or the Office of Counsel to the President, acting on the President's behalf, to obtain such reports from any consumer/credit reporting agency for employment purposes.

_____
Signature

_____
Date

_____
Social Security Number

Oct. 97

Standard Form 86
Revised September 1995
U.S. Office of Personnel Management
5 CFR Parts 731, 732, and 736

Form approved:
O.M.B. No. 3206-0007
NSN 7540-00-634-4036
86-111

Questionnaire for National Security Positions

Follow instructions fully or we cannot process your form. Be sure to sign and date the certification statement on page 9 and the release on page 10. *If you have any questions,* call the office that gave you the form.

Purpose of this form

The U.S. Government conducts background investigations and reinvestigations to establish that military personnel, applicants for or incumbents in national security positions, either employed by the Government or working for Government contractors, licensees, certificate holders, and grantees, are eligible for a required security clearance. Information from this form is used primarily as the basis for investigation for access to classified information or special nuclear information or material. Complete this form only after a conditional offer of employment has been made for a position requiring a security clearance.

Giving us the information we ask for is voluntary. However, we may not be able to complete your investigation, or complete it in a timely manner, if you don't give us each item of information we request. This may affect your placement or security clearance prospects.

Authority to Request this Information

Depending upon the purpose of your investigation, the U.S. Government is authorized to ask for this information under Executive Orders 10450, 10865, 12333, and 12356; sections 3301 and 9101 of title 5, U.S. Code; sections 2165 and 2201 of title 42, U.S. Code; sections 781 to 887 of title 50, U.S. Code; and parts 5, 732, and 736 of Title 5, Code of Federal Regulations.

Your Social Security Number is needed to keep records accurate, because other people may have the same name and birth date. Executive Order 9397 also asks Federal agencies to use this number to help identify individuals in agency records.

The Investigative Process

Background investigations for national security positions are conducted to develop information to show whether you are reliable, trustworthy, of good conduct and character, and loyal to the United States. The information that you provide on this form is confirmed during the investigation. Investigation may extend beyond the time covered by this form when necessary to resolve issues. Your current employer must be contacted as part of the investigation, even if you have previously indicated on applications or other forms that you do not want this.

In addition to the questions on this form, inquiry also is made about a person's adherence to security requirements, honesty and integrity, vulnerability to exploitation or coercion, falsification, misrepresentation, and any other behavior, activities, or associations that tend to show the person is not reliable, trustworthy, or loyal.

Your Personal Interview

Some investigations will include an interview with you as a normal part of the investigative process. This provides you the opportunity to update, clarify, and explain information on your form more completely, which often helps to complete your investigation faster. It is important that the interview be conducted as soon as possible after you are contacted. Postponements will delay the processing of your investigation, and declining to be interviewed may result in your investigation being delayed or canceled.

You will be asked to bring identification with your picture on it, such as a valid State driver's license, to the interview. There are other documents you may be asked to bring to verify your identity as well. These include documentation of any legal name change, Social Security card, and/or birth certificate.

You may also be asked to bring documents about information you provided on the form or other matters requiring specific attention. These matters include alien registration, delinquent loans or taxes, bankruptcy, judgments, liens, or other financial obligations, agreements involving child custody or support, alimony or property settlements, arrests, convictions, probation, and/or parole.

Organization of this Form

This form has two parts. Part 1 asks for background information, including where you have lived, gone to school, and worked. Part 2 asks about your activities and such matters as firings from a job, criminal history record, use of illegal drugs, and abuse of alcohol.

In answering all questions on this form, keep in mind that your answers are considered together with the information obtained in the investigation to reach an appropriate adjudication.

Instructions for Completing this Form

1. Follow the instructions given to you by the person who gave you the form and any other clarifying instructions furnished by that person to assist you in completion of the form. Find out how many copies of the form you are to turn in. You must sign and date, in black ink, the original and each copy you submit. You should retain a copy of the completed form for your records.

2. Type or legibly print your answers in black ink (if your form is not legible, it will not be accepted). You may also be asked to submit your form in an approved electronic format.

3. All questions on this form must be answered. If no response is necessary or applicable, indicate this on the form (for example, enter "None" or "N/A"). If you find that you cannot report an exact date, approximate or estimate the date to the best of your ability and indicate this by marking "APPROX." or "EST."

4. Any changes that you make to this form after you sign it must be initialed and dated by you. Under certain limited circumstances, agencies may modify the form consistent with your intent.

5. You must use the State codes (abbreviations) listed on the back of this page when you fill out this form. Do not abbreviate the names of cities or foreign countries.

6. The 5-digit postal ZIP codes are needed to speed the processing of your investigation. The office that provided the form will assist you in completing the ZIP codes.

7. All telephone numbers must include area codes.

8. All dates provided on this form must be in Month/Day/Year or Month/Year format. Use numbers (1-12) to indicate months. For example, June 8, 1978, should be shown as 6/8/78.

9. Whenever "City (Country)" is shown in an address block, also provide in that block the name of the country when the address is outside the United States.

10. If you need additional space to list your residences or employments/self-employments/unemployments or education, you should use a continuation sheet, SF 86A. If additional space is needed to answer other items, use a blank piece of paper. Each blank piece of paper you use must contain **your name and Social Security Number at the top of the page.**

Final Determination on Your Eligibility

Final determination on your eligibility for access to classified information is the responsibility of the Federal agency that requested your investigation. You may be provided the opportunity personally to explain, refute, or clarify any information before a final decision is made.

Penalties for Inaccurate or False Statements

The U.S. Criminal Code (title 18, section 1001) provides that knowingly falsifying or concealing a material fact is a felony which may result in fines of up to $10,000, and/or 5 years imprisonment, or both. In addition, Federal agencies generally fire, do not grant a security clearance, or disqualify individuals who have materially and deliberately falsified these forms, and this remains a part of the permanent record for future placements. Because the position for which you are being considered is a sensitive one, your trustworthiness is a very important consideration in deciding your eligibility for a security clearance. Your prospects of placement or security clearance are better if you answer all questions truthfully and completely. You will have adequate opportunity to explain any information you give us on the form and to make your comments part of the record.

Disclosure of Information

The information you give us is for the purpose of investigating you for a national security position; we will protect it from unauthorized disclosure. The collection, maintenance, and disclosure of background investigative information is governed by the Privacy Act. The agency which requested the investigation and the agency which conducted the investigation have published notices in the Federal Register describing the systems of records in which your records will be maintained. You may obtain copies of the relevant notices from the person who gave you this form. The information on this form, and information we collect during an investigation may be disclosed without your consent as permitted by the Privacy Act (5 USC 552a (b)) and as follows:

PRIVACY ACT ROUTINE USES

1. To the Department of Justice when: (a) the agency or any component thereof; or (b) any employee of the agency in his or her official capacity; or (c) any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee; or (d) the United States Government, is a party to litigation or has interest in such litigation, and by careful review, the agency determines that the records are both relevant and necessary to the litigation and the use of such records by the Department of Justice is therefore deemed by the agency to be for a purpose that is compatible with the purpose for which the agency collected the records.

2. To a court or adjudicative body in a proceeding when: (a) the agency or any component thereof; or (b) any employee of the agency in his or her official capacity; or (c) any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee; or (d) the United States Government, is a party to litigation or has interest in such litigation, and by careful review, the agency determines that the records are both relevant and necessary to the litigation and the use of such records is therefore deemed by the agency to be for a purpose that is compatible with the purpose for which the agency collected the records.

3. Except as noted in Question 24, when a record on its face, or in conjunction with other records, indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature, and whether arising by general statute, particular program statute, regulation, rule, or order issued pursuant thereto, the relevant records may be disclosed to the appropriate Federal, foreign, State, local, tribal, or other public authority responsible for enforcing, investigating or prosecuting such violation or charged with enforcing or implementing the statute, rule, regulation, or order.

4. To any source or potential source from which information is requested in the course of an investigation concerning the hiring or retention of an employee or other personnel action, or the issuing or retention of a security clearance, contract, grant, license, or other benefit, to the extent necessary to identify the individual, inform the source of the nature and purpose of the investigation, and to identify the type of information requested.

5. To a Federal, State, local, foreign, tribal, or other public authority the fact that this system of records contains information relevant to the retention of an employee, or the retention of a security clearance, contract, license, grant, or other benefit. The other agency or licensing organization may then make a request supported by written consent of the individual for the entire record if it so chooses. No disclosure will be made unless the information has been determined to be sufficiently reliable to support a referral to another office within the agency or to another Federal agency for criminal, civil, administrative, personnel, or regulatory action.

6. To contractors, grantees, experts, consultants, or volunteers when necessary to perform a function or service related to this record for which they have been engaged. Such recipients shall be required to comply with the Privacy Act of 1974, as amended.

7. To the news media or the general public, factual information the disclosure of which would be in the public interest and which would not constitute an unwarranted invasion of personal privacy.

8. To a Federal, State, or local agency, or other appropriate entities or individuals, or through established liaison channels to selected foreign governments, in order to enable an intelligence agency to carry out its responsibilities under the National Security Act of 1947 as amended, the CIA Act of 1949 as amended, Executive Order 12333 or any successor order, applicable national security directives, or classified implementing procedures approved by the Attorney General and promulgated pursuant to such statutes, orders or directives.

9. To a Member of Congress or to a Congressional staff member in response to an inquiry of the Congressional office made at the written request of the constituent about whom the record is maintained.

10. To the National Archives and Records Administration for records management inspections conducted under 44 USC 2904 and 2906.

11. To the Office of Management and Budget when necessary to the review of private relief legislation.

STATE CODES (ABBREVIATIONS)

Alabama	AL	Hawaii	HI	Massachusetts	MA	New Mexico	NM	South Dakota	SD
Alaska	AK	Idaho	ID	Michigan	MI	New York	NY	Tennessee	TN
Arizona	AZ	Illinois	IL	Minnesota	MN	North Carolina	NC	Texas	TX
Arkansas	AR	Indiana	IN	Mississippi	MS	North Dakota	ND	Utah	UT
California	CA	Iowa	IA	Missouri	MO	Ohio	OH	Vermont	VT
Colorado	CO	Kansas	KS	Montana	MT	Oklahoma	OK	Virginia	VA
Connecticut	CT	Kentucky	KY	Nebraska	NE	Oregon	OR	Washington	WA
Delaware	DE	Louisiana	LA	Nevada	NV	Pennsylvania	PA	West Virginia	WV
Florida	FL	Maine	ME	New Hampshire	NH	Rhode Island	RI	Wisconsin	WI
Georgia	GA	Maryland	MD	New Jersey	NJ	South Carolina	SC	Wyoming	WY
American Samoa	AS	Dist. of Columbia	DC	Guam	GU	Northern Marianas	CM	Puerto Rico	PR
Trust Territory	TT	Virgin Islands	VI						

PUBLIC BURDEN INFORMATION

Public burden reporting for this collection of information is estimated to average 90 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Reports and Forms Management Officer, U.S. Office of Personnel Management, 1900 E Street, N.W., Room CHP-500, Washington, D.C. 20415. Do not sent your completed form to this address.

Standard Form 86
Revised September 1995
U.S. Office of Personnel Management
5 CFR Parts 731, 732, and 736

QUESTIONNAIRE FOR NATIONAL SECURITY POSITIONS

Form approved:
O.M.B. No. 3206-0007
NSN 7540-00-634-4036
86-111

Part 1

Investigating Agency Use Only | Codes | Case Number

Agency Use Only (Complete Items A through P using Instructions provided by the Investigating agency).

A Type of Investigation	B Extra Coverage	C Sensitivity Level	D Access	E Nature of Action Code	F Date of Action (Month Day Year)
G Geographic Location	H Position Code	I Position Title			
J SON	K Location of Official Personnel Folder: ☐ None ☐ NPRC ☐ At SON	Other Address			ZIP Code
L SOI	M Location of Security Folder: ☐ None ☐ At SOI ☐ NPI	Other Address			ZIP Code
N OPAC-ALC Number	O Accounting Data and/or Agency Case Number				
P Requesting Official	Name and Title	Signature	Telephone Number ( )	Date	

Persons completing this form should begin with the questions below.

1 FULL NAME • If you have only initials in your name, use them and state (IO). • If you have no middle name, enter "NMN." • If you are a "Jr.," "Sr.," "II," etc., enter this in the box after your middle name.

Last Name | First Name | Middle Name | Jr., II, etc.

2 DATE OF BIRTH (Month Day Year)

3 PLACE OF BIRTH • Use the two letter code for the State.

City | County | State | Country *(if not in the United States)*

4 SOCIAL SECURITY NUMBER

5 OTHER NAMES USED

Give other names you used and the period of time you used them *(for example: your maiden name, name[s] by a former marriage, former name[s], alias[es], or nickname[s])*. If the other name is your **maiden name**, put **"nee"** in front of it.

Name #1	Month/Year Month/Year To	Name #3	Month/Year Month/Year To
Name #2	Month/Year Month/Year To	Name #4	Month/Year Month/Year To

6 OTHER IDENTIFYING INFORMATION

Height *(feet and inches)* | Weight *(pounds)* | Hair Color | Eye Color | Sex *(mark one box)* ☐ Female ☐ Male

7 TELEPHONE NUMBERS

Work *(include Area Code and extension)* ( ) Day ( ) ( ) Night ( )

Home *(include Area Code)* ( ) Day ( ) ( ) Night ( )

8 CITIZENSHIP

a Mark the box at the right that reflects your current citizenship status, and follow its instructions.

- ☐ I am a U.S. citizen or national by birth in the U.S. or U.S. territory/possession. → Answer Items **b and d**
- ☐ I am a U.S. citizen, but I was NOT born in the U.S. → Answer Items **b,c, and d**
- ☐ I am not a U.S. citizen. → Answer Items **b and e**

b Your Mother's Maiden Name

c UNITED STATES CITIZENSHIP If you are a U.S. Citizen, but were not born in the U.S., provide information about one or more of the following proofs of your citizenship.

Naturalization Certificate ***(Where were you naturalized?)***

Court | City | State | Certificate Number | Month/Day/Year Issued

Citizenship Certificate ***(Where was the certificate issued?)***

City | State | Certificate Number | Month/Day/Year Issued

State Department Form 240 - Report of Birth Abroad of a Citizen of the United States

Give the date the form was prepared and give an explanation if needed. | Month/Day/Year | Explanation

U.S. Passport

This may be either a current or previous U.S. Passport | Passport Number | Month/Day/Year Issued

d DUAL CITIZENSHIP If you are *(or were)* a dual citizen of the United States and another country, provide the name of that country in the space to the right. | Country

e ALIEN If you are an alien, provide the following information:

Place You Entered the United States: | City | State | Date You Entered U.S. (Month Day Year) | Alien Registration Number | Country(ies) of Citizenship

9 WHERE YOU HAVE LIVED

List the places where you have lived, beginning with the most recent (#1) and working back 7 years. All periods must be accounted for in your list. Be sure to indicate the actual physical location of your residence: do not use a post office box as an address, do not list a permanent address when you were actually living at a school address, etc. Be sure to specify your location as closely as possible: for example, do not list only your base or ship, list your barracks number or home port. You may omit temporary military duty locations under 90 days (list your permanent address instead), and you should use your APO/FPO address if you lived overseas.

For any address in the last 5 years, list a person who knew you at that address, and who preferably still lives in that area (do not list people for residences completely outside this 5-year period, and do not list your spouse, former spouses, or other relatives). Also for addresses in the last five years, if the address is "General Delivery," a Rural or Star Route, or may be difficult to locate, provide directions for locating the residence on an attached continuation sheet.

Month/Year	Month/Year	Street Address	Apt. #	City (Country)	State	ZIP Code
#1	To Present					
Name of Person Who Knows You	Street Address	Apt. #	City (Country)	State	ZIP Code	Telephone Number ( )

Month/Year	Month/Year	Street Address	Apt. #	City (Country)	State	ZIP Code
#2	To					
Name of Person Who Knew You	Street Address	Apt. #	City (Country)	State	ZIP Code	Telephone Number ( )

Month/Year	Month/Year	Street Address	Apt. #	City (Country)	State	ZIP Code
#3	To					
Name of Person Who Knew You	Street Address	Apt. #	City (Country)	State	ZIP Code	Telephone Number ( )

Month/Year	Month/Year	Street Address	Apt. #	City (Country)	State	ZIP Code
#4	To					
Name of Person Who Knew You	Street Address	Apt. #	City (Country)	State	ZIP Code	Telephone Number ( )

Month/Year	Month/Year	Street Address	Apt. #	City (Country)	State	ZIP Code
#5	To					
Name of Person Who Knew You	Street Address	Apt. #	City (Country)	State	ZIP Code	Telephone Number ( )

10 WHERE YOU WENT TO SCHOOL

List the schools you have attended, beyond Junior High School, **beginning with the most recent (#1) and working back 7 years**. List College or University degrees and the dates they were received. If all of your education occurred more than 7 years ago, list your most recent education beyond high school, no matter when that education occurred.

- Use one of the following codes in the "Code" block:
  1 - High School **2** - College/University/Military College **3** - Vocational/Technical/Trade School
- For schools you attended in the past 3 years, list a person who knew you at school (an instructor, student, etc.). Do not list people for education completely outside this 3-year period.
- For correspondence schools and extension classes, provide the address where the records are maintained.

Month/Year	Month/Year	Code	Name of School	Degree/Diploma/Other	Month/Year Awarded
#1	To				
Street Address and City (Country) of School				State	ZIP Code
Name of Person Who Knew You	Street Address	Apt. #	City (Country)	State	ZIP Code	Telephone Number ( )

Month/Year	Month/Year	Code	Name of School	Degree/Diploma/Other	Month/Year Awarded
#2	To				
Street Address and City (Country) of School				State	ZIP Code
Name of Person Who Knew You	Street Address	Apt. #	City (Country)	State	ZIP Code	Telephone Number ( )

Month/Year	Month/Year	Code	Name of School	Degree/Diploma/Other	Month/Year Awarded
#3	To				
Street Address and City (Country) of School				State	ZIP Code
Name of Person Who Knew You	Street Address	Apt. #	City (Country)	State	ZIP Code	Telephone Number ( )

Enter your Social Security Number before going to the next page →

11 YOUR EMPLOYMENT ACTIVITIES

List your employment activities, beginning with the present (#1) and working back 7 years. You should list all full-time work, part-time work, military service, temporary military duty locations over 90 days, self-employment, other paid work, and all periods of unemployment. The entire 7-year period must be accounted for without breaks, but you need not list employments before your 16th birthday. **EXCEPTION:** Show all Federal civilian service, whether it occurred within the last 7 years or not.

- **Code.** Use one of the codes listed below to identify the type of employment:

  1 - Active military duty stations
  2 - National Guard/Reserve
  3 - U.S.P.H.S. Commissioned Corps
  4 - Other Federal employment
  5 - State Government (Non-Federal employment)
  6 - Self-employment (Include business name and/or name of person who can verify)
  7 - Unemployment (Include name of person who can verify)
  8 - Federal Contractor (List Contractor, not Federal agency)
  9 - Other

- **Employer/Verifier Name.** List the business name of your employer or the name of the person who can verify your self-employment or unemployment in this block. If military service is being listed, include your duty location or home port here as well as your branch of service. You should provide separate listings to reflect changes in your military duty locations or home ports.

- **Previous Periods of Activity.** Complete these lines if you worked for an employer on more than one occasion at the same location. After entering the most recent period of employment in the initial numbered block, provide previous periods of employment at the same location on the additional lines provided. For example, if you worked at XY Plumbing in Denver, CO, during 3 separate periods of time, you would enter dates and information concerning the most recent period of employment first, and provide dates, position titles, and supervisors for the two previous periods of employment on the lines below that information.

Month/Year	Month/Year	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank
#1	To Present			

Employer's/Verifier's Street Address	City (Country)	State	ZIP Code	Telephone Number
				( )
Street Address of Job Location (if different than Employer's Address)	City (Country)	State	ZIP Code	Telephone Number
				( )
Supervisor's Name & Street Address (if different than Job Location)	City (Country)	State	ZIP Code	Telephone Number
				( )

PREVIOUS PERIODS OF ACTIVITY (Block #1)

Month/Year	Month/Year	Position Title	Supervisor
	To		
	To		
	To		

Month/Year	Month/Year	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank
#2	To			

Employer's/Verifier's Street Address	City (Country)	State	ZIP Code	Telephone Number
				( )
Street Address of Job Location (if different than Employer's Address)	City (Country)	State	ZIP Code	Telephone Number
				( )
Supervisor's Name & Street Address (if different than Job Location)	City (Country)	State	ZIP Code	Telephone Number
				( )

PREVIOUS PERIODS OF ACTIVITY (Block #2)

Month/Year	Month/Year	Position Title	Supervisor
	To		
	To		
	To		

Month/Year	Month/Year	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank
#3	To			

Employer's/Verifier's Street Address	City (Country)	State	ZIP Code	Telephone Number
				( )
Street Address of Job Location (if different than Employer's Address)	City (Country)	State	ZIP Code	Telephone Number
				( )
Supervisor's Name & Street Address (if different than Job Location)	City (Country)	State	ZIP Code	Telephone Number
				( )

PREVIOUS PERIODS OF ACTIVITY (Block #3)

Month/Year	Month/Year	Position Title	Supervisor
	To		
	To		
	To		

Enter your Social Security Number before going to the next page →

YOUR EMPLOYMENT ACTIVITIES (CONTINUED)

Month/Year	Month/Year	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank
#4	To			

Employer's/Verifier's Street Address	City (Country)	State	ZIP Code	Telephone Number
				( )
Street Address of Job Location (if different than Employer's Address)	City (Country)	State	ZIP Code	Telephone Number
				( )
Supervisor's Name & Street Address (if different than Job Location)	City (Country)	State	ZIP Code	Telephone Number
				( )

PREVIOUS PERIODS OF ACTIVITY (Block#4)

Month/Year	Month/Year	Position Title	Supervisor
	To		
Month/Year	Month/Year	Position Title	Supervisor
	To		
Month/Year	Month/Year	Position Title	Supervisor
	To		

Month/Year	Month/Year	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank
#5	To			

Employer's/Verifier's Street Address	City (Country)	State	ZIP Code	Telephone Number
				( )
Street Address of Job Location (if different than Employer's Address)	City (Country)	State	ZIP Code	Telephone Number
				( )
Supervisor's Name & Street Address (if different than Job Location)	City (Country)	State	ZIP Code	Telephone Number
				( )

PREVIOUS PERIODS OF ACTIVITY (Block#5)

Month/Year	Month/Year	Position Title	Supervisor
	To		
Month/Year	Month/Year	Position Title	Supervisor
	To		
Month/Year	Month/Year	Position Title	Supervisor
	To		

Month/Year	Month/Year	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank
#6	To			

Employer's/Verifier's Street Address	City (Country)	State	ZIP Code	Telephone Number
				( )
Street Address of Job Location (if different than Employer's Address)	City (Country)	State	ZIP Code	Telephone Number
				( )
Supervisor's Name & Street Address (if different than Job Location)	City (Country)	State	ZIP Code	Telephone Number
				( )

PREVIOUS PERIODS OF ACTIVITY (Block#6)

Month/Year	Month/Year	Position Title	Supervisor
	To		
Month/Year	Month/Year	Position Title	Supervisor
	To		
Month/Year	Month/Year	Position Title	Supervisor
	To		

12 PEOPLE WHO KNOW YOU WELL

List **three people** who know you well and live in the United States. They should be good friends, peers, colleagues, college roommates, etc., whose combined association with you covers as well as possible the last 7 years. Do not list your spouse, former spouses, or other relatives, and try not to list anyone who is listed elsewhere on this form.

Name	Dates Known Month/Year	Month/Year	Telephone Number
#1	To		( ) Day ( ) Night ( )
Home or Work Address	City (Country)	State	ZIP Code

Name	Dates Known Month/Year	Month/Year	Telephone Number
#2	To		( ) Day ( ) Night ( )
Home or Work Address	City (Country)	State	ZIP Code

Name	Dates Known Month/Year	Month/Year	Telephone Number
#3	To		( ) Day ( ) Night ( )
Home or Work Address	City (Country)	State	ZIP Code

Enter your Social Security Number before going to the next page →

13 YOUR SPOUSE

Mark one box to show your current marital status and provide information about your spouse(s) in items a, and/or b.

☐ 1 - Never married ☐ 2 - Married ☐ 3 - Separated ☐ 4 - Legally Separated ☐ 5 - Divorced ☐ 6 - Widowed

a Current Spouse Complete the following about your current spouse only.

Full Name	Date of Birth	Place of Birth *(Include country if outside the U.S.)*	Social Security Number

Other Names Used *(Specify maiden name, names by other marriages, etc., and show dates used for each name)*	Country(ies) of Citizenship

Date Married	Place Married *(Include country if outside the U.S.)*	State

If Separated, Date of Separation	If Legally Separated, Where is the Record Located? City *(Country)*	State

Address of Current Spouse, if different than your current address *(Street, city, and country if outside the U.S.)*	State	ZIP Code

b Former Spouse(s) Complete the following about your former spouse(s), use blank sheets if needed.

Full Name	Date of Birth	Place of Birth *(Include country if outside the U.S.)*	State

Country(ies) of Citizenship	Date Married	Place Married *(Include country if outside the U.S.)*	State

Check One, Then Give Date ☐ Divorced ☐ Widowed	Month/Day/Year	If Divorced, Where is the Record Located? City *(Country)*	State

Address of Former Spouse *(Street, city, and country if outside the U.S.)*	State	ZIP Code	Telephone Number
			( )

14 YOUR RELATIVES AND ASSOCIATES

Give the full name, correct code, and other requested information for each of your relatives and associates, living or dead, specified below.

1 - Mother *(first)*
2 - Father *(second)*
3 - Stepmother
4 - Stepfather
5 - Foster parent
6 - Child *(adopted also)*
7 - Stepchild
8 - Brother
9 - Sister
10 - Stepbrother
11 - Stepsister
12 - Half-brother
13 - Half-sister
14 - Father-in-law
15 - Mother-in-law
16 - Guardian
17 - Other Relative*
18 - Associate*
19 - Adult Currently Living With You

* Code 17 (Other Relative)-include only foreign national relatives not listed in 1-16 with whom you or your spouse are bound by affection, obligation, or close and continuing contact. Code 18 (Associates) - include only foreign national associates with whom you or your spouse are bound by affection, obligation, or close and continuing contact.

Full Name (If deceased, check box on the left before entering name)	Code	Date of Birth Month/Day/Year	Country of Birth	Country(ies) of Citizenship	Current Street Address and City *(country)* of Living Relatives	State
☐	1					
☐	2					
☐						
☐						
☐						
☐						
☐						
☐						
☐						
☐						
☐						

Enter your Social Security Number before going to the next page →

15 CITIZENSHIP OF YOUR RELATIVES AND ASSOCIATES

If your mother, father, sister, brother, child, or current spouse or person with whom you have a spouse-like relationship is a U.S. citizen by other than birth, or an alien residing in the U.S., provide the nature of the individual's relationship to you (Spouse, Spouse-like, Mother, etc.), and the individual's name and date of birth on the first line *(this information is needed to pair it accurately with information in items 13 and 14).*

On the second line, provide the individual's naturalization certificate or alien registration number and use one of the document codes below to identify proof of citizenship status. Provide additional information on that line as requested.

1. **Naturalization Certificate:** Provide the date issued and the location where the person was naturalized (Court, City and State).
2. **Citizenship Certificate:** Provide the date and location issued (City and State).
3. **Alien Registration:** Provide the date and place where the person entered the U.S. (City and State).
4. **Other:** Provide an explanation in the "Additional information" block.

Association 1#	Name	Date of Birth (Month/Day/Year)
Certificate/Registration #	Document Code	Additional Information
Association 2#	Name	Date of Birth (Month/Day/Year)
Certificate/Registration #	Document Code	Additional Information

16 YOUR MILITARY HISTORY

	Yes	No
a Have you served in the United States military?		
b Have you served in the United States Merchant Marine?		

List all of your military service below, including service in Reserve, National Guard, and U.S. Merchant Marine. Start with the most recent period of service (#1) and work backward. If you had a break in service, each separate period should be listed.

- **Code.** Use one of the codes listed below to identify your branch of service:
  1 - Air Force 2 - Army 3 - Navy 4 - Marine Corps 5 - Coast Guard 6 - Merchant Marine 7 - National Guard
- **O/E.** Mark "O" block for Officer or "E" block for Enlisted.
- **Status.** "X" the appropriate block for the status of your service during the time that you served. If your service was in the National Guard, do not use an "X": use the two-letter code for the state to mark the block.
- **Country.** If your service was with other than the U.S. Armed Forces, identify the country for which you served.

Month/Year To	Month/Year To	Code	Service/Certificate #	O	E	Status: Active	Status: Active Reserve	Status: Inactive Reserve	Status: National Guard (State)	Country

17 YOUR FOREIGN ACTIVITIES

	Yes	No
a Do you have any foreign property, business connections, or financial interests?		
b Are you now or have you ever been employed by or acted as a consultant for a foreign government, firm, or agency?		
c Have you ever had any contact with a foreign government, its establishments (embassies or consulates), or its representatives, whether inside or outside the U.S., other than on official U.S. Government business? (Does not include routine visa applications and border crossing contacts.)		
d In the last 7 years, have you had an active passport that was issued by a foreign government?		

If you answered "Yes" to a, b, c, or d above, explain in the space below: provide inclusive dates, names of firms and/or governments involved, and an explanation of your involvement.

Month/Year To	Month/Year To	Firm and/or Government	Explanation

18 FOREIGN COUNTRIES YOU HAVE VISITED

List foreign countries you have visited, except on travel under official Government orders, beginning with the most current (#1) and working back 7 years. **(Travel as a dependent or contractor must be listed.)**

- Use one of these codes to indicate the purpose of your visit: **1 - Business 2 - Pleasure 3 - Education 4 - Other**
- Include short trips to Canada or Mexico. If you have lived near a border and have made short (one day or less) trips to the neighboring country, you do not need to list each trip. Instead, provide the time period, the code, the country, and a note ("Many Short Trips").
- **Do not repeat travel covered in items 9, 10, or 11.**

Month/Year To	Month/Year To	Code	Country	Month/Year To	Month/Year To	Code	Country
#1				#3			
#2				#4			

This concludes Part 1 of this form. If you have used Page 9, continuation sheets, or blank sheets to complete any of the questions in Part 1, give the number for those questions in the space to the right:

Enter your Social Security Number before going to the next page →

QUESTIONNAIRE FOR NATIONAL SECURITY POSITIONS

Form approved:
O.M.B. No. 3206-0007
NSN 7540-00-634-4036
86-111

Part 2

OFFICIAL USE ONLY

19 YOUR MILITARY RECORD

Have you ever received other than an honorable discharge from the military? If "Yes," provide the date of discharge and type of discharge below.

Yes	No

Month/Year	Type of Discharge

20 YOUR SELECTIVE SERVICE RECORD

	Yes	No
a Are you a male born after December 31, 1959? If "**No,**" go to **21**. If "**Yes,**" go to **b.**		
b Have you registered with the Selective Service System? If "**Yes,**" provide your registration number. If "**No,**" show the reason for your legal exemption below.		

Registration Number	Legal Exemption Explanation

21 YOUR MEDICAL RECORD

	Yes	No
In the last 7 years, have you consulted with a mental health professional (psychiatrist, psychologist, counselor, etc.) or have you consulted with another health care provider about a mental health related condition?		

If you answered "Yes", provide the dates of treatment and the name and address of the therapist or doctor below, unless the consultation(s) involved only marital, family, or grief counseling, not related to violence by you.

Month/Year	Month/Year	Name/Address of Therapist or Doctor	State	ZIP Code
	To			
	To			

22 YOUR EMPLOYMENT RECORD

	Yes	No
Has any of the following happened to you **in the last 7 years?** If "**Yes,**" begin with the most recent occurrence and go backward, providing date fired, quit, or left, and other information requested.		

Use the following codes and explain the reason your employment was ended:

1 - Fired from a job
2 - Quit a job after being told you'd be fired
3 - Left a job by mutual agreement following allegations of misconduct
4 - Left a job by mutual agreement following allegations of unsatisfactory performance
5 - Left a job for other reasons under unfavorable circumstances

Month/Year	Code	Specify Reason	Employer's Name and Address *(Include city/Country if outside U.S.)*	State	ZIP Code

23 YOUR POLICE RECORD

For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.

	Yes	No
a Have you ever been charged with or convicted of any felony offense? (Include those under Uniform Code of Military Justice)		
b Have you ever been charged with or convicted of a firearms or explosives offense?		
c Are there currently any charges pending against you for any criminal offense?		
d Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?		
e In the last 7 years, have you been subject to court martial or other disciplinary proceedings under the Uniform Code of Military Justice? (Include non-judicial, Captain's mast, etc.)		
f In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e above? (Leave out traffic fines of less than $150 unless the violation was alcohol or drug related.)		

If you answered "Yes" to a, b, c, d, e, or f above, explain below. Under "Offense," do not list specific penalty codes, list the actual offense or violation (for example, arson, theft, etc.).

Month/Year	Offense	Action Taken	Law Enforcement Authority/Court *(Include City and county/country if outside U.S.)*	State	ZIP Code

Enter your Social Security Number before going to the next page →

24 YOUR USE OF ILLEGAL DRUGS AND DRUG ACTIVITY

The following questions pertain to the illegal use of drugs or drug activity. You are required to answer the questions fully and truthfully, and your failure to do so could be grounds for an adverse employment decision or action against you, but neither your truthful responses nor information derived from your responses will be used as evidence against you in any subsequent criminal proceeding.

		Yes	No
a	Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?		
b	Have you ever illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting the public safety?		
c	In the last 7 years, have you been involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of any narcotic, depressant, stimulant, hallucinogen, or cannabis for your own intended profit or that of another?		

If you answered "Yes" to a or b above, provide the date(s), identify the controlled substance(s) and/or prescription drugs used, and the number of times each was used.

Month/Year	Month/Year	Controlled Substance/Prescription Drug Used	Number of Times Used
	To		
	To		

25 YOUR USE OF ALCOHOL

	Yes	No
In the last 7 years, has your use of alcoholic beverages (such as liquor, beer, wine) resulted in any alcohol-related treatment or counseling (such as for alcohol abuse or alcoholism)?		

If you answered "Yes", provide the dates of treatment and the name and address of the counselor or doctor below. Do not repeat information reported in response to item 21 above.

Month/Year	Month/Year	Name/Address of Counselor or Doctor	State	ZIP Code
	To			
	To			

26 YOUR INVESTIGATIONS RECORD

		Yes	No
a	Has the United States Government ever investigated your background and/or granted you a security clearance? If **"Yes,"** use the codes that follow to provide the requested information below. If **"Yes,"** but you can't recall the investigating agency and/or the security clearance received, enter **"Other"** agency code or clearance code, as appropriate, and **"Don't know"** or **"Don't recall"** under the **"Other Agency"** heading below. If your response is **"No,"** or you don't know or can't recall if you were investigated and cleared, check the **"No"** box.		

Codes for Investigating Agency
1 - Defense Department
2 - State Department
3 - Office of Personnel Management
4 - FBI
5 - Treasury Department
6 - Other *(Specify)*

Codes for Security Clearance Received
0 - Not Required
1 - Confidential
2 - Secret
3 - Top Secret
4 - Sensitive Compartmented Information
5 - Q
6 - L
7 - Other

Month/Year	Agency Code	Other Agency	Clearance Code	Month/Year	Agency Code	Other Agency	Clearance Code

		Yes	No
b	To your knowledge, have you ever had a clearance or access authorization denied, suspended, or revoked, or have you ever been debarred from government employment? If **"Yes,"** give date of action and agency. **Note:** An administrative downgrade or termination of a security clearance is not a revocation.		

Month/Year	Department or Agency Taking Action	Month/Year	Department or Agency Taking Action

27 YOUR FINANCIAL RECORD

		Yes	No
a	In the last 7 years, have you filed a petition under any chapter of the bankruptcy code (to include Chapter 13)?		
b	In the last 7 years, have you had your wages garnished or had any property repossessed for any reason?		
c	In the last 7 years, have you had a lien placed against your property for failing to pay taxes or other debts?		
d	In the last 7 years, have you had any judgments against you that have not been paid?		

If you answered **"Yes"** to a, b, c, or d, provide the information requested below:

Month/Year	Type of Action	Amount	Name Action Occurred Under	Name/Address of Court or Agency Handling Case	State	ZIP Code

Enter your Social Security Number before going to the next page →

28 YOUR FINANCIAL DELINQUENCIES

		Yes	No
a	In the last 7 years, have you been over 180 days delinquent on any debt(s)?		
b	Are you currently over 90 days delinquent on any debt(s)?		

If you answered "**Yes**" to a or b, provide the information requested below:

Incurred Month/Year	Satisfied Month/Year	Amount	Type of Loan or Obligation and Account Number	Name/Address of Creditor or Obligee	State	ZIP Code

29 PUBLIC RECORD CIVIL COURT ACTIONS

	Yes	No
In the last 7 years, have you been a party to any public record civil court actions not listed elsewhere on this form?		

If you answered "**Yes**," provide the information about the public record civil court action requested below.

Month/Year	Nature of Action	Result of Action	Name of Parties Involved	Court *(Include City and county/country if outside U.S.)*	State	ZIP Code

30 YOUR ASSOCIATION RECORD

		Yes	No
a	Have you ever been an officer or a member or made a contribution to an organization dedicated to the violent overthrow of the United States Government and which engages in illegal activities to that end, knowing that the organization engages in such activities with the specific intent to further such activities?		
b	Have you ever knowingly engaged in any acts or activities designed to overthrow the United States Government by force?		

If you answered "**Yes**" to a or b, explain in the space below.

Continuation Space

Use the continuation sheet(s) (SF 86A) for additional answers to items 9, 10, and 11. Use the space below to continue answers to all other items and any information you would like to add. If more space is needed than is provided below, use a blank sheet(s) of paper. Start each sheet with your name and Social Security Number. Before each answer, identify the number of the item.

After completing Parts 1 and 2 of this form and any attachments, you should review your answers to all questions to make sure the form is complete and accurate, and then sign and date the following certification and sign and date the release on page 10.

Certification That My Answers Are True

My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of title 18, United States Code).

Signature *(Sign in ink)*	Date

Enter your Social Security Number before going to the next page →

Standard Form 86
Revised September 1995
U.S. Office of Personnel Management
5 CFR Parts 731, 732, and 736

Form approved:
O.M.B. No. 3206-0007
NSN 7540-00-634-4036
86-111

UNITED STATES OF AMERICA

AUTHORIZATION FOR RELEASE OF INFORMATION

Carefully read this authorization to release information about you, then sign and date it in ink.

I Authorize any investigator, special agent, or other duly accredited representative of the authorized Federal agency conducting my background investigation, to obtain any information relating to my activities from individuals, schools, residential management agents, employers, criminal justice agencies, credit bureaus, consumer reporting agencies, collection agencies, retail business establishments, or other sources of information. This information may include, but is not limited to, my academic, residential, achievement, performance, attendance, disciplinary, employment history, criminal history record information, and financial and credit information. I authorize the Federal agency conducting my investigation to disclose the record of my background investigation to the requesting agency for the purpose of making a determination of suitability or eligibility for a security clearance.

I Understand that, for financial or lending institutions, medical institutions, hospitals, health care professionals, and other sources of information, a separate specific release will be needed, and I may be contacted for such a release at a later date. Where a separate release is requested for information relating to mental health treatment or counseling, the release will contain a list of the specific questions, relevant to the job description, which the doctor or therapist will be asked.

I Further Authorize any investigator, special agent, or other duly accredited representative of the U.S. Office of Personnel Management, the Federal Bureau of Investigation, the Department of Defense, the Defense Investigative Service, and any other authorized Federal agency, to request criminal record information about me from criminal justice agencies for the purpose of determining my eligibility for access to classified information and/or for assignment to, or retention in, a sensitive National Security position, in accordance with 5 U.S.C. 9101. I understand that I may request a copy of such records as may be available to me under the law.

I Authorize custodians of records and other sources of information pertaining to me to release such information upon request of the investigator, special agent, or other duly accredited representative of any Federal agency authorized above regardless of any previous agreement to the contrary.

I Understand that the information released by records custodians and sources of information is for official use by the Federal Government only for the purposes provided in this Standard Form 86, and that it may be redisclosed by the Government only as authorized by law.

Copies of this authorization that show my signature are as valid as the original release signed by me. This authorization is valid for five (5) years from the date signed or upon the termination of my affiliation with the Federal Government, whichever is sooner. Read, sign and date the release on the next page if you answered "Yes" to question 21.

Signature *(Sign in ink)*	Full Name *(Type or Print Legibly)*		Date Signed
Other Names Used			Social Security Number
Current Address *(Street, City)*	State	ZIP Code	Home Telephone Number *(Include Area Code)* ( )

Standard Form 86
Revised September 1995
U.S. Office of Personnel Management
5 CFR Parts 731, 732, and 736

Form approved:
O.M.B. No. 3206-0007
NSN 7540-00-634-4036
86-111

UNITED STATES OF AMERICA
AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION

Carefully read this authorization to release information about you, then sign and date it in ink.

Instructions for Completing this Release

This is a release for the investigator to ask your health practitioner(s) the three questions below concerning your mental health consultations. Your signature will allow the practitioner(s) to answer only these questions.

I am seeking assignment to or retention in a position with the Federal government which requires access to classified national security information or special nuclear information or material. As part of the clearance process, **I hereby authorize** the investigator, special agent, or duly accredited representative of the authorized Federal agency conducting my background investigation, to obtain the following information relating to my mental health consultations:

> Does the person under investigation have a condition or treatment that could impair his/her judgement or reliability, particularly in the context of safeguarding classified national security information or special nuclear information or material?
>
> If so, please describe the nature of the condition and the extent and duration of the impairment or treatment.
>
> What is the prognosis?

I understand the information released pursuant to this release is for use by the Federal Government only for purposes provided in the Standard Form 86 and that it may be redisclosed by the Government only as authorized by law.

Copies of this authorization that show my signature are as valid as the original release signed by me. This authorization is valid for 1 year from the date signed or upon termination of my affiliation with the Federal Government, whichever is sooner.

Signature *(Sign in ink)*	Full Name *(Type or Print Legibly)*		Date Signed
Other Names Used			Social Security Number
Current Address *(Street, City)*	State	ZIP Code	Home Telephone Number *(Include Area Code)*
			( )

SUPPLEMENT TO STANDARD FORM 86 (SF-86)
(Attach additional pages if necessary)

1S. Please list names of all corporations, firms, partnerships or other business enterprises, and all nonprofit organizations and other institutions with which you are *now*, or *during the past five years* have been, affiliated as an officer, owner, director, trustee, partner, advisor, attorney or consultant. In addition, please provide the names of any other organizations with which you were affiliated *prior to the past five years* that might present a potential conflict or appearance of conflict of interest with your prospective appointment. (Please note that in the case of an attorney's client listing, it is only necessary to provide the names of major clients and those that might present a potential conflict or appearance of conflict of interest with the prospective appointment.)

2S. Please list all your interests in real property, other than a personal residence, setting forth the nature of your interest, the type of property and the address.

3S. Have you or any firm, company or other entity with which you have been associated ever been convicted of a violation of any Federal, state, county or municipal law, regulation or ordinance? If so, please provide full details.

4S. Have you or any firm, company or other entity with which you have been associated ever been the subject of Federal, state or local investigation for possible violation of a criminal statute? If so, please give full details.

5S. Have you ever been involved in civil or criminal litigation, or in administrative or legislative proceedings of any kind, either as a plaintiff, defendant, respondent, witness or party in interest? If so, please give full details identifying dates, issues litigated and the location where the civil action is recorded.

6S.	Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, please give full details.
7S.	Have you ever run for political office, served on a political committee or been identified in a public way with a particular organization, candidate or issue? Have any complaints been lodged against you or your political committee with the Federal Election Commission or state or local election authorities? If so, please describe.
8S.	Are you currently, or have you ever been, a member or office holder in any club or organization that restricts or restricted membership on the basis of sex, race, color, religion, national origin , age or handicap? If so, provide the name, address and dates of membership for each.
9S.	Please identify any adults (18 years or older) currently living with you who are not members of your immediate family. Provide the names of those individuals, dates and places of birth, and whether or not they are United States citizens.
10S.	Is there anything in your personal life that could be used by someone to coerce or blackmail you? Is there anything in your life that could cause an embarrassment to you or to the President if publicly known? If so, please provide full details.

I understand that the information being provided on this supplement to the SF-86 is to be considered part of the original SF-86 dated _____ and a false statement on this form is punishable by law.

_____

Signature

U.S. Department of Justice

Tax Check Waiver

I am signing this waiver to permit the Internal Revenue Service to release information about me which would otherwise be confidential. This information will be used in connection with my appointment or employment by the United States Government. This waiver is made pursuant to 26 U.S.C. §6103(c).

I request that the Internal Revenue Service release the following information to David T. Best, U.S. Department of Justice:

1. Have I failed to file any Federal income tax return for any of the last three years for which filing of a return might have been required? (If the filing date without regard to extensions and normal processing period for most recent year's return has not yet elapsed on the date IRS receives this waiver, and the IRS records do not indicate a return for the most recent year, the "last three years" will mean the three years preceding the year for which returns are currently being filed and processed.)

2. Were any of the returns in #1 filed more than 45 days after the due date for filing (determined with regard to any extension(s) of time for filing)?

3. Have I failed to pay any tax, penalty or interest during the current or last three calendar years within 45 days of the date on which the IRS gave notice of the amount due and requested payment?

4. Am I now or have I ever been under investigation by the IRS for possible criminal offenses?

5. Has any civil penalty for fraud been assessed against me during the current or last three calendar years?

I authorize the IRS to release any additional relevant information necessary to respond to the questions above.

To help the IRS find my tax records and the Department of Justice to evaluate my tax history, I am voluntarily giving the following information:

MY NAME: _____ MY SSN: _____
(Please print or type)

CURRENT ADDRESS: _____

_____

TELEPHONE NUMBERS: (HOME) _(_____)_____ (WORK) _(_____)_____
(Please include area codes)

IF MARRIED AND FILED A JOINT RETURN:

SPOUSE'S NAME: _____ SPOUSE'S SSN: _____

NAMES AND ADDRESSES SHOWN ON RETURNS (IF DIFFERENT FROM ABOVE)

YEAR	NAME	ADDRESS

_____

_____

1. If a tax return for any of the last three years was not filed, please explain why in the space provided below.

2. If a tax return for any of the last three tax years was filed more than 45 days after the due date for filing, please explain why in the space provided below.

3. If a tax payment for any of the last three tax years was made more than 45 days after notice and demand, please explain why in the space provided below.

4. If there was insufficient income to meet filing requirements or filing requirements were met by filing with a foreign tax agency (e.g., Puerto Rico or the Virgin Islands), please describe the circumstances in the space provided below.

_____

_____

_____

_____

_____

DATE: _____
(Waiver Invalid Unless Received
By the IRS Within 60 Days of This Date)

_____
(Signature of Taxpayer Authorizing the
Disclosure of Return Information)

DOJ-488A (Rev. 10/97)

Additional Instructions for Completing Standard Form 86, "Questionnaire for National Security Positions"

OU MUST READ AND FOLLOW CAREFULLY THE FOLLOWING INSTRUCTIONS WHEN MPLETING THE STANDARD FORM 86 (SF-86). NOTE THAT IN A NUMBER OF IPORTANT RESPECTS THESE ADDITIONAL INSTRUCTIONS VARY FROM THE INSTRUCTIONS INTED ON THE FORM ITSELF.

NERAL INSTRUCTIONS

Although many of the questions on the SF-86 ask you to provide information for the last seven years, we require that you answer *all* questions with information since your 18th birthday.

Although the instructions on the SF-86 indicate that you may legibly print your answers, you must type this form and all attachments.

It is essential that all information be provided in as much detail as requested. Ambiguous and incomplete information will impede the FBI's investigation and will cause valuable time to be lost. Be specific: exact and complete names, dates, and addresses and explanations of answers are necessary for an expeditious handling of the investigation. Do not abbreviate the names of cities. The inclusion of zip codes is particularly helpful.

STRUCTIONS REGARDING PARTICULAR QUESTIONS

Citizenship: If you are a U.S. citizen other than by birth, you must also execute the "Immigration Addendum to the SF-86."

Where You Have Lived: For apartment complexes, include the name of the complex and the specific unit number. If you lived in a residence that was leased or rented, include the name of the individual in whose name the rental agreement or lease was established.

Where You Went to School: Please list all education received <u>including</u> high school.

Your Employment Activities: Provide complete addresses (street/city/state/zip code) for each employment listed. Be as specific as possible (i.e., include divisions or departments, etc.)

Include all periods of unemployment, self-employment, volunteer employment, or internships. Provide names, complete addresses and telephone numbers of persons who can verify periods of unemployment or self-employment.

People Who Know You Well: Also please provide complete business addresses (including name of business), and business telephone numbers.

Your Relatives and Associates: Although the SF-86 requests only the country of birth, also provide the city and state or city and country. If relatives live overseas, please indicate whether or not they are serving in the military. Provide their complete address, including city and country. Do not list APO or FPO address.

Include the full name, complete date of birth, and place of birth (city and state) of all individuals who presently reside in your household.

If any relatives or cotenants were born outside the United States and/or are a U.S. citizen other than by birth, complete the "Immigration Addendum to the SF-86" with respect to those persons.

Your Military History: If you are a member of a military reserve component or National Guard unit, list the organization, its location, the name of your immediate officer and telephone number, if known.

Your Selective Service Record: Inquiries regarding your own registration can be directed to the Selective Service at 708-688-6888.

Your Employment Record: If you have ever been denied employment while undergoing or upon completion of a background investigation or polygraph examination, please identify the prospective employer and the date and reason for voluntary/involuntary withdrawal from consideration.

F. **Your Police Record:** List all arrests, charges and convictions (except traffic fines of less than $150.00).

/25. **Use of Illegal Drugs and Drug Activity/Your Use of Alcohol:** If you have ever abused legal or prescription drugs to the point of dependency, also list. In addition, list treatment for drug or alcohol dependency.

/28. **Your Financial Record/Your Financial Delinquencies:** If a collection procedure has ever been instituted against you by Federal, state or local authorities, please give full details. In addition, list any incidents of bankruptcy.

you have any questions, please call the White House Counsel's Office at 02) 456-6229.

Certification

have read and understand these supplemental instructions and have ovided my answers in accordance with such instructions.

gnature _____ Printed/Typed Name _____ Date _____

Standard Form 86A (EG)
Revised September 1995
U.S. Office of Personnel Management
5 CFR Parts 731, 732, and 736

CONTINUATION SHEET FOR QUESTIONNAIRES
SF 86, SF 85P, AND SF 85

Form approved:
OMB No. 3206-0007
NSN 7540-01-268-4828
86-203

For use with the SF 86, Questionnaire for National Security Positions;
SF 85P, Questionnaire for Public Trust Positions; and
SF 85, Questionnaire for Non-Sensitive Positions

INSTRUCTIONS: Use this form to continue your answers to "Where You Have Lived," "Where You Went to School," and/or "Your Employment Activities." Follow the instructions on the form for the particular questions you are answering and give information in the same sequence. Use as many continuation sheets as needed.

Your Name	Your Social Security Number

WHERE YOU HAVE LIVED *(Continued)*

#1 Month/Year To Month/Year	Street Address	Apt. #	City (Country)		State	ZIP Code		
Name of Person Who Knew You	Street Address	Apt. #	City (Country)	State	ZIP Code	Telephone Number ( )		
#2 Month/Year To Month/Year	Street Address	Apt. #	City (Country)		State	ZIP Code		
Name of Person Who Knew You	Street Address	Apt. #	City (Country)	State	ZIP Code	Telephone Number ( )		
#3 Month/Year To Month/Year	Street Address	Apt. #	City (Country)		State	ZIP Code		
Name of Person Who Knew You	Street Address	Apt. #	City (Country)	State	ZIP Code	Telephone Number ( )		
#4 Month/Year To Month/Year	Street Address	Apt. #	City (Country)		State	ZIP Code		
Name of Person Who Knew You	Street Address	Apt. #	City (Country)	State	ZIP Code	Telephone Number ( )		
#5 Month/Year To Month/Year	Street Address	Apt. #	City (Country)		State	ZIP Code		
Name of Person Who Knew You	Street Address	Apt. #	City (Country)	State	ZIP Code	Telephone Number ( )		

WHERE YOU WENT TO SCHOOL *(Continued)*

#1 Month/Year To Month/Year	Code	Name of School	Degree/Diploma/Other			Month/Year Awarded
Street Address and City (Country) of School					State	ZIP Code
Name of Person Who Knew You	Street Address	Apt. #	City (Country)	State	ZIP Code	Telephone Number ( )
#2 Month/Year To Month/Year	Code	Name of School	Degree/Diploma/Other			Month/Year Awarded
Street Address and City (Country) of School					State	ZIP Code
Name of Person Who Knew You	Street Address	Apt. #	City (Country)	State	ZIP Code	Telephone Number ( )
#3 Month/Year To Month/Year	Code	Name of School	Degree/Diploma/Other			Month/Year Awarded
Street Address and City (Country) of School					State	ZIP Code
Name of Person Who Knew You	Street Address	Apt. #	City (Country)	State	ZIP Code	Telephone Number ( )

Exception to SF85, SF85P, SF85P-S, SF86, and SF86A approved by GSA September, 1995.
Designed using Perform Pro, WHS/DIOR, Sep 95

YOUR EMPLOYMENT ACTIVITIES *(Continued)*

Month/Year To	Month/Year	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank
Employer's/Verifier's Street Address		City (Country)	State / ZIP Code / Telephone Number ( )	
Street Address of Job Location (If different than Employer's Address)		City (Country)	State / ZIP Code / Telephone Number ( )	
Supervisor's Name & Street Address (If different than Job Location)		City (Country)	State / ZIP Code / Telephone Number ( )	

PREVIOUS PERIODS OF ACTIVITY	Month/Year To	Month/Year	Position Title	Supervisor
	Month/Year To	Month/Year	Position Title	Supervisor
	Month/Year To	Month/Year	Position Title	Supervisor

Month/Year To	Month/Year	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank
Employer's/Verifier's Street Address		City (Country)	State / ZIP Code / Telephone Number ( )	
Street Address of Job Location (If different than Employer's Address)		City (Country)	State / ZIP Code / Telephone Number ( )	
Supervisor's Name & Street Address (If different than Job Location)		City (Country)	State / ZIP Code / Telephone Number ( )	

PREVIOUS PERIODS OF ACTIVITY	Month/Year To	Month/Year	Position Title	Supervisor
	Month/Year To	Month/Year	Position Title	Supervisor
	Month/Year To	Month/Year	Position Title	Supervisor

Month/Year To	Month/Year	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank
Employer's/Verifier's Street Address		City (Country)	State / ZIP Code / Telephone Number ( )	
Street Address of Job Location (If different than Employer's Address)		City (Country)	State / ZIP Code / Telephone Number ( )	
Supervisor's Name & Street Address (If different than Job Location)		City (Country)	State / ZIP Code / Telephone Number ( )	

PREVIOUS PERIODS OF ACTIVITY	Month/Year To	Month/Year	Position Title	Supervisor
	Month/Year To	Month/Year	Position Title	Supervisor
	Month/Year To	Month/Year	Position Title	Supervisor

Month/Year To	Month/Year	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank
Employer's/Verifier's Street Address		City (Country)	State / ZIP Code / Telephone Number ( )	
Street Address of Job Location (If different than Employer's Address)		City (Country)	State / ZIP Code / Telephone Number ( )	
Supervisor's Name & Street Address (If different than Job Location)		City (Country)	State / ZIP Code / Telephone Number ( )	

PREVIOUS PERIODS OF ACTIVITY	Month/Year To	Month/Year	Position Title	Supervisor
	Month/Year To	Month/Year	Position Title	Supervisor
	Month/Year To	Month/Year	Position Title	Supervisor

Enter your Social Security Number before going to the next page →

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

MEMORANDUM FOR PROSPECTIVE JUDICIAL NOMINEES

The attached packet of forms must be completed by all prospective judicial nominees. Although the forms may be repetitive, each does have a different purpose – and therefore, we ask your assistance in completing all of them.

The attached forms include the following:

- Personal Data Statement: This form is prescribed by the White House Counsel's Office for all prospective appointees.

- FBI Background Investigation Forms: The Standard Form 86, along with various waivers to include a tax-check waiver and two fingerprint cards, are required of all potential nominees, so that the FBI can conduct its routine background investigation. We are asking you to complete the forms now for our internal review; you will be notified before we direct the FBI to begin any investigation. Please see the separate cover memorandum on FBI clearances for detailed instructions on completing these forms. It may be possible for you to download an electronic version from www.opm.gov. After you reach the OPM web site, look under forms, then standard forms and find SF-86.

- Senate Judiciary Committee Questionnaire: This form is prescribed by the Judiciary Committee, for its review should the President decide to nominate you. Again, the draft you provide us now is for our internal use only; you will have a chance to prepare and review a final draft before it is submitted to the Senate. Thus, please disregard for now the form's instructions to submit 18 copies to the Committee.

- Financial Disclosure Report (AO-10): This form is required by the Ethics in Government Act. This form is required to be filed within five days of your name being transmitted to the Senate. Because this form must be reviewed and be in compliance with the provisions of the ethics act, we ask that you complete this form now and return it for our review.

We are asking you to complete all of these forms now – even those involving aspects of the nomination process that are not yet pressing – to avoid later delays in the review process

THE WHITE HOUSE
Washington

Office of Counsel to the President

PERSONAL DATA STATEMENT

TO: ALL PROSPECTIVE PRESIDENTIAL APPOINTEES AND WHITE HOUSE EMPLOYEES

FROM: ALBERTO R. GONZALES
COUNSEL TO THE PRESIDENT

As part of the clearance procedures relating to your proposed appointment, please respond to the following items. Responses should be typed on a separate sheet(s) of paper with responses numbered to correspond to the relevant item. **Please answer questions 1-9 on a sheet(s) of paper separate from your answers to questions 10-23.**

1. Please state your full legal name, any other names used and the position for which you are being considered.

2. Please state, if married, your spouse's name, occupation, position and place of employment.

3. In the last seven years, have you ever failed to file an income tax return, filed a late income tax return without a valid extension, paid any tax penalties, or been the subject or any tax collection or audit procedure? If so, please explain and describe the resolution of the matter.

4. Have you or your spouse ever failed to make payments on any obligations of child support or alimony? If so, please explain.

5. Have you or your spouse or any businesses over which you or your spouse have exercised control ever failed to pay any loan or similar obligation when due at final maturity, or have you ever been more than 180 days delinquent on any such loan or obligation?

6. Please list each membership you have had during the past ten years or currently hold with any civic, social, charitable, educational, political, professional, fraternal, benevolent or religious organization, private club, or other membership organization. Include dates of membership and any positions you have held with any organization.

7. Have you ever been a candidate for public office? If so, indicate whether that campaign has any outstanding debt, the amount and whether you are personally liable for that debt.

8. Do you have any commitments or agreements, formal or informal, to maintain employment, affiliation or practice with any business, association or other organization during your appointment? If so, please explain.

9. Do you have any commitments or agreements, formal or informal, to resume or initiate employment, affiliation or practice with any business, association or other organization following your appointment? If so, please explain.

* * * * * *

(PLEASE ANSWER QUESTIONS 10-23 ON A SHEET(S) OF PAPER SEPARATE FROM YOUR RESPONSES TO QUESTIONS 1-9)

10. Please describe the general state of your health, including any medical conditions that could in any way interfere with your ability to fulfill your duties.

11. Since the age of 18 or in the last 15 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?

12. Have you ever illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance, or while in a position directly and immediately affecting the public safety?

13. Since the age of 18, have you been involved in the illegal purchase, manufacturer, trafficking, production, transfer, shipping, receiving, or sale of any narcotics, depressant, stimulant, hallucinogenic, or cannabis for you own intended profit or that of another?

14. Please list any household employees (e.g., nannies, gardeners, and housekeepers) you have employed to perform services on a regular basis in the last ten years. Please also indicate as to each household employee whether the employee was legally working in the United States at the time of employment, and whether you complied with all required payments of federal and state taxes for the employee.

15. Have you ever been accused, formally or informally, of sexual harassment or discrimination on the basis of sex, race, religion or any other basis? If so, please explain.

16. Please identify each instance in which you have testified orally or in writing before Congress in a non-governmental capacity and specify the subject matter of each testimony.

17. Please list each book, article, column, or publication you have authored, individually or with others, and any speeches that you have given. Do not attach copies of these publications unless otherwise instructed by the Office of Counsel to the President.

18. Have you ever been publicly identified either personally or by organizational membership with a particularly controversial national or local issue? If so, please explain.

19. Have you or your spouse ever had any association with any person, group or business venture that could be used, even unfairly, to impugn or attack your character and qualifications for a government position? If so, please explain.

20. Do you know anyone or any organization that might take any steps, overtly or covertly, fairly or unfairly, to criticize your appointment? If so, please explain.

21. Is there any other information, including information about other members of your family, that would indicate a conflict of interest, whether actual or perceived, with your prospective employment in this administration?

22. Is there any other information, including information about other members of your family that could be considered a possible source of embarrassment to you, your family, or the President?

23. Please indicate any additional information that you believe would be material to the Office of Counsel to the President in the consideration of your proposed appointment.

PHYSICAL QUALIFICATION - Judiciary

U.S. Department of Justice

The physical and mental requirements for Judiciary appointments are in principle that the appointee is currently capable, and for the foreseeable future will be capable of efficient service without evidence of mental or emotional instability.

The following are suggested medical findings:

I. Eyes - (a) vision required in only one eye

(b) 20/40 near and far vision required in better eye, with or without correction.

II. Ears - no hearing loss of greater than 30 decibels at the 500, 1000 and 2000 Hz levels or adequate hearing as corrected by a hearing aid.

III. Speech - clear, discernable speech.

The following conditions may be disqualifying:

I. EEN & T

(a) Eyes - Chronic retinitia, poorly controlled glaucoma, bilateral cataracts.

(b) Ears - severe tinnitus, Meniere's Disease.

(c) Nose - chronic disabling sinusitis.

II. Cardiovascular System

(a) Hypertension exceeding 160/100 with medication.

(b) Congestive heart disease requiring digitalis and diuretics.

(c) Myocardial ischemia manifested by angina, dyspnea, fatigue, positive stress testing or a history of 2 or more myocardial infarctions.

(d) Aberrant Conduction - i.e., left bundle branch block, chronic paroxysmal tachycardia, etc.

(e) Peripheral vascular disease: arterial manifested by pain, blanching, etc. Venous by symptomatic venous dysfunction manifested by painful varicosities, edema, ulceration and skin discoloration.

(f) Cerebral ischemia or hemorrhage manifested by ataxia, neurological deficits or two or more episodes of cerebral thrombosis or hemorrhage.

(g) Blood and allied disorders such as Leukemia, Lymphoma, Hodgkin's disease, multiple myeloma, etc.

III. Musculo-skeletal

(a) Moderately severe symptomatic arthritis.

(b) Disc disease manifested by muscle spasm, radiculitis, etc.

(c) Chronic low back syndrome.

IV. Respiratory

(a) Moderately severe restrictive or obstructive lung disease manifested by x-ray or pulmonary function tests.

(b) Chronic, moderately severe bronchitis, recurrent pneumonia, moderately severe asthma.

V. Gastro-intestinal

Ulcers manifested by frequent exacerbation, obstruction, bleeding, dumping dyndrome, etc., chronically severe colitis, chronic pancreatitis, chronic hepatitis, cirrhosis, etc.

VII. Neurological

Progressive neurological disorders such as Parkinson's disease, Huntington's chorea, poorly controlled epilepsy, disabling cephalgia.

VIII. Endocrine

Diabetes with complications, symptomatic adrenal insufficiency, etc.

IX. Malignancy

A history or finding of a malignancy within the last two years except for non-invasive, non-metastasizing skin malignancies.

X. Current emotional or mental instability

XI. Miscellaneous

Any other condition that is disabling or potentially disabling in the foreseeable future.

PLEASE COMPLETE (A) OR (B) BELOW.

(A) I certify that _____ meets the above physical and mental requirements for appointment to the Federal Judiciary.

Signed:_____

Date:_____

(B) I certify that _____ does not meet the above physical and mental requirements for appointment to the Federal Judiciary.

Signed:_____

Date:_____

Comments:

Name of Judicial Candidate	Date of Birth	Height	Weight

Date of Examination: _____

Vision	Near		Far	
Uncorrected	20/	20/	20/	20/
Corrected	20/	20/	20/	20/

Audiometric				
	500 Hz	1000 Hz	2000 Hz	4000 Hz
Rt				
Left				

Do you find any abnormal condition or disease of:

	Yes	No
Eye, Ear, Nose & Throat		
Cardiovascular System		
Respiratory System		
Musculo-skeletal		
Gastro-intestinal		
Genito-urinary		

	Yes	No
Brain & Nervous System		
Mental or Emotional		
Endocrine		
Speech		
Urinalysis		
EKG, X-ray, etc		

Describe abnormal findings (if necessary, use extra sheets).

I certify that _____ meets the physical and mental requirements as described in the attached "Physical Qualifications - Judiciary" statement dated February, 1992.

_____
Physician's Signature

Physician's Name and Address
(PLEASE PRINT)

QUESTIONNAIRE FOR NOMINEES REFERRED TO THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

Your answers to the following questions will assist the Senate Committee on the Judiciary in evaluating your nomination. In completing the questionnaire, use letter size paper to complete your answers to the following questions. **Please type each question and place your answer immediately beneath it.**

Certain portions of the Committee Questionnaire will be made available to the public however, the confidential section of the questionnaire will be maintained on a confidential basis. **Please DO NOT STAPLE the public and confidential sections of the questionnaire together.**

If in response to any question to attach judicial opinions or published articles, **please include in your response the full citation of the judicial opinion or the full title of the article.**

Please make **twenty-five (25) stapled copies** of the completed public portion of the questionnaire, **five (5) stapled copies** of the confidential section of the questionnaire, and **four (4) copies** of any attachments to the questionnaire.

Mail all copies to: United States Department of Justice
950 Pennsylvania Avenue N.W.
Room 4229
Washington, D.C. 20530

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

2. Address: List current place of residence and office address(es).

3. Date and place of birth.

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for

any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

13. Health: What is the present state of your health? List the date of your last physical examination.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

2. What percentage of these appearances was in:
(a) federal courts;
(b) state courts of record;
(c) other courts.

3. What percentage of your litigation was:
(a) civil;
(b) criminal.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

5. What percentage of these trials was:
   (a) jury;
   (b) non-jury.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

   (a) the date of representation;
   (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
   (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks				Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule				Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule			
Real estate owned-add schedule				Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property							
Cash value-life insurance							
Other assets itemize:							
				Total liabilities			
				Net Worth			
Total Assets				Total liabilities and net worth			
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)			
On leases or contracts				Are you defendant in any suits or legal actions?			
Legal Claims				Have you ever taken bankruptcy?			
Provision for Federal Income Tax							
Other special debt							

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue,or question? If so, please explain fully.

5. Please discuss your views on the following criticism involving "judicial activism."

   The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

IV. CONFIDENTIAL

1. Full name (include any former names used).

2. Address: List current place of residence and office addresses). List all office and home telephone numbers where you may be reached.

3. Have you ever been discharged from employment for any reason or have you ever resigned after being informed that your employer intended to discharge you?

4. Have you and your spouse filed and paid all taxes (federal, state and local) as of the date of your nomination? Please indicate if you filed "married filing separately". Did you make any back tax payments prior to your nominations? If so, give full details.

5. Has a tax lien or other collection procedure ( ) ever been instituted against you by federal, state, or local authorities? If so, give full details.

6. Have you or your spouse ever been the subject of any audit, investigation, or inquiry for either federal, state, or local taxes? If so, give full details.

7. Have you or your spouse ever declared bankruptcy? If so, give particulars.

8. Have you to your knowledge ever been under federal, state, or local investigation for a possible violation of either a civil or criminal statute or administrative agency regulation? If so, give full details. Has any organization of which you were an officer, director, or active participant ever been the subject of such an investigation with respect to activities within your responsibility? If so, give full details.

9. Have you ever been the subject of a complaint to any court, administrative agency, bar association, disciplinary committee, or other professional group for a breach of

ethics, unprofessional conduct or a violation of any rule of practice? If so, give particulars.

10. Have you ever been a party (whether plaintiff, defendant or in any other capacity) to any litigation?

11. Please advise the Committee of any unfavorable information that may affect your nomination.

AFFIDAVIT

I, _____, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

_____ _____

(DATE) (NAME)

_____

(NOTARY)

JUDICIAL CONFERENCE OF THE UNITED STATES

COMMITTEE ON FINANCIAL DISCLOSURE

George D. Reynolds, Staff Counsel
One Columbus Circle, N.E.
Washington, D.C., 20544

Telephone:(202)502-1850
Facsimile:(202)502-1899

June 2, 2005

Re: Nomination Financial Disclosure Filing

Dear Nominee:

The Ethics in Government Act of 1978 (5 U.S.C. app., §§ 101-111) requires the filing of a financial disclosure report from a nominee within five days of transmittal of his or her nomination by the President to the Senate. Financial disclosure reports for judicial nominees are reviewed by the Judicial Conference of the United States Committee on Financial Disclosure. A copy of the judiciary's filing form (AO Form 10) and the filing instructions for preparing the report are enclosed for your use. All financial disclosure reports must be filed on the AO Form 10.

Your initial report is due five calendar days from the date that your nomination is forwarded to the Senate. As an initial report, block 6 must cover the time period from January 1, 2004, to a date that precedes the "Date of Report" in block 3 by no more than 30 days. In Part III, you must also report compensation, other than from the United States Government, earned in excess of $5,000 during calendar year 2003. All items on the form must be completed except Parts IV and V, relating to Reimbursements and Gifts; and Part VII, Column D, pertaining to transactions. You should write "exempt" in these spaces.

While the statute requires a timely filing, reasonable extensions of time to file can be granted, although the total extension may not exceed ninety days. Requests for extensions must be submitted to the Committee before the due date. See "Extensions of Time to File," page 3 of the filing instructions.

Please note the provisions of section 104(d), which impose a filing fee of $200 for a report filed more than 30 days after the due date. Upon written request by the filer, the fee may be waived by the Committee, but only for extraordinary circumstances. Please see page 3 of the enclosed filing instructions for the regulations on filing fees.

A copy of the financial disclosure software CD and software instructions are enclosed to assist you in the preparation of your report. Once you have entered the appropriate information, the program will allow you to print a copy of the completed report form. If you experience problems with the software, please call (202) 502-1850 for assistance.

The original and three copies of the report should be filed at the above address.

This report will be a public document open for inspection at the Office of the Committee on Financial Disclosure. You will be notified if, upon a proper request, the report is made available.

If you need assistance with completing the AO Form 10 or have questions about the filing instructions, please call the Committee office at (202) 502-1850 for assistance.

Sincerely,

George D. Reynolds

Enclosures

Financial Disclosure Reports of Judicial Nominees:

1) Special Rules
2) How to Avoid Common Errors
3) Checklist with Examples

Committee on Financial Disclosure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E., Suite 2-301
Washington, D.C. 20544
202-502-1850
January 2005

CONTENTS

Rules Applicable to Financial Disclosure Reports filed by Nominees for Judicial Office

Special rules govern the information to be disclosed in parts of the financial disclosure report, as indicated in the following paragraphs. With the exception of the items specified here, all other provisions of the filing instructions are applicable to nomination reports.

Personal Information

Court or Organization - Block 2

Enter the name of the court or organization to which you are being nominated, even if you are currently serving in a different court. For example, a district court judge being nominated to the United States Court of Appeals for the Sixth Circuit should enter "6th Circuit" (example: page 5).

Date of Report - Block 3

Enter the date that the report is being completed, which must be no more than 5 days after the date inserted after "Nomination, Date" in Block 5. 5 U.S.C. app. §101(b)(1) (example: page 5).

Title - Block 4

Enter the title of the position to which you are being nominated, even if you are currently serving in a different court. For example, a district court judge being nominated to a circuit judgeship should enter "Circuit Judge."

Nomination Date - Block 5

A nominee for judicial office should check "Nomination" in Block 5 and also insert the date on which his or her nomination was transmitted to the Senate (example: page 5).

Reporting Period - Block 6

The beginning date should be January 1 of the year preceding the year you were nominated. The ending date must be no earlier than 30 days before the "Date of Report" in Block 3. For instance, if you are nominated on March 20, 2005, and submit your report on March 25, 2005, the beginning date must be January 1, 2004, and the ending date should be no later than March 25, 2005 nor earlier than February 25, 2005 (example: page 5).

Part III: Non-investment Income

A nomination report must disclose the source, nature, and the amount of non-investment income received by the filer from any one source that:

1) exceeded $200 during the reporting period (shown in Block 6); and

2) exceeded $5,000 during the two calendar years preceding the year of filing (example: page 7). [Note that because the reporting period already includes the calendar year preceding the year of filing, in effect this adds one year of information.]

For the filer's spouse, the report must also disclose the source and the nature of non-investment income that exceeded $1,000 from any one source and any honoraria exceeding $200 received during the reporting period shown in Block 6 (example: page 5). If you are not married, you may leave section B blank. If you are married but your spouse received no reportable income, check the "None" box.

Part IV: Reimbursements

A nominee is exempt from completing this part. Write "Exempt" on the first line of this part (example: page 8). However, you should note the requirements for this section set forth in the filing instructions to assist you in preparing future annual reports.

Part V: Gifts

A nominee is exempt from completing this part. Write "Exempt" on the first line of this part (example: page 8). However, you should note the requirements for this section set forth in the filing instructions to assist you in preparing future annual reports.

Part VII: Investments and Trusts

Columns D(1) - (5): Transactions

A nominee is exempt from completing Column D in this part regarding transactions involving investment assets. Write "Exempt" in Column D on the first line of this part (examples: pages 10 and 12). However, you should note the requirements for this section set forth in the filing instructions to assist you in preparing future annual reports.

Avoiding Common Errors

The following are the errors most frequently noted on nomination reports. Please review your report carefully to avoid these errors.

Prior year's income: In Part III, you must disclose income earned in the calendar year preceding the year of nomination and the calendar year before that. If your only source of income for any of those years was exempt from disclosure, e.g., United States government salary, include an explanatory note in Part VIII in order to avoid an inquiry.

Family members: Do not list the name of any family member or a description of the family relationship (e.g., "spouse," "son," "daughter," or "family") in any part of the report, unless required to identify the debtor on a note receivable.

Mutual fund names: In Part VII, list the name of the specific fund (e.g., "Fidelity Aggressive Growth Fund") rather than the name of the sponsoring investment company (e.g. "Fidelity Investments").

Assets held in brokerage accounts and IRAs: In Part VII, for a brokerage account or an IRA composed of stocks and bonds, you must list each asset (stock, bond, or mutual fund) that exceeds $1,000 in value or from which you received more than $200 during the reporting period. Listing of the brokerage account or IRA alone is not sufficient.

Investment income: In Part VII, Column B must be completed for each asset. If no dividend or interest income was received, leave Column B(1) blank and enter "None" in Column B(2). Capital gains from the sale of an asset are not reported in Column B.

Description of investment income: Investment income reported in Column B of Part VII should be described only as "dividends," "interest," "rent," "mineral royalty," or "distribution" (e.g., partnership income). Any type of income credited to a mutual fund account (usually a combination of dividends, interest, and capital gains from the fund's sales of stock) may be described as "dividend." For any type of income not listed, please call the Committee office at (202) 502-1850 for guidance.

Value codes: In Part VII, if an asset was owned at the end of the reporting period, you must disclose a value code in Column C(1) and indicate the method of valuation in Column C(2). If the asset was entirely sold before the end of the reporting period, both Columns C(1) and C(2) should be blank.

Bank names: In Part VII, you must disclose the name of any bank or other financial institution in which you have a deposit account (checking, savings, money market). This includes cash management accounts in brokerages, which often hold money market accounts.

Block 6 - Reporting Period: Any entry that does not cover both the current calendar year up to a date no earlier than 30 days before the date in Block 3 and the preceding calendar year will result in a letter requesting amendment of your report.

Positions: When you list a position as a trustee, executor, or a similar position, you must also list in Part VII the assets in the trust or estate for which the position is held. If there are no reportable assets in the trust, an explanatory note should be included in Part VIII (Instructions, pages 9, 42, and 57).

Brokerage accounts - income and value: The income and value of assets held in brokerage accounts must be reported individually. Do not report the aggregate value and income of a brokerage account (Instructions, pages 56).

Part VII - Value Codes: The use of value method codes "Q," "R," "S," and "V" in Column C(2) requires additional information in Column A or Part VIII (Instructions, pages 48-50).

Checklist for Nomination Financial Disclosure Report
Filed During Calendar Year 2005

Personal Information

FINANCIAL DISCLOSURE REPORT
NOMINATION REPORT

1. Person Reporting (*Last name, first, middle initial*)	2. Court or Organization	3. Date of Report
Jones, John P.	Sixth Circuit ❶	March 25, 2005 ❷
4. Title (*Article III judges indicate active or senior status; magistrate judges indicate full- or part-time*) Circuit Judge	5. Report Type ❸ XX Nomination Date 3/20/05 __ Initial __ Annual __ Final	6. Reporting Period: ❹ 1/1/2004 to 2/28/2005
7. Chambers or Office Address ❺ 44 West 32nd Street Fargo, ND 58107	CERTIFICATION BY REVIEWING OFFICER 8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion in compliance with applicable laws and regulations. Reviewing Officer: ❻ _____ Date: _____	
IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.		

❶ *Include the name of the court or office to which you are being nominated.*

❷ *The date should be no later than the date of your signature in Part IX, as the report reflects your knowledge as of the date indicated in this block.*

❸ *The "Report Type" should be "Nomination." The "Nomination Date" should also be included.*

❹ *The correct beginning date for a nomination report is January 1 of the year before the submission of your nomination and the correct ending date is not more than 30 days before the date in Block 3.*

❺ *Home addresses should not be listed. Insert the address of the office where you are currently employed.*

❻ *Leave this section blank - it is for the signature of the reviewing official who certifies that your report is complete.*

Part I. Positions

I. POSITIONS. *(Reporting individual only; see pp. 9-13 of Instructions.)*

POSITION	NAME OF ORGANIZATION/ENTITY
☐ **NONE** (No reportable positions)❶	
1. Partner	Silk, Stockings, and Whiteshoes
2. Trustee ❷	Trust #1 ❸
3. President	New Orleans Boys Club

❶ *Do you have any reportable positions? If not, is the "NONE" box checked?*

❷ *The reporting of a position as "Trustee" or "Executor" requires the filer to list in Part VII any assets held by the trust or estate. (However, this does not include a position as a member of a Board of Trustees that is equivalent to a Board of Directors of an institution for which individual trustees do not have control over investment assets.)*

❸ *Names and relationships (e.g., "daughter," "father-in-law") of family members should be omitted - substitute "Trust #1," "Estate #1," or other reference as appropriate.*

Part II. Agreements

II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of Instructions.)*

DATE	PARTIES AND TERMS
☐ **NONE** (No reportable agreements) ❶	
1. 1997	Jones & Smith Retirement Plan with former law firm, no control ❷
2. 1990	State Employees Pension Fund; pension upon retirement age 65 ❷

❶ *Be certain to check the "NONE" box if you have no reportable agreements.*

❷ *Pension coverage through a employer should be reported here, unless the pension is in the form of an investment account owned by the filer, which should be listed in Part VII.*

Part III. Non-investment Income

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

A. Filer's Non-Investment Income

☐ **NONE** (No reportable non-investment income.) ❶

	DATE	SOURCE AND TYPE	GROSS INCOME
1	2003 ❷	Silk, Stockings, & Whiteshoes ❸	$ 223,000
2	2004	Silk, Stockings, & Whiteshoes	$ 230,000
3	2005	Silk, Stockings, & Whiteshoes	$ 34,000
4	2004	Fourlane Law School, Teaching fee for Seminar	$ 3,500

B. Spouse's Non-Investment Income - If you were married during any portion of the reporting period, please complete this section (dollar amount not required except for honoraria).

☐ **NONE** (No reportable non-investment income.) ❹

1	2004	Self-employed, Educational Consultant ❺	
2	2005	Bugtussle Public Schools, salary ❻	❼
3	2005	South Succotash Public Schools, Honorarium	$2,500 ❼

❶ *Do you have non-investment income over $200.00? If not, check the "NONE" box.*

❷ *On a nomination report, the filer must disclose: 1) for the year of filing and the calendar year preceding it, the date, source, type, and amount for non-investment income in excess of $200; and 2) for the calendar year prior to that, the date, source, type, and amount of any non-investment income in excess of $5,000.*

❸ *Have you identified the source of income?*

❹ *Does your spouse have non-investment income over $1,000? If not, check the "NONE" box.*

❺ *If your spouse is self-employed, indicate the nature of the profession (e.g., lawyer, doctor, realtor) or business (e.g., retail store, home construction company).*

❻ *If your spouse is employed, have you identified the source of income?*

❼ *For spouse's income, is gross income left blank? For honorarium, is amount provided?*

IV. Reimbursements

IV. REIMBURSEMENTS – transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children. See pp. 25-27 of Instructions)

Source	Description
☐ **NONE** (No such reportable reimbursements)	
1 _____	EXEMPT ❶

❶ *Did you enter "Exempt" in this part? Nominees are exempt from completing Part IV, Reimbursements.*

V. Gifts

V. GIFTS. *(Includes those to spouse and dependent children; See pp. 28-31 of Instructions.)*

SOURCE	DESCRIPTION	VALUE
☐ **NONE** (No such reportable gifts.)		
1 _____	EXEMPT ❶	$ _____

❶ *Did you enter "Exempt" in this part? Nominees are exempt from completing Part V, Gifts.*

VI. Liabilities

VI. LIABILITIES. *(Includes those of spouse and dependent children. See pp. 32 and 33 of Instructions.)*

CREDITOR	DESCRIPTION	VALUE CODE *
☐ **NONE** (No reportable liabilities) ❶		
[1] Old National Bank	Credit Card	$ L ❷
Bank of America	Mortgage on rental property #1	
[2]	Alexandria, LA (Pt. VII, line 1) ❸	$ M
	~~Home equity line of credit~~	
3 ~~Home Sweet Home Finance Co.~~	~~on personal residence~~ ❹	$ ~~L~~

❶ *Do you, your spouse, or dependent child have any reportable liabilities over $10,000? If not, is the "NONE" box checked?*

❷ *Did you list the identity of the creditor, a description of the liability, and a value code for the amount?*

❸ *If a mortgage is listed, is there a corresponding entry for the property in Part VII?*

❹ *A home equity loan or line of credit that is secured by the filer's residence is exempt from reporting. Similarly, a loan secured by a personal motor vehicle (including an automobile or boat) is exempt.*

VII. Investments and Trusts

VII. Page 1 INVESTMENTS and TRUSTS – income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-59 of Instructions.)*

	A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income (1) Amt	B. Income (2) Type	C. Gross value (1) Value Code	C. Gross value (2) Value Method	D. Transactions during reporting period (1) Type	D. If not exempt from disclosure (2) Date	(3) Value	(4) Gain	(5) Buyer/seller
☐	NONE (No reportable income, assets, or transactions)									
	Examples of bank accounts									
1	Second National Bank accounts	B	Interest	K	T	Exempt ❶				
2	Farmers Credit Union accounts	A	Interest	J	T					
3	Valley Bank - Certificate of Deposit	A	Interest	J	T					
	Examples of real estate assets									
4	Rental Property #1, Alexandria, LA (1995 $200,000)	D	Rent	M	R❷					
5	Rental Property #2, Alexandria, LA		None❸	M	V❹					
6	Mineral interest, Carbon County, PA (Appraisal 1992)	D	Royalty	K	Q❺					
	Examples of partnerships, family-owned businesses, and non-publicly traded companies									
7	Blizzard Valley Hardware Stores	F	Dividends	L	U❻					
8	Wildcat Welldrilling Partnership #7	A	Royalty	❼						
9	Quaint Village State Bank stock	A	Dividend	K	U					
10	Note from Joe Schmoe❽		None	J	T					
	Examples of simple pension plans and life insurance policies									
10	Silk, Stockings, and Whiteshoes Law Partners 401K❾	B	Div❿	N	T					
11	Friendly Florists Pension Plan		None①	J	U②					
12	Prudential Universal Life Policy	A	Interest	J③	T					

1. Income/Gain Codes: A=$1,000 or less B=$1,001 - $2,500 C=$2,501 - $5,000 D = $5,001 - $15,000 E = $15,001 - $50,000
(See col. B1, D4) F=$50,001 - $100,000G=$100,001 - $1,000,000 H1=$1,000,001-$5,000,000 H2'=more than$5,000,000

2. Value Codes: J=$15,000 or less K=$15,001-50,000 L=$50,001-$100,000 M=$100,001-$250,000
(See Col. C1, D3) N=$250,001-$500,000O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000
P3=$25,000,001-$50,000,000 P4=more than $50,000,000

3. Value Method Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market
(See Col. C2) U=Book Value V=Other W=Estimated

NOTE IN PART VIII: ❹

Line 5 - Value based on comparison to sale prices of nearby properties in 2004.

❶ On a nomination report, you are exempt from reporting information on transactions that occurred during the reporting period.

❷ If "R" is used as the valuation method, the date of purchase and the amount of the purchase price must be listed (see Column A).

❸ If no income is received, enter "None" in Column B(2). Do not leave Column B blank for any asset.

❹ If "V" is used as the valuation method, an explanation of the method must be provided. See example of note in Part VIII.

❺ If "Q" is used as the valuation method, the date of the appraisal must be provided. In this example, it is assumed that the asset was inherited and the value disclosed is the appraisal conducted for estate purposes (see Column A).

❻ If stock in a company is not publicly traded, as in the family-owned business listed here, you may use book value - "U" - as the valuation method.

❼ If an asset is entirely sold before the end of the reporting period, Column C should be left blank.

❽ For a note or account receivable, the name of the debtor must be provided. While you should generally omit the name of any family member as it is not required to complete your report, the name of any person indebted to you through a note or account receivable is required in this section.

❾ If the fund is controlled by a current or former employer, and the individual cannot select stocks, bonds, or other assets for purchase or sale, report only the name of the fund and not the underlying assets. If the participant can select the investments in the fund (as in an IRA), the individual assets must be disclosed as shown in the example on page 12.

❿ If income from a pension is credited to the individual's account, it should be disclosed as income in Column B. Where income is a mixture of interest, dividends, and capital gain distributions, you may describe it as "dividends."

① If the fund does not credit earnings to individual accounts, but reflects the participant's share as "units" or other designations of the proportional share, enter "None" in Column B(2).

② If the value of your pension is provided in an annual report to participants, you may report it as book value -"U" - or as cash/market value - "T."

③ For a life insurance policy, disclose only the "cash value" component, not the death benefit or "face value."

VII. Investments and Trusts

Reporting of Brokerage Accounts, Trusts, Estates, IRAs, and Investment Clubs

	A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income (1) Amt	B. Income (2) Type	C. Gross value (1) Value Code	C. Gross value (2) Value Method	D. Transactions during reporting period (1) Type	D. If not exempt from disclosure (2) Date	(3) Value	(4) Gain	(5) Buyer/seller
☐	NONE (No reportable income, assets, or transactions)					Exempt ❶				
1	Brokerage Account #1									
2	- NationsBank Money Market Account	A	Interest	J	T					
3	- Ford Common Stock	B	Dividend	K	T					
4	- Daimler Chrysler Bonds	A	Interest	❷						
5	- Fidelity Aggressive Growth Fund	B	Dividend	L	T					
	Examples of Aggregate Reporting Method (not permitted for brokerage accounts)									
6	IRA #1	A	Dividend	M	T					
7	- Campbell Soup Common Stock									
8	- Heinz Foods Common Stock									
9	IRA #2	A	Interest	J	T					
10	- First National Bank (Cash equivalents)									
11	Trust #1	D	Dividend	O	T					
12	- Merrill Lynch Blue Chip Mutual Fund									
13	- Fidelity Blue Chip Mutual Fund									
14	Estate #1	C	Interest	M	T					
15	- U.S. Treasury Bonds									
16	- Richmond, IN Municipal Bonds									
17	- Richmond, CA Municipal Bonds									
18	Pennywise Investment Club		None	J	T					
19	- Nextel Common Stock									
20	- Priortel Common Stock									

1. Income/Gain Codes: A=$1,000 or less B=$1,001 - $2,500 C=$2,501 - $5,000 D = $5,001 - $15,000 E = $15,001 - $50,000
(See col. B1, D4) F=$50,001 - $100,000 G=$100,001 - $1,000,000 H1=$1,000,001-$5,000,000 H2'=more than$5,000,000

2. Value Codes: J=$15,000 or less K=$15,001-50,000 L=$50,001-$100,000 M=$100,001-$250,000
(See Col. C1, D3) N=$250,001-$500,000 O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000
P3=$25,000,001-$50,000,000 P4=more than $50,000,000

3. Value Method Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market
(See Col. C2) U=Book Value V=Other W=Estimated

❶ A nominee is exempt from providing information in Column D on transactions.

❷ Where an asset has been entirely sold before the end of the reporting period, Column C should be left blank.

AO-10
Rev. 1/2003

FINANCIAL DISCLOSURE REPORT
NOMINATION REPORT

Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App., §§101-111)

1. Person Reporting *(Last name, first, middle initial)*	2. Court or Organization	3. Date of Report

4. Title *(Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)*	5. Report Type (check appropriate type) ___ Nomination, Date _____ ___ Initial ___ Annual ___ Final	6. Reporting Period

7. Chambers or Office Address	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer _____ Date_____

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. *(Reporting individual only; see pp. 9-13 of Instructions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
☐	NONE (No reportable positions.)	
1		
2		
3		

II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of Instructions.)*

	DATE	PARTIES AND TERMS
☐	NONE (No reportable agreements.)	
1		
2		
3		

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
☐		NONE (No reportable non-investment income.)	
1			$
2			$
3			$
4			$
5			$

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report

IV. REIMBURSEMENTS – transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

☐ NONE (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1		
2		
3		
4		
5		
6		
7		

V. GIFTS. *(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)*

☐ NONE (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1			$
2			$
3			$
4			$

VI. LIABILITIES. *(Includes those of spouse and dependent children See pp. 32-33 of Instructions.)*

☐ NONE (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE*
1			
2			
3			
4			
5			
6			

*Value Codes: J=$15,000 or less K=$15,001-$50,000 L=$50,001-$100,000 M=$100,001-$250,000 N=$250,001-$500,000
O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000
P3=$25,000,001-$50,000,000 P4=$50,000,001 or more

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-59 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
						If not exempt from disclosure			
	(1) Amt. Code1 (A-H)	(2) Type (e.g., div., rent or int.)	(1) Value Code2 (J-P)	(2) Value Method Code3 (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	(2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets,									
1									
2									
3									
4									
5									
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									

1	Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less F=$50,001- $100,000	B=$1,001-$2,500 G=$100,001-$1,000,000	C=$2,501-$5,000 H1=$1,000,001-$5,000,000	D=$5,001-$15,000 H2=More than $5,000,000	E=$15,001-$50,000
2	Value Codes: (See Col. C1, D3)	J=$15,000 or less N=$250,001-$500,000 P3=$25,000,001-$50,000,000	K=$15,001-$50,000 O=$500,001-$1,000,000	L=$50,001- $100,000 P1=$1,000,001-$5,000,000 P4=More than $50,000,000	M=$100,001-$250,000 P2=$5,000,001-$25,000,000	
3	Value Method Codes: (See Col. C2)	Q=Appraisal U=Book value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report

VII. Page 2 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-59 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amt. Code1 (A-H)	(2) Type (e.g., div., rent or int.)	(1) Value Code2 (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure: (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
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1	Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less	B=$1,001-$2,500	C=$2,501-$5,000	D=$5,001-$15,000	E=$15,001-$50,000
		F=$50,001- $100,000	G=$100,001-$1,000,000	H1=$1,000,001-$5,000,000	H2=More than $5,000,000	
2	Value Codes: (See Col. C1, D3)	J=$15,000 or less	K=$15,001-$50,000	L=$50,001- $100,000	M=$100,001-$250,000	
		N=$250,001-$500,000	O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000	P2=$5,000,001-$25,000,000	
		P3=$25,000,001-$50,000,000		P4=More than $50,000,000		
3	Value Method Codes: (See Col. C2)	Q=Appraisal	R=Cost (real estate only)	S=Assessment	T=Cash/Market	
		U=Book value	V=Other	W=Estimated		

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report

VII. Page 3 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-59 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
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1	Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less F=$50,001- $100,000	B=$1,001-$2,500 G=$100,001-$1,000,000	C=$2,501-$5,000 H1=$1,000,001-$5,000,000	D=$5,001-$15,000 H2=More than $5,000,000	E=$15,001-$50,000
2	Value Codes: (See Col. C1, D3)	J=$15,000 or less N=$250,001-$500,000 P3=$25,000,001-$50,000,000	K=$15,001-$50,000 O=$500,001-$1,000,000	L=$50,001- $100,000 P1=$1,000,001-$5,000,000 P4=More than $50,000,000	M=$100,001-$250,000 P2=$5,000,001-$25,000,000	
3	Value Method Codes: (See Col. C2)	Q=Appraisal U=Book value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report

VII. Page 4 INVESTMENTS and TRUSTS – income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-59 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amt. Code1 (A-H)	(2) Type (e.g., div., rent or int.)	(1) Value Code2 (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure: (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
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1	Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less F=$50,001- $100,000	B=$1,001-$2,500 G=$100,001-$1,000,000	C=$2,501-$5,000 H1=$1,000,001-$5,000,000	D=$5,001-$15,000 H2=More than $5,000,000	E=$15,001-$50,000
2	Value Codes: (See Col. C1, D3)	J=$15,000 or less N=$250,001-$500,000 P3=$25,000,001-$50,000,000	K=$15,001-$50,000 O=$500,001-$1,000,000	L=$50,001- $100,000 P1=$1,000,001-$5,000,000 P4=More than $50,000,000	M=$100,001-$250,000 P2=$5,000,001-$25,000,000	
3	Value Method Codes: (See Col. C2)	Q=Appraisal U=Book value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app., § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature _____ Date _____

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App., § 104.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the
United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

Financial Disclosure Report

Filing Instructions for Judicial Officers and Employees

Committee on Financial Disclosure
Administrative Office of the U.S. Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544
202-502-1850
January 3, 2005

Major Changes to Financial Disclosure Instructions for 2005

The release to the public of information contained in the financial disclosure reports may increase the risks of identity theft and other financial fraud to filers and their families. The Security Issues page has been revised to provide more detailed assistance to filers to avoid these risks while complying with the statutory requirements to disclose specified types of information.

The instructions have been amended to emphasize that filers are required to provide the specific name of a money market fund in which they have invested. For example, a brokerage may invest client funds in "Putnam Tax Exempt Money Market Fund" pending investment in stocks or bonds. The filer should list the full name of the fund rather than listing "Cash" or "Money Market Account." This change is reflected on page 37 of the filing instructions.

The filing instructions have also been revised to clarify the requirements for reporting corporate name changes resulting from mergers and other business reorganizations. This change is reflected on page 51 of the instructions.

Issued January 3, 2005

SECURITY ISSUES

Every filer should be aware that the Ethics in Government Act of 1978 makes your Financial Disclosure Report a **PUBLIC DOCUMENT**. This means that a person seeking to harm or harass you and your family can get a copy of your Financial Disclosure Report. There have been instances of such misuse of information provided by filers. The Committee makes the following recommendations so that you can satisfy the financial disclosure requirements of the Act while accommodating appropriate security concerns:

(1) When filing your report, enter your CHAMBERS OR OFFICE ADDRESS in Block 7. Do not disclose your home address for any purpose in connection with your report.

(2) Do not provide unnecessary detail that could enable someone to commit financial fraud. For example:
   a) Do not list account numbers for bank or brokerage accounts
      - For banks, provide only the name of the institution, e.g., "First National Bank accounts"
      - Brokerage accounts should be designated by number, e.g., "Brokerage Account #1";
   b) Do not list a Social Security number;
   c) List only the name of a bank, not its address or the name of a branch you frequent, e.g., "First National Bank" rather than "First National Bank, Smallville Branch."

(3) For rental properties, provide only the city (or county) and state in which the property is located. Do not use street addresses, lot numbers, or survey descriptions. You may identify multiple properties as "Rental Property #1, Cincinnati, Ohio," "Rental Property #2, Cincinnati, Ohio," and so on.

(4) Do not report your personal residence or residences in Part VII (unless a portion of your residence is rented to a third party). Similarly, do not report any mortgage, equity loan, or line of credit secured by a personal residence, vehicle, boat, or motor home in Part VI.

(5) Do not identify relatives by name or designation such as "brother" or "mother-in-law." Identify a trust or estate by number, such as "Trust #2," "Estate #1."

(6) Do not attach financial statements, tax returns, deeds, or trust agreements - these often include home addresses and account numbers.

If the providing of specific information would create a security risk, you may request redaction of the required information pursuant to the Regulations of the Judicial Conference on

Access to Financial Disclosure Reports. A request for redaction should be submitted in a letter separate from your financial disclosure report. See pages 62 and 63 of the filing instructions.

If your Financial Disclosure Report is requested, you will be notified of the request. If you have any concerns or questions about the release of your report, please call the staff of the Committee at (202) 502-1850 or discuss the matter with your local United States Marshal.

Issued January 3, 2005

TABLE OF CONTENTS

INTRODUCTION

Three types of Financial Disclosure Reports--initial, annual, and final--are required by the Ethics in Government Act of 1978, as amended, published in Title 5 of the United States Code, Appendix, §§ 101-111.

These filing instructions govern the preparation and filing of AO Form 10, which is to be used by judicial officers and employees for all reports due after January 1, 2005. The body of the filing instructions covers reporting requirements for annual reports, which in some cases also apply to initial and final reports. Where requirements for initial and final reports differ from the annual reporting requirements, specific information can be found in Appendices I and II, respectively, of these instructions.

The Act requires that the Committee on Financial Disclosure review each report to assure that, on the basis of the information provided, the reporting person is in compliance with applicable laws and regulations. Section 106(b)(1). The Committee also reviews reports to determine potential conflicts of interest or ethical problems.

Questions concerning the reporting requirements (and suggestions for improving the AO Form 10 or these instructions) should be addressed to: Committee on Financial Disclosure, Administrative Office of the United States Courts, Suite 2-301, One Columbus Circle, N.E., Washington, D.C. 20544.

WHO MUST FILE, WHEN AND WHERE

JUDICIAL OFFICERS AND JUDICIAL EMPLOYEES are required to file an annual report by May 15 following each calendar year in which they performed their duties for more than sixty (60) days. Section 101(d). Filing before the due date is encouraged to ease the burden on members of the Committee on Financial Disclosure who review the reports, as required by the Act.

JUDICIAL OFFICERS are defined in the Act as the Chief Justice and Associate Justices of the Supreme Court, and the judges of United States courts of appeals, United States district courts, including the district courts in Guam, the Northern Mariana Islands, and the Virgin Islands, Court of International Trade, Tax Court, Court of Federal Claims, Court of Veterans Appeals, United States Court of Appeals for the Armed Forces, and any court created by an Act of Congress, the judges of which are entitled to hold office during good behavior. Section 109(10).

A JUDICIAL EMPLOYEE is any employee, other than a JUDICIAL OFFICER of the judicial branch of Government, of the United States Sentencing Commission, of the Tax Court,

of the Court of Federal Claims, of the Court of Veterans Appeals, or of the United States Court of Appeals for the Armed Forces, who

(a) is authorized to perform adjudicatory functions with respect to proceedings in the judicial branch, e.g., bankruptcy judges and magistrate judges; or

(b) occupies a position for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule. Section 109(8).

Persons whose obligation to file reports may vary from year to year, e.g., a senior judge, or recalled bankruptcy judge or magistrate judge who may perform more than 60 days of service in one year but not in another, should certify their exempt status to the Committee on Financial Disclosure by May 15th, if they are exempt from filing for the prior year. This will avoid an inquiry from the Committee concerning failure to file. When they file their next reports, they should explain any apparent inconsistencies resulting from the "gap" between the two reporting periods.

For information on who must file initial and final reports, and when they must be filed, see Appendices I and II, respectively.

Commentary

The General Counsel of the Administrative Office has determined that the term "basic pay" within the definition of a judicial employee does not include locality pay or geographic cost-of-living allowance (COLA) received by some employees in Alaska, Guam, Hawaii, Puerto Rico, and the Virgin Islands. Geographic COLAs are considered additional allowances for the cost of living rather than part of the basic rate of pay. Similarly, there is no express statutory authority permitting court employees to receive locality pay. Payment is based upon the Director of the Administrative Office's authority to set compensation and is treated in the same manner that locality pay is treated in the Executive Branch, which does not consider locality pay as a part of basic pay.

Part-time employees without adjudicatory functions are deemed to satisfy the filing threshold if the basic rate of pay fixed for the position held meets the statutory minimum. Thus, the "rate of basic pay" rather than actual pay received, is used to determine the need to file a report. In addition, the Committee has held that the "rate of basic pay" to be used to determine whether a reemployed annuitant who is not authorized to perform adjudicatory functions must file a report does not include the annuity.

A part-time magistrate judge whose annual salary level is less than 16.4% of the salary of a full-time magistrate judge will normally perform the duties of his or her office for less than sixty-one (61) days each year and accordingly is not required to notify the Committee of his or her exempt status.

Extensions of Time to File

The Committee on Financial Disclosure may grant reasonable extensions of time for filing initial, annual, and final reports. Requests for extension should be submitted to the Committee before the due date, in writing signed by the filer explaining why the extension is necessary. The maximum extension permitted by the Act is 90 days. Section 101(g).

Emergency requests for extension may be made by telephone to the Committee staff if the reason for the request could not have been reasonably anticipated. A letter confirming the request should be sent promptly to the Committee. A letter confirming the oral response will be sent promptly by the Committee.

Filing Fee

The statute requires a person to file a timely report. One who files a report more than thirty (30) days after the date the report was due may be assessed a filing fee of $200.00. If for good reason it is necessary to request a delay in filing, extensions of time of up to 90 days may be granted by the Committee on Financial Disclosure. The statute states that extensions beyond 90 days are not permissible. Absent a waiver, those granted a full 90 day extension will have to pay the fee if they do not file by the 120th day. Section 104(d)(1).

The Committee may waive the filing fee for extraordinary circumstances. Requests for waivers must be submitted in writing to the Committee with explanation of the reason(s) the report was not filed on time. Section 104(d)(2).

Commentary

When a report is filed more than 30 days after the date it is due, the filer is assessed a late filing fee of $200. The fee is deposited in the United States Treasury. If a filer requests a waiver of the fee due to extraordinary circumstances, the Committee has delegated the authority to approve waivers to the Subcommittee on Compliance. Please note, that reports are deemed to have been filed ten (10) days prior to physical receipt for the purpose of determining whether the report has been timely filed.

Where to File

The original and three copies of the report, and of any amendments (including amendments in response to letters of inquiry) are to be filed with:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

Section 103(h)(1)(B).

The additional copies of the report may be made by photocopying the original, rather than by retyping or using carbons.

Commentary

Reports are not considered to have been received unless they are physically received by the staff of the Committee on Financial Disclosure and contain an original signature of the filer. Reports will be date stamped as soon as they are received by the staff. Reports sent to the Committee on Financial Disclosure by facsimile or other electronic means are not considered to be received until a copy with an original signature is received.

Amendments

A report may be amended by filing an amended AO Form 10 for that year, fully explaining items added to, or changed from, the original submission.

Alternatively, additional information may be submitted by a separate letter addressed to the Committee. You should identify the report(s) and part(s) being corrected and provide complete information for the item(s) being corrected. Sign the letter personally, which will constitute your certification to the accuracy and completeness of the report(s) as amended.

Regardless of which method is used, you should file amendments in the same manner as for the original, i.e., a signed original and three copies with the Committee.

Commentary

Self-initiated amendments will be certified in the same manner as an original report. Each reviewer will complete Block 8 on the AO Form 10 for each amendment as amended.

Amendments must be submitted over the signature of the filer. Amendments submitted on the filer's behalf by accountants, lawyers, or others are not acceptable.

Waivers

The Committee may grant a request for a waiver of any reporting requirement for one who is expected to perform the duties of the office or position less than one hundred and thirty (130) days in a calendar year, but only if the Committee determines that:

(1) the person is not a full-time employee of the federal government;

(2) the person is able to provide services specially needed by the federal government;

(3) it is unlikely that the person's outside employment or financial interests will create a conflict of interest; and

(4) public financial disclosure by the person is not necessary under the circumstances.

Any request for such a waiver must be directed in writing to the Committee with a detailed explanation of the facts upon which the Committee can make the determinations required under the Act. All such requests are available to the public. Section 101(i).

GENERAL INSTRUCTIONS

The report should be legible. Its format has been designed to be completed on most typewriters. The name of the person and date of the report should appear on each page. Financial Disclosure Report software is available upon request from the Committee.

"None" Box

Parts I through VII of the report must be completed. If you have no reportable items in any of these parts, do not simply leave it blank or mark it as "N/A," but instead mark the "None" box as an affirmative declaration of the fact.

Disclosure Concerning Family Members

A reporting person is required to disclose financial information concerning a spouse and dependent children, and the form is designed for inclusion of this information. Section 102(e)(1). The requirement to disclose trust information for a spouse and dependent children only when a beneficial interest exists is found on pages 58 and 59. The Act does not require disclosure of the financial interests of other family members, nor is it required with

respect to a spouse who is living separate and apart with the intention of terminating the marriage or permanently separating. Section 102(e)(2).

The Act defines a dependent child as a "son, daughter, stepson, or stepdaughter . . . who--

(A) is unmarried and under age 21 and is living in the household of the reporting person; or
(B) is a dependent of the reporting person within the meaning of Section 152 of the Internal Revenue Code of 1986." (26 U.S.C. § 152)

Section 109(2).

Extra Pages; Attachments

If more space is needed for any part than is provided on the form, make the additional entries on a new page and include it as a numbered attachment. The identifying information (name and date of report) must appear on each attachment page. If you make these entries on other than a photocopy of a page from the form, make sure that the part being continued is indicated and that all the required information is given.

Alternative Format For Reporting

The computer program available from the Committee provides an acceptable format for reporting.

It is permissible in exceptional circumstances to provide the required information in any part of the report in an alternative format but only upon a specific written determination by the Committee that such alternative reporting is acceptable. Those wishing to use alternative formats should seek permission to do so by writing to the Committee stating in detail the format to be used, why the request is being made, and whether it is for the current report only or for future reports, as well. All information submitted must be in a format easily reconciled with prior reports. Section 102(b)(2)(A).

In the absence of permission to use an alternative format, no extrinsic reports or documents may be used as substitutes for disclosure on the AO Form 10 as provided. This limitation is necessary to avoid additional burdens that would occur in the review process if a variety of documents, with different formats and often with extraneous information, were permitted.

Reconciliation with Prior Reports

Each report should be complete in itself. No information may be adopted by reference to prior reports. If letters approving a specific transaction, position, or agreement have been

received from the Committee, or if the Committee on Codes of Conduct has approved particular conduct or actions, a copy of the letter of approval should be attached to each report to avoid a letter of inquiry.

Compare the information on your current report with that in the prior report to assure that each is complete and correct.

To assist the Committee during the review process, list items in each part of the report in the same order as shown in the prior report (placing any new items at the bottom of the list or of the appropriate subdivision of the list).

Personal Information

AO-10
Rev. 1/2000

FINANCIAL DISCLOSURE REPORT

FOR CALENDAR YEAR 2004

Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app., 101-111)

1. Person Reporting *(Last name, first, middle initial)*	2. Court or Organization	3. Date of Report
Smith, John B.	U.S. District Court, North Dakota	April 16, 2005
4. Title *(Article III Judges indicate active or senior status; Magistrate Judges indicate full- or part-time)*	**5. Report type (check appropriate type)**	**6. Reporting Period**
U.S. District Judge - Senior Status	___ Nomination, Date _____ ___ Initial _X_ Annual ___ Final	January 1, 2004- December 31, 2004
7. Chambers or Office Address	**8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.**	
U.S. Courthouse 44 West 32nd Street Fargo, North Dakota 58107	**Reviewing Officer** _____ **Date**_____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.

Notes to filer:

____ *Are Blocks 1 through 7 filled in?*

____ *Block 3 should be the date the report is completed, not later than the date of signature in Part IX.*

____ *Does Block 4 show your status?*

____ *Does Block 5 indicate the type of report?*

____ *Does Block 6 cover the correct reporting period?*

Commentary

Blocks 1 through 7 of the heading to the report should be filled in as indicated:

Block 6. Reporting Period. *The following entry should be made for annual reports: January 1, 2004-December 31, 2004.*

Block 8. Certification. *Reviewing official will sign and date this block when the report is complete. The front page of the AO-10 with the reviewing judge's original signature will be returned to the staff of the Committee on Financial Disclosure for permanent filing.*

Certification by the reviewing judge or staff counsel, as reviewing officials, certifies that the information in the report, any amendments, or attached correspondence has been disclosed in accordance with applicable laws and regulations. The reviewing official has the authority to approve the report as submitted, direct that a letter of inquiry be sent, or waive an error as de minimis and approve the report. The reviewing official can also approve a report and direct that an advisory letter be sent to provide the filer with guidance for future reports. All letters of inquiry are prepared for the Chair's signature on Committee letterhead stationery. The Chair has authority to revise or waive a letter of inquiry and approve a report.

INSTRUCTIONS FOR COMPLETING EACH PART

I. Positions

Only information pertaining to the reporting person is required in this part.

In this part, a complete listing is required of all positions held by the reporting person as an officer, director, executor, administrator, trustee, guardian, custodian, or similar fiduciary, partner, proprietor, representative, employee, or consultant of any corporation, company, firm, partnership, or other business enterprise, any nonprofit organization, any labor organization, or any educational or other institution other than the United States. Disclose your position even if you are not compensated and even if neither you nor a member of your family has any financial interest in the entities herein listed. Please note that positions held are reported in this part while assets owned or held are reported in Part VII. **You need not report any positions held in any religious, social, fraternal, or political entity and positions solely of an honorary nature. Section 102(a)(6)(A).**

In completing this part, for annual reports, the reporting period consists of the calendar year preceding the date of the report, and the time to the date of the report. Section 102(a)(6)(A). For initial and final reports, refer to Appendices I and II, respectively, of these instructions.

An interest as a limited partner in an investment partnership, if you have no managerial responsibilities, reflects assets held or owned, but not a position held. The position as such a limited partner need not be reported in Part I, but the interest must be disclosed in Part VII.

For Article III judges, bankruptcy judges, and magistrate judges, the Codes of Conduct for United States Judges specify additional constraints on the positions that may be held. See especially Canon 5. Part-time magistrate judges are governed by special rules as provided in 28 U.S.C. § 632(b) and the Guide to Judiciary Policies and Procedures, Volume II, Chapters I and III.

Additional information--e.g., an opinion from the Committee on the Codes of Conduct, or approval from a Judicial Council--that bears on the question whether a position presents a potential conflict of interest problem or problem under the Code of Conduct for United States Judges should be provided in Part I or Part VIII or on an attached page.

If you did not hold any reportable positions at any time during the reporting period, check the "None" box rather than leaving Part I blank.

I. POSITIONS. *(Reporting individual only; see pp. 9-13 of Instructions.)*

POSITION	NAME OF ORGANIZATION/ENTITY
☐ **NONE** (No reportable positions)	
1 Director	Fargo Boys Club
2 Trustee	Trust #1
3	

Notes to filer:

____ *Do you have any reportable positions ? If not, is the NONE box checked?*

____ *Did you provide the full name of the position and the organization?*

____ *Does the position appear to represent a conflict of interest?*

____ *Does the position require a listing of assets in Part VII?*

Commentary

In completing this part, the reporting period is not always consistent with the reporting period delineated in Block 6 of the heading. For annual reports, the reporting period consists of the calendar year of the report and the current year up to the date of the report.

A power of attorney need not be reported in Part I if it has not been exercised, as for example, if it is conditioned upon an event that has not yet occurred, such as the disability of the grantor. Once a power of attorney has been exercised, it should be reported in Part I, and all investment assets subject to that power of attorney should be disclosed in Part VII. Similarly a filer is not required to report a position as "successor trustee" or similar fiduciary position that is contingent upon an event that has not occurred.

The positions a filer can hold are normally determined by the filer's status. Each category is affected by the Canons and statutes governing the creation and duties of the position held. Examples are as follows:

Judges

A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties. "Member of the

judge's family means any relative of a judge by blood, adoption, or marriage or any other person treated by a judge as a member of the judge's family." (Canon 5D.)

The duties of a co-trustee are, while nominal, fiduciary in nature. Canon 5D would seem to rule out service as fiduciary for other than a trust for a member of the judge's family. Service as a fiduciary for other than a member of the family is permitted to continue in limited circumstances, as provided in the Code's "Applicable Date of Compliance" section, but this section seems to contemplate a relationship with an individual rather than with a pension plan. In any event, even such a nonfamily fiduciary relationship is to be terminated as stated in the Compliance section. (Advisory Opinion No. 33.)

A judge who, before ascending the bench, served as an executor of the estate of a nonfamily member, or as trustee of a nonfamily trust may, with the approval of the judicial council of the circuit, continue in that capacity if resignation would cause undue hardship to the estate and its beneficiaries, but may not receive compensation for such service. (Compendium § 5.1-3(a) (2003).)

Note: A judge may serve as a part-time special lecturer in law or as a faculty member at a law school. It is necessary for the judge to obtain advance approval from the chief judge of the circuit, or in the case of the chief judge from the judicial council, before engaging in teaching activity. The normal restrictions on extra judicial compensation apply; the compensation must be reasonable in amount, no greater than a similarly situated non-judge would receive for the same service; the 15% cap on outside earned income is applicable; and the payments must be included in Part III of the report. The teaching duties should not in any way interfere with the performance of judicial duties.

Where a judge failed to obtain <u>prior</u> approval of teaching, the Chief Judge has authority to approve teaching for compensation <u>nunc pro tunc</u> if satisfied that the failure was occasioned by excusable neglect, the application would have been approved if timely filed, and other criteria for approval are satisfied. If circumstances do not justify <u>nunc pro tunc</u> approval, the judge's only recourse is to refund the compensation. (Compendium § 35.7 (2003).)

In a partnership engaged in real estate investment, a judge may have a passive investment as a general partner. Canon 5C(2) prohibits active business participation.

The listing of a position as partner in a business in Part I will ordinarily require a listing of the income and value of the business in Part VII. If the partnership owns or trades in securities and the filer can influence the selection of assets for purchase or sale, the individual stocks and transactions should be reported in Part VII.

It is permissible for a judge to be an uncompensated officer or director of a business wholly owned by members of the judge's family. (Compendium § 5.2-3(c)(2003).)

A judge may serve as a member of the board of directors of a nonprofit social club, or a nonprofit club whose object is to promote an interest in and to enlighten its membership on important governmental, economic and social issues, provided that (a) the club does not engage in partisan political activity and (b) the judge does not take positions on governmental, economic, and social issues which would embarrass the judge in the exercise of judicial duties. (Advisory Opinion No. 15.)

A judge may serve on the board of trustees of a university foundation (no fund-raising involved). Same for service on a university advisory board. (Compendium § 5.3-3(b)(2003).)

Senior judges designated in 5 U.S.C. app. § 502(b), (justices and senior judges) are excluded from the 15% cap on compensation received from approved teaching. Even if the Ethics Reform Act is satisfied, provisions of the Code of Conduct for United States Judges must also be satisfied.

Part-time Magistrate Judges

Part-time United States magistrate judges render such service as judicial officers as is required by law. While so serving they may engage in the practice of law, but may not serve as counsel in any criminal action in any court of the United States, or act in any capacity that is inconsistent with the proper discharge of their office. Within such restrictions, they may engage in any other business, occupation, or employment which is not inconsistent with the expeditious, proper, and impartial performance of their duties as judicial officers. (28 U.S.C. § 632(b).)

Judicial Employees

a. No covered senior employee, as defined in the "Regulations of the Judicial Conference of the United States Under Title VI of the Ethics Reform Act of 1989 Concerning Outside Earned Income, Honoraria, and Outside Employment," Guide to Judiciary Policies and Procedures, Volume II, Chapter VI, Part H, shall:

(1) affiliate with or be employed by a firm, partnership, association, corporation, or other entity to provide professional services which involve a fiduciary relationship for compensation;

(2) permit the use of his or her name by any such firm, partnership, association, corporation, or other entity;

(3) practice a profession which involves a fiduciary relationship for compensation;

(4) serve for compensation as an officer or member of the board of any association, corporation, or other entity; or

(5) receive compensation for teaching, without the prior notification and approval as herein provided.

Note: Senior employees of the Court of International Trade or the Court of Federal Claims must obtain approval from the chief judges of those courts. Senior employees of the Tax Court must obtain approval from the chief judge of the Tax Court. Commissioners and senior employees of the Sentencing Commission shall obtain approval from the Chairman of the Sentencing Commission. Senior employees of the Administrative Office of the United States Courts must obtain approval from the Director of the Administrative Office.

b. Judicial Employees. A judicial employee may engage in such activities as civic, charitable, religious, professional, educational, cultural, avocational, social, fraternal, and recreational activities, and may speak, write, lecture, and teach. If such outside activities concern the law, the legal system, or the administration of justice, the judicial employee should first consult with the appointing authority. (Code of Conduct for Judicial Employees, Canon 4A.)

c. Federal Public Defenders. A defender employee should not engage in the private practice of law. Notwithstanding this prohibition, a defender employee may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the defender employee's family, so long as such work does not present an appearance of impropriety and does not interfere with the defender employee's primary responsibility to the defender office. (Code of Conduct for Federal Public Defender Employees, Canon 5D.)

II. Agreements

Only information pertaining to the reporting person is required in this part.

In this part a complete listing is required of any agreement with respect to:

(a) future employment;

(b) a leave of absence during government service;

(c) continuation of payments by a former employer other than the United States; and

(d) continuing participation in an employee welfare or benefit plan maintained by a former employer.

Report the date, parties, and terms of the agreement. Section 102(a)(7).

For all reports, show any such agreements currently in force.

Any additional information--e.g., an opinion from the Committee on Codes of Conduct, or approval from a Judicial Council--that bears upon the question whether an agreement presents a potential conflict of interest problem or problem under the Codes of Conduct for United States Judges should be provided in Part II or on an attached page.

If you did not have any reportable agreements during the reporting period, check the "None" box, rather than leaving Part II blank.

II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of Instructions.)*

	DATE	PARTIES AND TERMS
☐	**NONE** (No reportable agreements)	
1	2000	Jones & Smith Retirement Plan with former law firm, no control
2		
3		

Notes to filer:

____ *Do you have any reportable agreements? If not, is the NONE box checked?*

____ *Did you list the date, parties, and terms of the agreement?*

____ *Is the agreement permissible?*

Commentary

Continuation of payments by a former employer other than the United States

It is permissible for judges to receive appropriate payment for their interests in a law firm and compensation for legal services they rendered before becoming judges. (Compendium § 2.7(a)(2003).)

A termination of partnership agreement provides for payment of an agreed amount representing the retiring partner's interest and some of these payments can be paid in years following the partner's appointment as a United States judge. (Advisory Opinion No. 24.)

The Committee on Codes of Conduct is of the opinion that when a partner leaves a law firm to become a federal judge, he should, if possible, agree with his partners on an exact amount which he will receive for his interest in the firm, whether that sum is to be paid within the year or over a period of years. (Id.)

Such agreed-upon payments may continue to be made to the judge, provided it is clear (1) that he is not sharing in profits of the firm earned after the judge's departure, as distinguished from sharing in an amount representing the fair value of the judge's interest in the firm, including the fair value of the judge's interest in fees to be collected in the future for work done before leaving the firm, and (2) such judge does not participate in any case in which the former firm or any partner or associate thereof is counsel until the full amount which he or she may be entitled to receive under the agreement has been paid. (Id.)

It is permissible for the departing judge to share in contingent fees received at the end of the litigation, provided a fixed percentage or fixed ceiling is agreed upon, and reasonably reflects the value of services previously rendered by the departing judge. While it is permissible for a judge to share in future contingent fees under the circumstances previously set forth, the judge should first attempt to reach agreement with his former partners on a fixed sum. (Compendium § 2.7(b) and (b-1)(2003).)

Continuing participation in an employee welfare or benefit plan maintained by a former employer

A judge should remove his or her retirement account from a former law firm's profit-sharing trust where members of former law firm appear regularly in federal court in the judge's district requiring frequent disqualification by the judge. If the judge's continued recusal would impose a significant burden on other judges, the judge should ordinarily withdraw the account if feasible. (Compendium § 5.2-4(a) and (a-1)(2003).)

When, long after the judge's departure, additional assets are discovered which should have been transferred to the judge at the time of his departure (delayed refund under health insurance plan), there is no ethical impediment to the judge's receipt of the appropriate distribution. (Compendium § 2-7(e)(2003).)

A judge who is a participant in a law firm's KEOGH plan has a financial interest in all of the corporations whose stock is owned by the plan, and must keep informed of the plan's investments, unless the plan is a common fund. (Compendium § 3.1-1(i)(2003).)

A law firm's KEOGH plan or 401K plan (managed by the firm, small number of participants, ready access to investment information) does not qualify for the "common fund" exception. A law firm's retirement fund qualifies for the "common investment fund" exception where the financial interest is indirect (due to the number of participants and the size and diversity of investments), directed investment by participants is not available, and the participants do not know and cannot easily find out about a fund's portfolio, which turns over frequently. (Compendium § 3.1-3(c) (2003).)

Other Employment

Part-time United States magistrates render such service as judicial officers as is required by law. While so serving, they may engage in the practice of law and, within certain restrictions, engage in any other employment which is not consistent with the expeditious, proper, and impartial performance of their duties as judicial officers. (28 U.S.C. § 632.)

A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge: (1) is not required to comply with Canons 5C(2), D, E, F, and G, and Canon 6C; (2) except as provided in the Conflict-of-Interest Rules for Part-time Magistrate Judges, should not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, or act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

The judge should take reasonable steps to require that law clerks keep the judge informed of their future employment plans and prospects. Participation by the law clerk in a pending case involving the prospective employer may reasonably create an appearance of impropriety and a cause for concern on the part of opposing counsel. A former law clerk should be disqualified from work in the United States attorney's office on any cases that were pending in the court during the law clerk's employment with the court. (Advisory Opinions Nos. 74 and 81.)

III. Non-investment Income

Information pertaining to the reporting person and the spouse, as noted, is required in this part.

A. General Non-investment Income

In this part, report non-investment income from whatever source, including but not limited to these items: compensation for services, including fees, commissions, etc.; income derived from business; royalties from intellectual property such as copyrights; and fixed benefits from vested pension plans. Amounts reported should be net income, except for income derived from a business, can be listed as net or gross, and indicated as such. Section 109(7).

Report the source, type, amount or value, of income from any source aggregating $200 or more in value. Honoraria are treated differently. Section 102(a)(1)(A). See Part III B. below. See below for specific exemptions.

If a spouse is self-employed in business or a profession, only the nature of such business or profession should be reported. A spouse is "self-employed" with regard to the net earnings derived from a profession or business carried on by the spouse as a sole proprietor or a partnership of which the spouse is a member. See Treas. Reg. 26 C.F.R. § 1.1401-1(c). Otherwise, for spouses, report the source of items of earned income from any person which exceeds $1,000 and the source and amount of any honoraria which exceed $200.

Each filer must complete Part III A., and if married during any portion of the reporting period, provide the information in PART III B. for his or her spouse. The amount of earned income in Part III B. need not be shown except for honoraria.

You are not required to disclose in Part III the following:

- compensation for current employment by the United States. Section 102(a)(1)(A).
- income that from a single source did not aggregate $200 or more during the reporting period. Section 102(a)(1)(A).
- the amount of the spouse's "earned income," or any information about that "earned income" that from a single source did not aggregate more than $1,000 during the reporting period. Section 102(e)(1)(A).
- any information about dependent children's non-investment income. Section 102(e)(1)(A).

- information with respect to a spouse living separate and apart with the intention of terminating the marriage or providing for permanent separation or with respect to any income or obligations arising from the dissolution or permanent separation. Section 102(e)(2).

- any political campaign funds, including campaign receipts. Section 102(g).

- income derived from any retirement system under title 5, United States Code (including the Thrift Savings Plan under Subchapter III of Chapter 84 of such title) or any other retirement system maintained by the United States for officers or employees of the United States. Section 102(i)(1).

- benefits received from Social Security. Section 102(i)(2).

- death benefits under insurance policies, gifts, inheritances, tort recoveries and other compensation for injuries and sickness, disability compensation, and veteran's benefits.

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

	DATE	SOURCE AND TYPE	GROSS AMOUNT
A. Filer's Non-Investment Income			
☐	**NONE** (No reportable non-investment income.)		
1	2004	East Publishing Company, book royalties	$ 3,000
2	2004	WV Law School - teaching	$ 4,500
B. Spouse's Non-Investment Income - If you were married during any portion of the reporting period, please complete this section (dollar amount not required except for honoraria).			
☐	**NONE** (No reportable non-investment income.)		
1	2004	Jones, Jackson, and Hancock - salary	
2	2004	self-employed - writer	

Notes to filer:

____ *Do you have any reportable non-investment income over $200.00?*

____ *Does your spouse have any reportable non-investment income over $1,000.00?*

____ *If no reportable income, is the NONE box checked?*

____ *Is the date, source, type, and amount for your reportable income reported?*

____ *Is the income subject to the 15% limitation ($23,715) for calendar year 2004?*

____ *Is the income an honorarium or reported as such?*

Commentary

Although various types of non-investment income have been listed, some elaboration on several sources of income may be useful to provide a clearer distinction between non-investment and investment income.

No income should be disclosed in this part if it is derived from an investment asset that should be reported in Part VII. Thus, a "royalty" received from the use or sale of copyright, patent, or other legally recognized intellectual property rights should be reported in Part III, but a "royalty" or any other payment from ownership or investment in oil, gas, or other mineral interests or enterprises should be disclosed in Part VII.

Annuity Income: Income received from an annuity purchased by the filer should be reported in Part VII rather than in Part III as it represents a return on the filer's investment. Similarly, where a filer has converted an IRA or other account to an annuity, the value of the annuity and income paid pursuant to the annuity should be reported in Part VII as an investment asset. Income received from an annuity that was purchased by an employer and in which the filer does not have ownership of the contract or the underlying assets should be reported in Part III as a form of deferred compensation.

Income received from a life insurance policy is not reported in Part III, but certain types are reported in Part VII.

Special attention will be given to the review of nomination and initial reports. The filer must report compensation, other than from the United States Government, in excess of $5,000 in any of the two calendar years prior to the calendar year during which a first report is filed.

B. Outside Employment and Honoraria

Special attention should be given to regulations relating to Outside Employment and Honoraria at Appendix III.

Covered Senior Employees

In accordance with the Ethics Reform Act of 1989, and the Judicial Conference regulations implementing this Act, covered senior employees, other than justices of the United States who retired from regular active service under Section 371(b) of title 28, United States Code; judges of the United States who retired from regular active service under Section 371(b) of title 28, United States Code and who have met the requirements of subsection (f) of Section 371(b) of title 28, United States Code, as certified in accordance with such subsection; and, justices and judges of the United States who retired from regular active service under Section 372(a) of title 28, United States Code, who receive compensation for teaching, are prohibited from:

- Receiving more than 15% of the pay rate for Executive Level II in earned income from outside employment if the officer or employee occupies a position classified above GS-15 of the General Schedule or, in the case of positions not under the General Schedule, for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule and is not a career civil servant (See 5 U.S.C. § 5313 for the pay rate for Executive Level II). 5 U.S.C. app. § 501(a)(1). Those covered by the provisions of this Act for only a portion of a year, must pro-rate the 15% on the basis of the number of days the person will actually work in that calendar year. 5 U.S.C. app. § 501(a)(2).

- Being affiliated with or being employed by a firm, partnership, association, corporation, or other entity to provide professional services which involve a fiduciary relationship for compensation, serving for compensation as an officer or member of the board of any association, corporation, or other entity. 5 U.S.C. § 502.

- Receiving compensation for teaching without prior notification and approval from the appropriate official, if the officer or employee occupies a position classified above GS-15 of the General Schedule or, in the case of positions not under the General Schedule, for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule and is not a career civil servant. See Section 5 of Appendix III for the procedures for requesting approval. 5 U.S.C. app. § 502.

NOTE: Covered senior employees are defined by Judicial Conference approved regulations as all judicial officers (except for part-time magistrate judges), commissioners and staff of the Sentencing Commission, the Director and Deputy Director of the Administrative Office of the United States Courts, and senior employees of the Administrative Office of the United States Courts serving at the pleasure of the Director (Schedule C status).

Judicial Officers and All Employees

In accordance with the Ethics Reform Act of 1989, and the Judicial Conference regulations implementing this Act, all judicial officers and all employees of the judicial branch are prohibited from accepting honoraria for any "appearance, speech, or article." Actual and necessary travel expenses incurred by the person and one relative are not deemed to constitute honoraria. 5 U.S.C. app. § 501(b).

- No judicial officer or employee of the judicial branch (except for part-time magistrate judges), may accept honoraria, but a payment may only be made on behalf of such officer or employee to a charitable organization in lieu of the honorarium, so long as the payment does not exceed $2,000, and is not made to a charitable organization from which the filer or the filer's parent, sibling, spouse, child, or dependent relative derives any financial benefit. 5 U.S.C. app. § 501(b) and (c). In such instances, the filer should report the source, date, and amount of payments made to charitable organizations in lieu of honoraria and shall simultaneously file with the Committee on Financial Disclosure, on a confidential basis, a corresponding list of recipients of all such payments together with their dates and amounts. Section 102(a)(1)(A).

C. General Provisions

For annual reports, the reporting period is the calendar year preceding the date of the report. Section 102(a)(1)(A). For initial and final reports, see Appendices I and II, respectively, for the appropriate reporting periods.

If neither you nor a spouse had any reportable income during the reporting period, check the "None" boxes rather than leaving Part III A or Part III B blank.

Commentary

Contained within these Instructions and Appendix III are detailed instructions and regulations relating to limitations imposed on certain judicial officers and employees with respect to certain types of outside employment and income. Several important guidelines need to be emphasized for the benefit of the reviewing official.

Covered senior employees (defined in the cited appendix) are prohibited from receiving more than 15% of the pay rate for Executive Level II ($158,100 during 2004) in earned income from outside employment. The limitation for 2004 is $23,715. However, senior judges who receive compensation for teaching, part-time magistrate judges, officers and employees of the Supreme Court, and employees of the Federal Judicial Center are exempted as to teaching income and are not restricted to this outside income limitation.

In addition, all judicial officers and all employees of the judicial branch (except for part-time magistrate judges) are prohibited from accepting honoraria for any "appearance, speech, or article." Any filer listing honoraria will be questioned for clarification and may eventually be referred to the Committee on Codes of Conduct for an advisory opinion.

Frequently, difficulty arises for the reviewing official and staff examiner concerning what constitutes outside earned income (which is attributed solely to the filer and not to the spouse). The following lists common examples of compensated activities which are subject to the calendar year income limitation, less the ordinary and necessary expenses paid or incurred in producing the income:

(1) teaching,
(2) serving as trustee of a family trust or executor of a family estate, and
(3) writing.

In addition, the following common examples do not constitute outside earned income and have no limitations imposed on the filer:

(1) pensions, annuities, and deferred compensation for services rendered prior to becoming a judicial officer or senior employee,
(2) investment funds,
(3) funds received from a family owned business,
(4) publication royalties, fees, and their functional equivalent, and
(5) compensation received by a senior judge for teaching.

Advisory Opinion Number 86, "Honoraria, Teaching, and Outside Earned Income Limitation," provides detailed interpretation on these issues and may serve as a helpful guideline. In addition, the following are summaries contained in Compendium, Sections 31-35 (2003), concerning recent advice given by the Committee on Codes of Conduct in response to confidential inquiries:

Outside Earned Income Limitation

(1) Where service as a family fiduciary involves work performed over several years but fee is paid in a single year, it is consistent with the statute and outside employment regulations for the judge, in applying the 15% cap, to allocate the amount of the fee over

the several years in proportion to the work actually performed during each year. (Compendium § 33.1(a) (2003).)

(2) Flat fee of $250 received by judge from publisher (established user or purchaser of copyright and other forms of intellectual property) for writing a chapter in publisher's treatise is not excludable from the definition of outside earned income. The payment is a fixed and unconditional cash payment for a manuscript that is wholly unrelated to the sales or distribution of the ensuing publication. Thus, the fee is subject to the 15% cap. (Compendium § 33.2-5(a) (2003).)

(3) Where judge serves as editor-in-chief of a law journal and receives a royalty of 15% of the net cash receipts from the sale of the publication, the amount is considered a royalty and thus not subject to the 15% cap. (Compendium § 33.2-5(b) (2003).)

(4) Outside earned income is attributed solely to the actual earner regardless of community property laws. (Compendium § 33.3 (2003).)

Prohibition on Receipt Of Honoraria

(1) It would violate the statute and outside employment regulations for a law clerk to write an article for compensation during clerkship even though publication of the article and receipt of the honorarium would occur after the clerkship ends. (Compendium § 34(a) (2003).)

(2) Fee for performing wedding is not an honorarium. However, canons bar a judge from accepting additional compensation for performing judicial activities. (Compendium § 34.1(a) (2003).)

(3) Reimbursement of travel expenses (as defined in 5 U.S.C. app. § 505) for judge and one relative does not constitute an honorarium. (Compendium § 34.1(b) (2003).)

(4) Where a judge's paper to a continuing legal education program was later published and later still won $3000 cash award at sponsor's annual award program, the award is not a payment for the speech or article, and thus not an honorarium. An after-the-fact award based on merit for scholarly work, like the Nobel Prize, is an award in recognition of prior meritorious service and not in exchange therefor. (Compendium § 34.1(d) (2003).)

(5) Compensation for teaching a seminar for prospective law students and preparation of course materials does not constitute an honorarium. (Compendium § 34.1-2(d) (2003).)

(6) Fee received by judge as editor-in-chief of a law journal is not an honorarium, but rather compensation for writing more extensive than an article. (Compendium § 34.1-3(a) (2003).)

Limitations On Outside Employment

(1) Serving as a fiduciary of a family estate or trust as permitted by Canon 5D of the Code of Conduct for United States judges does not constitute practicing a profession involving a fiduciary relationship under this section. (Compendium § 35.3(a) (2003).)

(2) Service for compensation as editor-in-chief of a bankruptcy law journal is not the equivalent of being an officer or member of the board of an entity, and thus is not barred by this section. (Compendium § 35.4(a) (2003).)

(3) Although judge cannot receive compensation for service as family fiduciary where the trust directs the operating policy of the charity because that would be the functional equivalent of serving as an officer or member of the board of directors in violation of 5 U.S.C. app. § 502(4), where the judge serves as family fiduciary charged only with duties normally exercised by a family fiduciary, then 5 U.S.C. app. § 502(4) is inapplicable. Rather, § 502(3) applies, as does the family fiduciary exception. Thus, the judge may receive compensation subject to the 15% cap. (Compendium § 35.4(b) (2003).)

(4) A judge's status as partner of a family partnership or shareholder of a family corporation is not the equivalent of serving as officer or member of the board of an entity, and thus the financial return to the judge as partner or shareholder is not prohibited by 5 U.S.C. app. § 502(4). (Compendium § 35.4(c) (2003).)

(5) Where a judge failed to obtain prior approval of teaching, Chief Judge has authority to approve teaching for compensation nunc pro tunc if satisfied that the failure was occasioned by excusable neglect, the application would have been approved if timely filed, and other criteria for approval are satisfied. If circumstances do not justify nunc pro tunc approval, the judge's only recourse is to refund the compensation. (Compendium § 35.7(a) (2003).)

IV. Reimbursements

Information pertaining to the reporting person, spouse, and dependent children, as noted, is required in this part.

In this part, report information about reimbursements received by you, your spouse and dependent children, exclusive, however, of any items received by them totally independent of their relationship to you. Sections 102(a)(2)(A) and (C); and 102(e)(1)(C) and (D).

A reimbursement means any payment or other thing of value, other than gifts, to cover travel related expenses. Section 109(15).

For annual reports, the reporting period is the calendar year preceding the date of the report. Section 102(a)(2)(B). For initial and final reports, see Appendices I and II, respectively, for the appropriate reporting period.

In this part, provide:

the identity of the source and a brief description (including location, dates, and nature of expenses provided) of reimbursements received from any source aggregating $285 or more in value. Section 102(a)(2)(B).

You are not required to report in Part IV:

- food, lodging, or entertainment received from a relative. Section 102(a)(2)(A).
- food, lodging, or entertainment received as personal hospitality. Section 102(a)(2)(A).
- reimbursements received by your spouse and dependent children, independently of their relationship to you. Section 102(e)(1)(C) and (D).
- reimbursements received in a period when you were not an officer or employee of the federal government. Section 102(h).
- food, lodging, transportation, and entertainment provided by a foreign government within a foreign country or by the United States, the District of Columbia, or a state or local government or political subdivision thereof; food and beverages not consumed in connection with a gift of overnight lodging; Section 109(5).

- reimbursements provided by the United States, the District of Columbia, or a state or local government or political subdivision thereof; required to be reported under 5 U.S.C. § 7342; or required to be reported under 2 U.S.C. § 434. Section 109(15).

Relative means one who is related to the reporting person, as father, mother, son, daughter, brother, sister, uncle, aunt, great uncle, great aunt, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, half sister, or who is the grandfather or grandmother of the spouse of the reporting person, and shall be deemed to include the fiance or fiancee of the reporting person. Section 109(16).

Personal hospitality means hospitality extended for a nonbusiness purpose by one, not a corporation or organization, at the personal residence of that person or his family or on property or facilities owned by that person or family. Section 109(14).

Beginning on January 1, 1991, in accordance with the Ethics Reform Act of 1989, and the Judicial Conference regulations implementing this Act, officers and employees are prohibited from soliciting or accepting anything of value from a person seeking official action from, doing business with, or whose interests would be substantially affected by, the performance or nonperformance of official duties. 5 U.S.C. § 7353. This prohibition applies to all reimbursements and gifts covered in Parts IV and V of the Financial Disclosure Report.

If you, your spouse, and your dependent children did not receive any reimbursements reportable in Part IV, check the "None" box rather than leaving Part IV blank.

IV. REIMBURSEMENTS

(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

	SOURCE	DESCRIPTION
☐	**NONE** (No such reportable reimbursements)	
1	Staley Foundation	June 15 - Haymarket, VA, Mtg of Board of Directors (Transportation, Meals, and Room)
2	FREE Foundation	Aug. 7-14 - Butte, MT - Environmental Seminar (Travel, Housing, Food, and Tuition)
3	VA CLE	Nov 7 - Williamsburg, VA - TAX CLE Seminar (Transportation, Food, and Hotel)

Notes to filer:

____ *Do you, your spouse, or any dependent child have any reportable reimbursements or expense paid education or other trips? If not, is the NONE box checked?*

____ *Did you identify the source of the reimbursement, and provide a brief description including location, dates, and nature of expenses?*

____ *Can the reimbursement be accepted by you, your spouse, or dependent child?*

Commentary

The following opinions issued by the Committee on Codes of Conduct provide guidance on issues associated with this part.

Attendance of judges and their spouses as guests at bar association dinners is proper, and a judge may accept reimbursement for the judge's or the judge's spouse's travel and hotel expenses to attend such a dinner sponsored by lawyer organizations even when the judge does not speak or render other services at the function. (Advisory Opinion No. 17.)

Although mere attendance (along with others similarly situated) without paying a registration fee would not create an appearance of impropriety, it would create an appearance of impropriety for employees of the Administrative Office to accept from a legal publishing firm a gift of transportation, lodging and meals in connection with a professional training program sponsored by the firm. (Compendium § 2.9(b) (2003).)

A judge participating as a faculty member in a two-week seminar of general interest organized on a nonprofit basis and financed by tuition and subsistence payments by nonfaculty attendees may accept reimbursement for the judge's and the judge's spouse's travel and subsistence expenses. (Advisory Opinion No. 3.)

A judicial employee may receive compensation and reimbursement of expenses for outside activities provided that receipt of such compensation and reimbursement is not prohibited or restricted by this Code, the Ethics Reform Act, and other applicable law, and provided that the source or amount of such payments does not influence or give the appearance of influencing the judicial employee in the performance of official duties or otherwise give the appearance of impropriety. Expense reimbursement should be limited to the actual cost of travel, food and lodging reasonably incurred by a judicial employee and, where appropriate to the occasion, by the judicial employee's spouse or relative. Any payment in excess of such an amount is compensation. (Code of Conduct for Judicial Employees, Canon 4E.)

V. Gifts

Information pertaining to the reporting person, spouse, and dependent children, as noted, is required in this part.

In this part, report information about gifts other than transportation (or lodging, food or entertainment in connection with transportation that is furnished or reimbursed), aggregating $285 or more in value received by you, your spouse and dependent children from any source other than a relative during the preceding calendar year. A gift of lodging or entertainment not incident to travel which exceeds $285 must be reported in this part. Gifts from separate sources with a fair market value of $114 or less need not be aggregated to determine if the $285 reporting threshold has been met. Section 102(a)(2)(A).

A gift is a payment, advance, forbearance, rendering, or deposit of money, or anything of value, unless consideration of equal or greater value is received by the donor. Section 109(5).

If you have been extended an honorary membership in an organization and you avail yourself of the privileges, rights, etc., to a substantial degree, and the dues are in excess of $285 a year, you must report the honorary membership in this part.

You are not required to disclose information about:

- gifts received from a relative. Section 102(a)(2)(A).
- gifts received by a spouse and dependent children, totally independent of their relationship to you. Section 102(e)(1)(C).
- gifts received in a period when you were not an officer or employee of the federal government. Section 102(h).
- gifts that are bequests and other forms of inheritance. Section 109(5)(A).
- communications to the offices of a reporting person, including subscriptions to newspapers and periodicals. Section 109(5)(E).
- suitable mementos of a function honoring the reporting person. Section 109(5)(B).

If you, your spouse, and your dependent children did not receive any gifts reportable in Part V, check the "None" box rather than leaving Part V blank.

For the definition of relative, refer to Part IV of these instructions.

For annual reports, the reporting period is the calendar year preceding the date of the report. Section 102(a)(2)(A). For initial and final reports, see Appendices I and II, respectively, for the appropriate reporting period and rules.

V. GIFTS. *(Includes those to spouse and dependent children. See pp.28-31 of Instructions.)*

☐ **NONE** (No such reportable gifts)

	SOURCE	DESCRIPTION	VALUE
1	Clyde Monet	Tickets to World Cup games	$ 325.00
2	The Executive Club	Honorary Membership (dues, like privileges)	$ 1200.00
3			$

Notes to filer:

___ *Do you, your spouse, or any dependent child have any reportable gifts other than transportation, lodging, food, or entertainment? If not, is the NONE box checked?*

___ *Did you list the identity of the source, a description of the gift, and the actual dollar value?*

___ *Can the gift be accepted?*

Commentary

If stock is listed as a gift, the stock should also be reported in Part VII, Investments and Trusts.

The value of a gift is shown by a dollar amount, not by a value code.

If the gift is from an individual, the individual must be specifically named. It is not acceptable to identify the source of the gift as "boyfriend," "girlfriend," "friend," or "significant other."

The following opinions issued by the Committee on Codes of Conduct provide guidance on issues associated with this part.

Investitures and Similar Ceremonies

(a) It is permissible for a judge to accept a gavel and a $500 gift from a former client on the occasion of the judge's investiture. (Compendium § 5.4-2(a) (2003).)

(b) It is permissible for a judge to accept a gavel and a contribution toward the cost of the reception from a local bar association on the occasion of the judge's investiture. (Compendium § 5.4-2(b) (2003).)

(c) It is permissible for a judge to accept leather notebook and pen from Law Institute as a memento of a judge's presentation. (Compendium § 5.4-2(c) (2003).)

(d) It is permissible for a judge to be the guest of honor at a public dinner arranged by former law clerks, attended by lawyers and other members of the public, as well as the law clerks. The law clerks should make clear on the invitations and other papers relating to the dinner, not only the fact that the dinner is sponsored solely by present and former law clerks, but that the amount paid by other attendees is solely to cover the cost of the dinner, that no fund-raising activity is involved, and that no part of the amount paid for the dinner will be employed in the purchase of a gift for the honoree. (Compendium § 5.4-5(c) (2003).)

Gifts on Special Occasions

(a) A judge may accept a gift of a trip aboard a cruising ship (costing about $1500) on the occasion of 20th anniversary as a United States judge where the donees consist exclusively of persons who have worked directly with the judge (i.e., law clerks, secretaries, courtroom deputies, and court reporters), there are a sufficient number of donees that no individual contribution to the gift is unusually large, and the judge is not made aware of the amounts contributed by the respective donees. (Compendium § 5.4-7(a) (2003).)

(b) On occasion of taking senior status, judge may accept gift from law clerks of golfing trip. (Compendium § 5.4-7(b) (2003).)

(c) No impropriety for former law clerks to solicit from other law clerks to establish scholarship in honor of retiring judge. The Judge and present law clerks should not solicit. (Compendium § 5.4-7(c) (2003).)

(d) It would create an appearance of impropriety for a judge to permit a for-profit company to host a reception following the judge's investiture, where the judge had no pre-existing relationship with the company, would not otherwise have been required to recuse, and the circumstances would convey the impression that the company was in a special position to influence the judge. (Canon 2B and Compendium § 2.10(c) (2003).)

Miscellaneous Gift Rulings

(a) It is permissible to accept books from West Publishing Company for official use. (Compendium § 5.4-Z(a) (2003).)

(b) It is permissible for a judge's children to accept scholarships awarded on the same terms and based on the same criteria applied to other applicants. (Compendium § 5.4-Z(b) (2003).)

(c) Gifts from a friend not prohibited where friend not likely to ever appear in judge's court. (Compendium § 5.4-Z(c) (2003).)

(d) It is permissible for a judge to attend, and accept hospitality at bar association events and meetings of other organizations devoted to improvement of the law, legal system, or the administration of justice. With respect to attendance at cocktail parties hosted by law firms in connection with bar meetings, judicial conferences, and the like, there is no impropriety in a judge accepting such invitations in the absence of reason to believe that such attendance will reasonably reflect unfavorably on the judge's impartiality or is likely to be exploited by the law firm. (Advisory Opinion No. 17.)

(e) It is permissible for judges to attend bar association events such as receptions where a legal publishing firm has donated the hors d'oeuvres and beverages to the bar association. It is not appropriate, however, for a group of judges or judicial personnel to allow a legal publishing firm or other vendor doing business with their court to donate food and beverages for a meeting of the judges or judicial employees. (Compendium § 2.9(a) (2003).)

Honorary/Reduced-Rate Memberships

(a) It is permissible for a judge to accept a free membership in a country club, including a waiver or reduction in the initiation fee, or to accept a free or reduced membership in a YMCA if it is customary in that community, similar privileges are extended to other public officials, the interests of the organizations have not and are not likely to come before the judge, and the judge is satisfied that the membership is not being used by the organization to promote its endeavors. (See Advisory Opinion No. 47.)

(b) It is permissible for a judge to accept a free membership in the "American Board of Trial Advocates," the organization being devoted to the improvement of the law. (Compendium § 5.4-1(b) (2003).)

(c) It is permissible to accept free membership in a local bar association. (Compendium § 5.4-1(c) (2003).)

VI. Liabilities

Information pertaining to the reporting person, spouse, and dependent children is required in this part.

In this part, list all of your, your spouse's and dependent children's liabilities to any creditor other than a spouse, parent, brother, sister, or child, which exceeded $10,000 at any time during the reporting period. Sections 102(a)(4) and 102(e)(1)(E).

For annual reports, the reporting period is the calendar year preceding the date of the report. Section 102(a)(4). For initial and final reports, see Appendices I and II, respectively, for the appropriate reporting periods.

In this part, list the identity and category of value of each liability. The identity includes the name of the creditor and a description of the liability. Section 102(a)(4). To assist the reviewer, liabilities should be listed in the same order as in the previous report.

The category codes for the amount owed as of the end of the reporting period are shown on the report and are as follows:

J -	$15,000 or less	P1 -	$1,000,001 to $5,000,000
K -	$15,001 to $50,000	P2 -	$5,000,001 to $25,000,000
L -	$50,001 to $100,000	P3 -	$25,000,001 to $50,000,000
M -	$100,001 to $250,000	P4 -	more than $50,000,000
N -	$250,001 to $500,000		
O -	$500,001 to $1,000,000		

Section 102(d)(1).

The reporting requirement relates to obligations that at any time during the reporting period exceeded $10,000, but the amount to be shown by the category code is the amount owed as of the end of the reporting period.

You are not required to report:

- any liability owed to a spouse, parent, brother, sister, or child. Section 102(a)(4).
- any mortgage, home equity loan, or line of credit secured by real property which is a personal residence of you or your spouse. Section 102(a)(4)(A).
- any loan secured by a personal motor vehicle, household furniture, or appliances that does not exceed the purchase price of the item securing the liability. Section 102(a)(4)(B).

- any information with respect to a spouse living separate and apart from you with the intention of terminating the marriage or providing for permanent separation or with respect to any income or obligations arising from the dissolution of the marriage or permanent separation. Section 102(e)(2).

- any revolving charge account whose balance did not exceed $10,000 as of the close of the preceding calendar year.

- political campaign funds, including campaign receipts and expenditures. Section 102(g).

- any liability which is the sole liability or responsibility of the spouse or child; which is not derived from the assets, income or activities of the reporting person; from which the reporting person does not derive or expect to derive a benefit; and of which the reporting person has no knowledge. Section 102(e)(1)(E). Omission of such data indicates a certification of these statutory conditions. This rule also applies to the reporting of investments and trusts, see the Instructions for Part VII.

If you, your spouse, and dependent children did not have any reportable liabilities, check the "None" box rather than leaving Part VI blank.

VI. LIABILITIES. *(Includes those of spouse and dependent children. See pp. 32-33 of Instructions.)*

	CREDITOR	DESCRIPTION	VALUE CODE*
☐	**NONE** (No reportable liabilities)		
1	Old National Bank	Credit Card	L
2	Bank of America	Mortgage on Rental Prop. #1, Alexandria, VA (Pt VII, line 2)	M

*Value Codes: J=$15,000 or less K=$15,001-$50,000 L=$50,001-$100,000 M=$100,001-$250,000 N=$250,001-$500,000 O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000 P3=$25,000,001-$50,000,000 P4=$50,000,001 or more

Notes to filer:

____ *Do you, your spouse, or dependent child have any reportable liabilities over $10,000?*

____ *Did you list the identity of the creditor, a description of the liability, and a value code for the amount?*

____ *If a mortgage is listed, is there a corresponding entry for the property in Part VII?*

VII. Investments and Trusts

Information pertaining to the reporting person, spouse, and dependent children is required in this part.

1. General

In this part, a complete listing is required of reportable assets owned by the reporting person, spouse, and dependent children. **Each asset must be individually listed and identified except as may be specifically provided otherwise (see Part 7B Trusts, page 58).** Bank or brokerage house reports are not acceptable for compliance with these reporting requirements unless they succinctly contain all necessary information without requiring the reader to perform calculations or select out necessary data from a larger body of information. The use of bank or brokerage house statements as an alternative form of filing must have the advance approval of the Committee in accordance with page 6 of the filing instructions. Any request should be made sufficiently in advance of the filing deadline to permit careful consideration and discussion with the reporting person.

Report assets held during the preceding calendar year in a trade or business, or for investment or the production of income, which have a fair market value in excess of $1,000 at the end of the year or from which you received income in excess of $200 during the preceding calendar year. Sections 102(a)(3) and 102(a)(1)(B).

You are not required to report:

- Investments in the Thrift Savings Plan. Section 102(i)(1)(A).

- Any property, real or personal, not held in a trade or business, or for investment or the production of income. As examples, you need not report a private residence or personal automobiles. Section 102(a)(3).

- Any personal liability owed to you, your spouse, or dependent children by a spouse, or by a parent, brother, sister, or child of you or your spouse. Sections 102(a)(3) and 102(e)(1).

- Accounts in a financial institution (any form of deposit in a bank, savings and loan association, credit union, or similar financial institution), unless the aggregate amount of income for all an individual's income producing accounts at the institution for the reporting year is in excess of $200, or the aggregate value at the end of the reporting year of all such income producing accounts is more than $5,000. If either condition is met, the name of the financial institution, the amount of income, and the value of the accounts must be disclosed. Sections 102(a)(1)(B) and 102(a)(3).

- Asset information with respect to a spouse living separate and apart with the intention of terminating the marriage or providing for permanent separation. Section 102(e)(2).

- Political campaign funds, including campaign receipts and expenditures. Section 102(g).

- In Part VII, information associated with property which is the sole financial interest or responsibility of the spouse or child; which is not derived from the assets, income or activities of the reporting person; from which the reporting person does not derive or expect to derive a benefit; and of which the reporting person has no knowledge. Section 102(e)(1)(E). Omission of such data indicates a certification of these statutory conditions. This rule also applies to the reporting of liabilities, see the Instructions for Part VI.

To help reporting persons in instances where a position held in an economic entity may have a bearing on reporting requirements, the following should be used as guidance:

When a Financial Disclosure Report contains information reflecting a filer's interest in a partnership or other business enterprise, the filer must disclose the assets held by the business entity if a filer can direct, influence or in any other manner affect the purchase, exchange, sale or disposition of the entity or property owned by the entity, or when the filer can influence policy decisions which affect the purchase, exchange, sale or disposition of the entity or of property which it owns.

For annual reports, the reporting period is the calendar year preceding the date of the report. Section 102(a)(1)(B). For initial and final reports, see Appendices I and II, respectively, for the appropriate period.

If you, your spouse, and dependent children did not have assets subject to reporting, check the "None" box rather than leaving Part VII blank.

Commentary

Filers should compare the list of assets in Part VII from their prior report and their current report and ensure that an explanation is provided for every asset that does not appear on both reports. In most cases, this explanation would be the reporting of a transaction in Column D. In other cases, a parenthetical "(X)" in Column A or a note in Part VIII would be appropriate. See pages 39-42, 52, and 61 for detailed instructions and examples on these matters.

Investment income is to be contrasted with earned income. The crucial factor is the filer's services. If the filer's services are a material factor in the production of income, it is earned income and should be reported in Part III. However, limited partners usually receive

investment income from the partnership, since they normally do not perform services for the partnership. Investment income includes returns on investments rather than compensation for personal services. It includes income derived from all forms of property, such as securities, funds, accounts, real estate, partnerships, joint ventures, businesses, and interests in trusts and estates.

An investment asset must be reported if either the income or value threshold is met:

a) If the interest-bearing deposit accounts (savings, checking, or money market) in a bank or similar financial institution (credit union, savings & loan) produced more than $200 in income or had a value greater than $5,000, the name of the financial institution, the amount of income, and the value of the accounts must be disclosed;

b) If any other asset (stocks, bonds, mutual funds, real estate) produced more than $200 in income or had a value greater than $1,000, the asset, its income, and its value must be disclosed.

Normally, any information pertaining to a personal residence is exempted from reporting. However, a second personal residence (e.g., a weekend or vacation home) should be reported if rental income is received for the use of the property.

The reporting of accounts in a financial institution does require some clarification. If the aggregate amount of income for all of an individual's accounts or the value of all such income producing accounts exceeds the established thresholds, then the aggregate totals for all accounts in that institution should be reported. It is important to apply the "threshold test" separately to each individual owner of the accounts, which would include the following:

(1) accounts individually owned by filer,

(2) accounts individually owned by spouse,

(3) accounts individually owned by dependent child, and

(4) accounts jointly owned by filer and spouse or dependent child.

It should be understood that a reporting exemption for failure to meet a threshold amount, or for any other reason, does not affect any inquiry or recusal obligation under the Code of Conduct for United States Judges.

2. Description of Assets

In completing Part VII, a separate description of each asset listed is required. To assist the reviewer, assets should be listed in the same order as in the previous report. Each asset reported should be described in sufficient detail so the reader can tell what the property is. As examples:

- For stocks, bonds, and other securities indicate the type of the holding, "common," etc., and its name. Commonly understood abbreviations are permitted such as stock ticker symbols (e.g., "JNJ" for "Johnson & Johnson") or trademarked names (e.g., "GE" for "General Electric" or "GM" for "General Motors").

- For a cash equivalent account (savings, interest checking, money market, CDs) within a bank, credit union, savings and loan, or similar financial institution (distinguished from accounts invested in stocks and bonds) valued at or aggregating over $5,000, list the name of the institution (e.g., Bank of America or Federal Courts Savings and Loan) followed by "Account" (or "Accounts," if there is more than one account). Do not list account numbers or addresses for a financial institution or its branches. You need not indicate the precise type of cash equivalent account (e.g., "checking," "savings," "N.O.W."). Information for all cash equivalent accounts at each institution may be aggregated.

- For a brokerage account or stock management account with a financial management company, a bank, or similar financial institution it is not necessary to list the name of the financial management company, bank, or similar financial institution. You must list the individual stocks, the full name of a mutual fund or money market fund, bonds, or other assets in the account. If you desire to list the account identification in a header for ease of reporting, you should list only the name of the institution and not the address or account number, e.g., SunTrust Bank Brokerage Account. For security reasons, you may list the account only as Brokerage Account #1 or Brokerage Account #2.

- For notes or accounts receivable, indicate the nature of the receivable and the name of the debtor(s).

- For each real estate interest, indicate the general geographic location, such as city or county and state. If more than one parcel of real estate is owned in the same geographic area, you may identify each parcel by number, i.e., Parcel 1, 2, 3, etc., rather than identifying each parcel by street address, lot, or block number.

- For an interest in a trust, indicate the nature of the interest (e.g., "income beneficiary") and the name (if appropriate) of the trust.

- For an interest in a mutual fund or pooled or common trust fund administered by an independent financial or brokerage institution, furnish the name of the specific fund (e.g., Kemper-Dreman Financial Services Fund B).

- For each royalty or other mineral interest (including oil and gas):

  (a) Royalty interest in minerals - an interest in minerals in a particular parcel of real property (whether or not the filer owns the surface rights), and regardless of whether minerals are currently being produced, should be reported as a real property interest - the description in Part VII, Column A, should indicate "Mineral Interest" or "Royalty Interest" and indicate the city or county and state in which the property is located. For example: "Royalty Interest, Clay County, Kansas."

  (b) Investor interest in mineral production enterprise - an investment in a mineral production enterprise for a percentage interest in the profits should be described in Part VII, Column A by listing the name of the enterprise and the location of the business, but not the locations of wells. For example: "ABC Joint Venture - Oklahoma City, OK." The income description in Column B(2) may be "Royalty" (if the filer receives a fixed payment for each barrel, ton, or other unit of production) or "distribution" (if the filer receives a share of the profits).

  (c) Working interest in minerals - a participation in the drilling enterprise in minerals owned by the filer (where the filer has elected to take a share of production profits rather than a royalty payment) should be listed in Part VII, Column A as "working interest" with the name of the well or mine, and the county and state in which it is located. For example: "Working Interest - Clay #1, Sand County, MO." The income description in Column B(2) should be "royalty."

- An interest in the investment value of an annuity should be reported in Part VII, whether or not contributions are continuing to be made.

- Life insurance policies are issued in two basic varieties: "term" and "cash value" insurance.

  Term insurance pays a benefit if the insured person dies during the term of the policy and when the policy expires, no value remains. As the insured person does not have an ownership interest in the value of the policy, term insurance is not reportable in Part VII.

  Cash value insurance is part insurance and part investment. Such policies require premiums during the life of the insured person in exchange for a fixed sum of money to a beneficiary when the insured person dies. A part of the premiums pays for the expense of the insurance portion of the policy, and the remainder goes

into a tax-deferred cash reserve which is invested and builds the policy's cash value. An insured person would have an ownership interest in the investment portion of such a policy that would be reported in Part VII. The filer would have no control over the assets of a "whole life" or "universal life" policy. For these types of policies, the filer should report in Column A the name of the insurance company and the type, for example, "Prudential Whole Life" or "Metlife: Universal Variable."

Generally, the purchaser of an insurance policy does not select specific investment funds other than a general category of risk, e.g., high, medium, or low-risk. Under a "variable" or "universal variable" policy that allows the insured person to choose specific investments from options offered by the insurer, the filer should report in Column A the name of the insurance company and the fund that he or she has selected, for example, "Prudential Variable Life: Prudential Money Market Fund." If assets were allocated to more than one fund, all funds to which investments were allocated should be reported.

At times, reporting persons inadvertently omit the listing of assets, and correct the previous year's errors in the following year's report. Also, assets which were reported in one year may fail a qualifying requirement (such as a value of $1,000) in the following year and thus are not reported. When this occurs, put an explanatory item in Part VII or in Part VIII, with a reference in Part VII to avoid a letter of inquiry (see the example on page 61).

In addition, identify with a parenthetical "(X)" assets which have been previously exempt from disclosure and now are reportable. The parenthetical "(X)" should also be used to identify an asset that meets the reporting threshold and is otherwise exempt from the reporting requirements for gift under Part V. This should preclude a letter of inquiry from the Committee.

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-60 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
1 Oracle Common Stock		None	J	T					
2 Rental Property #1, Alexandria, VA (1995 $200,000)	A	Rent	O	R					
3 Bank of America (IRA) (CDs)	B	Interest	K	T					
4 Cabin Creek National Bank Stock (X)	A	Dividend	J	T					
5 Fidelity Magellan Mutual Fund	B	Dividend	K	T					
6 NY State Urban Dev. Corp. Muni. Bond	A	Interest	J	T					
7 Mineral rights, Parcel 1, Oil County, Oklahoma (Purchase 1950, $10,000)		None	J	R					
8 ABC Drilling Partners, Tulsa, OK	B	Dist.	M	W					
9 Working Interest - Spindletop #2, Hard Rock County, OK	C	Royalty	J	W					
10 Brokerage Account #1									
11 - Fidelity Money Market Fund	A	Interest	J	T					
12 - ABC Company Stock	B	Dividend	K	T					
13 - XYZ Corporate Bonds	A	Interest	K	T					

1 Income/Gain Codes: (See Col. B1, D4) A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000 F=$50,001- $100,000 G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=More than $5,000,000

2 Value Codes: (See Col. C1, D3) J=$15,000 or less K=$15,001-$50,000 L=$50,001- $100,000 M=$100,001-$250,000 N=$250,001-$500,000 O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000 P3=$25,000,001-$50,000,000 P4=More than $50,000,000

3 Value Method Codes: (See Col. C2) Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market U=Book value V=Other W=Estimated

VII. Page 2 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-60 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
14 - DEF Aggressive Growth Mutual Fund	C	Dividend	L	T					
15 Prudential: Variable Life Policy	B	Interest	L	T					
16 Circus Enterprises	A	Dividend	J	T					
17 Cotton Candy Co. (Spinoff of Circus Enterprises)		None	J	T					
18 General Motors Bonds (X)	A	Interest	M	T					See note in Part VIII
19 General Mills Bonds	A	Interest	M	T					
20 General Foods Bonds	A	Interest	M	T					
21 Robert Thomas, personal loan - note receivable	A	Interest	J	T					
22 Time Warner (formerly known as AOL Time Warner)	A	Dividend	K	T					

1 Income/Gain Codes: (See Col. B1, D4) A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000 F=$50,001- $100,000 G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=More than $5,000,000

2 Value Codes: (See Col. C1, D3) J=$15,000 or less K=$15,001-$50,000 L=$50,001- $100,000 M=$100,001-$250,000 N=$250,001-$500,000 O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000 P3=$25,000,001-$50,000,000 P4=More than $50,000,000

3 Value Method Codes: (See Col. C2) Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market U=Book value V=Other W=Estimated

Notes to Filer:

____ *Do you identify the asset in Column A in sufficient detail to clearly identify the type of property? If no assets are listed, is the NONE box checked?*

____ *If a real estate interest is listed, is the city or county and state listed?*

____ *If a financial institution is listed, is the institution clearly identified?*

____ *If a note or account receivable is listed, are the debtor names and the nature of the debt described?*

____ *If a gas, oil, or mineral interest is listed, do you identify the city or county and state and the name of the energy company or other payor of royalties, working interests, or rentals?*

____ *Do you clearly identify stocks, bonds, mutual funds and the underlying assets of IRAs and brokerage accounts?*

____ *If the asset was not listed on the previous report, do you include transactional information in Column D or a parenthetical "(X)" in Column A denoting that the asset was exempt from disclosure on the previous report?*

____ *If you listed a position in Part I as trustee, administrator, custodian, etc., is the estate or trust listed and the assets therein properly identified?*

Commentary

When listing stocks, bonds, and other securities, the individual name or commonly understood abbreviation should be provided. Stocks should be indicated as "common" or "preferred." Bonds and other securities should have enough detail in the description to differentiate that asset from other similar assets listed. This is particularly helpful for the reviewer and examiner when the filer reports multiple bonds or securities in the same or similar series, or brokerage accounts that list accounts in the name of the firm.

When reporting accounts with financial institutions, the type of account does not need to be listed.

When reporting an interest in a mutual fund or common trust fund, the name of the specific fund is required, e.g., Kemper-Dreman Financial Services Fund B. There is no requirement to list the individual assets. An interest in a trust, estate, or similar entity requires the listing of each individual asset unless the exemptions from disclosure of the individual assets in paragraph 7B. Trusts are met.

The reviewer and examiner will note when an asset appears on the current report and is not listed on the prior report and there is no transaction information in Column D. In this situation, the filer should place a parenthetical "(X)" in Column A denoting that the asset was exempt from disclosure in the prior report.

It is important to recognize that in almost every instance where a filer is a trustee, executor, administrator, custodian etc., the filer has the legal authority and responsibility to exercise control over and manage the assets in a trust or estate. It is this authority based on the filer's fiduciary responsibilities to control the purchase, sale, or other disposition of the assets that requires the filer to list the assets in this part.

Filers should take special care when disclosing an IRA. They are merely arrangements for holding other investments on a tax-deferred basis. The focus should be placed on the underlying investments which should be disclosed:

- *Many IRAs are invested in cash-equivalent accounts, such as a money market account, certificate of deposit, or other deposit account in a bank, credit union, or savings and loan. No further information about these accounts is required to be disclosed. In this regard, see line 3 of the example on page 46.*

- *However, IRA accounts are also offered by brokers and investment firms for investment in stocks and bonds. If the IRA account contains any other type of entity, such as mutual funds, stocks, or bonds, the filer must disclose the underlying holdings in the account. In this regard, see lines 5-8 of the example on page 57.*

The next question is the authority to select investment assets that will be bought or sold by the plan:

- *If the filer can select the assets that will be purchased or sold (beyond merely select a risk category, e.g., high, medium, or low), the plan is considered "self-directed," and every asset in excess of $1,000 in value or which pays more than $200 in income must be reported. NOTE: So long as the filer has the power to choose investment assets - even if he or she generally defers to the decisions of an investment manager - the individual assets must be listed.*

- *If the filer does not control the selection of assets (or can only choose a general category of risk, e.g., low, medium, or high), the filer needs to report in Column A only the specific name of the fund and not the underlying assets. As described in later sections, the information required in Columns B, C, and D will relate to the fund as a whole, and not the individual assets held by that fund. Assets held in tax-deferred retirement or pension accounts, including 401(k), 403(b), and SEP (Simplified Employee Pension) Plans maintained and controlled by a former employer, e.g., a former law firm, TIAA-CREF, state and county governments, and other similar*

entities are not considered self-directed by the individual and qualify as "common trust funds." In addition, tax-deferred investment products from insurance companies, e.g., annuities, are also not considered self-directed. Therefore, the filer is not required to provide any details about the individual assets held by those plans, but is only required to list the name of the specific plan in Column A.

3. Income

In Column B of Part VII, the income from listed assets must be shown. The disclosure of the gross amount and the type of income -- dividends, rent, interest, or income from discharge of indebtedness -- is required. Sections 102(a)(1)(B) and 109(7). All income is reportable, whether taxable, tax deferred, or tax exempt. When no income is received (or there is a loss) Column B1 under Amount should be left blank and the word "NONE" should appear in Column B2 under Type. When some income is received, the appropriate code, reflecting the amount, should be used. The ranges are required by statute and the coded amounts for income are listed on the reporting form as follows:

A - $1,000 or less
B - $1,001 to $2,500
C - $2,501 to $5,000
D - $5,001 to $15,000
E - $15,001 to $50,000
F - $50,001 to $100,000
G - $100,001 to $1,000,000
H1 - $1,000,001 to $5,000,000
H2 - More than $5,000,000
Section 102(a)(1)(B).

The same ranges and codes are used to report capital gains associated with transactions in Column D of Part VII. However, capital gains associated with "distributions" should be treated and reported as dividends in Column B.

The income from U.S. Savings Bonds, and similar investments should be reported if the minimum of $200 is reached.

Regular, periodic payments of an annuity are treated as a return of the filer's investment and are, therefore, not reported as income. A filer need not report in Column B income received by the investments underlying an annuity which pays a fixed amount, and the filer should enter "NONE" in Column B(2) for such annuities. However, if the amount payable is variable according to returns on investment, the filer should report in Column B the amount credited to his or her annuity contract.

Dividends or interest received in the investment component of a cash value life insurance policy (whole life, universal life, variable life, or universal variable life), whether used to reduce premiums paid or to increase the amount of coverage, should be reported in Column B.

Column B must be completed even if an asset is entirely sold during the reporting period. If no income was received, enter "NONE" in Column B(2).

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-60 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
1 Oracle Common Stock		NONE	J	T					
2 Rental Property #1, Alexandria, VA. (1995 $200,000)	D	Rent			Sold	11/4	K		John Smith
3 Bank of America (IRA) (CDs)	A	Interest	K	T					
4 Cabin Creek National Bank Stock (X)	B	Dividend	J	T					
5 Fidelity Magellan Mutual Fund	B	Dividend	L	T					
6 NY State Urban Dev. Corp. Muni. Bond	A	Interest	J	T					

1	Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less	B=$1,001-$2,500	C=$2,501-$5,000	D=$5,001-$15,000 E=$15,001-$50,000
		F=$50,001- $100,000	G=$100,001-$1,000,000	H1=$1,000,001-$5,000,000	H2=More than $5,000,000
2	Value Codes: (See Col. C1, D3)	J=$15,000 or less	K=$15,001-$50,000	L=$50,001- $100,000	M=$100,001-$250,000
		N=$250,001-$500,000	O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000	P2=$5,000,001-$25,000,000
		P3=$25,000,001-$50,000,000	P4=More than $50,000,000		
3	Value Method Codes: (See Col. C2)	Q=Appraisal	R=Cost (real estate only)	S=Assessment	T=Cash/Market
		U=Book value	V=Other	W=Estimated	

Notes to filer:

____ *Do you disclose in Column B the amount and type of income?*

____ *If you indicate "NONE" in Column B(2), did you leave Column B(1) blank?*

Commentary

Column B(1), the income amount code, and Column B(2), the type of income, should both be completed if you have income. If no income was received, Column B(1) should be left blank and the word "None" should appear in Column B(2). When some income is received, then the appropriate income amount code and type should be provided.

Some filers question whether to report income from IRAs (Individual Retirement Account) or other retirement or pension plans where they are not actually drawing income from the account. All income should be reported, whether taxable, tax deferred, or tax exempt. For any mutual fund, IRA, pension fund, or other pooled investment plan, filers should report in Column B any dividend, interest, or capital gain income that is earned by the fund and credited to the filer's account. This type of income is generally reported on the Form 1099-Div that is issued for income tax purposes. Certain retirement and investment funds do not credit income to the individual accounts but instead report a "unit value" to participants. If no income is reported as having been credited to the filer's account, leave Column B(1) blank and enter "NONE" in Column B(2). Filers are not required to disclose as income any increase or decrease in the value of their account resulting solely from the change in market value of assets, even though these values are commonly highlighted in reports to investors. The market value of assets is reflected in the entries in Column C.

4. Value

In Column C, the gross value of the asset at the end of the reporting period is reported. Section 102(a)(3). Accordingly, if an asset is entirely sold before the end of the reporting period, Column C should be left blank. The statutory value ranges and a value code for each range are listed on the bottom of the form. These same values are used for the value of reported assets in Column C and for the value of assets reported in the transaction part of Part VII, Column D. They are as follows:

J - $15,000 or less	O - $500,001 to $1,000,000
K - $15,001 to $50,000	P1 - $1,000,001 to $ 5,000,000
L - $50,001 to $100,000	P2 - $5,000,001 to $25,000,000
M - $100,001 to $250,000	P3 - $25,000,001 to $50,000,000
N - $250,001 to $500,000	P4 - More than $50,000,000

Section 102(d)(1).

In addition, the method used for valuation should be reported in Column C. These are coded as follows:

Q Appraisal. Indicate in Part VII-A or Part VIII the date of the appraisal.

R Cost. This method may be used only for real property or an interest in a real estate partnership. If used, show in Part VII-A or Part VIII the date of purchase and the amount, not just the category code, of the purchase price.

S Assessment -- assessed value for tax purposes. If this method is used, show in Part VII-A or Part VIII the amount, not just the category code, of the assessed value and, if the property is assessed at less than 100% of its value, adjust the assessed value to reflect the current value and explain your adjustment.

T Cash/Market. The quoted market price of publicly traded stocks and other securities; the face value of interest bearing corporate or municipal bonds or comparable securities; the balance or surrender value of certificates of deposit, savings and checking accounts, money market funds, etc.

U Book. The net worth of a proprietorship, partnership interest, or corporate stock according to the books of such entity. This method may be used only for property interests not publicly traded.

V Other. Any other recognized indication of value, such as current selling price of a comparable interest. If this method is used, you must describe in Part VII-A or Part VIII the method used.

W Estimated. Your good faith estimate of the value of property if its exact value is not known and a more accurate determination of its value cannot be easily obtained by another method.

The gross value of the property should be indicated without reductions for mortgages, etc. References may be made in Part VII to mortgages included in Part VI (Liabilities).

The value of the investment component of a cash value life insurance policy should be reported in Column C. Do not report the "face value" or value of the death benefit under the policy.

Notes to Filer:

____ *Do you list in Column C(1) the gross value code (J-P) at the end of the reporting period?*

____ *Do you list in Column C(2) the correct value method code (Q-W) reflecting how the value of the asset was determined?*

____ *If you used value method codes "Q," "R," "S," or "V," did you include the appropriate information in Column A or Part VIII?*

Commentary

If an asset is entirely sold during the reporting period, then Column C should be left blank. However, if an asset is partially sold (such as a portion of the total shares of stock owned), then Column C should be completed.

In addition, it should be emphasized that in Column C(2), there are four value method codes which require additional information in either Column A or Part VIII. Filers tend to forget that each report must stand on its own and as a result often fail to provide the following on their report each year:

(1) "Q" - Appraisal - the date of the appraisal.

(2) "R" - Cost - the date of purchase and the dollar amount of the purchase price.

(3) "S" - Assessment - the dollar amount of the assessed value.

(4) "V" - Other - the filer must describe the method used in Column A (Description) or Part VIII.

VII. Page 1 INVESTMENTS and TRUSTS – income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-60 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
1 Oracle Common Stock		NONE	K	T					
2 Rental Property #1, Alexandria, VA (1995 $200,000)	D	Rent	M	R					
3 Rental Property #2, Alexandria, VA	F	Rent	K	V					See note in Part VIII
4 Bank of America (IRA) (CDs)	A	Interest	J	T					
5 Cabin Creek National Bank Stock (X)	B	Dividend	J	U	Part. Sale	5/30	J		
6 Fidelity Magellan Mutual Fund	B	Dividend			Sold	6/5	K		
7 NY State Urban Dev. Corp. Muni. Bond	A	Interest	J	T					

1 Income/Gain Codes: (See Col. B1, D4) A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000 F=$50,001- $100,000 G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=More than $5,000,000

2 Value Codes: (See Col. C1, D3) J=$15,000 or less K=$15,001-$50,000 L=$50,001- $100,000 M=$100,001-$250,000 N=$250,001-$500,000 O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000 P3=$25,000,001-$50,000,000 P4=More than $50,000,000

3 Value Method Codes: (See Col. C2) Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market U=Book value V=Other W=Estimated

5. Transactions

Information on transactions should be entered in Column D. Transactions to be reported involve any purchase, sale or exchange during the reporting period which exceeds $1,000. Section 102(a)(5).

As to each acquisition or disposition, you should disclose:

a) the type of transaction, e.g., buy, sell, redeem, etc.;

b) the date of the transaction;

c) the value category code indicating the value of the consideration paid or received (codes J-P);

d) the capital gain, if exceeding $200, realized on a disposition, using the appropriate income category code (codes A-H);

e) the identity of the buyer or seller unless the transaction was conducted through public trading, as on a stock or commodities exchange;

f) the liquidation of a bank account or money market fund that may have been reported on a prior report.

If an asset has been bought and sold during the same reporting period, provide the required information about both transactions on successive lines (see example on page 53, lines 6 and 7).

In most corporate mergers and reorganizations, shareholders play a passive role and realize no taxable capital gains. Accordingly, where a non-taxable corporate reorganization results in the listing of a new asset or the omission of an asset disclosed on the previous report with no purchase or sale by the filer, the change of name should be explained with a note in Column A or in Part VIII, as appropriate. For example, if the filer listed the "ABC Company" on a previous report and it has since been merged into the "XYZ Company," the filer should list "XYZ Co. (formerly ABC Co.)" in Column A. Only if the filer is required to report a capital gain for income tax purposes would a merger be treated as a transaction. Also, if the filer sells the shares of the new corporation after the merger, that transaction must be reported.

Income received pursuant to an annuity contract owned by the filer (or filer's spouse) need not be reported as a transaction in Column D. Similarly, the withdrawal of a portion of the investment component of a life insurance policy need not be reported as a transaction in Column D, but a cancellation or withdrawal of the entire balance so as to end the policy should be reported as "cancel," "withdrawal," or "sale."

The value category codes, codes J-P, which for convenient reference are also shown at the bottom of the report, are listed above under VALUE.

The income category codes, codes A-H, for reporting capital gains, which for convenient reference are also shown at the bottom of the report, are listed above under INCOME. If there is a loss, or no gain or loss, Column D4 under GAIN should be left blank.

You are not required to report:

- transactions solely between yourself, your spouse, and your dependent children; Section 102(a)(5);
- transactions in which the then fair market value of consideration paid or received did not exceed $1,000; Section 102(a)(5);
- transactions involving property used solely as the personal residence of you or your spouse; Section 102(a)(5)(A);
- transactions involving a mere change of form of assets, e.g., a stock split;
- transactions involving deposits or withdrawals from bank accounts and money market funds other than the opening or closing of such accounts;
- transactions involving the reinvestment of dividends, interest, and capital gain distributions;
- inheritances received by the filer or the filer's spouse or dependent children; or
- gifts made to a charity or to a non-dependent relative by the filer or the filer's spouse or dependent children.

However, if a transaction not reported under these exceptions would result in an asset being added to or removed from the list of assets in Part VII:

a) for the opening or closing of a bank account with a transaction involving less than $1,000, insert "Opened" or "Closed" in Column D(1) and leave Columns D(2) through D(5) blank;

b) for an asset acquired through an exempt transaction (such as an inheritance or exempt gift), insert "(X)" after the asset description in Column A; and

c) for an asset disposed of through an exempt transaction, insert "donated" in Column D(1) and leave Columns D(2) through D(5) blank or include an explanatory note in Part VIII to avoid an inquiry about the change in the list of assets.

Please ensure that the entries in Columns C and D are consistent:

- If property is entirely disposed of during the reporting year, Column C should be left blank;

- If property is partially disposed of during the reporting year, Column C should be completed and Column D(1) should include "Part" (e.g., "Part sold" or "Part redeemed").

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-60 of Instructions.)*

	A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐	**NONE** (No reportable income, assets, or transactions)									
1	Lego Common Stock		NONE	K	T	Buy	7/10	J		
2						Part Sale	9/1	J	A	
3						Buy	12/1	J		
4	Rental Property #1, Alexandria, VA (1995 $200,000)	C	Rent			Sold	12/5	N	C	Joe Smith
5	Bank of America (IRA) (CDs) (formerly known as NationsBank)	A	Interest	J	T	Buy	11/10	J		
6	Verizon (formerly known as Bell Atlantic)	A	Dividend			Buy	2/5	K		
7						Sold	11/3	K	A	
8	Cabin Creek National Bank Stock (X)	B	Dividend	K	U	Part Sale	4/8	J	A	Jerry West
9	Fidelity Magellan Mutual Fund	B	Dividend	K	T	Buy	4/15	J		
10	NY State Urban Dev. Corp. Muni. Bond	A	Interest			Redeem	7/5	J		
11	Real estate, Sussex County, Delaware		None			Donated				

1 Income/Gain Codes: (See Col. B1, D4) A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000 F=$50,001-$100,000 G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=More than $5,000,000

2 Value Codes: (See Col. C1, D3) J=$15,000 or less K=$15,001-$50,000 L=$50,001-$100,000 M=$100,001-$250,000 N=$250,001-$500,000 O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000 P3=$25,000,001-$50,000,000 P4=More than $50,000,000

3 Value Method Codes: (See Col. C2) Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market U=Book value V=Other W=Estimated

Notes to filer:

____ *If the asset is a new listing, do you list in Column D information on the transaction?*

____ *Do you list the date of the transaction in Column D(2)?*

____ *Do you list in Column D(3) the value code (J-P) indicating the value of the consideration paid or received for the asset?*

____ *Do you list in Column D(4) capital gain (income codes A-H) realized on the disposition of the asset or leave this column "blank" if there was no gain or a loss?*

____ *If an asset is partially disposed of or sold, did you indicate "partial sale" in Column D(1)?*

____ *If an asset was completely disposed of or sold, did you leave Column C blank and complete Columns D(1)-(5) as appropriate?*

____ *Do you list the identity of the buyer or seller for all transactions not conducted through public trading, as on a stock or commodities exchange?*

6. Widely Held Investment Funds

A fund is a widely held investment fund if it:

is publicly traded or the assets of the fund are widely diversified, and the reporting person neither exercises control, nor has the ability to exercise control over the financial interests held by the fund. Section 102(f)(8).

A reporting person must report holdings in widely held investment funds. The reporting person must report the income from the fund, the end of period value, and transactions with regard to the fund. The reporting person is not required to report the individual assets owned by the fund, or the transactions engaged in by the fund. Rather, the fund itself, is considered to be the source of the income obtained therefrom, even though that income includes dividends, interest on capital gains earned with respect to stocks, bonds, etc., held by the fund. Accordingly, a reporting person would report a widely held fund as follows:

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-60 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value2 Code (J-P)	C. (2) Value Method3 Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. If not exempt from disclosure (2) Date: Month-Day	(3) Value2 Code (J-P)	(4) Gain1 Code (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
1 Washington Growth Mutual Fund	C	Dividend	L	T					
2 Janus Enterprise Mutual Fund	B	Dividend			Sell	11/3	K	A	
3 Fidelity Growth Mutual Fund	A	Dividend	K	T	Buy	3/2	J		

1 Income/Gain Codes: (See Col. B1, D4) A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000 F=$50,001- $100,000 G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=More than $5,000,000

2 Value Codes: (See Col. C1, D3) J=$15,000 or less K=$15,001-$50,000 L=$50,001- $100,000 M=$100,001-$250,000 N=$250,001-$500,000 O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000 P3=$25,000,001-$50,000,000 P4=More than $50,000,000

3 Value Method Codes: (See Col. C2) Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market U=Book value V=Other W=Estimated

7. Aggregate Ownership Arrangements – Trusts, IRAs, and Investment Clubs

A. Aggregate Reporting

The Committee has established special rules for reporting assets held in an ownership arrangement which is separate from the reporting person himself or herself, referred to herein as an "Aggregate Ownership Arrangement." A personal stock account with a brokerage is not considered an Aggregate Ownership Arrangement. As discussed below, a reporting person will have to identify each separate asset held in the Aggregate Ownership Arrangement and report transactions regarding each asset. However, the reporting person can report the aggregate (total) income and end of period value of the asset and need[1] not provide the separate income and end of period value of each separate asset therein.

The basic rule is that the income, value, and transactions of the holdings of any Aggregate Ownership Arrangement in which the reporting person, spouse, or dependent child has a beneficial interest must be reported if the arrangement itself had ownership of any asset having a value of $1,000 at the end of the reporting period, regardless of the value of the reporting person, spouse, or dependent child's individual share. Thus, there must be a list of each asset owned by the Aggregate Ownership Arrangement having a value in excess of $1,000 or affected by any transaction in excess of $1,000.

As to each Aggregate Ownership Arrangement, the reporting person shall provide, on a line in Part VII, the following:

(1) The identity of the Aggregate Ownership Arrangement in Column A.

(2) Aggregate income information in Column B.

(3) Aggregate gross value in Column C.

(4) Transaction as to the Aggregate Ownership Arrangement itself in Column D.

On the following page is an illustration of reporting an Aggregate Ownership Arrangement. On the lines following the line for the Aggregate Ownership Arrangement, each separate asset owned by, or in, the arrangement during the reporting period must be reported as follows:

(1) The identity of the separate asset in Column A, preceded by a dash to show that it is part of the aggregate entry;

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[1] Of course, if the reporting person wishes to provide the income and end of period value with respect to each separate asset, it is permissible to do so.

(2) Column B, income information, is left blank;

(3) Column C, gross value, is left blank; and

(4) Transactions of the Aggregate Ownership Arrangement as to the separate assets are reported in Column D.

If the Aggregate Ownership Arrangement was utilized for a substantial number of assets and there is available clear documentation of all required information, the reporting person may apply to the Committee for leave to report the assets in an alternate manner. Any request should be made sufficiently in advance of the filing deadline to permit careful consideration and discussion with the reporting person.

VII. Page 1 INVESTMENTS and TRUSTS – income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-60 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
1 Trust #1	B	Dividend	L	T					
2 – IBM Stock (common)									
3 – American Century Growth Fund									
4 – New York City Transportation Bonds					Buy	12/21	K		
5 IRA #1	A	Dividend	M	T					
6 – Merrill Lynch Health Mutual Fund									
7 – Merrill Lynch Growth Fund					Buy	1/8	K		
8 – Capitol Holding Stock (common)					Sell	4/5	K	A	

9	Blue Sky Investment Club	B	Dividend	K	T	Buy	1/4	K		
10	– IBM (common)									
11	– General Motors (common)					Buy	3/6	K		
12	– AOL (common)					Partial Sale	8/10	L	C	

1	Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less	B=$1,001-$2,500	C=$2,501-$5,000	D=$5,001-$15,000	E=$15,001-$50,000
		F=$50,001- $100,000	G=$100,001-$1,000,000	H1=$1,000,001-$5,000,000	H2=More than $5,000,000	
2	Value Codes: (See Col. C1, D3)	J=$15,000 or less	K=$15,001-$50,000	L=$50,001- $100,000	M=$100,001-$250,000	
		N=$250,001-$500,000	O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000	P2=$5,000,001-$25,000,000	
		P3=$25,000,001-$50,000,000	P4=More than $50,000,000			
3	Value Method Codes: (See Col. C2)	Q=Appraisal	R=Cost (real estate only)	S=Assessment	T=Cash/Market	
		U=Book value	V=Other	W=Estimated		

Notes to filer:

____ *Did you complete the appropriate columns for each asset required to be individually listed in a trust, estate, investment club, or other similar financial arrangement?*

B. Trusts

The reporting of a position in Part I as trustee, executor, administrator, custodian, or any similar position requires a listing in Part VII of the assets involved if either you, your spouse, or any of your dependent children (1) has a beneficial interest in the estate or fund with which you are associated, or (2) controls the purchase, sale, or other disposition of the estate or fund.

A reporting person must also report all trusts[2] in which he or she, his or her spouse or dependent child has a beneficial interest. However, a reporting person does not have to report a contingent interest in a trust if the reporter has no control over the assets of the trust. An interest is contingent if there is no present right or ability to any income or principal, and the future is uncertain either by survivorship or otherwise.

A reporting person who is required to report a trust, etc. must report the separate assets of the trust or estate as an Aggregate Ownership Arrangement discussed above. However, the reporting person need not report the separate assets of a trust:

(1) which was not created directly by the reporting person, his spouse, or any dependent child; and

[2] Except, for employees other than judges, the assets of a qualified blind trust which is approved by the Committee need not be reported. See the discussion in paragraph C.

(2) the holdings or sources of income, of which the person, his spouse, or any dependent child have no knowledge. Section 102(f)(2).

If a trust has been established to receive proceeds of a life insurance policy, the insured person is still living, and the trust has no asset valued at more than $1,000, it should not be listed as an asset in Part VII, but if the trust was disclosed in Part I, the filer should include a note in Part VIII that it is an "unfunded trust." Similarly, a trust whose sole asset is a term life insurance policy need not be listed in Part VII, as term insurance is not regarded as an investment asset, but if the trust was disclosed in Part I, the filer should include a note in Part VIII explaining that it is an "unfunded trust."

C. Qualified Blind Trust (Employees Other Than Judges)

A qualified blind trust is subject to special rules. Section 102(f).

The reporting person, other than a judge, is not required to report in Column A the individual assets of a "qualified blind trust." Section 102(f)(1). The effect of the Code of Conduct for United States Judges (Canon 3(c)(2)) precludes qualified blind trusts for judges, their spouses, and dependent children. Other judicial employees may own beneficial interests in qualified blind trusts as defined and conditioned in the pertinent statutes. Judicial employees considering the establishment of a qualified blind trust are directed specifically to Section 102(f)(3)(D), which requires approval by the Committee on Financial Disclosure.

Commentary

Where the filer or spouse has exercised a power of attorney with respect to any assets, all investment assets subject to that power should be reported in Part VII.

The following are examples of statutory guidelines on related subjects extracted from The Codes of Conduct For Judges and Judicial Employees. These guidelines should provide assistance as to the propriety of disclosing certain financial interests.

(1) "Financial interest" means ownership of a legal or equitable interest, however small. (Canon 3(C)(3)(c).)

(2) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund. (Canon 3(C)(3)(c)(i).)

(3) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization. (Canon 3(C)(3)(c)(ii).)

(4) A policy holder in a mutual insurance company, a depositor in a mutual savings association, or owner of government securities has a "financial interest," if the outcome of any proceeding in which the filer participates could substantially affect the value of the interests. (Canon 3(C)(3)(c)(iii) and (iv).)

(5) An interest in a limited partnership designed to engage in particular investment strategies can fall within the concept of a "common investment fund" when the judge has no control or influence over the general partner or over the investment decisions. The investment vehicle is similar to a mutual fund. (Compendium § 3.1-3(e) (2003).)

(6) Judge has a "financial interest" in each of the named underlying equity securities when the judge's IRA owns units of an investment vehicle which holds 15 named corporations, the portfolio is not actively managed, and it is not contemplated the securities will be sold or exchanged prior to termination of the investment vehicle in ten years. Investment vehicle does not qualify as "mutual fund or common investment fund" under Canon 3C. (Compendium § 3.1-3(f) (2003).)

(7) A law firm's KEOGH plan or 401k plan managed by the firm, small number of participants, ready access to investment information does not qualify for the "common fund" exception. (Compendium § 3.1-3(c) (2003).)

(8) A law firm's retirement fund qualifies for the "common investment fund" exception where the financial interest is indirect (due to the number of participants and the size and diversity of investments), directed investment by participants is not available, and the participants do not know and cannot easily find out about a fund's portfolio, which turns over frequently. (Compendium § 3.1-3(c-1) (2003).)

VIII. Explanatory Comments

Use this part to add information clarifying other portions of the report. Of particular importance is any information, such as a reference to opinions of the Committee on Codes of Conduct and actions of a Judicial Council, that bears on possible conflicts of interest or problems under the Code of Conduct for United States Judges. Also use this part to explain any apparent inconsistencies between the current report and past reports.

Place explanatory comments either with the item or in Part VIII that will facilitate "tracing" items from one report to the next. For example, indicate if an asset has a different name from that used in the prior report because of a reorganization or change of name.

Use attachment pages if more space is needed.

Examples of Notes in Part VIII

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

1) Part VII, page 1, line 3 - Value based on comparison to sale prices of nearby properties.
2) Part VII, page 2, line 18: This asset was acquired through my marriage.
3) Values and income of assets listed on page 2, lines 21-24 of previous report have declined below reporting value (asset on line 24 now bankrupt).

IX. Certification and Signature

The certifications provided on the form cover (1) a certification that the report is accurate, true, and complete as to all information required by the Act to be reported; and (2) a certification that earned income from outside employment and honoraria and the acceptance of gifts that have been reported are in compliance with the provisions of applicable laws and regulations.

The original report that is to be filed with the Committee must bear the original signature of the reporting person; the other three copies may be copies of the signed original. At least one copy of an amended return or of a clarifying letter responding to a Committee inquiry must bear the original signature of the reporting person; all other copies shall be copies of the signed original. The signature of the reporting person may be excused only during a period of physical or mental incapacity of that person.

Promptly upon discovery that an error has been made in a report, amend the report by one of the methods explained on page 4.

COMPLIANCE AND SANCTIONS

Compliance with filing and reporting requirements is monitored pursuant to 5 U.S.C. app. § 106.

One who knowingly and willfully falsifies or fails to file or report any information required under the Act is subject to civil and criminal sanctions. Section 104(a).

ETHICAL STANDARDS

The disclosure requirements and exemptions from disclosure contained in the Act neither define nor limit the standards imposed by the Code of Conduct for United States Judges and other rules of the Judicial Conference of the United States or the statutory provisions for disqualification or recusal.

For example, disclosure of financial interests under the Act is required only for interests exceeding a stated minimum amount of value and only with respect to certain members of a person's family, whereas 28 U.S.C. § 455(b)(4) applies to financial interests without regard to amount and 28 U.S.C. § 455(b)(5) applies to participation in litigation by a person within the third degree of relationship to the judge. Similarly, the Act exempts from disclosure matters relating to campaign receipts and campaign disbursements, most of which would be prohibited under the Code of Judicial Conduct for United States Judges, which also precludes qualified blind trusts for judges.

PUBLIC ACCESS

Financial Disclosure Reports are public documents, open to inspection and copying at the office of the Committee on Financial Disclosure. Reports will be made available to the public in accordance with the regulations of the Judicial Conference of the United States on Access to Financial Disclosure Reports Filed by Judges and Judiciary Employees Under the Ethics in Government Act of 1978, as amended. Sections 105(a) and (b)(1). However, § 105(b)(3)(A) of the Ethics in Government Act of 1978, as amended, does not require the immediate and unconditional availability of reports filed if a finding is made by the Committee on Financial Disclosure, in consultation with the United States Marshals Service, that revealing personal and sensitive information contained on the report could endanger the filer.

When an annual report is filed, each filer shall, in a cover letter to the Committee, request redactions of any information required to be disclosed in the report, if the filer believes the release of the information to the public could endanger the filer or the filer's family. A filer may also request redaction after he or she receives notice of a request for his or her reports. Such requests should be submitted in accordance with Judicial Conference regulations specifying the material sought to be redacted and stating in detail the reasons justifying redaction. Each request for redaction will be reviewed by the Committee in accordance with Section 105 of the Act and

the regulations of the Judicial Conference. Information approved for redaction must still be disclosed when filing a report. Redactions will be made by the Committee staff prior to release.

A report will be made available only to a person who completes the AO Form 10A, Request for Examination of Report Filed by a Judicial Officer or Employee, in writing.

It shall be unlawful for any person to obtain or use a report--

A) for any unlawful purpose;

B) for any commercial purpose other than by news and communications media for dissemination to the general public;

C) for determining or establishing the credit rating of any person; or

D) for use directly or indirectly, in the solicitation of money for any political, charitable, or other purpose. Section 105(c)(1).

The Attorney General may bring a civil action against any person who obtains or uses a report for any prohibited purpose described above. The court in which such action is brought may assess against such person a penalty in any amount not to exceed $10,000. Such remedy shall be in addition to any other remedy available under statutory or common law. Section 105(c)(2).

APPENDIX I

INITIAL REPORTS

WHO MUST FILE AND WHEN

Persons nominated to be JUDICIAL OFFICERS must file an initial report within 5 days of the transmittal of their nomination by the President to the Senate. Section 101(b)(1).

Newly-appointed JUDICIAL EMPLOYEES must file an initial report within 30 days of assuming their positions, Section 101(a), if they assume their position before November 1. Newly-appointed JUDICIAL EMPLOYEES who assume their positions between November 1 and December 31 must file an initial report by March 15 of the subsequent year.

Judicial employees who receive a promotion or change in the rate of pay which results in pay equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule before November 1, must file an initial report within 30 days of the promotion or pay change. If the promotion or pay adjustment occurs between November 1 and December 31, judicial employees must file an initial report by March 15 of the subsequent year.

A JUDICIAL EMPLOYEE who is not expected to perform the duties of the office or position for more than sixty (60) days in a calendar year is not required to file an annual report. However, if the person actually performs duties for more than sixty (60) days, an initial report must be filed within fifteen (15) days of the sixtieth day. Section 101(h).

INSTRUCTIONS FOR COMPLETING EACH PART

Below are specific instructions that differ from those provided for annual reports.

Identifying Information

BLOCK 3. **Date of Report**. For a JUDICIAL EMPLOYEE, a date that is no more than 30 days after your entry in the position if you entered before November 1. If you entered between November 1 and December 31, the "Date of Report" should be no later than March 15. For a person nominated to be a JUDICIAL OFFICER, the date should be no more than 5 days after submission of your nomination to the Senate.

BLOCK 5. **Report Type.** Check the appropriate report form and in the case of a nomination report show the date your nomination was transmitted to the Senate.

BLOCK 6. **Reporting Period.** The beginning date (January 1 of the year preceding the year you assumed your office or were nominated) and the ending date (a date you choose that precedes the "Date of Report" by no more than 30 days).

I. Positions

The reporting period is the two calendar years preceding the date of the report through the filing date in the current calendar year. Section 102(a)(6)(A).

III. Non-investment Income

The reporting period is the calendar year preceding the date of the report and the year of filing. Section 102(b)(1)(A).

In addition, you must report compensation, other than from the United States Government, in excess of $5,000 in any of the two calendar years prior to the calendar year during which you file your first report. Section 102(a)(6)(B).

You must include the identity of each source of such compensation and a brief description of the nature of the duties performed or services rendered by the reporting person for each source. Section 102(a)(6)(B).

You are not required to report any information which is considered confidential as a result of a privileged relationship, established by law between the reporting person and any person, nor are you required to report any information with respect to any person for whom services were provided by any firm or association of which the reporting person was a member, partner, or employee unless the reporting person was directly involved in the provision of such services. Section 102(a)(6)(B).

IV. and V. Reimbursements and Gifts

You are not required to complete these parts of the report. Section 102(b)(1). Note "exempt" in these two spaces.

VI. Liabilities

The reporting period is the calendar year preceding the date of the report through a date which is less than thirty-one days before the filing date. Section 102(b)(1)(B).

VII. Investments and Trusts

The reporting period for providing income information for assets is the calendar year preceding the date of the report and the year of filing. Section 102(b)(1)(A). The reporting period for providing value information for assets is the calendar year preceding the date of the report through a date which is less than thirty-one days before the filing date. Section 102(b)(1)(B). **You are not required to complete Subpart D "Transactions."** Section 102(b)(1). Note "exempt" in Column D(1).

APPENDIX II

FINAL REPORTS

WHO MUST FILE AND WHEN

A JUDICIAL OFFICER who works 60 days or more in a calendar year is required to file a final report within thirty days after resigning under 28 U.S.C. § 371(a) or otherwise ceasing to continue in such position. A JUDICIAL OFFICER who retires under 28 U.S.C. § 371(b) is not required at that time to file a final report, but continues to be obligated to file an annual report for any year in which the relevant Judicial Council authorizes the employment by the judge of at least one law clerk or secretary, unless the judge certifies that he or she did not perform the duties of his or her office for more than sixty (60) days.

A JUDICIAL EMPLOYEE who works 60 days or more in a calendar year is required to file a final report within thirty days of termination of employment. Section 101(e).

A JUDICIAL OFFICER OR JUDICIAL EMPLOYEE accepting another position in the federal government subject to financial disclosure reporting is not required to file a final report when changing position. Section 101(e).

INSTRUCTIONS FOR COMPLETING EACH PART

Below are specific instructions that differ from those provided for annual reports.

Identifying Information

BLOCK 3. **Date of Report.** The date the report is completed, and not more than 30 days after termination of employment.

BLOCK 5. **Report Type.** Check final report.

BLOCK 6. **Reporting Period.** Show both the beginning and ending date of the reporting period. The beginning date will be January 1 of the current year if an annual report has already been filed covering the preceding calendar year; otherwise, it will be January 1 of the preceding calendar year. The ending date is the date of termination of employment.

Parts I. - VII.

The reporting period is the calendar year preceding the date of the report through the filing date in the current calendar year. Section 102(c). If an annual report was already filed covering the preceding calendar year, then the reporting period is the current calendar year through the filing date.

APPENDIX III

ADDITIONAL REFERENCES

Regulations concerning gifts, outside earned income, honoraria, and outside employment and the codes of conduct are contained in the Guide to Judiciary Policies and Procedures, Volume II, Codes of Conduct for Judges and Judicial Employees.

The Committee on Codes of Conduct has established a database on Westlaw containing the ethical materials in Volume II of the Guide. To use this database, log on to Westlaw using your judiciary-provided Westlaw password (you cannot access this database with a password provided by anyone other than the federal judiciary). When prompted for a file name, enter CONDUCT (this file name does not appear on the Westlaw menu). Once entered into the database file, research may be conducted using established Westlaw search mechanisms.

The *Code of Conduct for Administrative Office Employees* contains similar regulations concerning gifts, outside earned income, honoraria, and outside employment. These regulations are set forth in Vol. I(AO), *Guide to Judiciary Policies and Procedures*, Chapter I, Subchapter B. Administrative Office employees may seek guidance regarding the interpretation of these regulations from the General Counsel of the Administrative Office.

INDEX

Financial Disclosure Report
Software CD Instructions

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544
202-502-1850
January 14, 2005

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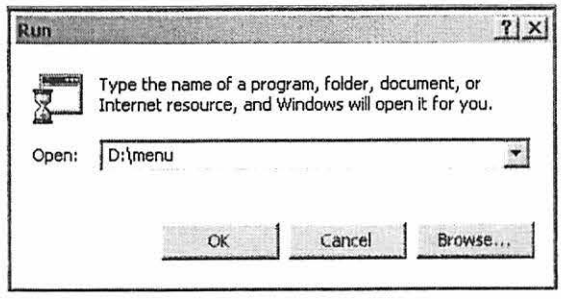
Contents - Financial Disclosure Report CD

The enclosed CD has been revised to contain copies of the financial disclosure filing instructions, report form, and other documents that were previously provided in a paper format. You may view the documents on your computer, print the documents, or save the documents to the hard drive on your computer. In addition, the CD allows you to install a copy of an updated version of the financial disclosure software issued January 2, 2005, and is designed to assist you in filing your financial disclosure report. The program is written in Microsoft Access and designed to work with Microsoft Access versions Access 97 and later. If you do not have Microsoft Access available on your machine, the program will install a runtime version of Microsoft Access that will allow you to install and use the FDR software. The program was designed to replace the older FoxPro for Windows-based software (FDR2001) which does not run on some of the newer computers used by filers. The CD allows the installation of the program on your computer and will copy the data from last year's report to assist you in completing the form.

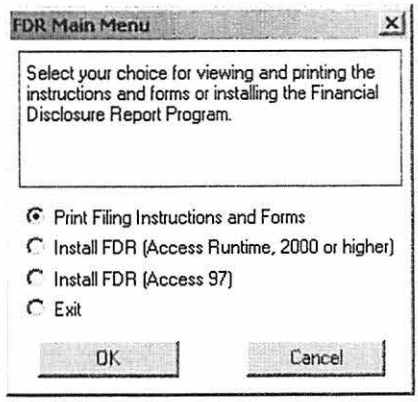
Using the CD

Follow these step-by-step instructions to use the Financial Disclosure Report CD on your computer:

(1) Insert CD in your CD drive.
(2) Use your mouse to click on the Start button at the bottom left hand corner of your desktop
(3) Select Run and press the <Enter> key
(4) Type D:\ or E:\ **menu.exe** and press the <Enter> key

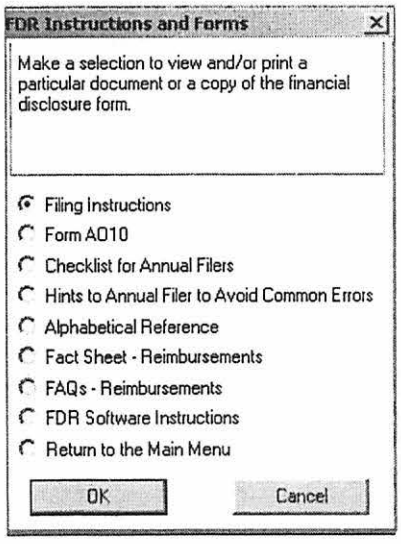


A menu will appear that gives you the option of viewing and printing the financial disclosure filing instructions, report form, and other documents or installing the financial disclosure software to assist you in completing your report.



Use your mouse to select the option you wish to use and select the <OK> button.

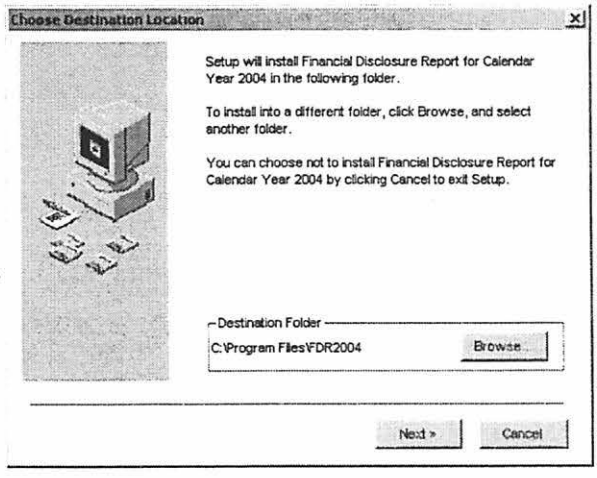
If you choose to view and print the financial disclosure instructions, forms and other documents, you will see the menu listing your choices. Select the form you wish to view, print, or save to your computer and the document will open in Adobe Acrobat. When you are finished viewing or printing the document, exit Adobe Acrobat and return to the FDR Instructions and Forms Menu. If you wish to install the FDR software or exit the CD, select <Return to the Main Menu>.



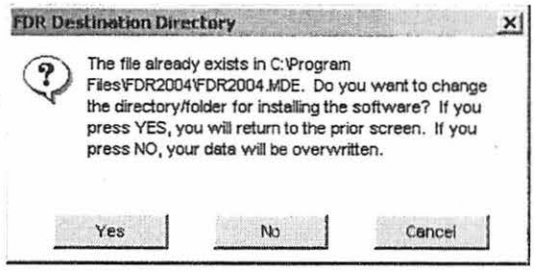
If you wish to install the FDR software, select the install option from the Main Menu and click your mouse on the <OK> button.

The setup program will display a series of screens that will assist you in installing the software. Move from screen to screen using the menu buttons at the bottom of the screen to complete the setup and installation of the program.

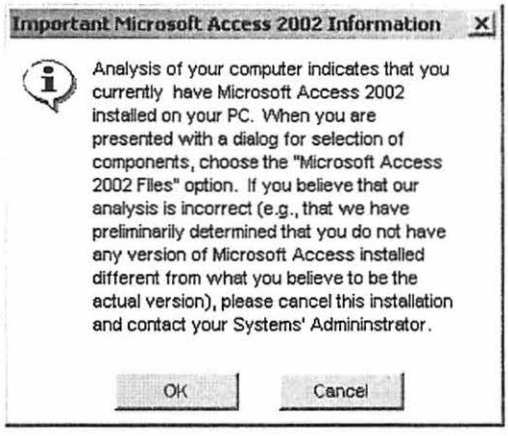
During installation you may choose a directory or program manager group other than the default. Click your mouse on the Browse button and select the folder where you would like the program installed. DO NOT install the program in the directory containing the version of the program that you used last year (normally C:\Program Files\FDR2003 or FDR2001). The installation program will overwrite your data files and you will not be able to incorporate the data from your previous report into the windows



program. Select the <Next> button to proceed with the installation of the software from the CD to your computer.



The setup program will search your computer to determine whether you have already installed the FDR software into the folder c:\program files\FDR2004. If you have, the program will warn you that any reinstallation to this folder will overwrite your data. You will have an opportunity to change the folder, exit the program (since installation is not needed) or overwrite the data in that folder.



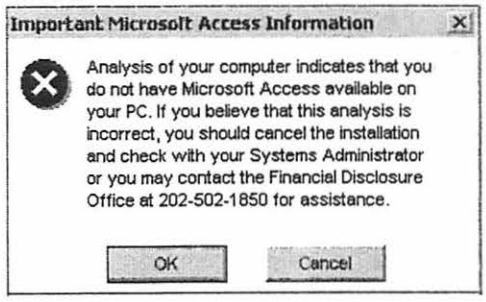
If you continue with the installation, the program will examine your computer and determine which version of Microsoft Access you are using: Access 97, Access 2000, or Access 2002 (XP) or higher. Once the search is complete, the screen will display a box stating what it has found. Press <OK> to continue the installation. If the search program does not find a version of Microsoft Access available to your computer, it will display a message informing you of this fact and give you the option of installing a "runtime" version of Microsoft Access 2000 that will allow you to run the FDR2004 program (<u>See</u> *Installing the Runtime Version* below).

If you have Access 97 on your computer, a screen will display instructing you to install the Access 97 files. If you have Access 2000, Access 2002, or Access 2003 available on your computer, the setup program will choose those files to install. Select <OK> to continue.

Once installation is complete, the program will add an icon to the program manager group you designated above and add a program icon on your desktop. The icon will read "FDR" if you are using Access 97 and "FDR2004" if you are using Access 2000 or higher.

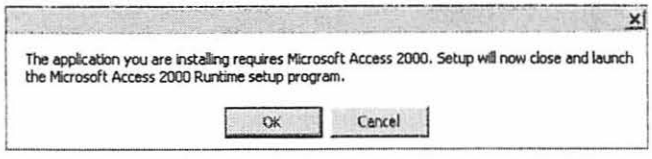
Installing the Runtime Version of Microsoft Access

If Microsoft Access is not available on your computer, you may install a "runtime" copy of Access from the CD that will allow you to run the FDR2004 program. Your court or office does not need to buy a copy of Access or purchase a license.

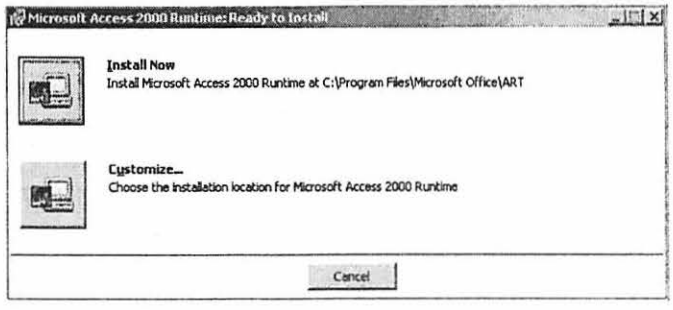


If you believe the analysis is incorrect, press the <Cancel> button. If you believe the analysis is correct, click the <OK> button and the following message will appear.

The program will inform you that it is preparing to install the program and show you a screen that gives you the option of a routine or customized installation. Most filers should choose <Install Now>.



The install program will inform you when the installation is complete. Press <OK> and your computer will automatically reboot. After your system has restarted, MS Access 2000 Runtime will continue to complete the setup. Again, please stand by, as this will take several minutes.



After the MS Access 2000 Runtime setup is completed, the FDR setup screen will automatically appear. Follow the instructions on the screen as outlined above in *Using the CD* on page 1. NOTE: The MS Access 2000 Runtime software is a one-time installation. If you need to reinstall the FDR software, follow the instructions for *Using the CD* on page 1.

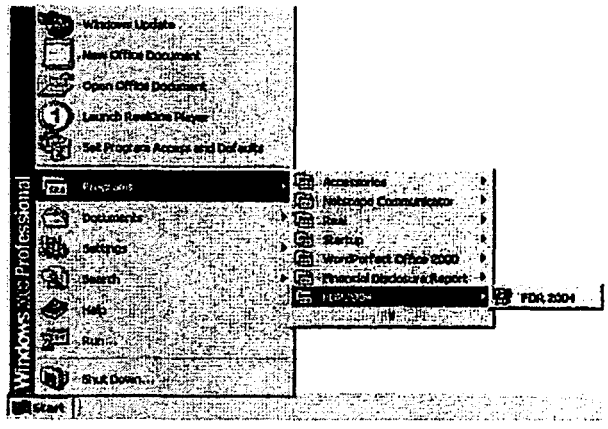
The Access runtime program does not create a desktop icon for the FDR software. You can create an icon or run the program from desktop menu using the START button.

To create the shortcut on your desktop:

Step 1. Right-click the mouse;
Step 2. Select "New" then "Shortcut";
Step 3. Type "c:\program files\fdr2004\fdr2004.mde" - this is the default path to the FDR application or the path you created;
Step 4. Select or type a name to appear on desktop;
Step 5. Press the "OK" button. The icon will appear on your desktop.

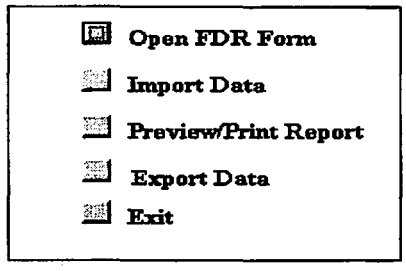
Starting the FDR Program

You can start the program by double clicking on the FDR icon on your desktop or using the Start button on your desktop and selecting programs as shown.

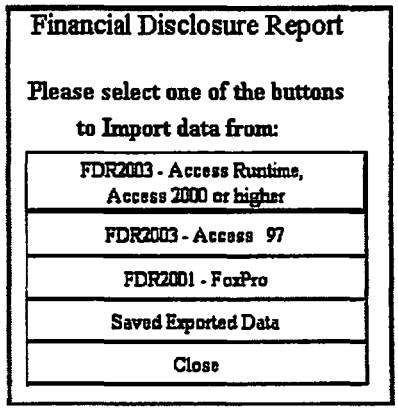


Importing Last Year's Data

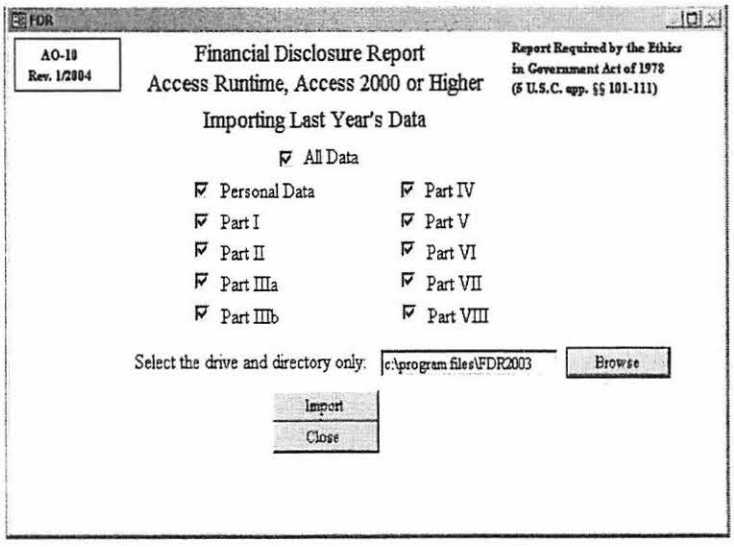
When you first enter the program, you will see the following screen with five menu buttons that enable you to open the form, import last year's data, preview/print the form, export your data, or exit the program. If you want to use the data from your last report to assist you in completing this year's report, choose that option by clicking on the <Import Data> button.



The following screen will appear to ask you to select the program used to file your last report and import that data into the FDR2004 program. The program automatically selects the default path for the program you used to file your last report. If you used the runtime version of the software which installed Access 2000 Runtime on your PC, select <FDR2003-Access Runtime, Access 2000 or higher2000> button. The Access 97 version can also be found in c:\program files\fdr2003. If you used the older FoxPro program, the data is normally in the c:\fdr2001 folder. Note that the <SavedData> button is a new feature and will only work with data saved from the FDR2004 report program.



Once you select the program that you used to complete your last report, the following screen will appear. Check the <All Data> box to import all of the data from your last report or check selected parts. Click on the <Import> button to copy the data.



The FDR2004 program allows you to re-import the data from your last report if you selected the wrong program. However, each new import will write over any data that was previously imported or entered in a particular section of the database.

Close each menu to return to the Main Menu. You are now ready to begin data entry.

Using the Main Menu

- Select Open FDR Form to add, edit, insert, view, or delete data in your form;
- Select Import Data to copy data from your last report;
- Select Preview/Print Report to view or print out the report;
- Select Export Data to save your data to a file for back-up or use on another computer; or
- Select Exit to close the software.

Completing the Form

Open FDR Form. When you press the <Open FDR Form> button, a sub-menu appears with four buttons. This screen enables you to:

Personal Information
Part I through Part VIII
Preview/Print
Close

- Select <Personal Information> to enter, modify, or delete personal information;

- Select <Parts I through VIII> to enter, modify, insert, delete, undo, or find data. Press the tabs at the top of the screen to toggle between parts;

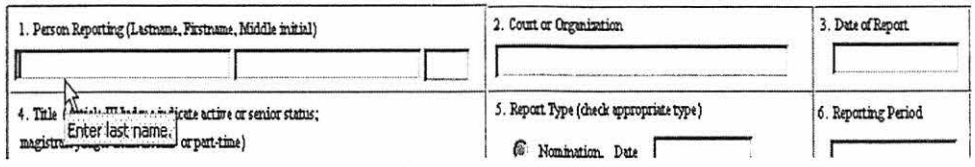
- Select <Preview/Print> to either preview or print data; or

- Select <Close> and return to the previous screen.

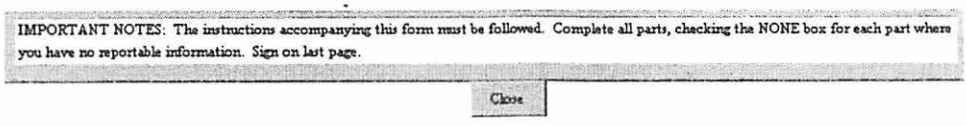
Each button displays another sub-menu or screen. Press the button to display next screen. *NOTE: "Insert" is used in Part VII only.

Entering Personal Information – Filing Instructions for Personal Information

If you choose the Personal Information menu button, you will see the following screen which can be used to add or edit personal information displayed in the header of the report:

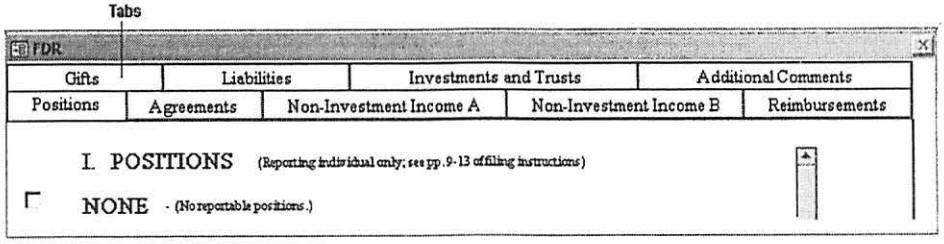


Press the <Close> menu button to close and return to the previous screen.



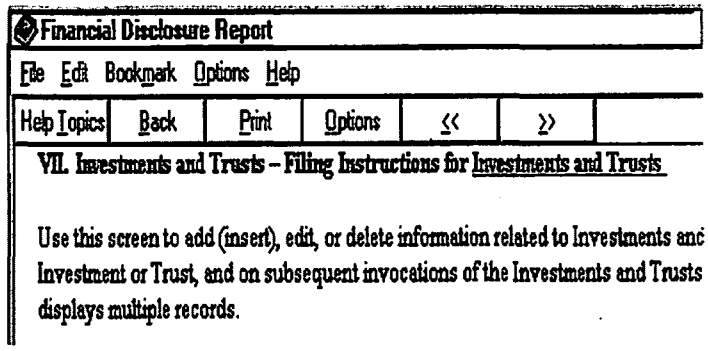
Completing Parts I through VIII

Press the tabs at the top of the screen to toggle between Parts I through VIII.



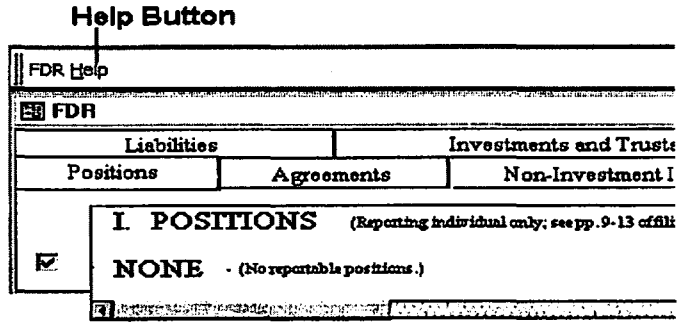
There are two vertical scroll bars and/or horizontal scroll bars. The outer vertical scroll bar controls the up and down movement for the screens for Parts I through VIII. The inner vertical scroll bar controls the up and down movement within each Part screen. The horizontal scroll bar controls left and right movement within each Part screen.

Parts I through VII of the report must be completed. If you have no reportable items in any of these parts, use your mouse and check the "NONE" box in the left margin. You must check the "NONE" box or have data in a section for that part to print on the form.



A. Using the Help Screens

Help for Parts I through VIII – Click inside a field in each Part and click on the <FDR Help> button on the top left or press the <F1> key for explanations on what to enter in each field in a particular part.



Once selected, the following help screen will appear. You can scroll through the existing screen, choose help topics, or if you click on the green underlined phrase in "Filing Instructions for Investments and Trusts," the program will display the 2004 filing instructions for that part of the form.

B. Entering Data in Parts I through VI

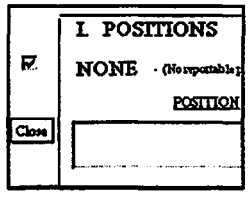
Use this screen or a similar screen in Parts I through VI to add, edit or delete information regarding each part. After you have entered the first record, and on subsequent invocations of this part from the Main Menu, the software displays multiple records.

The menu buttons allow you to do the following:

Delete – click inside the field, then press the <Delete> button. A warning message appears, press the appropriate button. Note: This button deletes one record at a time, not a character or word.

Undo – If you inadvertently make changes to a field and want to undo those changes, press the <Undo> button.

Refresh – Press this button to see any changes made to a record (i.e., insert).

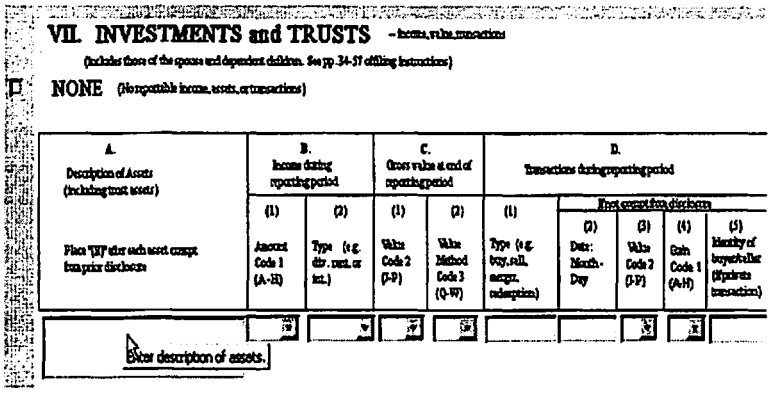


Close – Press the <Close> button to close and return to the previous screen.

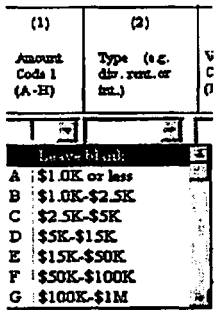
The value code field is a drop down menu listing the valid codes for Part VI, Liabilities.

C. Entering Data in Part VII, Investments and Trusts

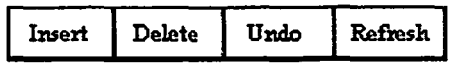
Use this screen to add (insert), edit, or delete information related to Investments and Trusts. After you have entered the first Investment or Trust, and on subsequent invocations of the Investments and Trusts screen from the Main Menu, the software displays multiple records.



The Part VII screen has several drop-down menus. Use your mouse to move up and down to make selection. Use the horizontal scroll bar to view dollar values or descriptions of choice selected.



There are five buttons on the screen—insert, delete, undo, refresh, and close.



- Insert – click inside the Description of Assets field of the line above where you want to insert a line. Next press the <Insert> button. The Part VII Insert screen appears. Enter data into fields. Once finished, press the <Close> button to return to the Part VII screen. To view the record you inserted, press the <Refresh> button. If you don't see the record, use the inner scroll bar and scroll up or down.

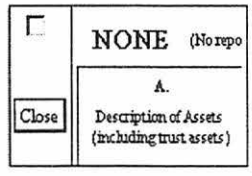
- Delete – click inside the field, then press the <Delete> button. A warning

message appears, press the appropriate button. Note: This button deletes one record at a time, not a character or word.

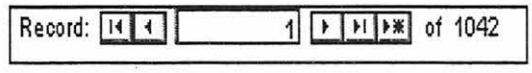
- Undo – If you inadvertently make changes to a field and want to undo those changes, press the <Undo> button.

- Refresh – Press this button to see any changes made to a record (i.e., insert).

- Close – Press the <Close> button to close and return to previous screen.

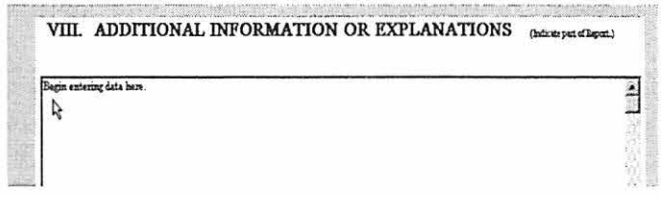


Also, there are record navigation buttons at the bottom left of the screen. Starting from left to right - the first button goes to the first record; the second button goes to the previous record; the third button goes to the next record; the fourth button goes to the last record; and the fifth button goes to a new record.

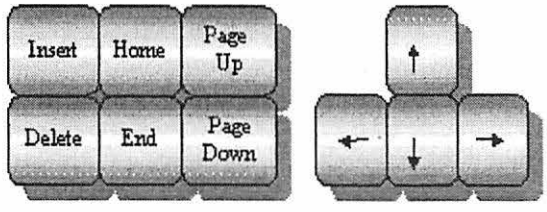


D. Entering Data in Part VIII, Additional Comments

Use this screen to add or change any comments you may have regarding any entry in any other part of the form.



Several keys on your keyboard are available to assist you when entering text in this Part and apply to Part VIII only:



<Insert> Toggles between insert and typeover mode. Characters that you type will obliterate any characters that are already typed. For insert mode, the cursor will appear as a box. Any characters you type will "push" existing characters to the right.

<Home> Moves the cursor to the beginning of the current line.

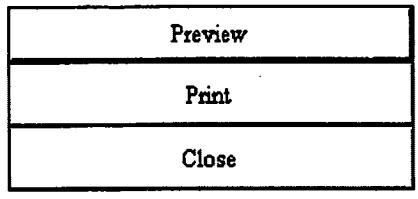
<Page Up>	Moves the cursor to the top line in the box. If there are more lines that are typed in above the first line in the box, then it will scroll up the previous fourteen lines (or less) of text to display the previous "boxful" of text.
<Delete>	Deletes one character at a time. Move the cursor to the beginning of the character you want to delete then press the delete key.
<End>	Moves the cursor to the end of the current line.
<Page Down>	Moves the cursor to the bottom line in the box. If you have more than fourteen lines of text in the box, it will automatically scroll the box down fourteen lines (or the rest of the lines in your explanation if it is less than fourteen lines) to reveal the next "boxful" of text.
<Up Arrow>	Moves the cursor up one line.
<Left Arrow>	Moves the cursor one character to the left.
<Down Arrow>	Moves the cursor down one line.
<Right Arrow>	Moves the cursor one character to the right.
<Shift>	If you hold the <Shift> key down and use one of the keys above, you can highlight multiple lines of text for deletion then press the delete key.
<Ctrl C>	Copy. If the data you want to copy is in another program, switch to that program. Select (highlight) the item you want to copy. - Click Edit then Copy on the Edit menu at the top of the program; or - Press the CTRL and C keys to copy data. This places your data in the Clipboard until you paste the data.
<Ctrl V>	Paste - Switch back to the FDR program. Click where you want to paste the items. - Do one of the following:

- Click Edit then Paste on the Edit menu at the top of the program; or

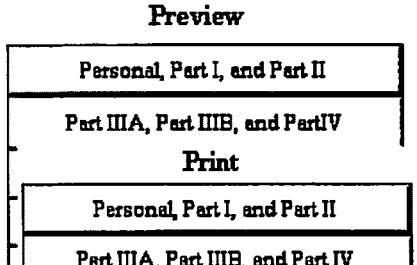
- Press the CTRL and V keys to paste data. This places your data in the area you selected.

Preview/Print Report

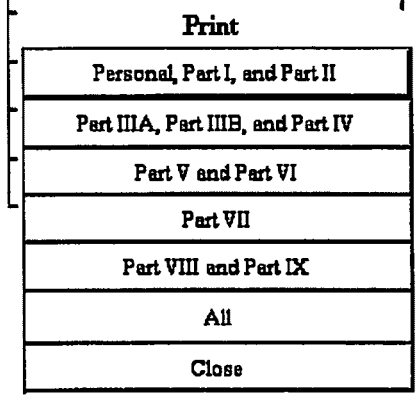
When you press the <Preview/Print> button, a sub-menu appears with three buttons. The sub-menu gives you the option to Preview the report on the screen or Print the report.



If you press the <Preview> button, a Preview sub-menu appears with five buttons enabling you to choose the parts to preview.



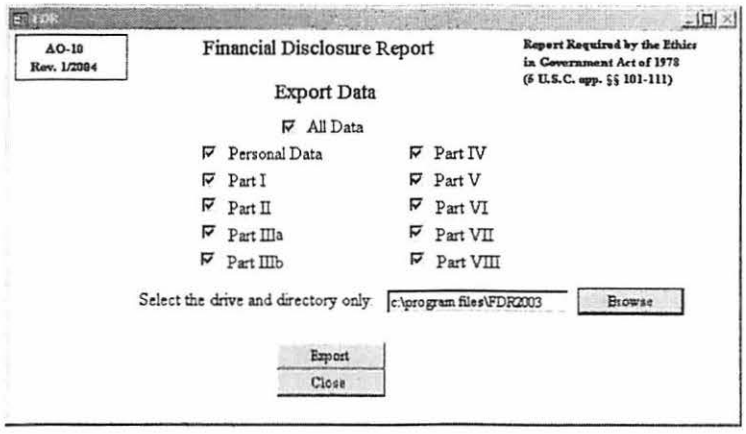
If you press the <Print> button, a Print sub-menu appears with six buttons enabling you to choose all or parts of the report to print. If the report does not print on the printer you intended, you may need to change the Windows default printer. To do this, use the Windows Print Manager icon. See your System Manager, or the Microsoft Windows documentation for further information.



Once you have printed, use the close button on the menu to return to the main menu or a particular part of the report for more data entry.

Exporting Your Data

When you press the "Export Data" button, a menu appears. This screen has several options that enable you to select and export all your data or individual parts of the form. It enables you to export your current year's data and save it to the FDR directory. You can then save the file to a diskette and use it on another PC with the FDR software.



Select the data you wish to export by checking the <All Data> box or any of the individual check boxes.

The program lists the default path to export the current year's data. This file will be saved to your FDR directory as FDR200x_saved.mde in Access 2000 or higher or FDR97_saved.mde in Access 97. NOTE: Please do not change the file name. The software uses this file name to import the saved data.

Once the export file is created, you can copy it to a disk or CD, and then import the data on another computer where the FDR 2004 program is installed.

Filer Assistance

If you have problems with this program, call the staff of the Committee on Financial Disclosure at (202) 502-1850.

REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON ACCESS TO FINANCIAL DISCLOSURE REPORTS FILED BY JUDGES AND JUDICIARY EMPLOYEES UNDER THE ETHICS IN GOVERNMENT ACT OF 1978, AS AMENDED

1.0 Purpose.

These regulations govern access to the financial disclosure reports filed by judges and judiciary employees under the Ethics in Government Act of 1978, as amended (5 U.S.C. app. §§ 101-111).

2.0 Application.

These regulations apply to the processing of all requests for copies of the financial disclosure reports of judges and judiciary employees maintained by the Administrative Office of the United States Courts.

3.0 Responsibility.

(a) The Judicial Conference of the United States has delegated to the Committee on Financial Disclosure the responsibility for implementing the financial disclosure requirements for judges and judicial employees under the Ethics in Government Act of 1978, as amended.

(b) The Committee on Financial Disclosure will monitor the release of financial disclosure reports to ensure compliance with the statute and the Committee's guidance. As provided in § 5.2(d), the Committee will review and within the Committee's discretion approve or disapprove any requests for the redaction of statutorily mandated information where the release of the information could endanger a filer. It will review and approve or disapprove any requests for waiver of costs associated with a request for the release of a financial disclosure report. It will also provide guidance when questions not covered in these regulations arise. The Committee's Subcommittee on Public Access and Security is delegated the authority to act for the Committee where necessary to implement the provisions of these regulations.

(c) The Administrative Office of the United States Courts is responsible for processing and maintaining financial disclosure reports in accordance with the statute and these regulations.

4.0 Procedure.

(a) The financial disclosure reports filed by judges and judiciary employees are maintained by the Administrative Office of the United States Courts. In accordance with the statute, the reports are kept for six years, after which they are destroyed.

(b) Section 105(b)(2) requires that all requests to examine or for a copy of a financial disclosure report must be in writing and contain the following:

(1) the requester's name, occupation, and address;

(2) the name and address of any other person or organization on whose behalf the inspection or copy is requested; and

(3) that the requester is aware of the prohibitions with regard to obtaining or viewing the report.

4.1 Requesting a Report (AO Form 10A).

(a) Requesters must provide the required information on AO Form 10A, Request for Examination of Report Filed by a Judicial Officer or Judicial Employee. The form must contain a list of the filers whose reports are requested, be signed and dated by the requester, and contain the information delineated in paragraph 4.0 above.

(b) Each AO Form 10A received that results in the release or viewing of a report will be placed in the file and will be made available to the public throughout the period during which the report is made available to the public, except as provided in § 4.4.

4.2 Request to View a Report.

Financial disclosure reports may be viewed in the Article III Judges Division by appointment. Appointments must be made at least 5 working days in advance. Staff will provide the requester with a duplicate redacted copy of the filer's file. In no case will the original file be removed from the file room for review by a member of the public.

4.3 Cost.

Requesters will be charged $.20 per page to cover reproduction and mailing costs. A copy of the requested report may be furnished without charge or at a reduced charge if it is determined that waiver or reduction of the fee is in the public interest. Requests for waiver must be presented in writing to the Committee on Financial Disclosure.

4.4 Notification of a Request.

(a) The office of the Committee on Financial Disclosure will immediately notify the filer when an AO Form 10A is received requesting the release of the filer's financial disclosure reports and will provide each filer with a copy of the requester's AO-Form 10A.

(b) When a request involves a filer who is the subject of an ongoing criminal or ethics investigation by the U.S. Department of Justice or a committee of the Judicial Conference or a

circuit judicial council, the Committee will not notify a filer of the release of a financial disclosure report where the originator of the request makes an affirmative request that the filer not be notified. The Committee staff will coordinate with the Chair on the release of reports in connection with such investigations.

5.0 Limitations on Release.

5.1 Incomplete or Improper Request.

Under section 105 of the Ethics in Government Act, financial disclosure reports will not be released to any individual who fails to properly complete the AO Form 10A or pay assessed costs.

5.2 Security.

(a) Committee staff will take every step to ensure the privacy and security of judges and judiciary employees required to file a financial disclosure report in accordance with the statute and the guidance provided by the Committee on Financial Disclosure. The reports will be maintained in a secure file room.

(b) The staff will not release or allow the viewing of any report until notice has been given to the filer, except as provided in § 4.4.

(c) In accordance with Committee direction, Committee staff will continue to monitor compliance with the Ethics in Government Act of 1978, as amended, while minimizing security risks by redacting information not required by the Act including without limitation:

(1) spouse's and dependents' names;

(2) home addresses;

(3) social security numbers;

(4) financial account and bank account numbers;

(5) street addresses of rental properties, financial institutions, and business properties;

(6) ownership codes; and

(7) filer's signature.

(d) A report that may be disseminated to the public after release to a requester may be redacted pursuant to Section 105 of the Act to prevent public disclosure of personal or sensitive information that could endanger the filer directly, or indirectly by endangering another, if

possessed by a member of the public hostile to the filer. The procedure for determining whether redaction is appropriate shall be as follows:

(1) When an annual report is filed, the filer shall request redactions believed to be appropriate before release of a report that may be disseminated to the public. Requests for redaction may also be made after a filer receives a notification of a request under § 4.4.

(2) Reports that will not be considered as ones that may be disseminated to the public after release to a requester include but are not limited to:

(i) reports released upon request to appropriate committees of the Senate or House of Representatives;

(ii) reports released upon request to appropriate officials of the Executive Branch.

In the case of (i) and (ii), redaction of the filer's signature pursuant to § 5.2(c)(7) shall not occur if so indicated by the requester.

(3) The filer shall state with specificity what material is sought to be redacted. The filer shall also state in detail the reasons justifying redaction. These reasons may include, but are not limited to:

(i) the purposes and need for an ongoing protective detail provided by the United States Marshals Service;

(ii) particular threats or inappropriate communications;

(iii) involvement in a high threat trial or appeal; or

(iv) certain information on the form could endanger the filer directly or indirectly if possessed by a member of the public hostile to the filer.

(4) The Committee will determine, in consultation with the United States Marshals Service, whether information sought to be redacted could, if disseminated to the public, endanger the filer directly or indirectly and grant or deny the request accordingly. Information that could facilitate the financial harassment of a filer, such as identity theft, may be deemed information that could endanger a filer. However, no redaction will be granted that eliminates disclosure of the existence, rather than extent, of an interest in an entity that would disqualify the filer from serving as a judge in litigation involving that entity, unless disclosure of that interest would reveal the location of a residence of the filer or a family member, reveal the place of employment of the filer or a family member, or might increase an existing danger to a filer based on circumstances described in (d)(3)(i)-

(iii) of this Section. The Committee may redact material without a request from a filer if it has received credible evidence that the release of information contained in a financial report could endanger the filer.

(5) A filer aggrieved by a denial of a request for redaction may petition the Special Redaction Review Panel of the Judicial Conference of the United States for review within 10 days of notification of the denial. The Special Review Panel shall issue a determination promptly. The term of the Special Redaction Review panel shall expire on December 31, 2001.

(e) Information may be redacted from a report in accordance with such finding to the extent necessary to protect the judge or judiciary employee who filed the report, and the redactions will be made for as long as the reasons for redacting the report exist.

(f) The Committee staff will notify a filer when a report is actually released or reviewed and provide the filer with a copy of the released report with any redactions. The staff will maintain a copy of the redacted material for as long as the original report is maintained.

(g) A request for redaction and its supporting documents, except for copies of the financial disclosure report and any amendments thereto, are considered confidential and will only be used to determine whether to grant a request for redaction. Such documents are not considered to be a part of any report releasable under section 105(b)(1) of the Act.

6.0 Use of Reports.

(a) Section 105 of the Act provides that it is unlawful for any person to obtain or use a report:

(1) for any unlawful purpose;

(2) for any commercial purpose other than by news and communications media for dissemination to the general public;

(3) for determining or establishing the credit rating of any individual; or

(4) for use directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.

(b) The Attorney General may bring a civil action against any person who obtains or uses a report for any purpose prohibited by this paragraph. The court in which such action is brought may assess against such person a penalty in any amount not to exceed $10,000. Such remedy may be in addition to any other remedy available under statutory or common law.

7.0 Reporting Requirements.

The Committee on Financial Disclosure will report to the Judicial Conference on an annual basis the following:

(a) the total number of reports in which required information is redacted under exercise of the authority delineated in paragraph 5.2(d);

(b) the total number of individuals whose reports have been redacted under exercise of the authority in paragraph 5.2(d); and

(c) the types of threats against filers whose reports are redacted, if appropriate.

The Conference will provide copies of the report to the Committees on the Judiciary of the House of Representatives and of the Senate.

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(b) Section 105(b)(2) requires that all requests to examine or for a copy of a financial disclosure report must be in writing and contain the following:

(1) the requester's name, occupation, and address;

(2) the name and address of any other person or organization on whose behalf the inspection or copy is requested; and

(3) that the requester is aware of the prohibitions with regard to obtaining or viewing the report.

4.1 Requesting a Report (AO Form 10A).

(a) Requesters must provide the required information on AO Form 10A, Request for Examination of Report Filed by a Judicial Officer or Judicial Employee. The form must contain a list of the filers whose reports are requested, be signed and dated by the requester, and contain the information delineated in paragraph 4.0 above.

(b) Each AO Form 10A received that results in the release or viewing of a report will be placed in the file and will be made available to the public throughout the period during which the report is made available to the public, except as provided in § 4.4.

4.2 Request to View a Report.

Financial disclosure reports may be viewed in the Article III Judges Division by appointment. Appointments must be made at least 5 working days in advance. Staff will provide the requester with a duplicate redacted copy of the filer's file. In no case will the original file be removed from the file room for review by a member of the public.

4.3 Cost.

Requesters will be charged $.20 per page to cover reproduction and mailing costs. A copy of the requested report may be furnished without charge or at a reduced charge if it is determined that waiver or reduction of the fee is in the public interest. Requests for waiver must be presented in writing to the Committee on Financial Disclosure.

4.4 Notification of a Request.

(a) The office of the Committee on Financial Disclosure will immediately notify the filer when an AO Form 10A is received requesting the release of the filer's financial disclosure reports and will provide each filer with a copy of the requester's AO-Form 10A.

(b) When a request involves a filer who is the subject of an ongoing criminal or ethics investigation by the U.S. Department of Justice or a committee of the Judicial Conference or a

circuit judicial council, the Committee will not notify a filer of the release of a financial disclosure report where the originator of the request makes an affirmative request that the filer not be notified. The Committee staff will coordinate with the Chair on the release of reports in connection with such investigations.

5.0 Limitations on Release.

5.1 Incomplete or Improper Request.

Under section 105 of the Ethics in Government Act, financial disclosure reports will not be released to any individual who fails to properly complete the AO Form 10A or pay assessed costs.

5.2 Security.

(a) Committee staff will take every step to ensure the privacy and security of judges and judiciary employees required to file a financial disclosure report in accordance with the statute and the guidance provided by the Committee on Financial Disclosure. The reports will be maintained in a secure file room.

(b) The staff will not release or allow the viewing of any report until notice has been given to the filer, except as provided in § 4.4.

(c) In accordance with Committee direction, Committee staff will continue to monitor compliance with the Ethics in Government Act of 1978, as amended, while minimizing security risks by redacting information not required by the Act including without limitation:

(1) spouse's and dependents' names;

(2) home addresses;

(3) social security numbers;

(4) financial account and bank account numbers;

(5) street addresses of rental properties, financial institutions, and business properties;

(6) ownership codes; and

(7) filer's signature.

(d) A report that may be disseminated to the public after release to a requester may be redacted pursuant to Section 105 of the Act to prevent public disclosure of personal or sensitive information that could endanger the filer directly, or indirectly by endangering another, if

possessed by a member of the public hostile to the filer. The procedure for determining whether redaction is appropriate shall be as follows:

(1) When an annual report is filed, the filer shall request redactions believed to be appropriate before release of a report that may be disseminated to the public. Requests for redaction may also be made after a filer receives a notification of a request under § 4.4.

(2) Reports that will not be considered as ones that may be disseminated to the public after release to a requester include but are not limited to:

(i) reports released upon request to appropriate committees of the Senate or House of Representatives;

(ii) reports released upon request to appropriate officials of the Executive Branch.

In the case of (i) and (ii), redaction of the filer's signature pursuant to § 5.2(c)(7) shall not occur if so indicated by the requester.

(3) The filer shall state with specificity what material is sought to be redacted. The filer shall also state in detail the reasons justifying redaction. These reasons may include, but are not limited to:

(i) the purposes and need for an ongoing protective detail provided by the United States Marshals Service;

(ii) particular threats or inappropriate communications;

(iii) involvement in a high threat trial or appeal; or

(iv) certain information on the form could endanger the filer directly or indirectly if possessed by a member of the public hostile to the filer.

(4) The Committee will determine, in consultation with the United States Marshals Service, whether information sought to be redacted could, if disseminated to the public, endanger the filer directly or indirectly and grant or deny the request accordingly. Information that could facilitate the financial harassment of a filer, such as identity theft, may be deemed information that could endanger a filer. However, no redaction will be granted that eliminates disclosure of the existence, rather than extent, of an interest in an entity that would disqualify the filer from serving as a judge in litigation involving that entity, unless disclosure of that interest would reveal the location of a residence of the filer or a family member, reveal the place of employment of the filer or a family member, or might increase an existing danger to a filer based on circumstances described in (d)(3)(i)-

(iii) of this Section. The Committee may redact material without a request from a filer if it has received credible evidence that the release of information contained in a financial report could endanger the filer.

(5) A filer aggrieved by a denial of a request for redaction may petition the Special Redaction Review Panel of the Judicial Conference of the United States for review within 10 days of notification of the denial. The Special Review Panel shall issue a determination promptly. The term of the Special Redaction Review panel shall expire on December 31, 2001.

(e) Information may be redacted from a report in accordance with such finding to the extent necessary to protect the judge or judiciary employee who filed the report, and the redactions will be made for as long as the reasons for redacting the report exist.

(f) The Committee staff will notify a filer when a report is actually released or reviewed and provide the filer with a copy of the released report with any redactions. The staff will maintain a copy of the redacted material for as long as the original report is maintained.

(g) A request for redaction and its supporting documents, except for copies of the financial disclosure report and any amendments thereto, are considered confidential and will only be used to determine whether to grant a request for redaction. Such documents are not considered to be a part of any report releasable under section 105(b)(1) of the Act.

6.0 Use of Reports.

(a) Section 105 of the Act provides that it is unlawful for any person to obtain or use a report:

(1) for any unlawful purpose;

(2) for any commercial purpose other than by news and communications media for dissemination to the general public;

(3) for determining or establishing the credit rating of any individual; or

(4) for use directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.

(b) The Attorney General may bring a civil action against any person who obtains or uses a report for any purpose prohibited by this paragraph. The court in which such action is brought may assess against such person a penalty in any amount not to exceed $10,000. Such remedy may be in addition to any other remedy available under statutory or common law.

7.0 Reporting Requirements.

The Committee on Financial Disclosure will report to the Judicial Conference on an annual basis the following:

(a) the total number of reports in which required information is redacted under exercise of the authority delineated in paragraph 5.2(d);

(b) the total number of individuals whose reports have been redacted under exercise of the authority in paragraph 5.2(d); and

(c) the types of threats against filers whose reports are redacted, if appropriate.

The Conference will provide copies of the report to the Committees on the Judiciary of the House of Representatives and of the Senate.

U.S. Department of Justice

Office of the Associate Attorney General

Principal Deputy Associate Attorney General

Washington, D.C. 20530

November 17, 2005

General Jay W. Hood
JTF-GTMO/CE
APO, AE 09360

Dear General Hood:

Thank you very much for allowing me to visit Guantanamo Bay last week. I was extraordinarily impressed. You and your colleagues have developed standards and imposed a degree of professionalism that the nation can be proud of, and being able to see first hand all that you have managed to accomplish with such a difficult and sensitive mission makes my job of helping explain and defend it before the courts all the easier.

Thank you again for taking so much time and trouble to make sure we received such a helpful and thorough briefing and tour.

Warm regards,

Neil M. Gorsuch

cc: William J. Haynes, II, Esquire
Frank Jimenez, Esquire

U.S. Department of Justice

Office of the Associate Attorney General

Principal Deputy Associate Attorney General

Washington, D.C. 20530

November 17, 2005

Admiral James M. McGarrah
Department of Defense
Office of the Administrative Review of
the Detention of Enemy Combatants (OARDEC)
United States Naval Base
Guantanamo Bay Cuba
1000 Navy Pentagon
Washington, DC 20350-1000

Dear Admiral McGarrah:

Thank you very much for allowing me to visit Guantanamo Bay last week. I was extraordinarily impressed. You and your colleagues have developed standards and imposed a degree of professionalism that the nation can be proud of, and being able to see first hand all that you have managed to accomplish with such a difficult and sensitive mission makes my job of helping explain and defend it before the courts all the easier.

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Warm regards,

Neil M. Gorsuch

cc: William J. Haynes, II, Esquire
Frank Jimenez, Esquire

Robert D. Novak

On Detainees, a Victory for Bush

The troubled Bush administration won a rare victory this week. The Senate voted to close federal courts to Salim Gherebi, an enemy combatant imprisoned at Guantanamo Bay. He is suing the president and the defense secretary for $100 million in compensatory damages and $1 billion in punitive damages for violation of his rights under the Constitution. His is one of 174 lawsuits filed on behalf of terrorist detainees, none of them U.S. citizens, that have undermined the war against terrorism.

That outcome is indeed the purpose of lawsuits instigated by left-wing American lawyers. Court filings demanding high-speed Internet service, claiming medical malpractice and seeking DVDs fail to release many prisoners, but they do hamstring U.S. intelligence. The Senate's action this week keeps noncitizen aliens from using habeas corpus, invoked throughout the country's history to protect citizens from illegal imprisonment.

"Never in the history of the law of armed conflict," Republican Sen. Lindsey Graham told the Senate on Monday, "has a military prisoner, an enemy combatant, been granted access to any court system, federal or otherwise, to have a federal judge come in and start running the prison." Graham's proposal would suspend habeas corpus for the third time in American history, following Abraham Lincoln and Franklin D. Roosevelt. Remarkably, 44 Senators voted Tuesday to permit legal harassment by enemy combatants.

Graham's legislation countermanded a June 28, 2004, decision by the Supreme Court, which voted 6 to 3 to overturn a lower court ruling and open the federal court system to alien enemy combatants in the absence of specific congressional action. That produced cases such as one filed by Saifullah Paracha, who seeks an order to improve his mail delivery and medical treatment and to establish judicial review over "opportunities for exercise, communication, recreation, worship, etc." Other lawsuits call for judges to sit in on interrogation of prisoners.

The purpose behind this litigation was exposed this year by prominent leftist lawyer Michael Ratner in an interview with Mother Jones magazine. "The litigation is brutal," Ratner said of its impact on the U.S. military's work at Guantanamo Bay. "We have over one hundred lawyers now from big and small firms working to represent those detainees. Every time an attorney goes down there, it makes it much harder to do what they're doing."

Yet, nearly half the Senate voted to keep the courtroom door open to aliens captured on the battlefield. The Senate often tries to give the impression of consensus when there really is none, and that is the case with Graham's amendment to the Armed Services authorization bill. Perhaps intentionally, critics of the administration's war policy have confused this issue with torture of prisoners, which the Senate overwhelmingly condemned by adopting Sen. John McCain's separate amendment.

An effort by Democratic Sen. Jeff Bingaman to maintain habeas corpus access for enemy combatants was narrowly defeated, 49 to 42, last week, when Graham's amendment was adopted. The vote was largely along party lines, with only five Democrats and four Republicans crossing over.

After that vote, Democrats put out the word that Graham had worked with Democratic Sen. Carl Levin for a "compromise." The new version did give a limited right of appeal for enemy combatants sentenced to more than 10 years or given the death penalty, but the flood of nuisance litigation by prisoners would still end.

But when Bingaman's proposal came up again, Tuesday, it actually gained two votes, losing 54 to 44. Levin, co-sponsor of the "compromise," voted against Graham to continue habeas corpus access as he had the previous week.

Late on Monday, the day before the final vote on the issue, the need for the Graham amendment was underlined. District Judge Colleen Kollar-Kotelly, a Clinton appointee with a reputation for judicial activism, blocked the trial by a U.S. military commission of a captured enemy combatant who was the first litigant of Ratner's Center for Constitutional Rights. David Hicks, an Australian, was accused of fighting alongside the Taliban in Afghanistan and charged with attempted murder and conspiracy to attack civilians and commit terrorism. Under Graham's amendment, this case could go only to the U.S. Court of Appeals for the D.C. Circuit after a conviction and sentencing decision by a military commission.

5:15
Lobby


courtTV
NETWORKS
DVD
Cameras in the Courtroom
Demonstration Video

OFFICE OF

THE DEPUTY ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE

Transmittal

25 APRIL 2006

TO:	
ASSOCIATE ATTORNEY GENERAL	ROOM 5706
PRIN. DEPUTY ASSOC. ATTORNEY GENERAL	ROOM 5706
ASSISTANT ATTORNEY GENERAL, OLP	ROOM 4232
ASSISTANT ATTORNEY GENERAL, OLA	ROOM 1145
DIRECTOR, OIPL	ROOM 1627

RE: HERITAGE FOUNDATION LUNCHEON

FROM:	
MARK GRIDER COUNSEL TO THE DEPUTY ATTORNEY GENERAL	ROOM 4213 TELEPHONE 514-8500

THE HERITAGE FOUNDATION LUNCHEON

APRIL 26, 2006

The Heritage Foundation Luncheon

Date: Wednesday, April 26, 2006, at 12:00 noon to 1:30 p.m.

Venue: The Heritage Foundation, 214 Massachusetts Ave., N.E. Washington, DC

Setting: Roundtable Discussion.

Audience: Approximately 15 Individuals -- Department Component Heads and Heritage Staff.

Purpose: The purpose of The Heritage Foundation luncheon is to provide a useful forum for a select gathering of senior political staff from the Department of Justice to discuss relevant policy areas of mutual concern—typically three issues over lunch.

Discussion: This is an informal and off-the-record lunch that will be hosted by Edwin Meese, the Reagan Distinguished Fellow Chairman of the Center for Legal and Judicial Studies; and Ginni Thomas, Director of Executive Branch Relations at The Heritage Foundation. The Deputy Attorney General has invited the appropriate senior-level Justice participants, and chosen the topics for discussion. This discussion will occur around the table during lunch.

Discussion Topics: Patriot Act (specifically Terrorism Prosecution/Civil Liberties issues that accompany the Act); Judicial confirmations; and Sentencing issues.

Department of Justice Attendees:

Paul J. McNulty, Deputy Attorney General
Bill Mercer, Principal Associate Deputy Attorney General
Michael Elston, Chief of Staff to the Deputy Attorney General
Robert McCallum, Associate Attorney General
Neil Gorsuch, Principal Deputy Associate Attorney General
Rachel Brand, Assistant Attorney General – Office of Legal Policy
William Moschella, Assistant Attorney General – Office of Legislative Affairs
Crystal Jezierski, Director, Office of Intergovernmental and Public Liaison
Mark Grider, Counsel to the Deputy Attorney General

The Heritage Foundation Attendees:

Ed Meese, Ronald Reagan Distinguished Fellow in Public Policy and Chairman, Center for Legal and Judicial Studies

Former U.S. Attorney General Edwin Meese was among President Ronald Reagan's most important advisors. As Chairman of the Domestic Policy Council and the National Drug Policy Board, and as a member of the National Security Council, he played a key role in the development and execution of domestic and foreign policy. During the 1970s, Mr. Meese was Director of the Center for Criminal Justice Policy and Management and Professor of Law at the University of San Diego. He earlier served as Chief of Staff for then-Governor Reagan and was a local prosecutor in California. Mr. Meese is a Distinguished Visiting Fellow at the Hoover Institution, Stanford University, and a Distinguished Senior Fellow at the Institute of United States Studies, University of London. He earned his B.A. from Yale University and his J.D. from the University of California, Berkeley.

Mike Franc, Vice President, Government Relations

A long-time veteran of Washington policymaking, Mike Franc oversees Heritage's outreach to members of the U.S. House and Senate and their staffs. From 1993 to 1996, he served as Heritage's Director of Congressional Relations. In 1996, he served as Director of Communications for House Majority Leader Richard Armey of Texas. Before joining Heritage, he served in the Office of National Drug Control Policy and as Legislative Counsel for then-Representative William Dannemeyer of California. A graduate of Yale University, Franc earned his J.D. from Georgetown University Law Center.

Ginni Thomas, Director, Executive Branch Relations

Virginia L. Thomas is director of executive branch relations at The Heritage Foundation. Previously, Thomas served as Heritage's senior fellow in government studies. Her work helped guide the implementation of the Government Performance and Results Act, which requires government agencies to define their missions and set performance goals so Congress can better carry out its oversight responsibilities. In her current position, Thomas works to advance Heritage's policy recommendations on a range of foreign and domestic issues among decision-makers in the executive branch.

Before coming to Heritage, Thomas handled oversight responsibilities for the House Majority Leader's Office. From 1993 to 1995, she was senior policy coordinator for the House Republican Conference. Prior to that she was deputy assistant secretary of labor and a labor counsel for the U.S. Chamber of Commerce. Thomas also served on the legislative staff of former Rep. Hal Daub, R-Neb. Thomas holds graduate and undergraduate degrees from Creighton University in her hometown of Omaha, Neb. She lives in Fairfax Station, Virginia.

Todd Gaziano, Director, Center for Legal and Judicial Studies

Todd Gaziano focuses on legal and judicial reform and such constitutional issues as ensuring that all citizens are accorded equal treatment under the law. Before joining former Attorney General Edwin Meese at The Heritage Foundation in 1997, Mr. Gaziano served under noted conservative leaders in all three branches of the federal government. He was Chief Counsel to the House Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, where he worked on government-wide regulatory reform legislation for Chairman David McIntosh. He served in the Office of Legal Counsel in the U.S. Justice Department, which provides advice on constitutional and legal issues to the President, the Attorney General, and other Cabinet Secretaries. He also served as a judicial law clerk to the Honorable Edith H. Jones, United States Judge for the Fifth Circuit Court of Appeals. Mr. Gaziano received his J.D. from the University of Chicago Law School, where he was selected as a John M. Olin Fellow in Law and Economics.

Brian Walsh, Senior Legal Research Fellow, Center for Legal and Judicial Studies (TENTATIVE)

Erica Little, Legal Policy Analyst, Center for Legal and Judicial Studies (TENTATIVE)

Erica graduated cum laude from UCLA with a Bachelor of Arts degree in history and political science. After graduation she was a Witherspoon Fellow at the Family Research Council. Erica is in her second year of law school at the George Mason University School of Law where she writes on the Federal Circuit Bar Journal. During the summer of 2005 Erica participated in the Blackstone Legal Fellowship program with the Alliance Defense Fund. Before coming to Heritage Erica spent a semester with the Senate Subcommittee on the Constitution, Civil Rights, and Property Rights, which is part of the Judiciary Committee and during which she worked on the confirmation hearings of Chief Justice John Roberts and Justice Samuel Alito.

Department of Justice POC: Mark Grider

MORE THAN 30 CIVIL LIBERTIES PROTECTIONS IN THE USA PATRIOT ACT CONFERENCE REPORT

Notwithstanding a four-year track record with no verified civil liberties abuses, the current USA PATRIOT Act reauthorization bill adds more than 30 new significant civil liberties safeguards. These protections include:

- **Four year sunsets on three provisions:** section 206, which authorizes FISA multipoint ("roving") electronic surveillance; section 215, which amended the FISA business records provision; and the "lone wolf" provision from the Intelligence Reform and Terrorism Prevention Act of 2004.

- **Significant new safeguards to section 215 court orders.** Among other protections, the report requires high-level approval for requests for sensitive categories of records such as library records and medical records, clarifies the appropriate standard for obtaining such an order, and explicitly authorizes judicial challenges to any section 215 order.

- **Additional safeguards on the use of multipoint electronic surveillance under FISA.** Among other protections, the report requires increased specificity for applications for surveillance so that each application describes a single, unique target; clarifies that a judge granting surveillance must ensure in the order that the surveillance is authorized only for the target in the application; and requires investigators to inform the court within 10 days when "roving" surveillance authority is used to target a new facility—such as when a terrorist or spy changes to a new cellular service provider.

- **Significant new safeguards for each of the National Security Letter (NSL) statutes.** Among other protections, the report explicitly authorizes judicial challenges to NSLs, including the non-disclosure requirement accompanying the NSL, and adopts standard of review for non-disclosure that passed the Senate by unanimous consent.

- **Additional reporting to Congress on the use of FISA authorities.**

- **A report to Congress on any use of data-mining programs by the Department of Justice.**

USA PATRIOT Act: Successes in the Field

Section 201. Authority to Intercept Wire, Oral, and Electronic Communications Relating to Terrorism

- Justice Department investigators used a wiretap made possible by section 201 to investigate an Imperial Wizard of the White Knights of the Ku Klux Klan who attempted to purchase hand grenades for the purpose of bombing abortion clinics. He was subsequently convicted of numerous explosives and firearms charges.

Section 212. Authority for Internet Service Providers to Make Emergency Disclosures of Electronic Communications to Protect Life and Limb

- Section 212 assisted law enforcement in safely recovering an 88-year-old Wisconsin woman who was kidnapped and held for ransom while bound in an unheated shed during a cold Wisconsin winter. Investigators swiftly used section 212 and other USA PATRIOT Act authorities to gather information, including communications provided on an emergency basis from an internet service provider, that assisted in identifying several suspects and accomplices and then quickly located the elderly victim.

- This provision was also used to locate the Kansas woman who had strangled a pregnant Missouri woman and cut that woman's unborn daughter from her womb. Within twenty-four hours of the murder, the perpetrator was arrested and the baby was found alive.

Section 213: Delayed-Notice Search Warrants

- Section 213 was of tremendous value in Operation Candy Box, a multi-jurisdictional OCDETF investigation targeting a Canadian-based ecstasy and marijuana trafficking organization. In 2004, investigators learned that an automobile loaded with a large quantity of ecstasy would be crossing the U.S.-Canadian border en route to Florida. On March 5, 2004, after the suspect vehicle crossed into the United States near Buffalo, DEA agents followed the vehicle until the driver stopped at a restaurant just off the highway. Thereafter, one agent used a duplicate key to enter the vehicle and drive away while other agents spread broken glass in the parking space to create the impression that the vehicle had been stolen. A search of the vehicle revealed a hidden compartment containing 30,000 ecstasy tablets and ten pounds of high-potency marijuana. Because investigators were able to obtain a delayed-notification search warrant, the drugs were seized, the investigation was not jeopardized, and more than 130 individuals were later arrested on March 31, 2004, in a two-nation crackdown. To stop the drugs' distribution without a delayed-notification search warrant, agents would have been forced to reveal the existence of the investigation prematurely, which almost certainly would have resulted in the flight of many of the targets of the investigation.

Section 218. Foreign Intelligence Information ("Bringing Down the Wall")

- The removal of the "wall" separating intelligence and law enforcement personnel played a crucial role in the Department's successful dismantling of a terror cell in Portland, Oregon, popularly known as the "Portland Seven." Members of the cell had attempted to travel to Afghanistan in 2001–02 to take up arms with the Taliban and al Qaeda against U.S. and coalition forces fighting there. Through an undercover informant, law enforcement agents investigating that case learned from a cell member, Jeffrey Battle, that at least one member of the cell had contemplated attacking Jewish schools or synagogues and had even been casing such buildings to select a target for such an attack. By the time investigators received this information from the undercover informant, they had information that a number of other persons besides Battle had been involved in the Afghanistan conspiracy. But while several of these other individuals had returned to the United States from their unsuccessful attempts to reach Afghanistan, investigators did not yet have sufficient evidence to arrest them. Before the USA PATRIOT Act, prosecutors would have faced a dilemma in deciding whether to arrest Battle immediately. If prosecutors had failed to act, lives could have been lost through a terrorist attack. But if prosecutors had arrested Battle in order to prevent a potential attack, the other suspects in the investigation would have undoubtedly scattered or attempted to cover up their crimes. Because of section 218, however, it was clear that the FBI agents could keep prosecutors informed of what they were learning as the agents conducted FISA surveillance to determine whether the cell had received orders to reinstate the plan to attack Jewish targets. This gave prosecutors the confidence not to arrest Battle prematurely while they continued to gather evidence on the other members of the cell. Ultimately, prosecutors were able to collect sufficient evidence to charge seven defendants and then to secure convictions and prison sentences ranging from three to eighteen years for the six defendants taken into custody. Without section 218, this case likely would have been referred to as the "Portland One" rather than the Portland Seven.

- Prosecutors and investigators also used information shared pursuant to section 218 in investigating the defendants in the "Virginia Jihad" case. This prosecution involved members of the Dar al-Arqam Islamic Center who trained for jihad in Northern Virginia by participating in paintball and paramilitary training. Eight members traveled to terrorist training camps in Pakistan or Afghanistan between 1999 and 2001. These individuals are associates of a violent Islamic extremist group known as Lashkar-e-Taiba, which operates in Pakistan and Kashmir and has ties to the al Qaeda terrorist network. As the result of an investigation that included the use of information obtained through FISA, prosecutors were able to bring charges against these individuals. Six of the defendants pleaded guilty, and three were convicted in March 2004 of charges including conspiracy to levy war against the United States and conspiracy to provide material support to the Taliban. These nine defendants received sentences ranging from a prison term of four years to life imprisonment.

COUNTERTERRORISM SUCCESSES

Talking Points:

- Terrorists seek to destroy the American promise of liberty and prosperity for all people. Our highest priority is to stop them.

- **The material support statutes are a cornerstone of the Department's prosecution efforts.** Cutting off the provision of support and resources to foreign terrorist organizations is essential to preventing terrorist attacks. Bringing prosecutions under the material support statutes, such as 18 U.S.C. § 2339A (material support to terrorist activity) and 18 U.S.C. § 2339B (material support to a designated foreign terrorist organization), is a primary deterrent to the provision of money and other resources to terrorists. Recent successes in material support prosecutions include:

  o ***Abu Ali***: On November 22, 2005, a federal jury convicted 24-year old Virginian Ahmed Omar Abu Ali on all counts, including conspiracy to provide and provision of material support to al-Qaeda and conspiracy to assassinate the President. Abu Ali faces a minimum sentence of 20 years and a maximum sentence of life imprisonment.

  o ***Paracha***: On November 23, 2005, a federal jury convicted Pakistani Uzair Paracha of conspiring to provide and of providing material support to al-Qaeda. Evidence showed that Paracha, together with his father, tried to assist an al-Qaeda member's effort to enter the United States to commit a terrorist act. Paracha faces up to 75 years' imprisonment.

  o ***Lakhani***: On April 27, 2005, a federal jury convicted Hemant Lakhani of attempting to provide material support to terrorists. Lakhani was arrested after an undercover sting, in which he attempted to sell shoulder-fired antiaircraft missiles to what he thought were members of a terrorist group. He was sentenced to 47 years' imprisonment.

  o ***Moussaoui***: On April 22, 2005, Zacarias Moussaoui pleaded guilty to six charges related to his participation in the September 11, 2001 conspiracy. He could face the death penalty, and jury selection in the penalty phase trial began on February 13, 2006 in the Eastern District of Virginia.

  o ***Al-Timimi***: On April 26, 2005, a federal jury convicted Ali al-Timimi, the spiritual leader of a Virginia mosque, on all charges related to the "Virginia Jihad" case. Al-Timimi encouraged other individuals to travel to Pakistan and receive military training from Lashkar-e-Taiba. He was sentenced to life in prison.

o ***Infocom***: On April 13, 2005, a federal jury convicted the Texas-based Infocom Corp. and associated individuals of conspiracy to deal in the property of a specially designated terrorist. Infocom was believed to be acting as a front for Hamas.

o ***Al-Moayad and Zayed***: On March 10, 2005, a federal jury convicted Mohammed Ali Hasan al-Moayad and Mohammed Zayed of conspiracy to provide and of providing material support to al-Qaeda and Hamas. Al-Moayad and Zayed were sentenced to 75 years and 45 years in prison, respectively.

o ***Dhafir***: On February 10, 2005, a federal jury convicted Rafil Dhafir of conspiring to provide funds to Iraq in violation of U.S. sanctions. He was sentenced to 22 years' imprisonment.

o ***Lynn Stewart***: On February 10, 2005, a jury convicted attorney Lynn Stewart and three others of providing material support to terrorists. The defendants were associates of Sheikh Abdul-Rahman, who is serving a life sentence for his role in terrorist activities, including the 1993 World Trade Center bombing. Stewart faces up to 20 years' imprisonment.

- **Defendants who plead to such charges often cooperate and provide information to the government that can lead to the detection of other terrorism-related activity.** Some examples of this approach include:

  o ***John Walker Lindh*** cooperated after pleading guilty to supporting the Taliban, in violation of the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. § 1705(b)), in exchange for a 20-year prison sentence. Lindh provided information about training camps and fighting in Afghanistan in 2001.

  o ***Earnest James Ujaama*** cooperated in terrorism investigations after pleading guilty in April 2003 in Seattle to providing material support to the Taliban, in violation of the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. § 1705(b)).

  o ***Six Buffalo "Cell" Defendants*** cooperated after pleading guilty to providing material support to al-Qaeda; five pleaded guilty to violation of 18 U.S.C. § 2339B) and one to violation of the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. § 1705). They provided information about a pre-9/11 trip to the Al Qaeda affiliated al Farooq training camp in Afghanistan.

o In the ***Portland Cell*** case, four defendants agreed to cooperate after pleading guilty to various charges, including conspiracy to contribute services to al Qaeda and the Taliban, in violation of the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. § 1705(b)), conspiracy to possess firearms in furtherance of a crime of violence (18 U.S.C. § 924(c), (o)), and money laundering (18 U.S.C. § 1956). The cooperation agreements from these four defendants were essential to obtaining guilty pleas from the final two defendants in custody and were vital to the investigation into those who provided support to the Portland Cell.

o In the ***Drugs-for-Stinger-Missiles*** case in San Diego, two defendants pleaded guilty to (1) conspiracy to distribute heroin and hashish (21 U.S.C. §§ 846, 841), and (2) providing material support and resources to al Qaeda (18 U.S.C. § 2339B), and they cooperated in the case against a third defendant.

- **In addition, the Department's counterterrorism efforts have broadened since September 11 to include pursuit of offenses terrorists are likely to commit, such as identity theft and immigration violations.**

o Prosecution of terrorism-related targets on less serious charges is often an effective method – and sometimes the only available method – of deterring and disrupting potential terrorist planning and support activities. Some examples of this approach include:

o ***Damrah*:** On June 17, 2004, a jury convicted Cleveland imam Fawaz Damrah of violating 18 U.S.C. § 1425 for concealing material facts in his citizenship application. Damrah had concealed his affiliation with terrorist-related groups, including Palestinian Islamic Jihad, and that he had incited, participated, or assisted in the persecution of others by advocating violent terrorist acts. He served his sentence and is awaiting deportation.

o ***Biheiri*:** In two separate trials, Soliman Biheiri was convicted of violating 18 U.S.C. §§ 1425 and 1546 (fraudulently procuring a passport), as well as of making false statements to government investigators in violation of 18 U.S.C. §§ 1001 and 1015. Biheiri was the president of a New Jersey-based investment firm suspected of having links to terrorist financing schemes. He will be deported to Egypt after serving his term of imprisonment.

- **The cooperation of State and local law enforcement is essential to prosecuting terrorism cases.** The FBI, through its Joint Terrorism Task Forces (JTTFs), and the United States Attorneys' Offices, through their Anti-Terrorism Advisory Councils (ATACs), work together with other federal agencies and with State and local law enforcement agencies to coordinate efforts to identify, respond to, and disrupt terrorist threats.

Background:

- Statutes reaching traditional terrorist activity include 18 U.S.C. § 2332a (use of a weapon of mass destruction), 18 U.S.C. § 2332b (terrorist acts transcending national boundaries), and explosives offenses such as 18 U.S.C. § 924. Examples of such prosecutions include:

  o ***Moussaoui***: Among the charges to which Zacarias Moussaoui pleaded guilty was conspiracy to violate 18 U.S.C. § 2332b for his role in the September 11 plot.

  o ***Rudolph***: On April 13, 2005, Eric Rudolph pleaded guilty to violations of 18 U.S.C. §§ 844 and 924 following a series of bombings in Georgia and Alabama, including the 1996 Atlanta Summer Olympic Games bombing. He was sentenced to four consecutive terms of life imprisonment.

- The key material support statute, 18 U.S.C. § 2339B, became functional in 1997 after the Secretary of State's initial designation of 30 groups as foreign terrorist organizations (FTOs). Currently, there are 42 FTOs. Other frequently charged offenses used in material support-type cases include 18 U.S.C. § 956 (conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country), 18 U.S.C. § 2339A (material support of terrorist activity), and 50 U.S.C. § 1705 (contribution of funds, goods, or services to or for the benefit of a specially designated terrorist).

- Statutes reaching related offenses that terrorists are likely to commit include 18 U.S.C. § 1546 (fraudulently obtaining travel documents), 18 U.S.C. § 1425 (immigration violations), and 18 U.S.C. § 1001 (making misrepresentations to federal investigators).

JUDICIAL NOMINATIONS: Production of Government Documents

Talking Points:

- The Department of Justice has important institutional concerns regarding the release to Congress of internal privileged or deliberative memoranda. The Attorney General and other Department officials rely upon the frank, honest, and thorough advice from all attorneys. Such an exchange cannot take place if attorneys are worried that their advice is not confidential, but subject to public disclosure.

- In the context of confirmation hearings, there is limited precedent for the production of otherwise privileged memoranda. For the vast majority of judicial nominees with experience at the Department of Justice – even those with no prior judicial experience – the Senate never requested their confidential memoranda.

- While the decision is ultimately up to the Attorney General, I commit that if confirmed, I would work with the Senate to try to resolve specific issues of concern, as the Department has done in the past.

Background:

- The Senate Judiciary Committee Democrats requested that the Department of Justice turn over attorney work product, specifically appeal, certiorari, and amicus memoranda that John Roberts and Samuel Alito wrote as attorneys in the Office of the Solicitor General.

- The Department did not disclose deliberative memoranda in either of these nominations. The National Archives did release Solicitor General documents that were in the files of other DOJ officials that the Clinton Department of Justice had released to the Archives without document-by-document review or reservation of privileges..

ABA Talking Points:

- First, let me make clear that the Administration fully welcomes the ABA's involvement in the judicial nominations and confirmation processes. The Administration welcomes the ABA's suggestions regarding potential judicial candidates, as well as the ABA's evaluation of nominees' fitness for judicial service.

- The Administration came to the conclusion that the ABA alone -- out of the literally dozens of groups and many individuals who have a strong interest in the composition of the federal courts -- should not receive advance notice of the identities of potential nominees in order to render pre-nomination opinions on their fitness for judicial service.

- That kind of preferential arrangement was not fair to the many other groups that also have strong interests in judicial selection.

- We do believe, however, once the President submits a nomination to the Senate, the ABA, like every other interested party, should be free to evaluate and express its views concerning the President's nominee.

- The Administration's decision to treat the ABA in the same manner as all other interested parties mirrors the approach taken in recent decades by Presidents of both parties with respect to Supreme Court nominees, as well as the approach taken by the Senate Judiciary Committee in 1997 when it ended the ABA's quasi-official role in the Senate confirmation process.

Background:

- Several of the Democratic members of the Committee objected when the Bush Administration removed the ABA from its role of pre-nomination review of judicial candidates.

SENTENCING

Sentencing Reform

Talking Points:

- The Department remains committed to the core principles underlying the Sentencing Reform Act of 1984 and the Federal Sentencing Guidelines that resulted from the Act - fair, tough, uniform, predictable and proportionate sentences. Consistency and fairness in sentencing are important; a defendant's sentence should not depend on the which judge happens to preside over the case

- After passage of the PROTECT Act in 2003, there was a marked increase of the percentage of sentences imposed within the ranges set by the Federal Sentencing Guidelines. The Sentencing Commission's recent report on the impact of *Booker* demonstrates that the impact of that legislation has been erased. Advisory guidelines have led to increased disparity and fewer sentences within the guidelines range. The rate of departures in cases involving sexual exploitation of minors and career offenders has increased significantly, and illegitimate factors – such as a defendant's race – appear to be having a greater influence on the sentence imposed now than before *Booker*.

- The Department has proposed legislation that would restore the protections and principles of the Sentencing Reform Act in a manner consistent with the requirements of the Sixth Amendment as set forth in *Booker*. Under such a system, the sentencing court would be bound by the guidelines minimum, just as it was before the *Booker* decision. The guidelines maximum would remain advisory, and the court would be bound to consider it, but not bound to adhere to it.

Background:

- The Federal Sentencing Guidelines are authorized by the Sentencing Reform Act of 1984, developed the Sentencing Commission, and went into effect in 1987. The Supreme Court upheld the Act and Guidelines in 1989 in *Mistretta v. United States*.

- In *United States v. Booker* (January 12, 2005), the Supreme Court held that judicial fact-finding pursuant to the Guidelines violated defendant's Sixth Amendment right to a jury trial, and remedied the problem by rendering the Guidelines advisory. Thus courts are no longer bound to follow the Guidelines, but "must consult those Guidelines and take them into account when sentencing." The Court also established a new standard of review – "reasonableness" – for sentences on appeal.

- In a June 2005 speech, you said that the minimum guideline system is a possible legislative response to *Booker* that deserves serious consideration. This address was followed by a July 2005 speech by the Deputy Attorney General who expressed DOJ's strong interest in a minimum guidelines system as a legislative response to *Booker*.

- Last month, Bill Mercer testified before a House subcommittee and outlined the Department's legislative proposal. Chairman Sensenbrenner has indicated that he will push reform legislation in the House.

Mandatory Minimum Sentences

Issue: Don't you agree that mandatory minimum sentences often result in excessive penalties that are insufficiently tailored to the individual circumstances of an offense?

Talking Points:

- For almost 20 years, the Department and Congress – during Republican and Democratic Administrations alike – have consistently supported mandatory minimum sentences for serious offenses and offenders. These offenders include sexual predators of children, drug traffickers, and those who use firearms to commit violent and drug crimes.

- During this same time period, crime rates – for violent and property crimes – have dropped to their lowest levels since 1973.

- While the Department supports mandatory minimum sentences for the most serious crimes, it also supports limited exceptions to these laws. Specifically, the Administration supports the so-called "safety valve" exemption from mandatory minimum sentences. It also supports departure motions for defendants who cooperate with the Government by providing substantial assistance.

Background:

- In 1986, Congress passed the Anti-Drug Abuse Act that created the basic framework for mandatory minimums for drug traffickers. Since then, Congress has created other mandatory minimum sentences such as a mandatory life sentence for offenders convicted of a third serious violent felony (18 U.S.C. § 3559(c)), and mandatory minimum sentences for certain firearm offenses and methamphetamine offenders.

- For example, in 2003, Congress passed the PROTECT Act, which established or increased mandatory minimum sentences for those who sexually exploit children by producing and trafficking in child pornography or by commercially promoting sex with a minor.

DRAFTER: Mike Elston (ODAG) (307-2090).

Julie

Cagney
Ward
Gordon
Lilly

The Heritage Foundation
214 Massachusetts Ave., N.E.
Washington, D.C. 20002-4999
(202) 546-4400

Date: 2/10/05

Number of pages following cover sheet: 8

To:

The Honorable Robert D. McCallum

Phone: (202) 514-9500

Fax: (202) 514-0238

From:

Virginia L. Thomas

Executive Branch Relations

Phone: (202) 608-6240

Fax: (202) 608-6068

REMARKS: ☐ Urgent ☐ For your review ☐ Reply ASAP ☐ Please comment

The Heritage Foundation
LEADERSHIP FOR AMERICA

February 9, 2006

The President
The White House
Washington, DC 20500

Dear Mr. President:

Five years ago, the nation entered a new and unexpected chapter of its history. After the 9/11 attacks, The Heritage Foundation – like most Americans and the U.S. Government – turned its focus to improving homeland security and national defense. Much has been done over the last five years. We believe it is time to measure the progress and assess how far the nation has come.

The Heritage Foundation has a new initiative to do just that. With widespread input and a series of public forums, we are launching a ***2006 National Security Report Card*** project. The goal of this project is to assess the efforts of the Administration, U.S. House of Representatives, and U.S. Senate since 9/11 to fill legislative holes in our security blanket, reform the bureaucratic structures and policies that hampered homeland security, and stimulate an efficient federal, state, and local partnership in the effort to make our nation safer.

We hope this initiative will produce a blueprint to help guide national security policy in the future, ensuring that America has the ways and means to win the Global War on Terrorism and meet emerging national security challenges.

Since 9/11, policymakers have made the most substantive and sweeping policy changes since President Truman signed the National Security Act of 1947. Three major pieces of legislation—the USA Patriot Act (signed on October 26, 2001), the Homeland Security Act (signed November 25, 2002), and the Intelligence Reform and Terrorism Prevention Act (signed on December 17, 2004) —initiated comprehensive reforms to refocus and revitalize all aspects of fighting the war on terrorism.

How have these changes helped improve homeland security? That is the question we will pose to evaluate the efforts of the Federal Government thus far.

In September 2006, prior to the Fifth Anniversary of 9/11, we will issue our report card, assigning letter grades for the efforts of the Administration, the House, and the Senate in seven core areas:

1. Civil Liberties—protecting the civil liberties of our citizens
2. Homeland Defense—providing for U.S. security both at home and abroad
3. Guns and Butter—ensuring the changes are not hamstringing our economy
4. Winning the War of Ideas—conducting public diplomacy
5. Comprehensive Immigration and Border Security Reform—controlling our borders
6. Intelligence Reform—providing effective, proactive intelligence
7. Medical Response to Catastrophic Disasters—organizing a national response

We anticipate using five criteria to grade each of these areas: including, how well they ensure that U.S. national security policy addresses future threats, boosts cost effectiveness, employs all elements of national power, respects federalism and other Constitutional principles, and promotes U.S. competitiveness in the global economy.

To complement our efforts to grade the nation's progress in homeland security, and to foster public discussion of each of the seven core areas listed above, The Heritage Foundation will be hosting monthly forums. At each event, we will ask two national security experts to address an issue, field questions from two Heritage analysts, and take questions from the audience. We will post a summary of the discussion on our website.

The first forum will take place on Friday, February 10th at 11:00 a.m. at The Heritage Foundation. Heather MacDonald of the Manhattan Institute and Timothy Edgar of the American Civil Liberties Union have agreed to address the issue of "Protecting Civil Liberties." We cordially invite you to send appropriate staff to this and any of the public events in this series.

I remain hopeful that this initiative will help advance public recognition of the significant efforts made thus far and move the discussion forward on what is still needed to win the war on terrorism. Should you have any questions, feel free to contact me or our Director of Executive Branch Relations, Ginni Thomas, at (202) 608-6240.

Faithfully,

Edwin J. Feulner, Ph.D.
President

Enc.: National Security Report Card: The Seven Essential Components, Five Criteria for Grading the Seven Components of National Security

Cc:

Richard B. Cheney, Vice President of the United States
Andrew H. Card, Jr., Assistant to the President and Chief of Staff
Frances Fragos Townsend, Assistant to the President for Homeland Security
Stephen J. Hadley, Assistant to the President for National Security Affairs
Daniel J. Bartlett, Counselor to the President
Karl Rove, Assistant to the President, Deputy Chief of Staff and Senior Advisor
Harriet Miers, Counsel to the President
Allan Hubbard, Assistant to the President for Economic Policy and Director, National Economic Council
Claude A. Allen, Assistant to the President for Domestic Policy
Joshua B. Bolten, Director of the Office of Management and Budget

Michael Chertoff, Secretary of the Department of Homeland Security
Michael P. Jackson, Deputy Secretary of the Department of Homeland Security
Randy Beardsworth, Under Secretary for Border and Transportation Security (Acting)
George Foresman, Undersecretary for Preparedness
Robert B. Stephan, Assistant Secretary for Infrastructure Protection
Charles G. McQuery, Under Secretary for Science and Technology
Stewart A. Baker, Assistant Secretary for Policy
Charles E. Allen, Assistant Secretary for Intelligence and Analysis
Admiral Thomas H. Collins, USCG, Commandant of the United States Coast Guard
Deborah Spero, Commissioner of the United States Customs and Border Protection (Acting)
Brian Besanceney, Assistant Secretary, Public Affairs
Julie L. Myers, Assistant Secretary for United States Immigration and Customs Enforcement
Emilio T. Gonzalez, Director of United States Citizenship and Immigration Services
Edmund "Kip" Hawley, Assistant Secretary for Transportation Security Administration
R. David Paulison, Under Secretary for Emergency Preparedness and Response (Acting)
Maureen Cooney, Chief Privacy Officer (Acting)
Dan W. Sutherland, Officer for Civil Rights and Civil Liberties
Ambassador Cresencio S. Arcos, Director of International Affairs
Tracy Henke, Executive Director, Office for State and Local Government Coordination and Preparedness
Phil Perry, General Counsel

Alberto R. Gonzales, Attorney General
Paul J. McNulty, Deputy Attorney General (Acting)
Robert McCallum, Associate Attorney General
Robert S. Mueller III, Director, Federal Bureau of Investigation

Donald Rumsfeld, Secretary of Defense
Gordon England, Deputy Secretary of Defense
General Peter Pace, USMC, Chairman of the Joint Chiefs of Staff
Paul McHale, Assistant Secretary for Homeland Defense
Lieutenant General H. Steven Blum, Chief, National Guard Bureau

John W. Snow, Secretary of the Treasury
Arnie Havens, Deputy Secretary of the Treasury
Stuart Levey, Under Secretary for Terrorism and Financial Intelligence
Timothy D. Adams, Under Secretary for International Affairs
Randal K. Quarles, Under Secretary for Domestic Finance

Condoleezza Rice, Secretary of State
Ambassador Robert B. Zoellick, Deputy Secretary
Ambassador Karen P. Hughes, Under Secretary for Public Diplomacy and Public Affairs
Ambassador R. Nicholas Burns, Under Secretary for Political Affairs
Paula J. Dobriansky, Under Secretary for Democracy and Global Affairs
Robert G. Joseph, Under Secretary for Arms Control and International Security
Ambassador Josette Sheeran Shiner, Under Secretary for Economic, Business and Agricultural Affairs

Michael Leavitt, Secretary of Health and Human Services
Alex M. Azar II, Deputy Secretary of Health and Human Services
Stewart Simonson, Assistant Secretary for Public Health Emergency Preparedness

Norman Mineta, Secretary of Transportation
Maria Cino, Deputy Secretary of Transportation

John Negroponte, Director of National Intelligence
Lieutenant General Michael V. Hayden, Principal Deputy Director, ODNI
Porter J. Goss, Director, Central Intelligence Agency

Ambassador Robert J. "Rob" Portman, US Trade Representative

THE HERITAGE FOUNDATION'S NATIONAL SECURITY REPORT CARD: THE SEVEN ESSENTIAL COMPONENTS

#1 Protecting Civil Liberties

Protecting the civil liberties of our citizens

National security cannot impermissibly infringe on civil liberties. Have security measures, such as the passage of the Patriot Act and subsequent changes, been made with the future in mind? If a change is made, it must be strategic for the long term. Policy for future technologies and capabilities for detecting, pursuing, and detaining terrorists must be considered. In the quest to win the global war on terrorism, has the government unintentionally or unnecessarily infringed upon civil liberties? Have other means to these ends been considered? Is there appropriate and adequate oversight? Have the House, Senate, and Administration effectively secured our liberty by safeguarding the conditions of true liberty?

#2 Defending the Homeland

Providing for U.S. security both at home and abroad

We need to take the "Eisenhower" approach to defending the homeland: build an enduring security system that is prepared for the long war and takes reasonable measures to protect Americans. The alternative is to do things that create the image of progress, without any real sense of whether such measures actually help stop terrorists. Did the laws passed and changes made to the government homeland security structure and response efforts since the 9/11 attacks create a solid strategy to protect our homeland, from both without and within our borders, or just create an illusion? Have the House, Senate, and Administration taken steps to streamline and enhance policy — from state and local government grant programs to the defense budget?

#3 Guns and Butter

Facilitating economic growth

Successful national security requires a strong economy — not principally to boost spending for defense or homeland security programs but rather to protect the American way of life. The U.S. economy is strongest when its capital is in the hands of citizens, not the government. Does our national security policy promote free trade, avoid taking unnecessary protectionist measures, and spend taxpayer dollars wisely? Reforming tax policy, taking government entitlements off automatic pilot, and amending the Congressional budget process to close holes that allow for massive and misdirected spending, will facilitate economic growth. Have the House, Senate, and Administration effectively made these reforms?

#4 Winning the War of Ideas
Conducting Public Diplomacy

Securing the United States means winning the war of ideas by convincing our enemies that their defeat is inevitable, destroying the legitimacy of their corrupt ideologies, and depriving them of their supporters. Does U.S. national security policy enhance understanding of our enemies and successfully de-legitimize their view of the world? Most importantly, does the U.S. offer a credible alternative? Have the House, Senate, and Administration enacted changes in policy that effectively use the nation's influence with its allies and friends to convince them that terrorism is unacceptable? Have they promoted and supported democracy, enlisted the help of the international community to focus on areas most at risk for terrorism or what breeds terrorism, and promoted the free flow of ideas? Have they gotten the message of American values out to the world?

#5 Comprehensive Immigration and Border Security Reform
Controlling our borders

The 9/11 attacks demonstrated the dangers of a broken immigration and border security system. National security policy changes since then should reflect improvements in strategy to protect air, land, and maritime borders though policies based on risk assessment. An integral component to border security is successfully processing people entering the borders. Over 11 million illegal immigrants, some of them criminals and terrorists, are currently inside our borders. This broken system also endangers national identity. Comprehensive immigration and border security reform means creating a strategy to secure U.S. borders, repairing a damaged visa policy system, protecting and enhancing understanding of U.S. national identity based on Constitutional principles, and working with international partners to encourage freedom and prosperity in the homelands of immigrants. Have the House, Senate, and Administration taken a comprehensive and systematic approach to border security?

#6 Intelligence Reform
Providing effective, proactive intelligence

Strong national security policy is buttressed by an intelligence network that will be able to face the challenges of the 21st century. The U.S. needs intelligence agencies that are as facile in dealing with shadowy transnational gangs as they are in countering conventional enemies. Has the intelligence community recovered from the overwrought state it found itself on 9/11? Is the intelligence community funded adequately and structured appropriately to perform its mission? Has it rebuilt its human capabilities to collect and analyze intelligence, as well as exploit cutting-edge technologies to gather, distribute, and evaluate information? Have the House, Senate, and Administration taken all appropriate steps to facilitate better counterintelligence?

FIVE CRITERIA FOR GRADING THE SEVEN COMPONENTS OF NATIONAL SECURITY

#1 Address Current and Future Threats

Policies, strategies and operations must employ the right tools for the right war. In the 21st century, this includes making sure the military is trained and ready, can effectively conduct current operations, and can transform to deal with evolving threats; and adapting more effective organization and resourcing for the reserve components so that they can perform both homeland defense and post-conflict missions. For homeland security, this includes establishing risk-based measures, providing layered defenses, and having the ability to adapt to meet new threats.

#2 Be Cost-Effective

America must invest sufficiently and consistently on defense and homeland security in a manner that gives Americans the biggest "bang" for their security bucks. Federal investments must produce results. Organizations, programs, and operations must be set up and managed to be most efficient and effective as possible.

#3 Employ All Elements of National Power

The United States must effectively employ all its military, political, diplomatic, economic, and informational instruments in concert. Policies, strategies, and operations must seek and utilize the support of America's friends and allies and build strong, enduring international partnerships, while maintaining and respecting the sovereignty of individual states.

#4 Respect Federalism and Other Constitutional Principles

National policies must enable local, state, and federal government entities to work well together. Each level of government should be able to fulfill its appropriate responsibilities and ensure programs and policies respect jurisdictions, utilize available resources, and have established procedures for "who is in charge" during catastrophic events.

#5 Promote U.S. Competitiveness in the Global Economy

National policies and programs must enhance America's ability to compete in international markets. This includes avoiding protectionism in the quest for security, enabling our allies to meet security standards for trade and immigration, and keeping our military competitiveness by utilizing equipment suppliers in cooperative nations around the world.

Shaw, Aloma A

From: Sprouse, Connie S
Sent: Wednesday, January 18, 2006 10:48 AM
To: Shaw, Aloma A
Subject: RE: JCON-S & TS Application Forms

Shaw,

I am not the person you need to send the completed application forms to. You need to send them to Kristin Atchley at 202-514-2261, she is also in the JCON Global address book if you need to e-mail her. Kristin is located in the Patrick Henry Building. If you need additional assistance please let me know.....Connie

Connie Sprouse
Telecommunications Manager

From: Shaw, Aloma A
Sent: Tuesday, January 17, 2006 7:59 AM
To: Sprouse, Connie S
Subject: JCON-S & TS Application Forms

Connie:
I need to send you the completed application forms from the Principal Deputy Associate Attorney General. What is your bldg and room number?
Aloma Shaw

Shaw, Aloma A

From: Sprouse, Connie S
Sent: Friday, December 23, 2005 10:37 AM
To: Vanyur, John; Renkiewicz, Martin
Cc: Whitacre, Charlotte T
Subject: JCON-S & TS Application Forms

Attachments: JCON-S CSAT Certification Form 05_07_042.doc; JCON-S User Agreement 02_07_05 .doc; JCON-TS User Access (final as of 02_07_05).doc; READ ME.txt

All,

As discussed attached please find the Application Forms, like I mentioned if you have trouble opening these files there are CDs at JCC with the forms.
Merry Christmas....Connie


JCON-S CSAT Certification Form...


JCON-S User Agreement 02_07_05


JCON-TS User Access (final as ...


READ ME.txt (4 KB)

Connie Sprouse
Telecommunications Manager

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 02/09/2006
DATE RECEIVED: 02/10/2006
WORKFLOW ID: 952097
DUE DATE: 02/28/2006

FROM: The Honorable William Frist
United States Senate

Washington, DC 20510

TO: AG

MAIL TYPE: Congressional Priority

SUBJECT: Ltr (rec'd from OLA via email) from Senate Majority Leader Frist and Chmn Specter & RMM Leahy, Senate Judiciary Comte, commenting on DOJ's proposed regulations to the new statutory provisions of the Public Safety Officers' Benefits Act (PSOB). The MCs recommend that the comments of the public safety community be reflected in the final rule.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/13/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: OAG, ODAG, OASG, OLC, OLP, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

952097

United States Senate

WASHINGTON, DC 20510

February 9, 2006

The Honorable Alberto R. Gonzales
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear General Gonzales:

We are writing to advise you of our genuine concern with the manner in which the Office of Justice Programs (OJP) and the Bureau of Justice Assistance (BJA) have proposed to implement several of the new statutory provisions of the Public Safety Officers Benefit (PSOB) Act, and with the changes it has proposed to the current regulations governing the program.

Specifically, we are concerned that the regulations as proposed will require claimants to obtain legal counsel in order to navigate each stage of the PSOB process; have a negative impact on existing case law; repeal or greatly restrict certain important provisions of the current regulations which have been at issue in a number of other PSOB court cases; define the term "terrorist attack" for the purpose of providing expedited PSOB benefits in a manner contrary to both the intent and spirit of the law which was passed in the wake of the terrorist attacks on the United States in September 2001; and define key terms for the purposes of determining eligibility under the Hometown Heroes Survivors Benefits Act of 2003 (HHSBA) in a manner inconsistent with the Act. We are particularly troubled with the impact the proposed regulations might have on the HHSBA, as they seem to interpret the rebuttable presumption created by the Act as not being a rebuttable presumption at all, which does not conform with either the spirit of the law or the intent of Congress.

In our view, the proposed changes make the PSOB less user-friendly and less accessible to the families of public safety officers who have lost their lives in the line of duty. This is extremely unfortunate, as this program means a great deal to the public safety community, and we strongly recommend that their comments on the proposed regulations be reflected in the final rule.

On behalf of our colleagues, we thank you for your continued good work at the U.S. Department of Justice and look forward to the new PSOB regulations with the hope that they will accurately reflect the intent of Congress and benefit the families of our nation's fallen heroes.

Sincerely,

William H. Frist, M.D.
Majority Leader
United States Senate

Arlen Specter
Chairman
Committee on the Judiciary
United States Senate

Patrick Leahy
Ranking Member
Committee on the Judiciary
United States Senate

Barnes, Michelle D

From: Callier, Saundra M
Sent: Friday, February 10, 2006 9:50 AM
To: Hines, Marcia L; Barnes, Michelle D
Subject: FW: PSOB Letter

Attachments: Document.pdf

Document.pdf (270 KB)

pls control.

Thx,
smc

-----Original Message-----
From: Moschella, William
Sent: Thursday, February 09, 2006 6:44 PM
To: Callier, Saundra M
Cc: Madan, Rafael A.; Seidel, Rebecca; Roland, Sarah E
Subject: FW: PSOB Letter

Please log in.

-----Original Message-----
From: brandi_white@frist.senate.gov [mailto:brandi_white@frist.senate.gov]
Sent: Thursday, February 09, 2006 5:57 PM
To: Moschella, William
Cc: Allen_Hicks@frist.senate.gov
Subject: PSOB Letter

Hi Will-

I just wanted to pass along the attached letter to the AG from the Leader, Chairman Specter, and Senator Leahy. Please forward to the appropriate folks at DOJ if you don't mind. Thanks!

Best,

Brandi

Brandi Wilson White

Deputy Chief Counsel

Office of Majority Leader Bill Frist, M.D.

United States Senate

The Capitol

Washington, DC 20510

202.224.0602

Neel

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/31/2006
DATE RECEIVED: 02/08/2006
WORKFLOW ID: 951078
DUE DATE: 02/27/2006

FROM: The Honorable Lloyd Doggett
U.S. House of Representatives
Washington, DC 20515

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: (Fax rec'd from OJP) Supporting the application submitted by the Travis County Domestic Violence and Sexual Assault Center, of Austin, TX, for funding through DOJ's FY 2006 Education and Technical Assistance Grants to End Violence Against Women (OVW) with Disabilities program.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/13/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

951678

LLOYD DOGGETT
25TH DISTRICT, TEXAS

COMMITTEE ON
WAYS AND MEANS

SUBCOMMITTEE ON
HEALTH

Congress of the United States
House of Representatives

WASHINGTON OFFICE:
201 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-4865

DISTRICT OFFICES:
311 NORTH 15TH STREET
MCALLEN, TX 78501
(956) 687-5921

300 EAST 8TH STREET, SUITE 763
AUSTIN, TX 78701
(512) 916-5921

E-MAIL: LLOYD.DOGGETT@MAIL.HOUSE.GOV
www.house.gov/doggett/
1-866-816-5921

January 31, 2006

Ms. Diane M. Stuart
Director
U.S. Department of Justice
Office on Violence Against Women
810 7th Street NW
Washington, D.C. 20531

Re: Travis County Domestic Violence and Sexual Assault Survival Center's Application for a FY 2006 Education and Technical Assistance Grant to End Violence Against Women with Disabilities

Dear Ms. Stuart:

I write in strong support of the concept paper submitted by the Travis County Domestic Violence and Sexual Assault Survival Center (d/b/a SafePlace), of Austin, Texas, to the Office on Violence Against Women (OVW) for the FY 2006 Education and Technical Assistance Grants to End Violence Against Women with Disabilities program. For over three decades, SafePlace has provided not only high-quality services to victims of rape, sexual abuse, and domestic violence, but also valuable prevention, education, and training services to help communities address and prevent these devastating crimes.

SafePlace would serve as the lead agency for this project and will be partnering with two disability services agencies, Advocacy, Inc., and Deaf Abused Women and Children Advocacy Services. Together, these three agencies will develop and conduct a statewide community needs assessment to gather data on the needs of Texans with disabilities who have experienced domestic and sexual violence. Based on the results, the agencies will develop and implement a strategic plan to address these needs, including offering statewide training and technical assistance activities.

As you know, persons with disabilities are among the populations at highest risk of experiencing domestic and sexual violence and related crimes. SafePlace and its partner agencies have extensive experience in addressing the needs of abuse survivors with disabilities, and I fully support their efforts.

Thank you for your consideration of this letter of support. I appreciate your full and fair consideration of this worthy proposal. If you should have any questions about this proposal or my support for it, please contact me at 202-225-4865. Please notify me as soon as possible of your funding decision (by phone or fax, 202-225-3073).

Sincerely,

Lloyd Doggett

Lloyd Doggett

LLOYD DOGGETT
25TH DISTRICT, TEXAS

COMMITTEE ON
WAYS AND MEANS

SUBCOMMITTEE ON
HEALTH

Congress of the United States
House of Representatives

WASHINGTON OFFICE:
201 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-4865

DISTRICT OFFICES:
311 NORTH 15TH STREET
MCALLEN, TX 78501
(956) 687-5921

300 EAST 8TH STREET, SUITE 753
AUSTIN, TX 78701
(512) 916-5921

E-MAIL: LLOYD.DOGGETT@MAIL.HOUSE.GOV
www.house.gov/doggett/
1-956-916-5921

FACSIMILE FROM THE OFFICE OF
CONGRESSMAN LLOYD DOGGETT
Twenty-Fifth District, Texas
Fax: (202) 225-3073
Phone: (202) 225-4865

TO: Diane Stuart DATE: 1/31 FAX #: 202-307-3911

OFFICE/ORGANIZATION: Director, US DoT OVW

FROM:
- [X] Celeste Drake
- [ ] Jess Fassler
- [ ] Juan Garcia
- [ ] Luke George
- [ ] Michelle Levy-Benitez
- [ ] Michael Mucchetti
- [ ] Betsy Quilligan
- [ ] Oscar Quiñones
- [ ] Caryn Schenewerk
- [ ] Intern: _____

NUMBER OF PAGES (including cover sheet): 3

COMMENTS:

Please consider these two letters of support from Rep. Doggett. Original to follow via U.S. Mail. Thanks,
Celeste Drake

PRINTED ON RECYCLED PAPER

DOJ_NMG_0143097

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/24/2006
DATE RECEIVED: 02/10/2006
WORKFLOW ID: 952208
DUE DATE: 02/28/2006

FROM: The Honorable Paul S. Sarbanes
United States Senate

Washington, DC 20510

TO: AG

MAIL TYPE: Congressional Grants

SUBJECT: Requesting consideration of the grant application submitted by the Office of the Sheriff of Prince George's County, MD, for funding under the Safe Havens: Supervised Visitation and Safe Exchange Program to establish and implement a fully functioning, collaborative-based, comprehensive, supervised visitation and safe exchange center within the administrative section of the Sheriff's office.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
02/13/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: OAG, OASG, ODAG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Paula Stephens: 202-616-0074

952208

PAUL S. SARBANES
MARYLAND

309 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510
202-224-4524

United States Senate

WASHINGTON, DC 20510-2002

January 24, 2006

The Honorable Alberto R. Gonzales
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Attorney General Gonzales:

The Office of the Sheriff of Prince George's County recently submitted an application requesting funding under the Safe Havens: Supervised Visitation and Safe Exchange Program to establish and implement a fully functioning, collaborative based, comprehensive supervised visitation and safe exchange center within the administrative section of the Sheriff's office. I am writing to urge your favorable consideration of this application.

The Sheriff's Office's immediate objective is to increase the supervised visitation and safe exchange services available to the citizens of Prince George's County by providing a secure location where professionally trained staff are committed to promoting the safety of children and parents involved in domestic violence, stalking or sexual assault situations.

If funded, the Sheriff's Office will partner with the Family Crisis Center, Incorporated, the Sexual Assault Center and Child Protective Services to establish this collaborative program, employ and comprehensively cross train profession staff, provide a welcoming, non-threatening atmosphere for children suffering the stress and trauma of exchange or visitation, provide parenting classes and parent support groups, as well as provide essential data to the Courts, victim service agencies, coalitions, and the U.S. Department of Justice.

I hope you will give this application every favorable review and I look forward to your response.

With best regards,

Sincerely,

Paul Sarbanes

Paul Sarbanes
United States Senator

PSS/nef

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/31/2006
DATE RECEIVED: 02/08/2006
WORKFLOW ID: 950658
DUE DATE: 03/14/2006

FROM: The Honorable Judd Gregg
United States Senate

Washington, DC 20510

TO: COPS

MAIL TYPE: Congressional Grants

SUBJECT: Supporting the grant application submitted by the Antrim, NH, Police Department for funding a School Resource Officer through the COPS-in-Schools grant program.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/10/2006	Community Oriented Policing Service For response by component.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS: Forward copies of incoming letter and draft response to OLA for review and approval prior to mailing. After OLA approval, scan response into the IQ system.

FILE CODE:

EXECSEC POC: Yvonne Williams: 202-514-5849

950658

JUDD GREGG
NEW HAMPSHIRE

COMMITTEES:
BUDGET, *Chairman*
APPROPRIATIONS
HEALTH, EDUCATION, LABOR AND PENSIONS

United States Senate

WASHINGTON, DC 20510–2904
(202) 224–3324

OFFICES:
125 NORTH MAIN STREET
CONCORD, NH 03301
(603) 225–7115

41 HOOKSETT ROAD, UNIT 2
MANCHESTER, NH 03104
(603) 622–7979

60 PLEASANT STREET
BERLIN, NH 03570
(603) 752–2604

16 PEASE BOULEVARD
PORTSMOUTH, NH 03801
(603) 431–2171

Reply to:
Concord Office

January 31, 2006

Mr. Carl R. Peed, Director
U.S. Department of Justice
Office of Community Oriented Policing Services
1100 Vermont Avenue, NW, 10th Floor
Washington, DC 20530

Dear Mr. Peed:

The Antrim Police Department in Antrim, New Hampshire, has submitted a grant application to you for a School Resource Officer under the "COPS in Schools" initiative. This is the first such effort by the Antrim Police Department. They are seeking a three year grant totaling $125,000. They plan to use this money to add an additional full-time police officer who would be assigned to the position of School Resource Officer. Among other things, this officer would have permanent assignment at the schools, provide DARE instruction, be involved in conflict resolution, intervene with at-risk juveniles, and be active in gang intervention. I ask that you give this application every consideration during the process.

Thank you in advance for your attention to this matter.

Sincerely,

Judd Gregg
U.S. Senator

JG/ahs

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 02/02/2006
DATE RECEIVED: 02/08/2006
WORKFLOW ID: 951064
DUE DATE: 02/27/2006

FROM: The Honorable Mitch McConnell
United State Senate

Washington, DC 20515

TO: OJP

MAIL TYPE: Congressional Grants

SUBJECT: Ltr (rec'd from OPJP) supporting the grant application submitted by Legal Aid of the Bluegrass for funding under the Legal Assistance for Victims Grant Program.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/10/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: OASG, ODAG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Yvonne Williams: 202-514-5849

951064

MITCH McCONNELL
KENTUCKY

361-A RUSSELL SENATE OFFICE BUILDING
WASHINGTON, DC 20510-1702
(202) 224-2541

United States Senate

MAJORITY WHIP

COMMITTEES:
AGRICULTURE
APPROPRIATIONS
SUBCOMMITTEE ON FOREIGN OPERATIONS
CHAIRMAN
RULES AND ADMINISTRATION

February 2, 2006

The Honorable Regina B. Schofield
Assistant Attorney General
Office of Justice Programs
U.S. Department of Justice
810 Seventh Street N.W.
Washington, D.C. 20531-0001

Dear Ms. Schofield:

I write to express my support for the application submitted by Legal Aid of the Bluegrass for funding under the Legal Assistance for Victims grant program (CFDA #16.524).

In 2004, Legal Aid of the Bluegrass (LABG) initiated a comprehensive civil legal services project with funding from the Office of Justice Programs. Through this program, over 250 victims of domestic violence, sexual assault, and stalking have received legal representation in areas of family, consumer, housing, and immigration law. The project serves 27 central and eastern Kentucky counties that either have highly rural or large non-English speaking populations. Several of the staffs involved in the project are bilingual, which helps to overcome language barriers many victims face in accessing and understanding the legal system. Attorneys also provide counseling about safety and emergency protective procedures to those clients who choose not to pursue legal remedies.

Legal Aid of the Bluegrass, in partnership with the Women's Crisis Center in northern Kentucky and the Bluegrass Rape Crisis Center in central Kentucky, seeks funds to continue and expand this program. More specifically, LABG would like to increase outreach efforts, streamline intake procedures, and focus on emergency issues. The partners will coordinate case management, transportation, benefits application, translation, and emergency shelter services so that victims are provided assistance seamlessly. In short, securing funding for this initiative will allow LABG to provide emergency and legal services to those most in need. I hope you will realize the importance of this project to Kentucky and give appropriate consideration to the application.

Thank you for your time and attention to this matter.

Sincerely,

MITCH McCONNELL
UNITED STATES SENATOR

MM/ bdb

FEDERAL BUILDING
241 EAST MAIN STREET
ROOM 102
BOWLING GREEN, KY 42101
(270) 781-1673

1885 DIXIE HIGHWAY
SUITE 345
FORT WRIGHT, KY 41011
(859) 578-0188

771 CORPORATE DRIVE
SUITE 530
LEXINGTON, KY 40503
(859) 224-8286

300 SOUTH MAIN
SUITE 310
LONDON, KY 40741
(606) 864-2026

601 WEST BROADWAY
SUITE 630
LOUISVILLE, KY 40202
(502) 582-6304

PROFESSIONAL ARTS BUILDING
2320 BROADWAY
SUITE 100
PADUCAH, KY 42001
(270) 444-9360

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/26/2006
DATE RECEIVED: 02/08/2006
WORKFLOW ID: 950698
DUE DATE: 02/27/2006

FROM: The Honorable George V. Voinovich
United States Senate
Washington, DC 20510

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: Supporting the application submitted by Community Legal Aid Services, Inc. for funding through DOJ's Legal Assistance for Victims Grant Program.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
02/13/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

950648

GEORGE V. VOINOVICH
OHIO

524 HART SENATE OFFICE BUILDING
(202) 224–3353
TDD: (202) 224–6997
senator_voinovich@voinovich.senate.gov
http://voinovich.senate.gov

United States Senate

WASHINGTON, DC 20510–3504

ENVIRONMENT AND PUBLIC WORKS
CHAIRMAN, SUBCOMMITTEE ON CLEAN AIR, CLIMATE CHANGE AND NUCLEAR SAFETY

ETHICS
CHAIRMAN

FOREIGN RELATIONS

HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE AND THE DISTRICT OF COLUMBIA

January 26, 2006

Ms. Diane M. Stuart, Director
The Office on Violence Against Women
800 K Street
Washington, DC 20530

Dear Ms. Stuart:

I write in reference to the grant application submitted by Community Legal Aid Services, Inc., for funding in the Legal Assistance for Victims Grant Program.

Community Legal Aid Services, Inc., a non-profit law firm that serves low-income populations located in Akron, seeks funding to provide comprehensive legal services to victims of violence and abuse. Community Legal Aid plans to add five staff members dedicated to providing comprehensive legal services to victims as well as coordinate trainings on domestic violence throughout its eight-county region. Funding will enable Community Legal Aid to provide effective legal services to low-income populations who otherwise could not afford legal representation.

Please give all due consideration to this request. If there are any questions, please contact my grants coordinator, Linda Greenwood at (419) 259-3895. Thank you.

Sincerely,

George V. Voinovich

George V. Voinovich
United States Senator

STATE OFFICES:
36 EAST SEVENTH STREET, ROOM 2615, CINCINNATI, OHIO 45202, (513) 684–3265
1240 EAST NINTH STREET, ROOM 2955, CLEVELAND, OHIO 44199, (216) 522–7095
37 WEST BROAD STREET, ROOM 320 (CASEWORK), COLUMBUS, OHIO 43215, (614) 469–6774
37 WEST BROAD STREET, ROOM 310, COLUMBUS, OHIO 43215, (614) 469–6697
417 SECOND AVENUE, P.O. BOX 758, GALLIPOLIS, OHIO 45631, (740) 441–6410
420 MADISON AVENUE, ROOM 1210, TOLEDO, OHIO 43604, (419) 259–3895

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/23/2006
DATE RECEIVED: 02/13/2006
WORKFLOW ID: 952465
DUE DATE: 03/02/2006

FROM: The Honorable Patty Murray
United States Senate

Washington, DC 20510-0001

TO: OJP

MAIL TYPE: Congressional Grants

SUBJECT: (Rec'd from OJP) Supporting the application submitted by the Northwest Justice Project (NJP) to OVW for continued funding of its Domestic Violence Community Legal Project.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/14/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Yvonne Williams: 202-514-5849

952465

PATTY MURRAY
WASHINGTON

ASSISTANT DEMOCRATIC FLOOR LEADER

COMMITTEES:
APPROPRIATIONS
BUDGET
HEALTH, EDUCATION, LABOR AND PENSIONS
VETERANS' AFFAIRS

United States Senate
WASHINGTON, DC 20510–4704

January 23, 2006

Ms. Diane Stuart
Director
Violence Against Women Office
U.S. Department of Justice
810 7th NW
Washington, D.C. 20001

Dear Ms. Stuart:

I am writing in support of the Northwest Justice Project's application for continuing funding through the Department of Justice, Violence Against Women office. This funding will support Northwest Justice Project's (NJP's) Domestic Violence Community Legal Project.

In collaboration with Consejo Counseling and Referral Services ("Consejo") and the Refugee Women's Alliance ("ReWa"), NJP's project seeks to provide civil legal services to battered immigrant women in King County, Washington. Originally created in 2001 with OVW funding, the project provides a unified source of legal information and representation to battered immigrant women in the greater Seattle area. The project will address problems of language and cultural barriers, isolation, and lack of culturally appropriate services, commonly faced by immigrant women experiencing family violence. By targeting this client population, NJP is addressing the critical issue of reducing barriers which prevent immigrant victims from accessing legal services.

As a strong supporter of the reauthorization of the Violence Against Women Act, I believe that programs funded under the Violence Against Women Office are crucial to our community's efforts to advocate for domestic violence victims. I am pleased to offer my continuing support for the Northwest Justice Project's Domestic Violence Community Legal Project.

Sincerely,

Patty Murray

Patty Murray
United States Senator

PM\sm

173 RUSSELL SENATE OFFICE BUILDING
WASHINGTON, DC 20510–4704
(202) 224–2621

1611—116TH AVENUE, NE
SUITE 214
BELLEVUE, WA 98004–3045
(425) 462–4460

2930 WETMORE AVENUE
SUITE 903
EVERETT, WA 98201–4107
(425) 259–6515

2988 JACKSON FEOERAL BUILDING
915 2NO AVENUE
SEATTLE, WA 98174–1003
(206) 553–5545

601 WEST MAIN AVENUE
SUITE 1213
SPOKANE, WA 99201–0613
(509) 624–9515

950 PACIFIC AVENUE
SUITE 650
TACOMA, WA 98402–4450
(253) 572–3636

THE MARSHALL HOUSE
1323 OFFICER'S ROW
VANCOUVER, WA 98661–3856
(360) 696–7797

website: http://murray.senate.gov
e-mail: http://murray.senate.gov/email

402 EAST YAKIMA AVENUE
SUITE 390
YAKIMA, WA 98901–2760
(509) 453–7462

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

Neil

DATE OF DOCUMENT: 02/10/2006 **WORKFLOW ID:** 953101
DATE RECEIVED: 01/26/2006 **DUE DATE:**

FROM: The Honorable Anthony D. Weiner
U.S. House of Representatives

Washington, DC 20515

TO: President George W. Bush

MAIL TYPE: White House Urgent Blue Cover

SUBJECT: (Rec'd from the White House for information only) Urging the President to fund the COPS Program at its fully authorized level of $1 billion in FY 07. Ltr also signed by 121 MCs. WH 685981.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/14/2006	For information.

INFO COMPONENT: OAG, ODAG, OASG, JMD, COPS, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Yvonne Williams: 202-514-5849

953101

THE WHITE HOUSE OFFICE
REFERRAL

February 10, 2006

TO: DEPARTMENT OF JUSTICE

ACTION REQUESTED: INFO AND FILE COPY ONLY/NO ACTION NECESSARY

DESCRIPTION OF INCOMING:

ID:	685981
MEDIA:	FAX
DOCUMENT DATE:	JANUARY 26, 2006
TO:	PRESIDENT BUSH
FROM:	ANTHONEY WEINER UNITED STATES HOUSE OF REPRESENTATIVES WASHINGTON, DC 20515
SUBJECT:	URGES THE PRESIDENT TO FUND THE C.O.P.S. PROGRAM AT ITS FULLY AUTHORIZED LEVEL OF $1 BILLION IN FY07
COMMENTS:	

PROMPT ACTION IS ESSENTIAL -- IF REQUIRED ACTION HAS NOT BEEN TAKEN WITHIN 9 WORKING DAYS OF RECEIPT, UNLESS OTHERWISE STATED, PLEASE TELEPHONE THE UNDERSIGNED AT 456-2590.

RETURN **ORIGINAL** CORRESPONDENCE, WORKSHEET AND COPY OF RESPONSE (OR DRAFT) TO: DOCUMENT TRACKING UNIT, ROOM 84, OFFICE OF RECORDS MANAGEMENT - THE WHITE HOUSE, 20500

THE WHITE HOUSE
DOCUMENT MANAGEMENT AND TRACKING WORKSHEET

DATE RECEIVED: 02/08/2006 **CASE ID: 685981**

NAME OF CORRESPONDENT: THE HONORABLE ANTHONEY WEINER

SUBJECT: URGES THE PRESIDENT TO FUND THE C.O.P.S. PROGRAM AT ITS FULLY AUTHORIZED LEVEL OF $1 BILLION IN FY07

		ACTION		DISPOSITION		
ROUTE TO: AGENCY/OFFICE	**(STAFF NAME)**	**CODE**	**DATE**	**TYPE RESPONSE**	**CODE**	**COMPLETED**
LEGISLATIVE AFFAIRS	CANDI WOLFF	ORG	02/10/2006			
	ACTION COMMENTS:					
OFFICE OF MANAGEMENT AND BUDGET		R	02/10/2006			
	ACTION COMMENTS:					
DEPARTMENT OF HOMELAND SECURITY		I	02/10/2006		C	
	ACTION COMMENTS:					
DEPARTMENT OF JUSTICE		I	02/10/2006		C	
	ACTION COMMENTS:					
	ACTION COMMENTS:					

COMMENTS:

MEDIA: FAX

USER CODE: 121 ADDL SIGNEES

SCANNED BY ORM

ACTION CODES:	**DISPOSITION**		
A - APPROPRIATE ACTION B - RESEARCH AND REPORT BACK D - DRAFT RESPONSE I - INFO COPY/NO ACT NECCESSARY R - DIRECT REPLY W/ CDPY	**TYPE RESPONSE:**	**DISPOSITION CODES:**	**COMPLETED DATE:**
	TYPE RESPONSE = INITIALS OF SIGNER NRN = ND RESPDNSE NEEDED	A - ANSWERED/ ACKNOWLEDGED C - CLOSED X - INTERIM REPLY	COMPLETED = DATE OF ACKNOWLEDGEMENT OR CLDSE-OUT DATE (MM/DD/YY)

REFER QUESTIONS AND ROUTING UPDATES TO DOCUMENT TRACKING UNIT (ROOM 84, OEOB) EXT-62590 KEEP THIS

WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO OFFICE OF RECORDS MANAGEMENT

685981
LACORR
CF

Congress of the United States
Washington, DC 20515

January 26, 2006

President George W. Bush
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20520

Dear Mr. President:

We urge you to fund the C.O.P.S. program at its fully authorized level of $1 billion in FY 2007.

Earlier this month, you signed the Violence Against Women and Department of Justice Reauthorization Act of 2005 into law, reauthorizing the C.O.P.S. program at $1,047,119,000 a year through 2009, and empowering the Department of Justice to award grants for state and local police departments to hire "terrorism cops."

The C.O.P.S. program has proven to be an integral part of the nationwide efforts to combat crime and prevent terrorism. To date, the program has helped local communities across the nation hire almost 120,000 additional police officers and acquire the equipment and technology they need to keep our streets safe.

Former Attorney General John Ashcroft has described C.O.P.S. as a "miraculous sort of success." And a GAO study released last year stated, "...we estimated that C.O.P.S.-funded increases in sworn officers per capita were associated with declines in the rates of total index crimes, violent crimes, and property crimes."

Thank you for your attention to this matter.

Sincerely,

ANTHONY D. WEINER
Member of Congress

RIC KELLER
Member of Congress

JIM RAMSTAD
Member of Congress

JOHN F. TIERNEY
Member of Congress

TIM HOLDEN
Member of Congress

MICHAEL E. CAPUANO
Member of Congress

BART STUPAK
Member of Congress

C.O.P.S. Funding Letter – 2

BEN CHANDLER
Member of Congress

CAROLYN MCCARTHY
Member of Congress

EDDIE BERNICE JOHNSON
Member of Congress

PETER J. VISCLOSKY
Member of Congress

TAMMY BALDWIN
Member of Congress

LLOYD DOGGETT
Member of Congress

ELIOT L. ENGEL
Member of Congress

RICK LARSEN
Member of Congress

BRIAN HIGGINS
Member of Congress

GRACE F. NAPOLITANO
Member of Congress

MIKE ROSS
Member of Congress

CHRIS VAN HOLLEN
Member of Congress

STEVEN R. ROTHMAN
Member of Congress

JAMES P. MCGOVERN
Member of Congress

ALCEE L. HASTINGS
Member of Congress

DORIS O. MATSUI
Member of Congress

JERROLD NADLER
Member of Congress

PATRICK J. KENNEDY
Member of Congress

ED CASE
Member of Congress

TOM LANTOS
Member of Congress

C.O.P.S. Funding Letter - 3

STEPHANIE HERSETH
Member of Congress

MAURICE D. HINCHEY
Member of Congress

HILDA L. SOLIS
Member of Congress

JOHN CONYERS JR.
Member of Congress

CAROLYN B. MALONEY
Member of Congress

JIM DAVIS
Member of Congress

JAMES R. LANGEVIN
Member of Congress

JOHN D. DINGELL
Member of Congress

DALE. E. KILDEE
Member of Congress

ROBERT C. SCOTT
Member of Congress

EMANUEL CLEAVER
Member of Congress

MICHAEL F. DOYLE
Member of Congress

EDOLPHUS TOWNS
Member of Congress

ELEANOR HOLMES NORTON
Member of Congress

NITA M. LOWEY
Member of Congress

SANDER M. LEVIN
Member of Congress

JOHN B. LARSON
Member of Congress

SHELLEY BERKLEY
Member of Congress

MICHAEL M. HONDA
Member of Congress

JANICE D. SCHAKOWSKY
Member of Congress

C.O.P.S. Funding Letter – 4

DIANE E. WATSON
Member of Congress

WILLIAM J. JEFFERSON
Member of Congress

GARY L. ACKERMAN
Member of Congress

JUANITA MILLENDER-MCDONALD
Member of Congress

TOM UDALL
Member of Congress

ROSA L. DELAURO
Member of Congress

RUSH D. HOLT
Member of Congress

JOHN W. OLVER
Member of Congress

ELIJAH E. CUMMINGS
Member of Congress

DENNIS A. CARDOZA
Member of Congress

LEONARD L. BOSWELL
Member of Congress

ADAM SMITH
Member of Congress

RON KIND
Member of Congress

C.A. DUTCH RUPPERSBERGER
Member of Congress

JIM MATHESON
Member of Congress

BETTY MCCOLLUM
Member of Congress

MICHAEL R. MCNULTY
Member of Congress

IKE SKELTON
Member of Congress

BOB ETHERIDGE
Member of Congress

TIMOTHY H. BISHOP
Member of Congress

JOSE E. SERRANO
Member of Congress

DONALD M. PAYNE
Member of Congress

JOE BACA
Member of Congress

BARBARA LEE
Member of Congress

ADAM B. SCHIFF
Member of Congress

CHARLES A. GONZALEZ
Member of Congress

FRANK PALLONE, JR.
Member of Congress

SHERROD BROWN
Member of Congress

DIANA DEGETTE
Member of Congress

DENNIS MOORE
Member of Congress

MARTIN T. MEEHAN
Member of Congress

ALLYSON Y. SCHWARTZ
Member of Congress

MARION BERRY
Member of Congress

NYDIA M. VELÁZQUEZ
Member of Congress

NEIL ABERCROMBIE
Member of Congress

EARL POMEROY
Member of Congress

AL GREEN
Member of Congress

DAVID E. PRICE
Member of Congress

BERNARD SANDERS
Member of Congress

GWEN MOORE
Member of Congress

SUSAN A. DAVIS
Member of Congress

PAUL E. KANJORSKI
Member of Congress

TIM RYAN
Member of Congress

STEVE ISRAEL
Member of Congress

JOSEPH CROWLEY
Member of Congress

SILVESTRE REYES
Member of Congress

BILL PASCRELL, JR.
Member of Congress

ROBERT WEXLER
Member of Congress

JIM MCDERMOTT
Member of Congress

ANNA G. ESHOO
Member of Congress

WILLIAM D. DELAHUNT
Member of Congress

GEORGE MILLER
Member of Congress

LORETTA SANCHEZ
Member of Congress

DONNA M. CHRISTENSEN
Member of Congress

DAVID SCOTT
Member of Congress

STEPHANIE TUBBS JONES
Member of Congress

NICK J. RAHALL, II.
Member of Congress

SAM FARR
Member of Congress

BENJAMIN L. CARDIN
Member of Congress

LINDA T. SÁNCHEZ
Member of Congress

HOWARD L. BERMAN
Member of Congress

EARL BLUMENAUER
Member of Congress

LOIS CAPPS
Member of Congress

RICHARD E. NEAL
Member of Congress

LINCOLN DAVIS
Member of Congress

DANIEL LIPINSKI
Member of Congress

CHET EDWARDS
Member of Congress

MADELEINE Z. BORDALLO
Member of Congress

GENE GREEN
Member of Congress

JERRY F. COSTELLO
Member of Congress

MIKE MCINTYRE
Member of Congress

GREGORY W. MEEKS
Member of Congress

MICHAEL H. MICHAUD
Member of Congress

MICHAEL F. DOYLE
Member of Congress

CHARLES W. DENT
Member of Congress

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

Neil

DATE OF DOCUMENT: 01/30/2006
DATE RECEIVED: 02/08/2006

WORKFLOW ID: 951095
DUE DATE: 03/01/2006

FROM: The Honorable Lloyd Doggett
U.S. House of Representatives

Washington, DC 20515

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: (Fax rec'd from OJP) Supporting the grant application submitted by the Travis County Domestic Violence and Sexual Assault Survival Center (d/b/a SafePlace) for funding through the Legal Assistance for Victims (LAV) Grant Program.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/14/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Shirley McKay: 202-514-5305

95 1095

LLOYD DOGGETT
25TH DISTRICT, TEXAS

COMMITTEE ON
WAYS AND MEANS

SUBCOMMITTEE ON
HEALTH

Congress of the United States
House of Representatives

WASHINGTON OFFICE:
201 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-4865

DISTRICT OFFICES:
311 NORTH 15TH STREET
MCALLEN, TX 78501
(956) 687-6921

300 EAST 8TH STREET, SUITE 763
AUSTIN, TX 78701
(512) 916-5921

E-MAIL: LLOYD.DOGGETT@MAIL.HOUSE.GOV
www.house.gov/doggett/
1-866-816-6921

January 30, 2006

Ms. Diane M. Stuart, Director
U.S. Department of Justice
Office on Violence Against Women
810 7th Street NW
Washington, D.C. 20531

Re: Travis County Domestic Violence and Sexual Assault Survival Center's Application for a Fiscal Year 2006 Legal Assistance for Victims Grant

Dear Ms. Stuart:

I am pleased to submit this letter of support for the Fiscal Year (FY) 2006 Legal Assistance for Victims (LAV) grant application submitted by the Travis County Domestic Violence and Sexual Assault Survival Center (d/b/a SafePlace) to your office. For 32 years, SafePlace, located in Austin, Texas, has provided innovative and effective services to women, children, and men affected by rape, sexual abuse, and domestic violence. The organization also offers education, prevention, training, and related services to assist in addressing and preventing these crimes.

SafePlace is the lead agency for the Civil Legal Assistance (CLA) program, the collaborative project for which LAV funds are requested. The other partners in the program demonstrate the broad community support for the good work of SafePlace and the goals of the LAV program: the Women's Advocacy Project, Inc.; University of Texas School of Law Domestic Violence Clinic; Volunteer Legal Services of Central Texas; Political Asylum Project of Austin; and Catholic Charities of Central Texas Office of Immigrant Concerns.

In the CLA program, SafePlace and its partners use a coordinated, streamlined system to refer domestic and sexual violence victims to the most appropriate partner agency for legal services. The program also provides training and education to increase the number of volunteer attorneys and social service providers to help them better assist victims of violence with civil legal issues. Legal services are critical to the safety and well-being of people whose lives are at risk due to sexual and domestic violence. The CLA program has served victims of violence in Travis County with funding from the Office of Violence Against Women since 1999, and if FY 2006 LAV funding is awarded, CLA will expand its services to also include neighboring, rural Williamson County.

I appreciate your full and fair consideration of SafePlace's LAV grant application. Should you have any questions about this invaluable program or my support for it, please contact me. Additionally, I would like to be advised of your funding decision via phone (202-225-4865) or fax (202-225-3073).

Sincerely,

Lloyd Doggett

Lloyd Doggett

LLOYD DOGGETT
25TH DISTRICT, TEXAS

COMMITTEE ON
WAYS AND MEANS

SUBCOMMITTEE ON
HEALTH

Congress of the United States
House of Representatives

WASHINGTON OFFICE:
201 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-4865

DISTRICT OFFICES:
311 NORTH 15TH STREET
MCALLEN, TX 78501
(956) 687-5921

300 EAST 8TH STREET, SUITE 763
AUSTIN, TX 78701
(512) 916-5921

E-MAIL: LLOYD.DOGGETT@MAIL.HOUSE.GOV
www.house.gov/doggett/
1-956-916-5921

FACSIMILE FROM THE OFFICE OF
CONGRESSMAN LLOYD DOGGETT
Twenty-Fifth District, Texas
Fax: (202) 225-3073
Phone: (202) 225-4865

TO: Didre Stuart DATE: 1/31 FAX #: 202-307-3911

OFFICE/ORGANIZATION: Director, US DoJ OVW

FROM:

- [X] Celeste Drake
- [ ] Jess Fassler
- [ ] Juan Garcia
- [ ] Luke George
- [ ] Michelle Levy-Benitez
- [ ] Michael Mucchetti
- [ ] Betsy Quilligan
- [ ] Oscar Quiñones
- [ ] Caryn Schenewerk
- [ ] Intern: _____

NUMBER OF PAGES (including cover sheet): 3

COMMENTS:

Please consider these two letters of support from Rep. Doggett. Original to follow via U.S. Mail. Thanks,
Celeste Drake

PRINTED ON RECYCLED PAPER

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/31/2006
DATE RECEIVED: 02/13/2006
WORKFLOW ID: 952694
DUE DATE: 03/01/2006

FROM: The Honorable Harold E. Ford, Jr.
U.S. House of Representatives

Washington, DC 20515

TO: OJP

MAIL TYPE: Congressional Grants

SUBJECT: (Rec'd from OJP) Supporting the grant application submitted by Crichton College for $399,889, over two years, under the Grants to Reduce Violent Crimes Against Women on Campus.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/14/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: OASG, ODAG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Paula Stephens: 202-616-0074

952694

HAROLD E. FORD
9TH DISTRICT, TENNESSEE

COMMITTEES:
BUDGET

FINANCIAL SERVICES

SUBCOMMITTEES:
CAPITAL MARKETS, INSURANCE, AND GOVERNMENT-SPONSORED ENTERPRISES

FINANCIAL INSTITUTIONS AND CONSUMER CREDIT

Congress of the United States
House of Representatives
Washington, DC 20515–4209

OFFICES:

325 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
TEL.: (202) 225–3265
FAX: (202) 225–5663

167 NORTH MAIN, SUITE 369
MEMPHIS, TN 38103
TEL.: (901) 544–4131
FAX: (901) 544–4329

WEBSITE:
www.house.gov/ford

January 31, 2006

Diane Stuart, Director
Department of Justice
Office on Violence Against Women
800 K Street, NW, Suite 920
Washington, D.C. 20530

Dear Director Stuart:

I am writing in strong support of the grant application submitted to the Department of Justice by Crichton College for $399,889 over two years under the Grants to Reduce Violent Crimes Against Women on Campus.

The requested funding will assist the efforts of the Memphis Safe Campus Consortium (MSCC), a diverse group of four institutions of higher education dedicated to making the lives of their students safer and more fulfilling. The four urban institutions, whose enrollments include a majority population of female students and a high percentage of minority and underserved populations, include:

- Crichton College – a private, four-year, coeducational, Christian, liberal arts college.
- Rhodes College – a private, four-year, coeducational liberal arts college.
- Christian Brothers University – a private, Catholic, co-educational university.
- The University of Memphis – a public, comprehensive, metropolitan university.

Collaborating with the MSCC are the Memphis Crime Commission, the Memphis Police Department, the Shelby County Crime Victims Center, the Memphis Sexual Assault Resource Center, the Family Exchange Center, and the Crisis Center.

With the funding, the consortium partners will adopt a comprehensive program aimed at reducing violence against women on Memphis campuses. The program will include:

- on-going violence reduction programming;
- mandatory prevention and education programs about violence against women during student orientation;

- development of a training curriculum for campus safety officers with the assistance of the Memphis Police Department to effectively respond to dating violence, domestic violence, sexual assault, and stalking cases;
- development of a curriculum to train campus disciplinary boards on the means to respond effectively to charges of violence against women; and
- expansion of victims' services on campuses and in the community by promoting access to a 24-hour crisis response hotline service.

Without a safe, comforting and comfortable environment, our colleges and universities cannot accomplish their mission of educating the leaders of tomorrow. I am encouraged by the initiative shown by the MSCC to confront the serious problem of violence against women on campuses, and I enthusiastically support this funding request.

I thank you in advance for your consideration. If there is any way I can be of further assistance, please do not hesitate to contact me.

Sincerely,

HAROLD FORD, JR.

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/26/2006
DATE RECEIVED: 01/26/2006
WORKFLOW ID: 943977
DUE DATE: 02/07/2006

FROM: Chris Cook
Staff Assistant
Presidential Messages
The White House
Washington, DC 20500

TO: DOJ

MAIL TYPE: White House Messages

SUBJECT: (Fax) Attaching a letter to the President from Carl Wicklund, Executive Director, American Probation and Parole Association, Project Administrator, National Youth Court Center, requesting a letter from President Bush by 3/16/06 recognizing September 2006 as National Youth Court Month, which would be included in their National Youth Court Month Action Kit. States that the National Youth Court Center is funded by a current initiative of OJJDP. Requests that DOJ advise whether an AG or Presidential message would be appropriate by COB 2/10/2006, and to provide a draft if a presidential message is appropriate. No prior corres in ES.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
01/27/2006	For appropriate handling. Advise ES of any action taken. Office of Justice Programs

INFO COMPONENT: OAG, ODAG, OASG

COMMENTS:

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

943977

Fax to Kim Tolson @ DOJ
3 Pages Total

Memo for: Kim Tolson
Dept. of Justice
514-8588 phone
514-4507 fax

From: Chris Cook
Staff Assistant, Presidential Messages
456-5983 phone
456-2806 fax

Subject: Recommendation request for a message for **the American Probation and Parole Association – National Youth Court Month 2006.**

Date: January 26, 2006

Please find attached a request for a Presidential Message for **the American Probation and Parole Association – National Youth Court Month 2006.**

Please advise my office as to the nature of this request and **whether a secretarial or presidential message would be appropriate for this event by COB 02/10/2006. Please provide a draft if a presidential message is appropriate.**

THANK YOU!

American Probation and Parole Association

COMMUNITY JUSTICE & SAFETY FOR ALL

APPA HEADQUARTERS
c/o The Council of State Governments
P.O. Box 11910
Lexington, KY 40578-1910
(859) 244-8203 • FAX (859) 244-8001
E-mail address: appa@csg.org

January 25, 2006

George W. Bush, President
The White House
Attention: Office of Presidential Messages
1600 Pennsylvania Ave.
Washington, DC 20500

RE: National Youth Court Month, September 2006

Dear President Bush:

As Executive Director of the American Probation and Parole Association, which through a cooperative agreement with the Council of State Governments administers the National Youth Court Center (NYCC), I am writing six weeks prior to the print deadline of the *National Youth Court Month Action Kit* to request a Presidential Message recognizing **September 2006 as National Youth Court Month**. The National Youth Court Center is funded by a current initiative of the U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention (OJJDP), with additional funds from the U.S. Department of Transportation, National Highway and Traffic Safety Administration (NHTSA); and the U.S. Department of Education, Office of Safe and Drug-Free Schools.

Youth courts (also known as teen courts, peer courts and student courts) are one of the fastest growing crime intervention programs in the nation in which youth sentence their peers for minor delinquent and status offenses and problem behavior. Youth courts offer ways to engage the community in a partnership with the juvenile justice system to respond to juvenile crime and problem behavior. They can increase the awareness of delinquency issues on a local level and can mobilize community members and youth to take an active civic role in addressing the problem.

Not only are youth courts based on a philosophy of being youth-driven and youth-led, they also provide an excellent example of youth who are answering the call to public service as requested by President Bush. All youth involved in the close to 1,070 youth courts across the nation are volunteers. The theme selected for 2006 National Youth Court month is "*Correcting Crooked Paths: Youth and Communities in Partnership for Justice.*" During September 2006, youth will be planning community service projects and events to recognize the contributions youth courts make to our communities and to celebrate the accomplishments of thousands of youth court volunteers, defendants, and staff.

If possible, I would like to have the Presidential Message by March 15, 2006 in order to place a copy of it in our *National Youth Court Month Action Kit*. If we do not

receive the message by our print deadline for the Action Kit, then we would like to be able to send a copy of the message to the individuals in the National Youth Court Center's database (which includes active youth courts, programs in development stage, and other persons interested in the youth court concept) at the beginning of National Youth Court Month in September.

A greeting similar to the Presidential Greeting issued in the past for the National Youth Court Month would be greatly appreciated. If this office can be of further assistance, please feel free to contact me at (859) 244-8216, or contact the Project Director for the National Youth Court Center, Tracy Godwin Mullins at 859-244-8215 or via email at tmullins@csg.org.

Please mail the Presidential Message to:

National Youth Court Center
c/o American Probation and Parole Association
PO Box 11910
Lexington, KY 40578-1910.

Sincerely,

Carl Wicklund
Executive Director, American Probation and Parole Association
Project Administrator, National Youth Court Center

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT:
DATE RECEIVED: 01/23/2006

WORKFLOW ID: 942107
DUE DATE:

FROM: The Honorable John W. Gillis
Director, Office for Victims of Crime
Office of Justice Programs
Washington, DC 20531

TO: AG

MAIL TYPE: DOJ Invitations

SUBJECT: Inviting the AG to attend the national-level activities to commemorate National Crime Victims' Rights Week in the Nation's capital. Advising that the 4th Annual National Observance and Candlelight Ceremony will be held in the evening on 4/20/2006 and the National Crime Victims' Rights Week Awards Ceremony will be held in the afternoon on 4/21/2006. Encloses a copy of the 2006 National Crime Victims' Rights Week Resource Guide.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
01/31/2006	Forward to OAG. For OAG(Beach). Office of the Attorney General

INFO COMPONENT: OASG, ODAG, without encls.

COMMENTS:

FILE CODE:

EXECSEC POC: Shirley McKay: 202-514-5305

942107

U.S. Department of Justice

Office of Justice Programs

Office for Victims of Crime

Washington, D.C. 20531

January 2006

Dear Colleagues and Friends:

The Office for Victims of Crime (OVC) is pleased to provide you with the 2006 National Crime Victims' Rights Week Resource Guide. This year's commemoration is scheduled for April 23 to 29, 2006.

This year's theme—"Victims' Rights: Strength in Unity"—pays tribute to crime victims and survivors who, for many decades, have joined together in mutual support and advocacy to promote victims' rights and services. It also recognizes the ongoing efforts of countless victim service providers, justice professionals, and allied professionals and volunteers who selflessly dedicate their lives to helping victims of crime.

OVC's theme—"Putting Victims First"—is highlighted throughout the many components of the Resource Guide. Only when we work *together* to "put victims first" will we be successful in ensuring that *any victim* who needs assistance will receive it, and that *any victim* who needs help in exercising his or her rights will find guidance and support. This means engaging the support from *your entire community*, including justice professionals, civic leaders, interfaith communities, medical and mental health professionals, schools, and business leaders, among others.

Please take time to review this Resource Guide in its entirety so you can ensure maximum use of its many valuable victim and public awareness resources. It is also helpful to coordinate your efforts with crime victims and survivors, victim service providers, and justice and allied professionals in your community and state to commemorate 2006 National Crime Victims' Rights Week and truly promote "strength in unity."

I would also like to invite you to join our wonderful national-level activities to commemorate National Crime Victims' Rights Week in our Nation's capital. The 4th Annual National Observance and Candlelight Ceremony will be held on the evening of Thursday, April 20th, and the National Crime Victims' Rights Week Awards Ceremony will be held on the afternoon of Friday, April 21st. I hope you, your colleagues and the victims you serve can join us for these special events.

The Office for Victims of Crime is grateful to Justice Solutions, Inc. for developing the 2006 Resource Guide, a component of the National Public Awareness and Education Campaign coordinated by Justice Solutions with support from OVC.

The staff of OVC joins me in sending our best wishes to you and your colleagues as you plan and implement your 2006 National Crime Victims' Rights Week activities.

Sincerely,

John W. Gillis

John W. Gillis
Director

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 12/30/2005
DATE RECEIVED: 01/06/2006
WORKFLOW ID: 933361
DUE DATE: 01/31/2006

FROM: The Honorable Hilda L. Solis
U.S. House of Representatives

Washington, DC 20515

TO: DOJ

MAIL TYPE: Congressional Invitations

SUBJECT: Announcing that she will be sponsoring a free Grants Seminar on 1/23-1/24/2006 between 9 a.m. and 12 p.m., at the El Monte City Hall East Council Chambers, 1133 Valley Boulevard, El Monte, CA. Requesting that DOJ participate as a speaker at this event on 1/23/2006 and highlight some of DOJ's new programs and/or popular grants.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
01/10/2006	For appropriate handling. Advise ES of any action taken. Office of Justice Programs

INFO COMPONENT: COPS, OLA, ODAG, OASG

COMMENTS:

FILE CODE:

EXECSEC POC: Yvonne Williams: 202-514-5849

HILDA L. SOLIS
32ND DISTRICT, CALIFORNIA
website: www.house.gov/solis

COMMITTEE ON
ENERGY & COMMERCE

SUBCOMMITTEE:
RANKING MEMBER, ENVIRONMENT AND
HAZARDOUS MATERIALS

CHAIR, CONGRESSIONAL HISPANIC CAUCUS
HEALTH TASK FORCE

DEMOCRATIC VICE CHAIR,
CONGRESSIONAL CAUCUS FOR WOMEN'S
ISSUES

Congress of the United States
House of Representatives
Washington, DC 20515-0531

☐ 1725 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-5464
FAX: (202) 225-5467

☐ 4401 SANTA ANITA AVENUE
SUITE 211
EL MONTE, CA 91731
(626) 448-1271
FAX: (626) 448-8062

☐ 4716 CESAR CHAVEZ AVENUE
BUILDING A
EAST LOS ANGELES, CA 90022
(323) 307-9904
FAX: (323) 307-9906

933361

December 30, 2005

U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

To Whom It May Concern:

I am pleased to announce that I will be sponsoring a free **Grants Seminar** for the cities and community based organizations in the 32nd District. The event will be held on January 23rd and 24th, 2006 between 9:00 am and 12:00 p.m. at the El Monte City Hall East Council Chambers, located at 1133 Valley Blvd. El Monte, CA 91731. The purpose of this event is to provide information to local community based organizations and city representatives regarding grant funding, such as applying for grants, writing grant proposals and gaining letters of support. We would also like for you to highlight some of your new programs and/or popular grants.

I would appreciate your participation as a speaker for the Department of Justice at this event on January 23rd, 2006. I feel that you and your Agency have invaluable information to offer my constituents.

Please contact Anela Freeman in my El Monte office (626-448-1271) to confirm your participation in this event.

Sincerely,

Hilda L Solis

HILDA L. SOLIS
Member of Congress
HLS:af

Congresswoman Hilda L. Solis

INVITES YOU TO ATTEND:

Grant Resource SEMINAR

January 23 & 24, 2006
9:00 a.m.—12:00 p.m.
Location: El Monte City Hall East
Council Chambers
11333 Valley Blvd.
El Monte, CA 91731

Interested in applying for federal grants?
Want to know how to write a grant proposal?
Curious about what Congressional resources are available?

Come learn how you can apply for federal and private funding grants.

SAVE THE DATE!

****Space is Limited****
Please RSVP to Anela Freeman at (626-448-1271)

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/23/2006
DATE RECEIVED: 01/30/2006
WORKFLOW ID: 945286
DUE DATE: 02/14/2006

FROM: The Honorable Joseph R. Biden, Jr.
United States Senate

Washington, DC 20510-0001

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: (Rec'd from OJP) Supporting the application submitted by the Widener University School of Law (WUSL), in coordination with Delaware Volunteer Legal Services (DVLS) and Child Incorporated, for funding under OVW's Legal Assistance for Victims Grant Program to establish a Center on Victim Education, Advocacy and Research (COVEAR).

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
01/31/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: OASG, ODAG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Paula Stephens: 202-616-0074

945286

JOSEPH R. BIDEN, JR.
DELAWARE

201 RUSSELL SENATE OFFICE BUILDING
WASHINGTON, DC 20510-0802
(202) 224-5042
www.senate.gov/~biden

United States Senate

JUDICIARY COMMITTEE
SUBCOMMITTEE ON
CRIME, CORRECTIONS AND VICTIMS' RIGHTS
RANKING MEMBER

FOREIGN RELATIONS COMMITTEE
RANKING MEMBER

CAUCUS ON INTERNATIONAL
NARCOTICS CONTROL
CO-CHAIRMAN

January 23, 2005

Ms. Diane M. Stuart
Director
Office on Violence Against Women
800 King Street, NW
Washington, DC 20530

RE: Center on Victim Education Advocacy and Research (COVEAR)

Dear Ms. Stuart:

I am writing to express my strong support for Widener University School of Law's (WUSL), in coordination with Delaware Volunteer Legal Services (DVLS) and Child Incorporated, application for the Office on Violence Against Women's Legal Assistance for Victims Grant Program. Through this partnership and program, Widener University will establish a Center on Victim Education, Advocacy and Research (COVEAR).

Delaware Volunteer Legal Services is the pro bono arm of the Delaware State Bar Association and is located on Widener University's campus. Widener works very closely with the legal community throughout the state of Delaware. Child, Incorporated is a nonprofit organization working to provide services to victims of domestic violence and sexual assault. With the expertise and close working relationship between these three entities, the Center on Victim Education, Advocacy and Research will be able to reach out to victims of crime and assist in many aspects.

COVEAR will allow for both law students and legal professionals to receive the proper education and necessary training to be able to address and respond to the ill effects and severe trauma that victims of domestic violence and sexual assault experience. This training will allow for these legal advocacies to have a better understanding of the emotional dynamics associated with domestic violence and distinguish the best approaches to working with these victims. COVEAR will be a statewide initiative, offering symposiums, seminars and training sessions throughout Delaware, to better ensure the protection of the victim's needs and security through the legal process, while increasing the number of pro bono attorneys who are willing to take on these sensitive cases.

24 NORTH WEST FRONT STREET
WINDSOR BUILDING, SUITE 101
MILFORD, DELAWARE 19963-1440
(302) 424-8090

1105 NORTH MARKET STREET
SUITE 2000
WILMINGTON, DELAWARE 19801-1233
(302) 573-6345

The creation of COVEAR is a wonderful and worthwhile inclusion into the curriculum at Widener University, and I wholeheartedly support the efforts of all involved. I appreciate your consideration of this worthy endeavor and if you have any questions regarding my support for this proposal, please contact Sarah Gallagher in my office at (302) 573-6345.

Sincerely,

Joseph R. Biden, Jr.
United States Senator

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/12/2006
DATE RECEIVED: 01/25/2006
WORKFLOW ID: 943255
DUE DATE: 02/14/2006

FROM:
Mr. Dave Haynik
Hate Crimes Project Coordinator, VOCA Clinician
Family Service of Greater New Orleans
2515 Canal Street, Suite 201
New Orleans, LA 70119

TO: AG

MAIL TYPE: General

SUBJECT: Advising the AG of the programs, VOCA and the Hate Crimes Project, at the Family Service of Greater New Orleans which are funded by the Louisiana Commission on Law Enforcement and Administration of Criminal Justice. States that due to recent events, both programs are temporarily located at their West Bank office, and that they are hoping to be back at their Canal Street office within the next month. They will continue to keep the AG informed of their correct contact information. Ltr also signed by Dawn Barras, VOCA Project Coordinator, Clinician. See WF 826558.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
01/31/2006	For component response. Office of Justice Programs

INFO COMPONENT: OAG, ODAG, OASG, FBI, CRT

COMMENTS:

FILE CODE:

EXECSEC POC: Paula Stephens: 202-616-0074

9432855

FAMILY SERVICE
OF GREATER NEW ORLEANS

NEW ORLEANS
2515 Canal Street #201
New Orleans, LA 70119
504-822-0800
FAX 504-822-0831
family@fagno.org
EAST JEFFERSON
504-733-4031
WEST BANK
504-361-0926
ST. BERNARD
504-271-3781
EAST ST. TAMMANY
985-641-7185
WEST ST. TAMMANY
985-893-1025
ORLEANS PARISH DRUG COURT
504-821-1191

Thursday, January 12, 2006

United States Department of Justice
950 Pennsylvania Ave NW
Washington DC, 0

Dear Alberto Gonzales,

We would like to take this opportunity to inform you of the programs at Family Service of Greater New Orleans funded by the Louisiana Commission on Law Enforcement and Administration of Criminal Justice. The VOCA program and the Hate Crimes Project are both functioning as before. Below is a list of the services that can be provided by both programs.

The VOCA program provides free counseling services for those who have been victims of crime or have witnessed a crime. The VOCA program also provides agencies and organizations with educational presentations on trauma, coping skills and other relevant topics. If you would like to make a referral to this program, receive services or talk about having a presentation at your agency, please contact Dawn Barras, M.Ed or Dave Haynik, GSW at (504) 361-0926.

The Hate Crimes Project provides organizations and agencies with materials, education and referrals for victims, professionals and the general public. The Hate Crimes Project is an outreach program and relies on collaborations with other agencies to educate professionals and clients on

the impact of hate crimes on the community. All services of the Hate Crimes Project are free. If you would like to discuss ways in which this program can work with you, please call Dave Haynik, GSW at (504) 361-0926.

Due to recent events, both programs are temporarily located at our West Bank office. We are hoping to be back at our Canal Street within the next month. We will continue to keep you informed of our correct contact information. Also, if you had a presentation previously scheduled, please contact us to reschedule. Thanks for your flexibility and understanding during these trying times. Also, please keep Family Service of Greater New Orleans in mind for any counseling needs that your organization may have.

Sincerely,

Dave Haynik, GSW
Hate Crimes Project Coordinator, VOCA Clinician

Dawn M. Barras, M.Ed., NCC

Dawn Barras M.Ed, NCC
VOCA Project Coordinator, Clinician

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 06/21/2005 **WORKFLOW ID:** 826558
DATE RECEIVED: 06/29/2005 **DUE DATE:**

FROM: Mr. Dave Haynik
Family Service of Greater New Orleans
2515 Canal Street, Suite 201
New Orleans, LA 70119-6489

TO: AG

MAIL TYPE: General

SUBJECT: Advising the AG of "The Hate Crimes Project," a new program at Family Service of Greater New Orleans which provides various services that may benefit DOJ and other organizations. The Project was made possible by a grant from the Crime Victim Assistance Program. Advises that they would like to set up a presentation or services and requests that DOJ refer Family Service to other organizations that can benefit from their services.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
07/01/2005	For component response. Office of Justice Programs

INFO COMPONENT: OAG, ODAG, OASG, FBI, CRT

COMMENTS: 7/15/2005: OJP responded by ltr dtd 7/14/05.

FILE CODE: AG

EXECSEC POC: Shirley McKay: 202-514-5305

NeLC

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/14/2006
DATE RECEIVED: 01/24/2006
WORKFLOW ID: 942533
DUE DATE: 02/14/2006

FROM: Mr. Beverly Tran
497 Prentis, #2
Detroit, MI 48201

TO: AG

MAIL TYPE: General

SUBJECT: Offering the State of Michigan her expertise as a policy analyst by submitting the enclosed paper entitled, "Policy Impacts In Wayne County Foster Care: A Time Series Analysis," a sophisticated model which will act as a lens to better view the inner workings of the current state of affairs in the foster care system in the state of Michigan. Advising that she looks forward to participating in discussions and decisions that will make Michigan an exemplary model for the rest of the country.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
01/31/2006	For appropriate handling. Advise ES of any action taken. Office of Justice Programs

INFO COMPONENT: OAG, ODAG, OASG

COMMENTS:

FILE CODE:

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United States Department of Justice
The Honorable Alberto R. Gonzales, Attorney General
950 Pennsylvania Ave., NW
Washington, D.C. 20530

January 14, 2006

Honorable Gonzales:

Across the nation, challenges in the foster care system have only been addressed from a qualitative aspect. At this time, I offer the State of Michigan my expertise as a policy analyst by submitting a sophisticated model which will act as a lens to better view the inner workings of the current state of affairs in the foster care system.

I, sincerely, look forward to participating in discussions and decisions that will make Michigan an exemplary model for the rest of the country. I shall continue to present any significant findings of my future research.

Regards,

Beverly Tran

Enclosed: 1

Policy Impacts
In Wayne County Foster Care:
A Time Series Analysis

Beverly Tran

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The public welfare is therefore that which fosters a secure life both universally and in each person. There is nothing worthwhile in human life which is not advantageous for a secure life.

John of Salisbury, Policraticus, c.1178

I. ABSTRACT

In the last year, much attention has been focused on the numbers of children of color entering foster care in Wayne County, Michigan. The purpose of this study is to analyze the effects of the implementation of Personal Responsibility Opportunity Work Reconciliation Act (PROWRA)[1], 1996 and the relationship between economic hardships and the number of children entering foster care in Wayne County, Michigan over the time period of 1999 through 2004. A model will be constructed by co-opting Canadian Children's Welfare analytical techniques and observations of PROWRA enhancements to establish the correlation between poverty in Wayne County for the same period Wayne County Court-Administered County Child Care Fund: Foster Care Gross Expenditures October 1998 - September 2004[2].

It is hypothesized that a strong relationship exists between poverty and the numbers of children entering foster care. The goal of this analysis is to construct a model that will help Michigan assess, at the local level, the relationship between poverty and number of children entering foster care. This analysis was designed around a report by the State of Michigan Department of Human Services that led to the creation of a state task force, "to find out why black children...account for only for only 17.5 percent of Michigan's 2.6 million children overall but make up for 51.9 percent of children in the state's foster care system.[3]"

II. INTRODUCTION

The purpose of this monograph is to analyze systemic impacts on the number of children in foster care and in no way will address other factors pertaining to an individual's psychological challenges or illegal activities. The 1986 amended Title IV-E of the Social Security Act required states to develop a system to collect and report adoption and foster care data of child welfare agencies. It was not until 1993 that legislation was passed that allowed states the opportunity to receive enhanced funding through the Title IV-E program of the Social Security Act to plan, design, develop, and implement Statewide Automated Child Welfare Information System (SACWIS)[4] which supported the Adoption and Foster Care Analysis Reporting System (AFCARS)[5]. AFCARS was created in 1994 due to the lack of national information available on children in foster care. It was not until PROWRA extended funding through the fiscal year 1997 for SACWIS did data under the auspices of state child welfare agencies begin to be maintained. Under the "Adoption and Safe Families Act of 1997" adoption incentives and funding for technical assistance (AFCARS) was reallocated through PROWRA addendum 1997 from Title IV-B to Title IV-E funding. Therefore, there is no

complete reporting, nor accurate data reporting of foster care for Wayne County, Michigan prior to1998.

Even though the number of welfare recipients has decreased in Michigan by transitioning individuals from welfare to work, the numbers of unemployed steadily increased[6] as well as the number of children entering foster care due to the, "...failure of caretakers to provide for a child's fundamental needs. Although neglect can include children's necessary emotional needs, neglect typically concerns adequate food, housing, clothing, medical care and education"[7] This has impacted the numbers of children entering Wayne County foster care as a result of non-eligibility for social servicing. This is an issue that has been coined as "back-end funding," where medical, housing, food, special needs, and child care assistance is not accessible until a child has entered the system.

The focus of Michigan's Project Zero[8] was to decrease the number of welfare recipients by increasing the means tests for eligibility. This fueled a growing segment of the Wayne County population which can be named as "the working poor" who are mainly populations of color. Addressing another facet of the purported positive correlation between poverty and children entering foster care is the theoretical issue of welfare, itself. The actual application for social assistance becomes a legal admission of guilt for abuse and neglect. Because the parent is unable to provide the necessary needs of the child, the child automatically is considered to be under the auspices of state protection; therefore, any subsequent allegation of inability to provide the necessary needs of the child, thereafter, is regarded as a preponderance of factual evidence for abuse and neglect.

In September 2005, Detroit became the nation's most impoverished major city[9] with 47.8% of children living below the federal poverty level.[10] Children of color account for only 25.4% of Michigan's 2.6 million children overall but reflect 57% of the children in foster care.[11] The numbers for children of color in Wayne County foster care have been reported by numerous sources to be above the level of 90%, but the question is: Why?

III. METHODOLOGY

Because the data examined is time-series in nature, it must be noted that autocorrelation among the data will be evident in monthly total amounts for any given time length of observation and are not independent from the previous observation(s). The interrupted time-series model in this data analysis is to examine the intervention effects of policy changes from PROWRA enhancements. It is not intended to provide a complete explanation of time-series analysis nor dramatic results to achieve the goal of eliminating any disparities in the state's foster care system.

Hypothesis 1: An increase in the numbers of children entering the Wayne County Foster Care system is not associated with an increase in the number of persons impoverished in Wayne County.

$$H1_0: \mu = 0; H1a: \mu \neq 0$$

Regression analysis using SPSS will be conducted to determine if there is a correlation between poverty and the number of children entering foster care. For the purposes of this study, unemployment is designated as the poverty component and the number of children in foster care system is estimated using the Court Administrated Child Care Fund Gross Expenditure.[12] The poverty and foster care components will be treated as econometric variables. Cases that fall outside 2 standard deviations of the regression line will then be investigated to see what Public Acts, laws, and/or policies of PROWRA enhancements functioned as a major interruption in the series, Court Administrated Child Care Fund Gross Expenditure: October 1998 through September 2004.

If cases are identified, a second regression will be run. The purpose of running a second regression with a dummy variable is to test each case that was found to be greater than 2SDs from the original regression line to establish which, if any, had a significant effect on the model estimates, and which case might provide the best evidence to be used as an intervention in the time series.

To test possible selection bias in the correlation of the error term for the measured variables, the gross expenditures and poverty, a two-stage least squares (2SLS) regression will be performed. If the first stage does not show a decline in the goodness of fit for the independent variable of unemployment, it will not present itself as an obstacle to continue into stage 2.

2SLS method will be performed for extending the regression. It is assumed, for purposes of constructing this model to investigate reasons for the significant number of children in Wayne County foster care, that the disturbance term of gross expenditures is correlated with the causes of poverty, (i.e. cost of living increase) which violates Ordinary Least Squares (OLS). The regression data will be described and removed before the 2SLS is analyzed.

The purpose of including 2SLS in the model building process is twofold: (1) to investigate the possibility if some of the data is cointegrated. If there is some linear combination of the time series that is stationary, for instance, PROWRA enhancements that led to a reduction in federal block grants which allow states to subsidize child care would tend to be roughly constant to the proportion of individuals with children who were in poverty. (2) To conduct a final goodness of fit test for independence for the dummy variable, the case with the most significant policy impacts, which fell 2SDs outside the initial regression line, that will function as an intervention variable for the time series. This process will lead into the construction of a second area of analysis:

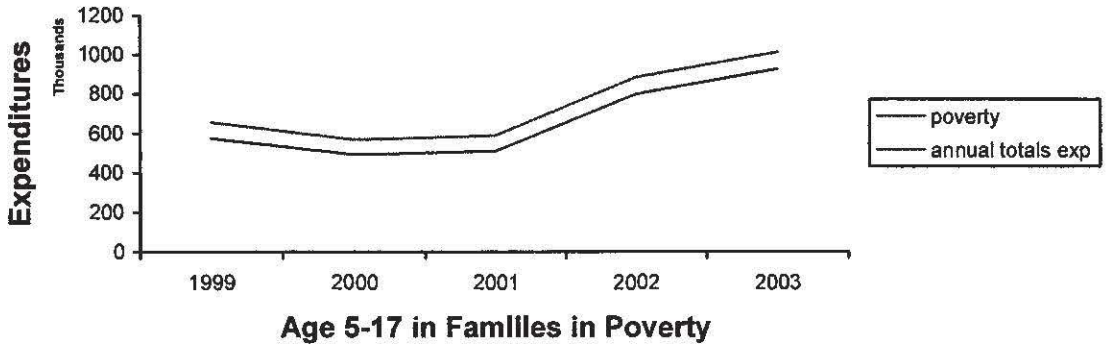
> *Hypothesis 2:* The implementation of the 1996 PROWRA has generated a trend in the number of children entering the Wayne County Foster Care system.
>
> $H2_0$: $\mu = 0$; H2a: $\mu \neq 0$

The series of Wayne County Court Administrated Child Care Fund gross expenditures for the fiscal years 1999-2004 will be analyzed as an interrupted time series to identify any trend, seasonality, and random error. Model specification will be the identification of ARIMA parameters: Integrated component (d), Autoregressive component (p), Moving average component (q).

IV. ANALYSIS

Initial observation in the relationship between the number of children entering Wayne County, signified by the annual Court Administrated Child Care Fund: Foster Care Gross Expenditures in Wayne Count and Wayne County children, age 5-17, in families in poverty (Table 1)[13] indicated an extreme and highly significant, strong correlation. A simple regression was performed which resulted in an R = .9324. Due to the small sample size, 5, an alternative measurement of poverty was sought. It was determined that unemployment would best interpolate poverty by providing a reflection of the geographic economy for Wayne County.

Table 1: Relationship between Court Administrated Child Care Fund: Foster Care Gross Expenditures and Poverty in Wayne County, Michigan: 1999-2004

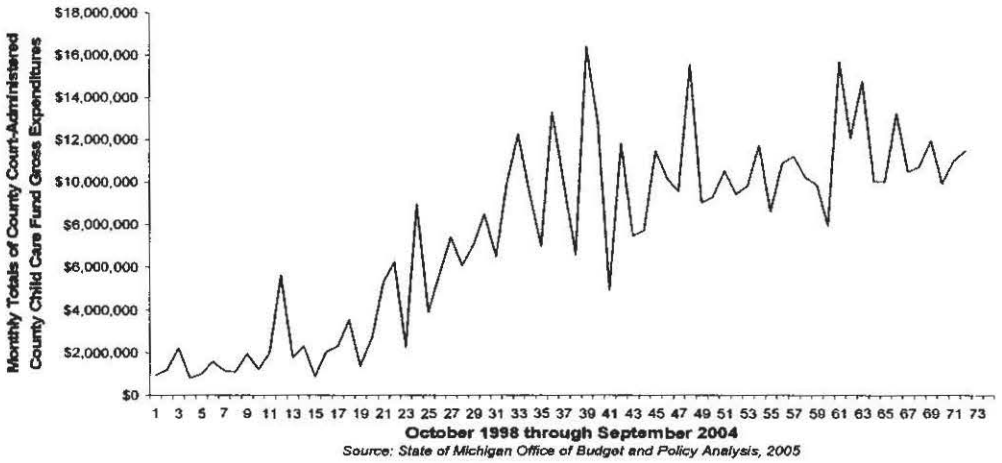


Source: U.S. Census Bureau, Small Area Income and Poverty Estimates, 2005
State of Michigan Office of Policy and Budget, 2005

Dependent Variable: The variable, Wayne County Court-Administered County Child Care Fund: Foster Care Gross Expenditures, October 1998-September 2004, shall be, henceforth, referred to as "grossexp" (TABLE 2).

TABLE 2: Line Graph for Dependent Variable (grossexp)

Table 1: Wayne County Court-Administered County Child Care Fund: Foster Care Gross Expenditures October 1998 - September 2004



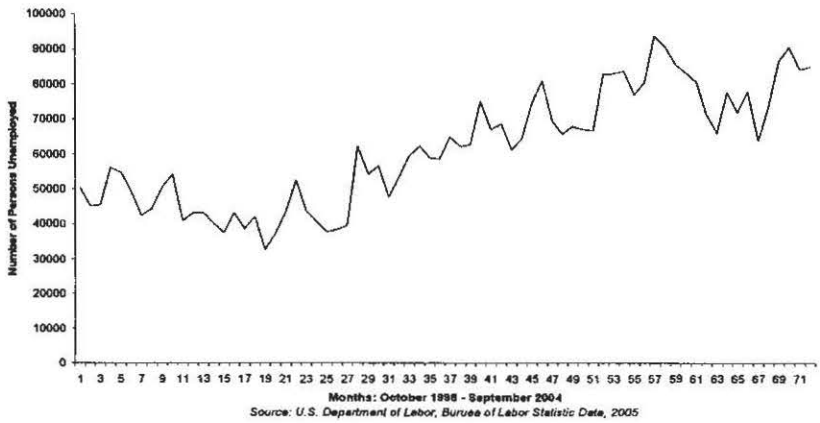
Source: State of Michigan Office of Budget and Policy Analysis, 2005

Data were extracted from Michigan Family Independence Agency (now known as the Department of Human Services) Publication 292, 2005 by the Office of Budget and Policy Analysis. Initial description of the grossexp histogram found it to have an approximately normal distribution (M=7,533,297.6528, SD= 4,371,828.56099, Skewness = -.101, Range = 15,600,936.00, Minimum = 805,959.00 Maximum = 16,406,895.00, $\sum$= 542,397,431.00, n=72).

Independent Variable: Data for the variable, Wayne County Unemployment Monthly Totals, were extracted from the U.S. Department of Labor, Bureau of Labor Statistics Data, for the October 1998-September 2004 series and were not seasonally adjusted. The monthly totals for Wayne County unemployment series will be termed as the variable, "poverty" for the purposes of this analysis (TABLE 3).

TABLE 3: Line Graph for Independent Variable (unemploy)

Table 2: Wayne County Unemployment Monthly Totals: October 1998-September 2004



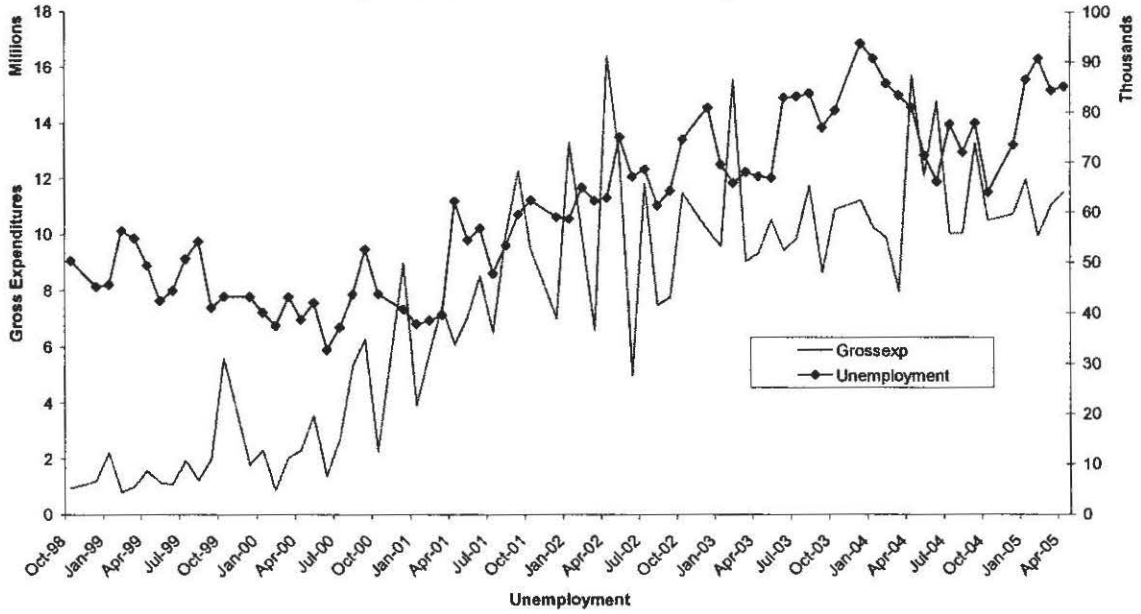
Source: U.S. Department of Labor, Bureau of Labor Statistic Data, 2005

A histogram for poverty showed an approximately normal distribution (M=61228.03, SD=16530.203, Skewness=.133, Sum=4,408,418, Range=61,046, Minimum=32,633, Maximum=93,679, n=72). It must be noted that unemployment cannot be calculated as an average rate due to the declining population in Wayne County. Annotations by the U.S. Department of Labor, Bureau of Labor Statistics have some preliminary monthly estimates, reflecting 2000 based geography, new model controls, 2000 Census inputs, and methodologies on federal and state levels, with revisions pending.[14]

Visual analysis of the relationship between grossexp and poverty variables demonstrated a parallel path for each (Table 4). Collectively, grossexp and poverty will be referred to as "Monthly Foster Care Data".

TABLE 4: Line Graph for Trend Relationship

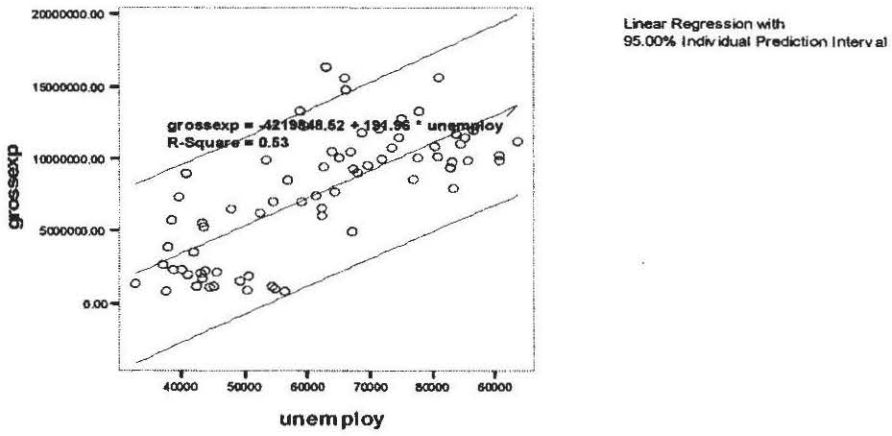
Relationship of Trend for Wayne County Court Administrated County Child Care Fund: Foster Care Gross Expenditures and Unemployment: October 1998 - September 2004



Source: State of Michigan Office of Budget and Policy Analysis, 2005
U.S. Department of Labor, Bureau of Labor Statistics Data,2005

Regression: A linear regression of grossexp against poverty was run with a 95% Individual Prediction Interval. A strong, positive correlation was found ($r=.726$, $df=70$, $p<.05$), indicating a significant linear relationship between monthly totals of poverty and the Foster Care Gross Expenditures (TABLE 5).

TABLE 5: Scatterplot of Linear Regression of Monthly Foster Care Data



A visual examination of this graph suggest that there is evidence of a strong linear relationship between an increase in the monthly poverty totals and child care court administrated expenditures in Wayne County.

TABLE 6: Results of OLS Linear Regression for Monthly Foster Care Data

Analysis of Variance:

Multiple *R*	.726
R Square	.527
Adjusted *R* Square	.520
Standard Error	3,028,796.09

	df	Sum of Squares	Mean Square
Regression	1	7.1E+014	7.714E+014
Residual	70	6.4E+014	9.174E+012
F = 77.926		Sig F < .001	

----------Variables in the Equation----------

Variable	B	SE B	Beta	*t*	*Sig.* t	95%CI_L	95%CI_U
Constant	-4,219,849	1,379,431		-3.061	.003	-6,969,043.13	-1,470,653.92
Poverty	191.957	21.745	.726	8.828	.000		

52.7% of the variation in the linear analysis is accounted for in poverty. Regression for the standardized predicted residual (M=.000, SD=1.00, n=72) and standardized residuals (M=.000, SD=.993, n=72) proved to be homoscadastic (TABLE6).

OLS Linear Regression interpretation: The prediction equation that describes the relationship between the number of children in foster care and poverty is

$$y_{hat} = -4{,}219{,}849 + 191.957x$$

Every additional person in unemployed in Wayne County is associated with a $191.96 increase in Wayne County Court Administrated County Child Care Fund: Foster Care Gross Expenditures. A better understanding into the relevance of this interpretation can be put differently; bi-weekly total payment rates for a youth placed in foster family care for ages 0-12, $199.36[15] and the Wayne County Court-Administrated County Child Care Fund daily average per child of $194.23. Therefore, more relative understandings into the interpretation of the relationship can be stated: every additional person unemployed in Wayne County is associated with a two week length of stay for a youth placed in foster family care for ages 0-12, and/or every additional person unemployed in Wayne County is associated with a Court Administrated County Child Care Fund: Foster Care Gross Expenditures daily average per child of $194.23[16].

Casewise Diagnostics: Cases, #36 (September 2001=2.069), #39 (December 2001=2.825), #48 (September 2002=2.361), and #63 (December 2003=2.087), were identified to be greater than 2 SD's (1.986) from the regression line (TABLE 7).

TABLE 7: Results of OLS Linear Regression Foster Care Data (Cases > 2SDs)

Casewise Diagnostics:				
Case #	Std. Residual	Grossexp	Predicted Value	Residual
36	2.069	13306247	7040922.7	6265324
39	2.825	16406895	7849829.4	8557066
48	2.361	15561463	8410979.5	7150543
63	2.087	14781247	8461020.3	6320227

For cases #36 and #39, The 106th Congress of January, 24, 2000 passed the "Strengthening Abuse and Neglect Courts Act of 2000"[17]. Basically, the Act provided grants (1) to state courts and local courts to automate the data collection and tracking of proceedings in abuse and neglect courts (SACWIS) and (2) to reduce pending backlogs of abuse and neglect cases to promote permanency for abused and neglected children in state and local courts, and (3) to expand the court-appointed special advocate program in underserved areas. Simultaneously, Michigan passed Public Acts 46[18] and 491[19] that restructured probate court to expedite the hearing of child abuse and neglect cases and substantially increased funding to abuse and neglect courts. This same Congress also passed "The Child Abuse Prevention and Enforcement Act"[20]. Authorizations were made to state child welfare agencies, organizations, and programs that "engaged in the assessment of risk and other activities related to the protection of children, including protection against child sexual abuse, and placement of children in foster care". Much of the funding went to increased awareness programs and expansion of staffs. Michigan implemented these acts at the end of the fiscal year of 2000, September 2001, #36.

In January 2001 Michigan passed the amendment to the Probate Code of 1939 Act 288 of 1939 that set a timeline for Termination of Parental Rights as 12 months[21].

The federal government had already set a timeline that ranged from 15 to 22 months for Termination of Parental Rights to be filed. Michigan strongly departed from federally established policy for family preservation by severely reducing the timeframe for parents to obtain assistance for reunification. Another factor that might be a reactionary effect to this case is the implementation of the Electronic Transfer Benefit (EBT) program that came under federal scrutiny in 2002. The USDA report[22] cited areas of program improvements for the assessed period of September thorough December 2001.

Case #63 might be a reactionary effect to the "Keeping Children and Families Safe Act of 2003", June 23 2003, where the 108th Congress increased grants to states and public or private agencies and organizations for programs relating to the investigation and prosecution of child abuse and neglect cases. Also, during this time period, the State of Michigan began pilot programs to reduce the numbers of children entering the system because it was on Tier 2 for Program Improvement Plans and had incurred severe financial penalties for not meeting AFCARS benchmarks. A major shift to kinship care, where immediate relatives care for children with no financial assistance, reduced the financial burdens of the state and county.

Since this was the first time in many years that Detroit did not reach its mark in the 2000 Census as a major city with a population over 1,000,000, a large amount of federal monies were cut from the Wayne County budgets, numerous Michigan FIA programs funded by federal Block Grants were cut, and Wayne County's FIA Project Zero (whose goal was to follow mandates of PROWRA to reduce the roles of welfare recipients). There were dramatic economic conditions that took place in Wayne County in 2001 that resulted in the increased poverty.

After researching the legislative significance of the four aforementioned, diagnosed cases, the one that contained the greatest PROWRA enhancements, as well as the second highest SD (2.069), was #36. Cases prior to September 2001 were coded (0) and cases post were coded (1). The inclusion of this variable in the model building process was to test model fit for the identified case (lag 36) in becoming the intervention variable for analysis of the time series. When grossexp was regressed against case #36 and poverty, it demonstrated the greatest impact of the four identified cases, but was extremely biased in results ($R = .019$, $R^2 = .000$, $n=36$), with no significance. Parsimony of the model supported the deletion of the poverty variable, and the regression was rerun (TABLE 8).

TABLE 8: Results of Linear Regression for Grossexp against (Dummy Variable)

Analysis of Variance:

Multiple *R*	.766
R Square	.587
Adjusted *R* Square	.581
Standard Error	2829515.50
R Square Change	.587

Regression	1	8.0E+014	7.966E+014
Residual	70	8.006E+012	8.006E+012

F Change = 99.496 Sig. F < .001

Variables in the Equation

Variable	B	SE B	Beta	*T*	Sig. *t*	95%CI_L	95%CI_U
Constant	4,113,375	478,275.4		8.600	.000	315948.48	5067264.95
#36	6,654,985	667,180.6	.766	9.975	.000	532435.33	7985635.02

The results of linear regression for grossexp against case #36 was significant (R^2=.587, F<.001). The prediction equation for months prior to September 2001 is:

$$Y_{hat} = 4{,}113{,}375 + 6{,}654{,}985(0).$$

For the months beginning with September 2001:

$$Y_{hat} = 4{,}113{,}375 + 6{,}654{,}985(1).$$

2SLS: To test possible selection bias in the correlation of the error term for the measured variables, grossexp and employ, a 2SLS regression was performed. Grossexp was regressed against the instrumental variable and explanatory variable, employ (TABEL 9). The first stage showed slight decline in the goodness of fit for the independent employ but did not present itself as an obstacle to continue into stage 2.

TABLE 9: 2SLS Equation 1 Analysis of Variance

Multiple *R*	.72580	
R Square	.52679	
Adjusted *R* Square	.52003	
Standard Error	3028796.08916	

	df	Sum of Squares	Mean Square
Regression	1	7.1E+014	7.1E+014
Residual	70	6.4E+014	9173605749714

F = 77.92600 Sig F < .0000

Variables in the Equation

Variable	B	SE B	Beta	*t*	*Sig.* t
Constant	-4219848.5247	1379431.334		-3.061	.0031
unemploy	191.956962	21.745163	.725803	8.828	.0000

In stage 2 of 2SLS, the estimated probability of selection computed in stage 1, now named as grossexp2, is used as an independent variable. The OLS regression was run with the actual dependent variable, grossexp, with the independents of grossexp2 and the dummy variable. Unemploy was not included in the regression because of the assumption of multicollinearity. The OLS coefficient for the grossexp2 was not significant at the .05 level and the regression coefficients were similar for the dummy variable in the two regressions (TABLE 10); therefore, it was concluded that selection bias was not a problem. It should be noted that if the level of significance is increased to .10, it may lead to evidence of selection bias. The OLS coefficients were retained for analysis of the time series.

The purpose of including 2SLS in the model building process is twofold: (1) to investigate the possibility if some of the data is cointegrated. If there is some linear combination of the time series that is stationary, for instance, PROWRA enhancements that led to a reduction in federal block grants which allow states to subsidize child care would tend to be roughly constant to the proportion of individuals with children who were unemployed. (2) to conduct a final goodness of fit test for independence for the dummy variable to function as an intervention variable for the time series.

TABLE 10: 2SLS Equation 2 Analysis of Variance

Multiple *R*	.779		
R Square	.607		
Adjusted *R* Square	.596		
Standard Error	2779368.22		
	df	Sum of Squares	Mean Square
Regression	2	8.2E+014	4.120E+014
Residual	69	7.725E+012	9173605749714
F = 53.334		Sig F < .000	

Variables in the Equation

Variable	B	SE B	Beta	*t*	*Sig.* t
Constant	2339078	1052529		-3.061	.030
Gossexp2	.371	.197	.269	1.884	.064
#36	4667804	1241871	.537	3.759	.000

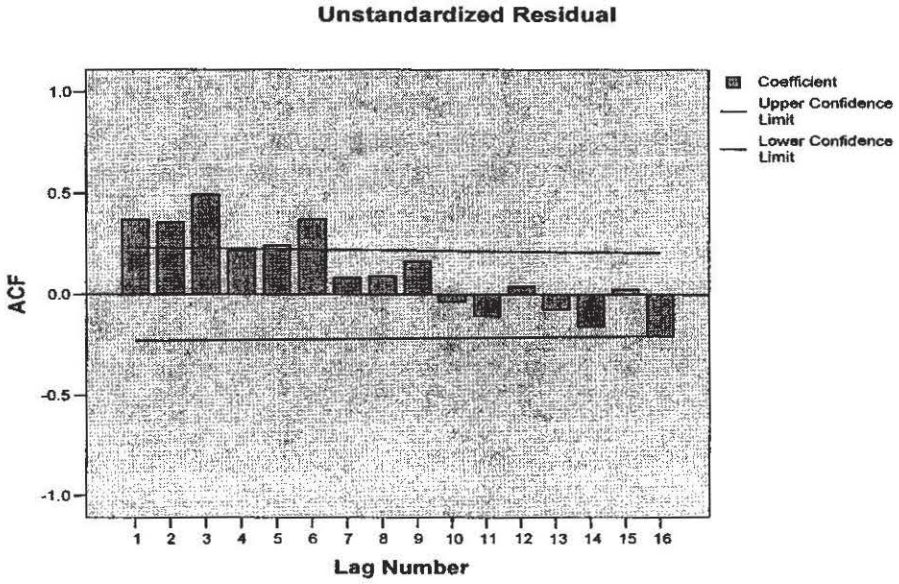
V. MODEL SPECIFICATION

I. Identification of ARIMA parameters:

Integrated component (d): The unstandardized residuals from the linear analysis were saved as a new variable. Next, lagged autocorrelation analyses were run on the residuals from the linear analysis. ACF for grossexp raw data showed solid no evidence for a nonstationary process; therefore, no differencing was necessary to transform the series for estimated ACF. Because the ACF did not effectively show zero for all lags

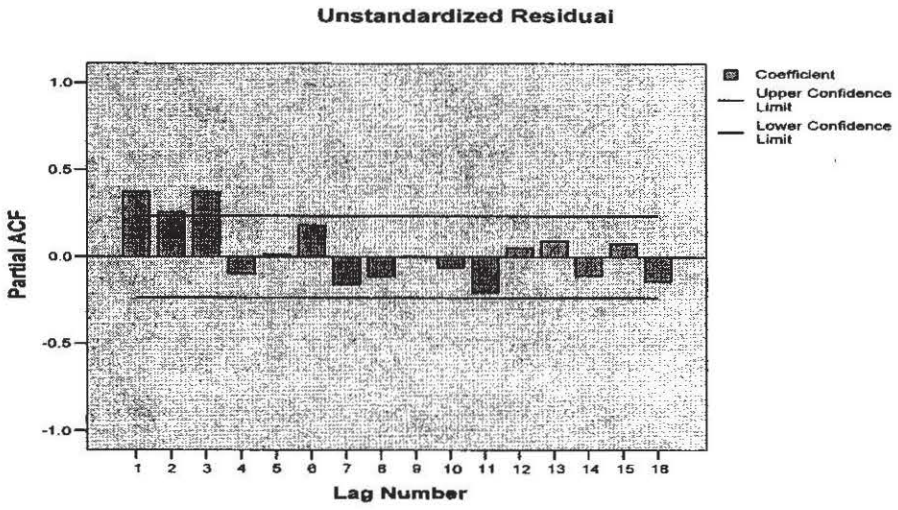
(values of lags to lie within the +/- 2 SE of the CI and are statistically different than zero at a .95 confidence level) it indicated that the series was not the realization of a white noise process and that there were shocks integrated within the series. The resulting lagged ACF for the linear residuals of the monthly grossexp are graphed in TABLE 11.

TABLE 11: Lagged Autocorrelation Function for Monthly Foster Care Data



Autoregressive component (p): The more recent an event, the greater its influence on the current realization. There is indicated autoregression in a rough pattern of spikes with ACF. Autocorrelation was detected in grossexp (d=1.225, d_L=1.60, d_U=1.65, n=72, K=1, Sig.> .001). A visual examination of PACFs determined that there was third-order autocorrelation, (ϕ_3 = -.011, ϕ_{SE}=.119) (TABLE 12). The Box-Ljung statistic supported the significance of autocorrelation at each lag (.000), but, because PACF (1) is contained within the bounds of stationarity, - 1 < ϕ_1 < + 1, the same as θ_1, the ARIMA (0,0,q) model is realized and it is found a moving average, autocorrelation may not prove to be significant in this model. Another procedure to detect significant autocorrelation is the Pankrantz criterion. If the autocorrelation divided by its SE is less than 1.25 for the first three lags and less than 1.60 for subsequent lags, it may be concluded that the series has no significant autocorrelation. As noted with ϕ_3 (-.011), it was concluded that there was no significant autocorrelation for this model.

TABLE 12: Lagged Partical Autocorrelation Function for Monthly Foster Care Data



The third-order autocorrelation may be explained in the "bottlenecking" of the court system. Because the data observations are not independent to the previous two observations, there may be theoretical correlation within the mandatory 90-day dispositional hearing cycle for children. Once a child has entered the foster care system under temporary state custody and throughout the length of stay, until the last permanency planning hearing, mandated at 182 days, delays the issuances of court orders and notifications for hearing dates which will have the 90 day dispositional hearing cycle overlap to become a 120 day cycle, causing an overflow of the courts. Another carry-over effect of the dispositional cycle, which would explain third-order correlation, might be the inability of child welfare agencies to coordinate mandated servicing.

Until recently[23], foster care in Michigan operated as "cookie-cutter" servicing, where all family reunification goal-orientated cases were proscribed identical servicing (i.e. parenting classes, individual therapy). The reduction of community resources and the increased demand for them creates another temporal factor that extended the lengths of stay for children in foster care. PROWRA enhancements terminated referrals for community resources and caused children to linger in the system longer, simply because a family could not access, in a timely fashion, servicing that had been ordered by the courts, or were referred to services that were either no longer in existence or reduced. Michigan's Freedom of Information Act allowed Child Welfare to function as a closed system; only certain resources were classified as acceptable to child welfare agencies. An example of this would be the "state v. state" issue. The State cannot violate federal HIPPA law by relinquishing personal information; therefore, a birth parent cannot utilize a state funded resource to fulfill court requirements for family reunification and must stand in line. The greater the influx of birth parents being mandated servicing, the longer the waiting lists became: "first-in, first-out" (FIFO).

Moving average component (q) Because there is a single spike in the first lag, ACF(1) and the series is uniformly zero, it is concluded that this is an ARIMA (0,0,1) model for moving average because of the non zero values for ACFs. As time passes, random shocks leak out of the system at an exponential rate the influence of random shocks on a time series observation, thus decreases exponentially with time. ACF (1) had a nonzero integer first lag ($\theta_0 = -.495$) and is, thus, constrained to the bounds of invertibility, $-1 < \theta_1 < +1$, for the ARIMA (0,0,1) process and was noted as an integrated and infinite process. Each realization process consists of an infinite sequence of all past random shocks integrated or summed with a "starting" value, or constant.

This stochastic element, white noise, might be theorized in the historical social constructs of economic disparities: geographic constraints due to poor mass transit and lack of affordable, quality housing; factory model educational systems and public school funding from millage taxes based on property values; urbanization taking the money out the tax bases of the urban structures; heavy metal fallout such as industrial emissions of mercury and lead based paint in older homes that has exponentially demonstrated emotional and cognitive challenges and disabilities on generations; and past shocks such as the decline of the automobile manufacturing industry in Detroit, where no one prepared and the city relied solely upon it for viability and sustainability. This would mean that poverty, as represented in this analysis as unemployment, has an extreme influence on the number of children in foster care because poverty is considered to be a form of abuse and neglect, which is "suspected as criminal activity"[24].

Intervention Variable: The dummy variable (#36) that was earlier constructed has now come to be the intervention variable (ωI_t) in the time series for grossexp, where September 2001 is the point of departure. Data was coded 0 = pre-intervention and 1 = post-intervention. There was discovered to be an extremely strong positive correlation between the aforementioned date and grossexp (R=.838). No autocorrelation was detected ($d=1.710$, $d_L=1.60$, $d_U=1.65$, $n=72$. $K=1$); therefore, it may be purported that this lag (#36), is a time of major influence for the increased numbers of children entering foster care.

Constants: Since it was determined no differencing was necessary to make the series into a stationary process, the constant term will be equal to the mean of the series (TABLE 13).

II. Estimation

ARIMA (0,0,1): A non-seasonal forecasting model using Unconditional Least Squares, with the model constant for initialization and inclusion of ωI_t had no realization of constraints in the bounds of stationarity ($-1<\phi<+1$) because it was shown that were decaying PACFs which further indicates a moving average. It was determined that there was no autoregression, but had statistically significant MA parameters ($\theta_2 = -.302$, $t = -2.624$) constrained to the bounds of invertibility ($-1<\theta<+1$) for grossexp that produced 2 iterations (TABLE 9). The parameter estimates of the tentative model, θ_0 (-.431, $t = .106$) and θ_1 ($t = 4.446$), are not statistically significant, so the parameter is dropped from the model. Because these two parameter estimates are statistically insignificant, they are interpreted as drift in the series and support the process of trend. There was no more than one ARIMA model to use in comparison to test a goodness of fit measure, such as nested models, so Akaike Information Criterion (AIC) and Bayesian Information Criterion (BIC), did not need to be reported in the residual diagnostics.

TABLE 13: Diagnostics of Non-seasonal ARIMA (0,0,1) for Foster Care Monthly Data

Iteration History:

	Non-Seasonal Lags	Regression Coefficients	Constant	Adjusted Sum of Squares	Marquardt Constant
	MA1	Intervention			
0	-.431	6689048.739	4085872.761	513423546264774.000	.001
1	-.319	6689618.601	4087612.517	503661792420078.000	.001
2	-.302	6688520.297	4088513.925	503490651830410.000(a)	.000

Melard's algorithm was used for estimation.

a. The estimation terminated at this iteration, because the sum of squares decreased by less than .001%.

Residual Diagnostics:

N	72
Parameters	1
df	69
Adjusted Sum of Squares	503490648741414.000
Sum of Squares	513423546264774.000
Variance	7287302847538.050
MSE	2699500.481
-LL	-1166.927

Parameter Estimates:

		Estimates	SE	t	Approx Sig.
Non-Seasonal Lags:	MA1	-.302	.115	-2.624	.011
Regression Coefficients:	Intervention	6688525.693	818413.394	8.173	.000
Constant:		4088509.646	589246.146	6.939	.000

Melard's algorithm was used for estimation.

III. Diagnosis

Model fit: There were no significant ACFs and PACFs estimated from the model residuals indicating a perfect fit ($p < .001$). Residuals are not different than white noise and all lags of the residual of the ACF are statistically significant by randomness. To test whether the entire residual ACF is different than that expected of a white noise process, the Q statistic formula was used:

$$Q(df) = N \sum_{i=1}^{k} [ACF\ (i)]^2 \text{ with } df = k - p - q$$

where; $H_0 : Q = 0$ is distributed as a χ^2 with df determined by k lags of ACF residuals, subtracting the number of autoregressive and moving average parameters used in the model, and i replaces t as the point of intervention. The Q(15,1.117249) at $p < .005$ was found significant, so the null hypothesis was rejected. The tentative ARIMA model was determined to be statistically adequate, because the residuals were not different from white noise.

Residual Analysis: An approximately normal distribution of residuals indicated a good ARIMA model and the Box-Ljung statistics have significance levels of .001, or better than 99.9%, for the series as a test of randomness (TABLES 12 and 13)

TABLE 12: Histogram of ARIMA Residuals for Foster Care Monthly Data

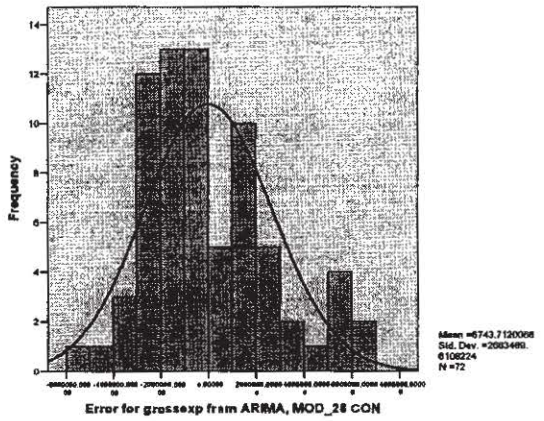
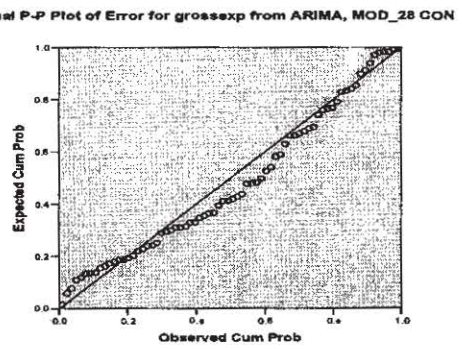


TABLE 13: P-P Plot ARIMA Residuals for Foster Care Monthly Data



Impact assessments: The confirmatory analysis of this time series quasi-experiment was a test of the null hypotheses that the postulated event (PROWRA enactments) caused a change in a social process (foster care) and is measured as a time series (Wayne County Court Administrated Child Care Fund Expenditures for Fiscal Years 1999-2004). The event is represented as a binary variable (0,1) which indicates the absence of the state a prior to the event and the presence of the state during and after the event. The intervention component is written as

$$y_t = \delta y_{t-1} + \omega I_t,$$

where, $I_t = 0$ in the pre-intervention equation and $I_t = 1$ in the post-intervention equation, where the level of the y_t series changes with each passing moment and is expected to produce a nonzero result. The model parameter (δ =.419, t = 17.977) was statistically significant which represents a gradual and permanent impact (linear trend) in the County Child Care Fund: Foster Care Gross Expenditures, as δ is constrained to the bounds of system stability ($0 < \delta < 1$). Therefore, the model is written as

$$y_t = .419y_{t-1} + 6688525.693(I).$$

It shows the impact of the intervention as a gradual duration. The level of the post-intervention series continues to grow by larger amounts,

$$y_{36+n} = .419y_{36+n-1} + 6688525.693(1).$$

As n grows infinitely large, this level may be evaluated as

$$\text{asymptotic change} = .419/(1 - 6688525.69) = -6.26446069E\text{-}8.$$

Interpretation: In the 36th month, September 2001, the level of this series increased $6,688,525.69, on average, in monthly totals for the Wayne County Child Care Fund: Foster Care Gross Expenditures. The PROWRA enhancements of 2001 are thus expected to result in an eventual reduction of nearly $6.26 per month in Wayne County Court Administrated Child Care Fund Expenditures. The change in level from month to month is infinitesimally miniscule, so it may be further concluded: (1) we must fail to reject $H1_0$: an increase in the numbers of children entering the Wayne County Foster Care system is not associated with an increase in the number of persons impoverished in Wayne County, and (2) fail to reject $H2_0$: the implementation of the 1996 PROWRA has generated a positive linear trend in the number of children entering the Wayne County Foster Care system.

Seasonal effects: The months of March, September and December show substantial spikes in the series. Theory for March might be that families begin to experience the financial burdens brought on by the Christmas season and spring recess for schools[25]. In Wayne County there are very limited day care programs that are accessible and affordable for families. September may be represented in the number of calls placed by educators to Child Protective Services concerning lack of after-school care, clothing, and food, and other behavioral concerns for children returning to school. December also provides high numbers for poverty. Lack of affordable housing forces children and families into homeless shelters in Wayne County where many children are removed from parents under the category of poverty, being a form of abuse and neglect. During the summer months, you have a reduction in staffing levels due to vacations of Child Protective Service workers. Also, much of the foster care industry redirects its focus from seeking "suspected criminal offenders"[26] to recruitment of foster families. May is foster care month. It must be recognized that September and December are fiscal quarters and represents changes in budgets.

Lag effects: Because the stochastic fluctuations are stationary and have been discriminated as white noise, a viable explanation to possible monthly lag effects might be what was addressed earlier as autocorrelation in the 90 day cycle of dispositional hearings and extended lengths of stay for children in foster care[27].

VI. CONCLUSION

Further Research: A Harmonic Analysis may provide a better model fit because it can estimate the amplitude of trend, seasonal effects are known a priori, and more accurately describe the Mean. Additional fiscal years will provide the necessary 80 minimum required lags to allow the usage of more powerful analytical programs and may describe a different conclusion. Utilizing parametric methods for a continuous-time regression event history model might shed light on Wayne County's poor performance in the rates of Family Reunification.

Another aspect that should be investigated is in the area of funding for the foster care system: juvenile delinquency. Children are being classified and sentenced as juvenile delinquents in order to access different levels of funding; therefore, a stronger correlation between Court Administrated County Child Care Fund expenditures and poverty may exist.

Comparative county analyses within Michigan should be performed to test the validity of my findings.

Implications: I submit the findings of this analysis to give credence to the design of Michigan's Child Protection Services; it functions in accordance to the construction of the policy. Simply put, large numbers of children will continue to enter Wayne County foster care and will linger in the system for long lengths of stay, as a direct result of Michigan's rulemaking of federal PROWRA enhancements. I state, again, as poverty rises, so will the number of children entering the foster care system.

Family preservation policies[28] for Michigan do not have ethical grievance procedures, or a valid investigative forum, for child welfare agency accountability. Director for the Office of Children's Ombudsman has been made a governor cabinet position. If the role of the governor is to protect its citizens by adopting and implementing child protective policies, then how can the Office of Children's Ombudsman be an unbiased, investigative entity regarding violations of child protective policies? If the role of the Attorney General is to prosecute cases of abuse and neglect, then how can there be a valid forum for administrative oversight for commercial licensing of child welfare agencies, regarding misfeasance, as well as malfeasance? How can an abuse and neglect case be ethically judicated when the presiding judge is affiliated in the activities of the child welfare agency that is managing the case without prejudice? How can Child Protective Proceedings mandate that only an expert, defined as being licensed by the state, testify in abuse and neglect cases when case managers of child protective agencies are not licensed, and in many instances, do not even possess a university degree? Michigan circumvented this area of licensing by re-classifying job titles for social workers to case managers in 2004. Because a case manager is not licensed, there can be no investigation by the state because the Department of Consumer Industries only has jurisdiction to respond to grievances pertaining to individuals who are licensed. Grievances are handled internally with the child welfare agencies under U. S. Civil Servant Codes. This means, if there is a complaint to be filed against the director of the child welfare agency, it will be facilitated and decided by the director of the child welfare agency.

Recommendations: The State of Michigan has been attempting to address the issues of racial disparities in Wayne County, particularly for people who do not hail from dominantly European decent, or more succinctly, African-Americans. I provide three suggestions:

(1) Focus on the economic conditions rather than race. On going research of Golebiowska and Michelini (2005) have established that Detroit (Wayne County) political appeals are "not influential by activating racial predispositions".[29] I submit the concept of living, breathing policies. If the United States Constitution is considered to be a living, breathing document that can be continuously interpreted and applied to a current frame of time, then policies of foster care should, also. Endogenous growth theory (Reid 1989)[30] would take into consideration major economical disaster that would allow individual foster care cases to be addressed in a more cost-effective manner than the current decision making model that is being used. A more proactive approach in family preservation in the area of front-end funding programs for individual/family therapy, affordable and quality child care, affordable housing, and career employment as with opportunities for educational, vocational and entrepreneurial support might prove to be a long term cost effective approach for the state;

(2) Amend Michigan's "Foster Care and Adoption Services Act, 203 of 1994" and "Probate Code of 1939 Act 288 of 1939" to bring the time limitations for Termination of Parental Rights in accordance with the federal "Adoption and Safe Families Act of 1997" from 12 months to 15 out of 22 months;

(3) Expand the oversight and redefine the role and powers of the Office of Children's Ombudsman as an independent, investigative authority over the grievance process for:

(a) judicial review, attorney generals, guardians ad litem, and defense attorneys;
(b) revocation or suspension of the license of a direct child welfare service employee who is found guilty of misfeasance[31];
(c) internal investigations and external audits of private/commercial child welfare agencies, Foster Care Review Boards, Family 2 Family mediations, foster family placements, and civil rights violations.

Not only is this economically feasible, but it is technically feasible. In opposition to sweeping, state legislative changes, the latter recommendation might operate as a sieve to filter though the severe cases of abuse and neglect. Financing of these reforms might be allocated from Michigan's Children's Trust Fund. Reducing the strains of the court by expediting the process of permancy placements for adoption, the number children entering foster care and the lengths of stay for children in the foster care system might meet federal benchmarks, and, prove to eradicate the racial disparities of children in foster care Wayne County, as well as the entire State of Michigan.

[1] Title V, Section 502 of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA - Public Law 104-193), enacted on August 22, 1996 of 1996, extended the SACWIS enhanced funding through Federal fiscal year 1997. Additionally, the legislation provided an enhanced SACWIS cost allocation to states so that Title IV-E would absorb all SACWIS costs for foster and adopted children, without regard to their Title IV-E eligibility.

[2] State of Michigan Office of Policy and Budget Analysis, Wayne County Court-Administered County Child Care Fund: Foster Care Gross Expenditures October 1998 - September 2004, FIA Publication 292, 2004.

[3] Associated Press, *Many minorities in foster care; state panel wants to know why*, Detroit Free Press, July 28, 2005

[4] Title XIII, Section 13713., ENHANCED MATCH FOR AUTOMATED DATA SYSTEMS, of the Omnibus Budget Reconciliation Act (OBRA) of 1993 (Public Law 103-66), August 19, 1993 was legislation that provided states with the opportunity to obtain 75 percent enhanced funding through the Title IV-E program of the Social Security Act to plan, design, develop, and implement a SACWIS.

[5] AFCARS - Adoption and Foster Care Analysis and Reporting System, U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, www.acf.hhs.gov/programs/cb. Reviewing the federal survey to states in collecting information on children in state's care, there is no information on the birth parent except for the item of "Termination of Parental Rights (TPR)". A federal mandate to expand the collection of information on birth parents and the causes that led to TPR may allow states to address to develop proactive policies to prevention the permanent separation of families. One underlying factor is the issue of poverty.

[6] United States Department of Labor, Bureau of Labor Statistics, Wayne County Poverty monthly totals: October 1998 through September 2004, 2005

[7] Ventrell, Marvin, "Evolution of the Dependency Component of the Juvenile Court" Children's Legal Rights Journal, Volume 19, Number 4,Winter 1999-2000.

[8] Department of Human Services, *Michigan's Project Zero Initiative*. Project Zero was designed with a 5 year projected goal to reduce the numbers of individuals receiving social assistance by transitioning families from welfare-to-work as one of the welfare reforms under PROWRA. For Wayne County, this created a new population of working poor. State of Michigan, 1997.

[9] Citizens Research Council of Michigan, *Overview of Michigan's Structural Budget Deficit*. The council reported Michigan's most recent economic statistics as 49th in Personal Income Growth, 48th in Poverty Rate, 48th 50th in Employment Growth (Decline for Michigan-Only State in the U.S.), 50th in Index of Economic Momentum, based on population, personal income, and employment. The same report presented the General Fund and School Aid Operating Deficit, declining almost $1,100,000,000 and $750,000,000, respectively, from fiscal year 2000 to 2001. May 13, 2005

[10] Ibid

[11] U.S. Census, 2004. The term, "children of color" is defined as all children that do not hail from predominantly European decent.

[12] http://www.ccsd.ca/cswp/2005/abstracts5.htm, Canadian Child Welfare policy analysis traditionally utilizes the method of expenditures as a true representation of the number of children in foster care due to reporting errors of provinces. It must be noted that the Court Administrated County Child Care Fund gross expenditures are salient because they do not contain any segmentation between new cases and continuing cases. Canadian Social Welfare Policy Conference, 2005

[13] http://www.census.gov/cgi-bin/saipe/saipe.cgi U.S. Census Bureau, Small Area Income and Poverty Estimates for Michigan counties, 1999-2004.

[14] I wish to note that the Department of Labor, Bureau of Labor Statistics does not monitor the underemployed, independent business owners, and those who have exhausted poverty benefits; therefore, the data presented may, in many instances, be significantly higher than actually reported.

[15] CFF 905-3, State of Michigan PR Foster Care Rates, CFB-001, revised 1-1-2005.

[16] Child Care Fund: Children, Days Care and Expenditures, October 1999-September 2000, State of Michigan, 2005

[17] S.2272 "Strengthening Abuse and Neglect Courts Act of 2000", U.S. 106th Congress, 2nd Session, January 2000. This act was "[T]o improve the administrative efficiency and effectiveness of the Nation's abuse and neglect courts for other purposes consistent with the Adoption and Safe Families Act of 1997".

[18] Act No. 46, Public Acts of 2000, Michigan Legislation, March 27, 2000. AN ACT to amend 1939 PA 288, entitled "An act to revise and consolidate the statutes relating to certain aspects of the family division of circuit court, to the jurisdiction, powers, and duties of the family division of circuit court and its judges and other officers, to the change of name of adults and children, and to the adoption of adults and children; to prescribe certain jurisdiction, powers, and duties of the family division of circuit court and its judges and other officers; to prescribe the manner and time within which certain actions and proceedings may be brought in the family division of the circuit court; to prescribe pleading, evidence, practice, and procedure in certain actions and proceedings in the family division of circuit court; to provide for appeals from certain actions in the family division of circuit court; to prescribe the powers and duties of certain state departments, agencies, and officers; and to provide remedies and penalties," by amending sections 1, 13b, 19a, 19b, and 19c of chapter XIIA (MCL 712A.1, 712A.13b, 712A.19a, 712A.19b, and 712A.19c), section 1 as amended by 1998 PA 478, section 13b as added and section 19a as amended by 1997 PA 163, section 19b as amended by 1998 PA 530, and section 19c as amended by 1998 PA 479.

[19] Act No. 291, Public Acts of 2000, Michigan Legislation, July 13, 2000. An ACT to make, supplement, and adjust appropriations for various state departments and agencies, the legislative branch, and the judicial branch for the fiscal year ending September 30, 2000; to provide for the expenditure of the appropriations; and to repeal acts and parts of acts.

[20] H.R. 764, "Child Abuse Prevention and Enforcement Act", 106th U.S. Congress, 2nd Session, January, 2000. The intention of this act was for "establishing or supporting cooperative programs between law enforcement and media organizations, to collect, record, retain, and disseminate information useful in the identification and apprehension of suspected criminal offenders.". Poverty should not be a crime.

[21] Act No. 232, Public Acts of 2000, Michigan Legislation, January 1, 2001. AN ACT to amend 1939 PA 288, entitled "An act to revise and consolidate the statutes relating to certain aspects of the family division of circuit court, to the jurisdiction, powers, and duties of the family division of circuit court and its judges and other officers, to the change of name of adults and children, and to the adoption of adults and children; to prescribe certain jurisdiction, powers, and duties of the family division of circuit court and its judges and other officers; to prescribe the manner and time within which certain actions and proceedings may be brought in the family division of the circuit court; to prescribe pleading, evidence, practice, and procedure in certain actions and proceedings in the family division of circuit court; to provide for appeals from certain actions in the family division of circuit court; to prescribe the powers and duties of certain state departments, agencies, and officers; and to provide remedies and penalties," by amending the title and section 19b of chapter XIIA (MCL 712A.19b), the title as amended by 1997 PA 163 and section 19b of chapter XIIA as amended by 2000 PA 46, and by adding chapter XII.

[22] Office of Inspector General, USDA Report #27099-0023-CH, August 2002. Electronic Benefits Transfer (EBT) was implemented statewide on July 1, 2001 but Michigan FIA had yet to establish, in a timely manner, an interoperational and permanent system to monitor system activity. From July 1, 2001, through December 31, 2001 the state incurred financial penalties.

[23] Family Independent Agency, *Family 2 Family 993*, State of Michigan, 2000. A grant was made to Michigan by the Annie Casey Foundation in the amount of $1,150,000 to reduce the number of children placed in congregate or institutional care.

[24] Public Law 105-89, 105th U.S. Congress, An Act to promote the adoption of children in foster care.

[25] Catholic Social Services St. Francis Family Center, Oakland County, Preliminary research investigating the number of incidence reports for abuse and neglect of children that were called in to Child Protective Services in Wayne County reported March as having the highest totals for complaints. This does not necessarily mean that each complaint is going to result in a child entering the foster care system but there is indication in the actual numbers of children removed from their primary care giver.
[26] H. R. 764, 106th U. S. Congress, "Child Abuse Prevention and Enforcement Act", 2000. Sec. 103. The amending for the use of funds under Byrne Grant Program for Child Protection uses language that labels impoverished birth parents as criminals.

[27] U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, *The AFCARS Report.* For length of stay in foster care for 2003, the Mean months were 21.7 and the Median months were 11.9. There is no report for the Mean and Median for Michigan but it is averaged between 33 to 60 months.

[28] http://www.opdv.state.ny.us/coordination/poldev_tool.html The development tool for the State of New York Domestic Violence Policy can be readily adopted for foster care policies.
[29] Golebiowska, Ewa, and Michelini, Mathew, "Anti-Detroit Appeals in Michigan Politics: A Case of Racial Appeal". Presented at Southern Political Science Association's Annual Meeting, New Orleans, LA, January 2004.
[30] Reid, Gavin C., Classical Economic Growth, Basil, Blackwell, 1989
[31] Public Act 61 of 2004, effective July 1, 2005, changes the regulation of the social work profession under the authority of the Department of Community Health. Unfortunately, the Bureau of Health Professions, Complaint and Allegation Division only has the power to regulate the Community Health Agency. There is no provision for any complaint filed against a direct child welfare worker in Child Protective Services due to the protection of Freedom of Information Act regarding the release of information pertaining to child welfare. Therefore, complaints are handled under civil servants codes, and for private institutions, complaints are handled internally. State of Illinois Public Act 92-0471, created the Direct Child Welfare Service Employee License Board giving the Department authority to revoke or suspend the license of anyone who, after a hearing, is found to be guilty of misfeasance.

Neil
Jeff

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 02/06/2006
DATE RECEIVED: 02/07/2006
WORKFLOW ID: 950231
DUE DATE: 03/28/2006

FROM:
Mr. A. Brian Wallace
Chairman
Washoe Tribe of Nevada and California
919 US Highway 395 N
Gardnerville, NV 89410

TO: AG

MAIL TYPE: General

SUBJECT: (Fax) Expressing gratitude for the AG's willingness to work with him on addressing the virulent threat to the health and safety of Washore Tribal members posed by crystal meth. Advising that he welcomes the opportunity to meet with the AG on 2/8/06 and thanks him for taking the time out of his busy schedule to meet with him to discuss this issue. See WF 900018.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
02/13/2006	For appropriate handling. Advise ES of any action taken. Office of Tribal Justice

INFO COMPONENT: OAG, ODAG, OASG, CRM, ENRD, DEA, EOUSA, OJP

COMMENTS: 2/13/06: Original corres rec'd in ES and forwarded to AG files.

FILE CODE:

EXECSEC POC: Shirley McKay: 202-514-5305

950231

Washoe Tribe of Nevada and California

February 6, 2006

Honorable Alberto R. Gonzales
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington D.C. 20530-0001

Re: Federal assistance with methamphetamine crimes in Washoe Indian Country

Dear Attorney General Gonzales,

I would like to express my gratitude for your willingness to work with me on addressing the virulent threat to the health and safety of Washoe Tribal members, and in fact to our very culture, posed by crystal meth. As we discussed at the Latino Leadership Luncheon last November, and as I further relayed to you in my letter of November 2, Washoe Indian Country has not been spared from the methamphetamine, or crystal meth, problem that is sweeping the nation. Washoe Tribal land is composed of primarily four reservation communities: Carson Colony, Stewart Community, and Dresslerville Community in Nevada, and Woodfords Community in California. To varying degrees, each of these communities have been plagued by non-Indian sellers and buyers of crystal meth, who have been taking advantage of the gap in law enforcement jurisdiction and the limited number of Tribal law enforcement personnel. I look forward to continuing our dialogue to determine how we can work together to combat this growing danger to our communities. In particular, I welcome the opportunity to meet with you on February 8 to discuss this issue.

A substantial part of this problem stems from non-Indian buyers and sellers of crystal meth coming onto Washoe reservations or residing on Washoe reservations with Tribal members. As you know, the federal government has a trust responsibility to protect Tribal communities from violations of federal drug laws on the reservation, particularly those committed by non-Indians. Due in part to the lack of jurisdiction to arrest non-Indians for violation of federal drug laws, and in part to the limited size of the Washoe Tribal Police Department, the Washoe Tribe needs the Department of Justice's assistance with crystal meth interdiction efforts, to investigate, enforce, and prosecute federal drug crimes on the reservation. The Washoe Tribal Police Department has a relatively small number of officers, currently only seven, who must spread their time across the four Tribal communities, which are separated by as much as 42 miles. There is a great need for federal agents to be available to work with Tribal police officers to plan and conduct joint operations, as well as to provide necessary surveillance equipment and additional

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training to Tribal police officers. Because Tribal police officers are well-known in the communities, it is difficult for Tribal police officers to go undercover to make a drug buy for a sting operation. Thus, dealing with this drug problem may also require working with undercover federal agents to conduct drug buys on the reservation. Implementation of a program for the sharing of law enforcement intelligence with federal law enforcement agencies may also be a key component in the interdiction of crystal meth flowing through Tribal communities.

The Washoe Tribe would like to pursue a memorandum of understanding or other formal agreement with the Department of Justice in order to establish a federal-tribal partnership on this issue. Although the Tribe has been negotiating a mutual aid agreement with Carson City and Douglas County for similar assistance with regard to enforcement of state drug laws against non-Indians, such an agreement does not seem likely due to the local governments' insistence that the Tribe defend and accept liability for the negligence and willful misconduct of city or county officers if suit is brought against them in Tribal Court. The Tribe has attempted to work with BIA law enforcement in the past, as well as cooperating with other Tribal law enforcement agencies in the area, but BIA has only one narcotics officer for the district and Tribal law enforcement agencies tend not to have the necessary experience or a sufficient number of officers to be able to lend officers out for joint operations.

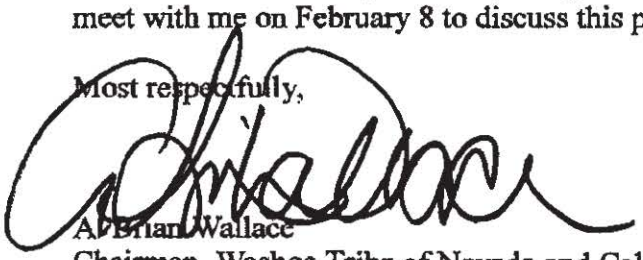
Of course, making arrests for violation of federal drug laws would only be half the battle. It is also necessary to ensure that federal prosecutions of crystal meth cases arising from Tribal lands will be given a high priority by the U.S. Department of Justice. Otherwise, the U.S. Attorney's Office may choose not to prosecute some crystal meth cases which normally may not meet the U.S. Attorney's Office guidelines for priority prosecutions. A reluctance to prosecute such crimes is not acceptable considering the virulent problem posed by crystal meth drug crimes on the reservation and the impact they have on reservation communities. I would like to discuss with you getting such a policy established within the U.S. Attorneys offices.

Another important component of this law enforcement problem is the lack of sufficient detention facilities available for housing criminals. While Tribal officers may arrest non-Indian suspects on reservation lands within Nevada (by virtue of state law, Nevada Revised Statutes 171.1255) for violations of state drug laws, local detention facilities are overcrowded, sometimes resulting in the parole of drug offenders, who often return to commit further drug crimes on the reservation. There is no corresponding law allowing Tribal officers to arrest non-Indian suspects for state law offense within the Washoe Tribe's Woodfords Community in California. As for Indian criminals, BIA detention facilities are limited and scant funding exists from the BIA to subcontract with local jurisdictions for detention space, which may not be abundant anyway. This lack of sufficient detention facilities impacts Tribal arrests, prosecution, and sentencing of Indian offenders, and may therefore result in Indian drug offenders remaining in Tribal communities. Assistance from the DEA and FBI in making arrests of both non-Indians and Indians for federal drug offenses in crystal meth cases would allow for offenders to be appropriately sentenced to federal detention facilities. (However, sentencing of

juvenile offenders may be more appropriately handled by the Tribe's Juvenile Drug Court, which is funded under a grant from the Department of Justice's Office of Juvenile Justice and Delinquency Prevention.)

Crystal meth poses a significant threat to Washoe Tribal communities. The Tribal government and Tribal members have recently begun a number of substantial efforts to deal with the danger to our people, our communities, and our culture posed by crystal meth. Establishing a partnership with the Department of Justice is a critical component of our efforts, and I look forward to working with you on this issue. I have also sent a letter on this matter to DEA Administrator Karen Tandy. I am confident that the three of us can work together to develop an effective solution to the crystal meth problem in Washoe Indian Country. Thank you again for taking time out of your busy schedule to meet with me on February 8 to discuss this pressing concern of the Washoe Tribe.

Most respectfully,



Al Brian Wallace
Chairman, Washoe Tribe of Nevada and California

cc: Ruben Barrales, Deputy Assistant to the President; Director, Intergovernmental Affairs
Nick Sinatra, Deputy Associate Director, Intergovernmental Affairs
R. Trent Shores, Deputy Director, Office of Tribal Justice, U.S. Department of Justice
Sergeant Bill Simpson, Washoe Tribal Police Department

Washoe Tribe of Nevada and California

Methamphetamine & Chemicals Initiative in Indian Country
(Issues and Recommendations)

— revised Jan. 19, 2006 —

1. ***DOJ COPS funding*** has been dramatically reduced in Indian Country and many Tribes who have COPS program efforts are at or have exceeded the normal three year grant term. This has resulted in the loss of hundreds of Police Officer positions. There is a great need to permanently restore funding for these positions (BIA, DOJ, etc.).

2. There exist very drastic challenges in ***securing detention space*** for the housing of criminals to offset the enforcement and interdiction efforts in Indian Country at current levels of arrests. Any increase in enforcement activity would multiply that challenge. In addition, current detention alternatives have been declared deplorable by the Interior Office of the Inspector General; however, the problem is even greater. Many Tribes simply have no detention facilities available unless they have the ability to subcontract with local jurisdictions (cities/counties). The challenge here is that most cities and counties are overcrowded themselves or the costs for contracted detention space are exorbitant or prohibitive. Moreover, the BIA has very limited funding (or none at all) to pay for these costs. The result is that arrests are curtailed and Tribal Courts have nowhere to sentence convicted criminals, or have to explore less secure sentencing alternatives that endanger the Tribal communities.

3. Federal, state, and local law enforcement agencies have exhibited reluctance for various reasons (funding, ethnocentric, or discriminatory) to forcefully exercise "exclusive criminal jurisdiction over non-Indians" who represent a majority of the criminal activity associated with crystal meth supply and demand in Indian Country. It should be noted that NJC Report 203097 has documented that American Indians experience violence at a rate more than twice the rate for the entire nation. To offset this enforcement impediment, one solution would be to ***federally deputize Tribal Police*** officers to enforce criminal jurisdiction over non-Indian criminals. Currently, most Tribal Police agencies are funded through the BIA and DOJ and enjoy the protections and coverage of the Federal Tort Claims Act, and some already have federally trained and commissioned officers.

4. There is a need for ***special consideration for prosecuting Meth cases*** originating on Tribal Lands when they would not normally meet USAO District Guidelines (as in a recent meth case involving Mexican traffickers in Wyoming's Wind River Indian Reservation). These should be looked at from the "impact" and "repeat offender" standpoints.

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(775) 265-4191 ◆ (775) 883-1446 ◆ (530) 694-2339 ◆ Fax (775) 265-6240

5. There is a need for assistance and guidance in ***training of Tribal Police and Tribal first responders*** regarding clandestine laboratory response, hazardous waste clean-up, remediation, Drug Endangered Children procedures, and EPIC Clandestine Lab Seizure System incident reporting. Basically, Tribal Police and Tribal first responders need to be brought into the mainstream of "best practices" already established throughout the U.S.

6. There is a need for assistance and guidance to ***control retail sales of precursors/chemicals*** from stores on Tribal lands (Tribally regulated at this time).

7. There also must be implemented some type of program to ***exchange law enforcement intelligence with outside agencies***. Crystal meth distributors are well organized and operate both on and off reservations as their needs dictate. Often, reservations are used as "safe havens" to avoid outside law enforcement agencies who are already investigating their drug trafficking activities.

8. Finally, there exists a need for guidance and assistance in ***establishing a viable Indian Country public awareness campaign*** warning adults and especially Indian youth about the dangers of meth use.

Washoe Tribe of Nevada and California

February 6, 2006

Administrator Karen Tandy
Drug Enforcement Administration
Mailstop: AES
2401 Jefferson Davis Highway
Alexandria, VA 22301

Re: Federal assistance with methamphetamine crimes in Washoe Indian Country

Dear Administrator Tandy,

On behalf of the Washoe Tribe of Nevada and California, I earnestly request your assistance in dealing with a virulent threat to the health and safety of Washoe Tribal members, and in fact to our very culture. As you well know, the methamphetamine, or crystal meth, problem has been sweeping the nation. Unfortunately, Washoe Indian Country is no exception. Washoe Tribal land is composed of primarily four reservation communities: Carson Colony, Stewart Community, and Dresslerville Community in Nevada, and Woodfords Community in California. To varying degrees, each of these communities have been plagued by non-Indian sellers and buyers of crystal meth, who have been taking advantage of the gap in law enforcement jurisdiction and the limited number of Tribal law enforcement personnel. I would like to open a dialogue with you to determine how we can work together to combat this growing danger to our communities.

A substantial part of this problem stems from non-Indian buyers and sellers of crystal meth coming onto Washoe reservations or residing on Washoe reservations with Tribal members. The federal government has a trust responsibility to protect Tribal communities from violations of federal drug laws on the reservation, particularly those committed by non-Indians. Due in part to the lack of jurisdiction to arrest non-Indians for violation of federal drug laws, and in part to the limited size of the Washoe Tribal Police Department, the Washoe Tribe needs DEA's assistance with crystal meth interdiction efforts, to investigate, enforce, and prosecute federal drug crimes on the reservation. The Washoe Tribal Police Department has a relatively small number of officers, currently only seven, who must spread their time across the four Tribal communities, which are separated by as much as 42 miles. There is a great need for DEA agents to be available to work with Tribal police officers to plan and conduct joint operations, as well as to provide necessary surveillance equipment and additional training to Tribal police officers. Because Tribal police officers are well-known in the communities, it is difficult for Tribal police officers to go undercover to make a drug buy for a sting operation. Thus, dealing with this drug problem may also require working

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with undercover DEA agents to conduct drug buys on the reservation. Implementation of a program for the sharing of law enforcement intelligence with the DEA and other agencies may also be a key component in the interdiction of crystal meth flowing through Tribal communities.

The Washoe Tribe would like to pursue a memorandum of understanding or other formal agreement with the DEA in order to establish a federal-tribal partnership on this issue. Although the Tribe has been negotiating a mutual aid agreement with Carson City and Douglas County for similar assistance with regard to enforcement of state drug laws against non-Indians, such an agreement does not seem likely due to the local governments' insistence that the Tribe defend and accept liability for the negligence and willful misconduct of city or county officers if suit is brought against them in Tribal Court. The Tribe has attempted to work with BIA law enforcement in the past, as well as cooperating with other Tribal law enforcement agencies in the area, but BIA has only one narcotics officer for the district and Tribal law enforcement agencies tend not to have the necessary experience or a sufficient number of officers to be able to lend officers out for joint operations.

Of course, making arrests for violation of federal drug laws would only be half the battle. It is also necessary to ensure that federal prosecutions of crystal meth cases arising from Tribal lands will be given a high priority by the U.S. Department of Justice. Otherwise, the U.S. Attorney's Office may choose not to prosecute some crystal meth cases which normally may not meet the U.S. Attorney's Office guidelines for priority prosecutions. A reluctance to prosecute such crimes is not acceptable considering the virulent problem posed by crystal meth drug crimes on the reservation and the impact they have on reservation communities. I would like to discuss with you getting such a policy established within the U.S. Attorneys offices.

Another important component of this law enforcement problem is the lack of sufficient detention facilities available for housing criminals. While Tribal officers may arrest non-Indian suspects on reservation lands within Nevada (by virtue of state law, Nevada Revised Statutes 171.1255) for violations of state drug laws, local detention facilities are overcrowded, sometimes resulting in the parole of drug offenders, who often return to commit further drug crimes on the reservation. There is no corresponding law allowing Tribal officers to arrest non-Indian suspects for state law offense within the Washoe Tribe's Woodfords Community in California. As for Indian criminals, BIA detention facilities are limited and scant funding exists from the BIA to subcontract with local jurisdictions for detention space, which may not be abundant anyway. This lack of sufficient detention facilities impacts Tribal arrests, prosecution, and sentencing of Indian offenders, and may therefore result in Indian drug offenders remaining in Tribal communities. Assistance from the DEA in making arrests of both non-Indians and Indians for federal drug offenses in crystal meth cases would allow for offenders to be appropriately sentenced to federal detention facilities. (However, sentencing of juvenile offenders may be more appropriately handled by the Tribe's Juvenile Drug Court, which is funded under a grant from the Department of Justice's Office of Juvenile Justice and Delinquency Prevention.)

Crystal meth poses a significant threat to Washoe Tribal communities. The Tribal government and Tribal members have recently begun a number of substantial efforts to deal with the danger to our people, our communities, and our culture posed by crystal meth. Establishing a partnership with DEA is a critical component of our efforts, and I look forward to working with you on this issue. I have also corresponded with Attorney General Gonzales on this issue and will be discussing it when I meet with him on February 8. I am confident that the three of us can work together to develop an effective solution to the crystal meth problem in Washoe Indian Country.

Most respectfully,

A. Brian Wallace
Chairman, Washoe Tribe of Nevada and California

cc: Ruben Barrales, Deputy Assistant to the President; Director, Intergovernmental Affairs
Nick Sinatra, Deputy Associate Director, Intergovernmental Affairs
R. Trent Shores, Deputy Director, Office of Tribal Justice, U.S. Department of Justice
Sergeant Bill Simpson, Washoe Tribal Police Department

Washoe Tribe of Nevada and California

Methamphetamine & Chemicals Initiative in Indian Country
(Issues and Recommendations)

— revised Jan. 19, 2006 —

1. ***DOJ COPS funding*** has been dramatically reduced in Indian Country and many Tribes who have COPS program efforts are at or have exceeded the normal three year grant term. This has resulted in the loss of hundreds of Police Officer positions. There is a great need to permanently restore funding for these positions (BIA, DOJ, etc.).

2. There exist very drastic challenges in ***securing detention space*** for the housing of criminals to offset the enforcement and interdiction efforts in Indian Country at current levels of arrests. Any increase in enforcement activity would multiply that challenge. In addition, current detention alternatives have been declared deplorable by the Interior Office of the Inspector General; however, the problem is even greater. Many Tribes simply have no detention facilities available unless they have the ability to subcontract with local jurisdictions (cities/counties). The challenge here is that most cities and counties are overcrowded themselves or the costs for contracted detention space are exorbitant or prohibitive. Moreover, the BIA has very limited funding (or none at all) to pay for these costs. The result is that arrests are curtailed and Tribal Courts have nowhere to sentence convicted criminals, or have to explore less secure sentencing alternatives that endanger the Tribal communities.

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8. Finally, there exists a need for guidance and assistance in ***establishing a viable Indian Country public awareness campaign*** warning adults and especially Indian youth about the dangers of meth use.

Washoe Tribe of Nevada and California

OFFICE OF THE CHAIRMAN

FAX COVER SHEET

DATE: Feb. 6th 2006 TIME: 2:35 AM/PM

FAX NUMBER TRANSMITTED TO: (202) 514-4507

ATTN: Courtney Elwood, U.S.

OF: U.S. Dept. of Justice

SUBJECT: Fed. Assistance / Indian Country

DOCUMENTS	NUMBER OF PAGES*
Karen Tapia letter	3 pages
Honorable Gilberto Gonzales letter	5 pages

COMMENTS:

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Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 11/02/2005 **WORKFLOW ID:** 900018
DATE RECEIVED: 11/03/2005 **DUE DATE:**

FROM: Mr. A. Brian Wallace
Chairman
Washoe Tribe of Nevada and California
919 US Highway 395 N
Gardnerville, NV 89410

TO: AG

MAIL TYPE: General

SUBJECT: (Fax) Commending the AG on his speech at the Latino Leaders Luncheon sponsored by Ibarra & Associates. Thanking the AG for the honor and historic opportunity to speak with him on 11/2/05 about the crippling phenomena of Crystal Meth supply and demand that is now stalking and threatening to destroy Indian Country. Refers to the recent BJS report (NCJ203097) regarding American Indians and crime. Advising that he has dedicated himself and his staff to follow up on the AG's suggestion to organize, ASAP, a national focus and discussion to capitalize upon the constructive leadership the AG provided, and offers Reno, NV, as a possible location for such a meeting with the National Tribal Leadership. See WFs 890332 & 702002.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
11/07/2005	For appropriate handling. Advise ES of any action taken. Office of Tribal Justice

INFO COMPONENT: OAG, ODAG, OASG, CRM, ENRD, EOUSA, OJP, DEA

COMMENTS: 1/18/2006: OTJ replied by ltr dtd 1/13/06. 11/21/2005: Original dtd 11/7/05 with enclosures rec'd in ES on 11/16/05 & forwarded to AG files with cc of encls to OTJ. 11/10/2005: Per OAG(Smith's) request, copy of AG 11/10/05 response letter and enclosures forwarded to OTJ for information.

FILE CODE: AG FILE: INDIAN AFFAIRS General

EXECSEC POC: Debbie Alexander: 202-616-0075

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/12/2006
DATE RECEIVED: 01/30/2006
WORKFLOW ID: 945306
DUE DATE: 02/17/2006

FROM: The Honorable Jon Kyl
United States Senate

Washington, DC 20510

TO: AG

MAIL TYPE: Congressional Priority

SUBJECT: Advising that he is aware that the Administration's proposed budget for the Crime Victims Rights Act (P.L. 108-405), now being finalized, will recommend less than the full funding for the amounts authorized in that statute. States that he is disappointed with the Administration's plan and urges that the FY 2008 budget request full funding ($33.5 million) for Sections 103(b) and (c), most importantly subsection (b)(4), which authorizes $11 million for the crime victims' clinics. See WF 759143.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
02/03/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: OAG, ODAG, OASG, JMD, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

945306

JON KYL
ARIZONA
730 HART SENATE OFFICE BUILDING
(202) 224-4521

COMMITTEES:
FINANCE
JUDICIARY
CHAIRMAN
REPUBLICAN POLICY COMMITTEE

United States Senate

WASHINGTON, DC 20510-0304

STATE OFFICES:
2200 EAST CAMELBACK ROAD
SUITE 120
PHOENIX, AZ 85016
(602) 840-1891

7315 NORTH ORACLE ROAD
SUITE 220
TUCSON, AZ 85704
(520) 575-8633

January 12, 2006

The Honorable Alberto Gonzales
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

I am writing about the Crime Victims Rights Act (Title I of the Justice for All Act (P.L. 108-405)). It is my understanding that the Administration's proposed budget, now being finalized, will recommend less than the full funding for the amounts authorized in that statute.

In the past, as you know, I have sought an appropriation to fully fund the victims rights implementation programs authorized in Section 103 — an appropriation, I should add, that draws off none of the revenue from the Crime Victims Fund, which I believe should be treated as inviolate (this position represents a bedrock dedication that I share with many others to giving full force to both the Crime Victims Rights Act and the Victims of Crime Act).

My disappointment in the Administration's plan to recommend less than full funding is leavened by its desire to increase the level of financial support over last year's. That is not a small gesture in a time of fiscal austerity, and I will be pleased to report to supporters of the Crime Victims Rights Act that, if the Administration's proposal is adopted, it will represent a promising step in the right direction.

For Fiscal Year 2008, let me again urge that the budget request full funding ($33.5 million) for Sections 103(b) and (c), the most important of which is subsection (b)(4) which authorizes $11 million for the crime victims' clinics. Funding for the crime victims' clinics should be given the highest priority.

As you know, all the victim rights' implementation programs included in Section 103 of the Crime Victims Rights Act were designed to make a good faith effort through such a statute to give victims of Federal crime the rights we have long sought to afford them through a Constitutional amendment. Some of the very early tests of the use of the law are encouraging, but, I regret to say, some are not. Of all the techniques we devised to make the law meet its stated goals, by far the most effective one in helping victims exercise their rights in both state and Federal courts is the establishment of clinics. While the other approaches we devised are helpful in enforcing victims' rights, none can claim a greater ability of making the law work than a victim having the ability to find redress for any violation of his rights by taking that matter to court — with the assistance of counsel and supportive services.

I look forward to continue to work with you in the advancement of victim rights and services.

Sincerely,

JON KYL
United States Senator

JK:MMM

cc: Mothers Against Drunk Driving
National Organization for Victim Assistance
Maryland Crime Victim Resource Center
Force 100
Parents of Murdered Children

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/11/2005
DATE RECEIVED: 03/09/2005
WORKFLOW ID: 759143
DUE DATE:

FROM: The Honorable Jon Kyl
United States Senate

Washington, DC 20510

TO: President George W. Bush

MAIL TYPE: White House Urgent Blue Cover

SUBJECT: (Fax referred from the WH for information only) Urging the President to include in the proposed budget for FY 2006 full funding for programs authorized in the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, which was signed into law on 10/30/2004. Ltr also signed by MC Feinstein. WH ID 650151

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
04/06/2005	For OLA signature. Office of Legislative Affairs

INFO COMPONENT: OTJ, EOUSA, CRM, JMD, OJP, OLA, OASG, ODAG, OAG (Nichols)

COMMENTS: 5/5/05: OLA replied by ltrs (2) dtd 4/26/05. Copy of response w/original incoming returned to the WH. cc: OJP, CG files. 4/6/05: OJP submitted prepared response for OLA signature. 3/18/05: Original rec'd from the WH w/new WHB referral sheet dtd 3/17/05, for DOJ response.

FILE CODE: CONG

EXECSEC POC: Pat Morgan: 202-616-0081

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/17/2006
DATE RECEIVED: 01/27/2006

WORKFLOW ID: 944313
DUE DATE: 02/21/2006

FROM: The Honorable Tim Holden
U.S. House of Representatives

Washington, DC 20515

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: Supporting the application submitted by the YWCA of Greater Harrisburg, PA, for DOJ funding to open a legal clinic in the area to provide legal representation to assist victims of domestic violence and sexual assault, along with numerous other civil matters.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/03/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

944313

TIM HOLDEN
17TH DISTRICT, PENNSYLVANIA

www.holden.house.gov

2417 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-3817
(202) 225-5546

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DEPARTMENT OPERATIONS, OVERSIGHT, NUTRITION AND FORESTRY

TRANSPORTATION AND INFRASTRUCTURE
HIGHWAYS, TRANSIT AND PIPELINES
AVIATION

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES

January 17, 2006

Ms. Diane Stuart
Office of Justice Programs
Violence Against Women Office
810 7th Street, NW
Washington, DC 20531

Dear Ms. Stuart:

I am contacting you to offer my support on behalf of the YWCA of Greater Harrisburg. They are currently planning to open a legal clinic in the area that will provide legal representation to meet the civil legal needs of victims of domestic violence, and sexual assault, along with numerous other civil matters.

As you know they are in need of funding, as their Congressman I am pleased to support their application for assistance with their project. I believe that this innovative idea will be a blessing to those unfortunate victims of domestic and sexual violence that reside within the 17th Congressional District. Enclosed is a summary of their project and the invaluable services that they will offer.

Thank you in advance for your consideration of their application.

Sincerely,

Tim Holden

TIM HOLDEN
Member of Congress

TH/jb
Enclosure

☐ SRBC OFFICE BUILDING
1721 NORTH FRONT STREET, SUITE 105
HARRISBURG, PA 17102
(717) 234-5904

☐ 47 SOUTH 8TH STREET
LEBANON, PA 17042
(717) 270-1395

☐ 101 NORTH CENTRE STREET, SUITE 303
POTTSVILLE, PA 17901
(570) 622-4212

☐ 4918 KUTZTOWN RDAD
TEMPLE, PA 19560
(610) 921-3502

ABSTRACT

This project responds to the unmet civil legal needs of victims of domestic violence, sexual assault, and/or stalking in Dauphin County, Pennsylvania by supporting direct legal services on behalf of victims in civil matters, including protection from abuse ("PFA"), divorce, spousal/child support, child custody/visitation, administrative matters, bankruptcy, wills, powers of attorney, housing, and immigration matters.

We propose to provide a full-time attorney responsible for assessing cases, providing legal representation for said cases, and referring appropriate cases to Widener Law School's Harrisburg Civil Law Clinic to maximize the number of victims served. This project will reach the currently underserved areas of rural northern Dauphin County and inner-city Harrisburg. The YWCA Legal Clinic will maintain a satellite legal office at the Community Check-Up Center to provide convenient access to services for residents of the Hall Manor and Hoverter Homes public housing communities. We will provide two full-time legal advocates serving at five community locations to best reach the identified populations most in need of services, including indigent, low-income, rural, and limited-English victims. Our advocates will perform case intake and assessments under the supervision of the project attorney and provide accompaniment and support to victims at domestic violence, sexual assault, and/or stalking-related court proceedings.

In addition to direct legal services, the YWCA Legal Clinic will provide domestic violence, sexual assault, and safety planning practical education to identified Widener Law School staff and students and Community Check-Up Center health care professionals. In addition, the YWCA Legal Clinic will offer comprehensive educational programs in our community that specifically target populations most in need of services,

as well as programs for agencies and organizations that commonly interact with individuals from targeted populations

Neel

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/24/2006
DATE RECEIVED: 01/26/2006
WORKFLOW ID: 943926
DUE DATE: 02/17/2006

FROM: The Honorable Charles B. Rangel
U.S. House of Representatives

Washington, DC 20515

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: Supporting the grant application submitted by the Edwin Gould Services for Children and Families--Steps to End Family Violence, for funding through the Legal Assistance for Victims grant program (CFDA #16.524, Opportunity #OVW 2006-1204).

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/03/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Shirley McKay: 202-514-5305

CHARLES B. RANGEL
15TH CONGRESSIONAL DISTRICT
NEW YORK

COMMITTEE:
WAYS AND MEANS
RANKING MEMBER

JOINT COMMITTEE ON TAXATION

Congress of the United States
House of Representatives
Washington, DC 20515–3215

2354 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–3215
TELEPHONE: (202) 225–4365

DISTRICT OFFICE:
MS. VIVIAN E. JONES
DISTRICT ADMINISTRATOR

163 WEST 125TH STREET
NEW YORK, NY 10027
TELEPHONE: (212) 663–3900

PLEASE RESPOND TO
OFFICE CHECKED

January 24th, 2006

Ms. Diane M. Stuart, Director
Office on Violence Against Women
800 K Street, NW
Washington, DC 20530

I write in support of the Edwin Gould Services for Children and Families-- Steps to End Family Violence application for the Legal Assistance for Victims grant program CFDA #16.524, Opportunity #OVW 2006-1204.

STEPS has operated in my congressional district for over 19 years providing a myriad of needed services to victims of domestic violence. STEPS has demonstrated a special expertise in working with women victims of domestic violence. These women have special needs, and this organization has focused on addressing these needs and empowering the women to move ahead with their lives.

I understand from Steps to End Family Violence that they propose to provide on-site legal advocacy and service for up to 700 clients within two years. A good part of my district encompasses Spanish speaking population that is in desperate need of legal advocacy. STEPS believes that they are well suited to provide on-site legal advocacy services without the benefit of a collaboration with a legal services organization. From their experience they are capable because they currently provide limited legal advocacy services and have the expertise and infrastructure of a legal services department currently in place within the curriculum of domestic violence/sexual assault victim services programs.

I wholehardly support STEPS in attaining this grant for the benefit of my constituents in need of such services.

Sincerely,

Charles B. Rangel
Member of Congress

CBR/jcr

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/24/2006
DATE RECEIVED: 01/31/2006
WORKFLOW ID: 946251
DUE DATE: 02/17/2006

FROM: The Honorable Saxby Chambliss
United States Senate

Washington, DC 20510-0001

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: Supporting the grant application submitted by the YWCA of Northwest Georgia, Inc. for funding through the 2006 Legal Assistance for Victims Grant Program.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/03/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Yvonne Williams: 202-514-5849

946251

SAXBY CHAMBLISS
GEORGIA

COMMITTEES:
AGRICULTURE
CHAIRMAN

ARMED SERVICES

INTELLIGENCE

RULES

United States Senate

WASHINGTON, DC 20510–1007

January 24, 2006

Krista Blakeny-Mitchell
Program Specialist
United States Department of Justice
Office of Violence Against Women
800 K Street
Washington, D.C. 20530

Dear Ms. Mitchell:

I am writing in support of the application for the *2006 Legal Assistance for Victims* grant, CFDA # 16.524, from the United States Department of Justice, Office of Violence Against Women, submitted by the YWCA of Northwest Georgia, Inc. They seek $448,965.

I understand that the YWCA of Northwest Georgia is seeking to establish a family law center that would specialize in issues related to domestic violence and sexual assault. I am told that the YWCA works collaboratively with several county agencies in both referrals and in providing direct services to victims of domestic violence and sexual assault. I believe this has allowed them to offer critical and compassionate services. It appears that the judicial, enforcement and victim services providers all effectively work together to impact the causes and consequences of domestic violence and sexual assault.

I would appreciate your positive consideration of this grant request based on the merits of the application. If I can assist in any way, please do not hesitate to contact me.

Very truly yours,

Saxby

Saxby Chambliss
United States Senate

SC:tm

416 RUSSELL SENATE OFFICE BUILDING
WASHINGTON, OC 20510–1007
PHONE: (202) 224–3521

100 GALLERIA PARKWAY
SUITE 1340
ATLANTA, GA 30339
PHONE: (770) 763–9090

6501 PEAKE ROAD
BUILDING 950
MACON, GA 31210
PHONE: (478) 476–0788

P.O. BOX 3217
MOULTRIE, GA 31776
PHONE: (229) 985–2112

2 EAST BRYAN STREET
SUITE 620
SAVANNAH, GA 31401
PHONE: (912) 232–3657

105B CLAUSSEN ROAD
SUITE 105
AUGUSTA, GA 30907
PHONE: (706) 724–0010

TOLL FREE NUMBER
1 (800) 234–4208

U.S. Department of Justice
Office of the Attorney General

To: Neil Gorsuch

From: Courtney Elwood

7/11

10/21/05

CE

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 09/30/2005 **WORKFLOW ID:** 881692
DATE RECEIVED: 10/05/2005 **DUE DATE:**

FROM: The Honorable Glenn A. Fine
Inspector General
U.S. Department of Justice
Office of the Inspector General
950 Pennsylvania Avenue, NW, Room 4706
Washington, DC 20530

TO: AG (cc indicated for OJP Schofield, Johnson, Paull, Meldon, Fralick, Silver, Schwimer, JMD Corts, Lofthus, Hitch, Morgan, Arnold, Theis)

MAIL TYPE: Information Memorandum

SUBJECT: Memo transmitting OIG's final report (Audit Report 05-38) entitled, Office of Justice Programs Annual Financial Statement Fiscal Year 2004 As Restated (9/2005).

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
10/05/2005	For DAG initialing on Information Memorandum. Office of the Deputy Attorney General

INFO COMPONENT: 10/21/05: OAG

COMMENTS: Acting DAG initialed on 10/19/05.

FILE CODE:

EXECSEC POC: Shirley McKay: 202-514-5305

8 81692

U. S. Department of Justice

Office of the Inspector General

SEP 3 0 2005

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: Acting THE DEPUTY ATTORNEY GENERAL 10/19/05

FROM: GLENN A. FINE
INSPECTOR GENERAL

SUBJECT: Office of Justice Programs
Annual Financial Statement
Fiscal Year 2004, as Restated

This memorandum transmits the final report on the audit of the Office of Justice Programs (OJP) restated Annual Financial Statement for the fiscal year (FY) ended September 30, 2004. This audit was performed pursuant to the Government Management Reform Act of 1994, which requires submission of the audit report to the head of the agency.

The OJP received an unqualified opinion on the single year presentation of its restated FY 2004 financial statements. This audit was a re-audit of OJP's FY 2004 financial statements. As such, the Independent Auditors' report is presented as a single year stand alone report for FY 2004 only. The auditors reported three material weaknesses related to improvements needed in: (1) OJP's controls over the grant advance and payable estimation process; (2) financial reporting, monitoring, analysis and documentation; and (3) general and application controls for electronic data processing. In addition the auditors reported one reportable condition that identified the need for improvements in OJP's grant and non-grant de-obligation process.

In their report on compliance and other matters, the auditors concluded that OJP's financial management systems did not substantially comply with federal financial management system requirements or with applicable federal accounting standards. The auditors also reported non-compliance with Office of Management and Budget Circular A-50, *Audit Follow-up and Resolution Policy*, and the Inspector General Act of 1978, *Prompt Management Decisions*, on timeliness of follow-up actions; the Prompt Payment Act on incorrect calculation of interest payments; and the Improper Payments Information Act on completeness of risk assessments.

If you have any questions or would like to meet to discuss the audit, please contact me on (202) 514-3435 or Marilyn A. Kessinger, Director, Financial Statement Audit Office, on (202) 616-4660.

Attachment

cc: Regina B. Schofield
Assistant Attorney General
Office of Justice Programs

Paul R. Corts
Chief Financial Officer
Assistant Attorney General
for Administration
Justice Management Division

Lee J. Lofthus
Deputy Chief Financial Officer
Deputy Assistant Attorney General, Controller
Deputy Chief Financial Officer
Justice Management Division

Melinda Morgan
Director, Finance Staff
Justice Management Division

Lori Armold
Assistant Director
Financial Management Policies
& Requirements Group
Justice Management Division

Vance Hitch
Chief Information Officer
Deputy Assistant Attorney General,
Information Resources Management
Justice Management Division

Cynthia J. Schwimer
Comptroller
Office of Justice Programs

Gary N. Silver
Director
Office of Administration
Office of Justice Programs

Gerald Fralick
Chief Information Officer
Office of the Assistant Attorney General
Office of Justice Programs

Jill Meldon
Director
Office of Budget and Management Services
Office of Justice Programs

Marcia Paull
Senior Audit Manager
Program Review Office
Office of Justice Programs

LeToya A. Johnson
Director
Program Review Office
Office of Justice Programs

Richard P. Theis
Acting Director
Audit Liaison Office
Justice Management Division

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/19/2006
DATE RECEIVED: 01/26/2006
WORKFLOW ID: 943924
DUE DATE: 02/13/2006

FROM: The Honorable Michael D. Crapo
United States Senate

Washington, DC 20510-0001

TO: OVW (Marnie Shiels & Melissa Schmisek)

MAIL TYPE: Congressional Invitations

SUBJECT: Requesting OVW's assistance in calling attention to the Teen Dating Violence Awareness and Prevention Initiative by participating in a national news conference on 2/6/2006, at 10:15 a.m. at the Woodrow Wilson Senior High School in Washington, DC, to kick-off the National Teen Dating Violence Awarenss and Prevention Week, designated for 2/6-10/2006. See WF 842610

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
01/30/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

943924

MIKE CRAPO
U.S. SENATOR
IDAHO
DEPUTY WHIP
CO-CHAIRMAN, WESTERN WATER CAUCUS
CO-CHAIRMAN, SPORTSMEN'S CAUCUS
CO-CHAIRMAN, COPO CAUCUS
Internet/e-mail:
http://crapo.senate.gov

United States Senate

WASHINGTON, DC 20510

COMMITTEES:
AGRICULTURE, NUTRITION, AND FORESTRY
BANKING, HOUSING, AND URBAN AFFAIRS
BUDGET
FINANCE
INDIAN AFFAIRS

January 19, 2006

Marnie Shiels
Attorney
U.S. Department of Justice
Office of Violence Against Women
800 K St. NW, Suite 920
Washington DC 20530

Dear Ms. Shiels:

I write to request your assistance in calling attention to the Teen Dating Violence Awareness and Prevention Initiative by participating in a national news conference to be held on February 6, 2006. As you know, teen dating violence, a dreadful crime in and of itself, has also been shown to be a precursor to adult domestic violence.

I am aware that you have been working with Moreen Murphy of the American Bar Association (ABA) Steering Committee on the Unmet Legal Needs of Children on its Teen Dating Violence Prevention Initiative. With funding and support from the U. S. Department of Justice, and support from the U. S. Department of Health and Human Services and the U. S. Department of Education Safe and Drug Free Schools, state teams of teenagers developed Awareness and Prevention Toolkits for high schools to be sent out during a National Teen Dating Violence Awareness and Prevention Week. The Toolkits contain awareness and prevention strategies for parents, teenagers, judges, police, attorneys, medical and psychological professionals, domestic violence and other community organizations.

I sponsored a Senate resolution declaring February 6 – 10, 2006, National Teen Dating Violence Awareness and Prevention Week and Congresswoman Juanita Millender-McDonald sponsored a similar resolution in the United States House of Representatives. Both resolutions passed in December 2005.

The news conference will begin at 10:15 a.m. at Woodrow Wilson Senior High School in Washington, D.C. to kick-off the Week's activities nationwide. Other Initiative partners and Members of Congress who have co-sponsored the Resolution have been invited. I would be honored if you could attend. Your invaluable support and influence will help further the success of this Initiative. Teen dating violence is a terrible disease that affects our communities and families and knows no boundaries: rural, urban, socio-economic levels, race or gender. Please consider joining with me in this media event.

Thank you for your consideration of this matter. Laura Thurston Goodroe or Alison Aikele of my staff at (202) 224-6142 are available to provide further details.

Sincerely,

Mike Crapo

Mike Crapo
United States Senator
Idaho

WASHINGTON, DC
239 Dirksen Senate Office Bldg.
Washington, DC 20510
(202) 224-6142

BOISE
251 East Front Street
Suite 205
Boise, ID 83702

CALDWELL
524 E. Cleveland Blvd.
Suite 220
Caldwell, ID 83605

COEUR D'ALENE
610 Hubbard
Suite 209
Coeur d'Alene, ID 83814

IDAHO FALLS
490 Memorial Drive
Suite 102
Idaho Falls, ID 83402

LEWISTON
313 D Street
Suite 105
Lewiston, ID 83501

POCATELLO
275 S. 5th Avenue
Suite 225
Pocatello, ID 83201

TWIN FALLS
202 Falls Avenue
Suite 2
Twin Falls, ID 83301

MIKE CRAPO
U.S. SENATOR
IDAHO
DEPUTY WHIP
CO-CHAIRMAN, WESTERN WATER CAUCUS
CO-CHAIRMAN, SPORTSMEN'S CAUCUS
CO-CHAIRMAN, COPD CAUCUS
Internet/e-mail:
http://crapo.senate.gov

United States Senate

WASHINGTON, DC 20510

January 19, 2006

COMMITTEES:
AGRICULTURE, NUTRITION, AND FORESTRY
BANKING, HOUSING, AND URBAN AFFAIRS
BUDGET
FINANCE
INDIAN AFFAIRS

Melissa Schmisek
U.S. Department of Justice
Office of Violence Against Women
800 K St. NW, Suite 920
Washington DC 20530

Dear Ms. Schmisek:

I write to request your assistance in calling attention to the Teen Dating Violence Awareness and Prevention Initiative by participating in a national news conference to be held on February 6, 2006. As you know, teen dating violence, a dreadful crime in and of itself, has also been shown to be a precursor to adult domestic violence.

I am aware that you have been working with Moreen Murphy of the American Bar Association (ABA) Steering Committee on the Unmet Legal Needs of Children on its Teen Dating Violence Prevention Initiative. With funding and support from the U. S. Department of Justice, and support from the U. S. Department of Health and Human Services and the U. S. Department of Education Safe and Drug Free Schools, state teams of teenagers developed Awareness and Prevention Toolkits for high schools to be sent out during a National Teen Dating Violence Awareness and Prevention Week. The Toolkits contain awareness and prevention strategies for parents, teenagers, judges, police, attorneys, medical and psychological professionals, domestic violence and other community organizations.

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Thank you for your consideration of this matter. Laura Thurston Goodroe or Alison Aikele of my staff at (202) 224-6142 are available to provide further details.

Sincerely,

Mike Crapo

Mike Crapo
United States Senator
Idaho

WASHINGTON, DC
239 Dirksen Senate Office Bldg.
Washington, DC 20510
(202) 224-6142

BOISE
251 East Front Street
Suite 205
Boise, ID 83702

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524 E. Cleveland Blvd.
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Caldwell, ID 83605

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610 Hubbard
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Idaho Falls, ID 83402

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313 D Street
Suite 105
Lewiston, ID 83501

POCATELLO
275 S. 5th Avenue
Suite 225
Pocatello, ID 83201

TWIN FALLS
202 Falls Avenue
Suite 2
Twin Falls, ID 83301

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/20/2005 **WORKFLOW ID:** 842610
DATE RECEIVED: 07/28/2005 **DUE DATE:**

FROM: The Honorable Michael D. Crapo
United States Senate
Washington, DC 20510-0001

TO: AG

MAIL TYPE: Congressional Priority

SUBJECT: Requesting the AG's support in promoting the upcoming Teen Dating Violence Prevention and Awareness Initiative involving teenagers across the nation taking a stand against teen dating violence, led by the American Bar Association's (ABA) Steering Committee on the Unmet Needs of Children and co-sponsored by dozens of other organizations. MC will be introducing a resolution calling for the week of 2/6-2/10/2006, to be designated "National Teen Dating Violence Awareness and Prevention Week."

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
08/22/2005	For OLA signature. Office of Legislative Affairs

INFO COMPONENT: OAG, ODAG, OASG, OIPL, CRM, OLA

COMMENTS: 9/21/2005: OLA replied by ltr dtd 9/14/05. cc: OJP, AG/CG files.
8/22/2005: OJP submitted proposed draft response for OLA signature.

FILE CODE: AG FILE: INITIATIVES Teen Dating Violence Prevention and Awareness Initiative

EXECSEC POC: Shirley McKay: 202-514-5305

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/20/2006
DATE RECEIVED: 01/24/2006
WORKFLOW ID: 942429
DUE DATE: 02/09/2006

FROM: The Honorable Adam Smith
U.S. House of Representatives

Washington, DC 20515

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: (Fax rec'd from OJP) Supporting Columbia Legal Services' reapplication for funding under the Legal Assistance for Victims (LAV) Grant Program.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
01/26/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Paula Stephens: 202-616-0074

942429

ADAM SMITH
9TH DISTRICT, WASHINGTON
227 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-8901

DISTRICT OFFICE:
1717 PACIFIC AVENUE, #2135
TACOMA, WA 98402
(253) 593-6600
TOLL FREE 1-888-SMITH09
e-mail: http://www.house.gov/writerep/
http://www.house.gov/adamsmith/

Congress of the United States
House of Representatives
Washington, DC 20515–4709

COMMITTEE ON ARMED SERVICES
SUBCOMMITTEES:
TACTICAL AIR AND LAND FORCES
TERRORISM, UNCONVENTIONAL THREATS AND CAPABILITIES

COMMITTEE ON INTERNATIONAL RELATIONS
SUBCOMMITTEE:
ASIA AND THE PACIFIC
CONGRESSIONAL INTERNET CAUCUS
NEW DEMOCRAT COALITION

January 20, 2006

Ms. Diane Stuart
Director, Office on Violence Against Women
Office of Justice Programs
U.S. Department of Justice
810 Seventh Street. N.W., 7th Floor
Washington, D.C. 20531

RE: CFDA# 16.524
2006 VAWA Legal Assistance Grant support for Columbia Legal Services

Dear Ms. Stuart:

I am writing to express my support of Columbia Legal Services' reapplication to the Department of Justice to fund legal assistance to survivors and victims of domestic violence in our community. I voted in favor of H.R. 3402 which reauthorizes Department of Justice (DOJ) programs through fiscal year 2009 as well as provisions of the Violence Against Women Act (VAWA) through fiscal year 2011. I feel strongly that anyone who commits acts of domestic violence must be held accountable and that, as a nation, we must do better to prevent violence and protect our citizens.

Domestic violence knows no boundaries and it's important that victims receive the help and support they need. People escaping from domestic violence need emotional, physical and legal support. Legal intervention is one of the tools we can use to stop the cycle of domestic violence for families in need. Columbia Legal Services provides direct legal representation and support to victims of domestic violence. In addition, funding provides for bilingual advocates, culturally sensitive outreach programs to the Spanish speaking community, and enables referrals to volunteer attorneys.

Please give this application your every consideration. If there should be further questions regarding this matter, please contact Ms. Tina Lee Johnson at my district office at (253) 893-3787 or by fax at (253) 896-3789.

Sincerely,

Adam Smith
Member of Congress

AS:tlj

ADAM SMITH
9TH DISTRICT, WASHINGTON
227 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-8901

DISTRICT OFFICE:
1717 PACIFIC AVENUE, #2135
TACOMA, WA 98402
(253) 593-6600
TOLL FREE 1-888-SMITH09
e-mail: http://www.house.gov/writerep/
http://www.house.gov/adamsmith/

Congress of the United States
House of Representatives
Washington, DC 20515–4709

COMMITTEE ON ARMED SERVICES
SUBCOMMITTEES:
TACTICAL AIR AND LAND FORCES
TERRORISM, UNCONVENTIONAL THREATS AND CAPABILITIES

COMMITTEE ON INTERNATIONAL RELATIONS
SUBCOMMITTEE:
ASIA AND THE PACIFIC

CONGRESSIONAL INTERNET CAUCUS
NEW DEMOCRAT COALITION

Fax Transmission

To: Ms. Nancy Segerdahl-Ayres, Director, Office of Communications
Office of Justice Programs

Phone: (202)307-0703 Fax: (202) 514-5958

From: Tina Lee Johnson, Office of Congressman Adam Smith
Phone: (253) 896-3787 (directline) Office: (253) 896-3775
Fax: (253) 896-3789 E-mail:tina.johnson@mail.house.gov

Date: January 20, 2006

RE: Letter of Support for Columbia Legal Services for CFDA16.524, VAWA

Pages including cover: 2

Comments:

Please find following a letter of support from Congressman Adam Smith. A hard copy will be sent to Diane Stuart, Director of the Office on Violence Against Women.

Thank you for your attention to this matter.

Sincerely,

Tina Lee Johnson
Constituent Services Representative
Office of Congressman Adam Smith

Please note that we have moved to our new location at 3600 Port of Tacoma Rd, Suite 106, Tacoma WA 98424.

U.S. Department of Justice
Office of the Attorney General

8/29/05

To: Neil Gorsuch

From: Courtney Elwood

Elwood, Courtney

From: Daley, Cybele
Sent: Thursday, August 25, 2005 4:22 PM
To: Elwood, Courtney
Subject: RE: CFA consult timeline and draft response (MOV 9/11)

Courtney -- Ihe acronyms as follows, including those you did know.....

BJA - Bureau of Justice Assistance (a componenl of OJP) - Jim Burch, Depuly Direclor (prinicpal poinl of contact)
OAAG - Office of Assistant Allorney General (OJP) - Lizelte Benedi, Deputy AAG (I arrived on June 6 and did sign off on the memo for Regina later in the month)
OBMS - Office of Budget and Management (OJP)
OIPL - Office of Intergovernmental and Public Liaison
OASG - Office of the Associate Attorney General
OLA - Office of Legislative Affairs
IOH - Institute of Heraldry
AAAG - Acting Assistant Attorney General (OJP) - Tracy Henke
CFA - Commission of Fine Arts
OCOM - Office of Communications (OJP)

There are written documents to correspond to the timeline. I have asked BJA lo provide those as well. I will have them when you return.

-----Original Message-----
From: Elwood, Courtney
Sent: Wednesday, August 24, 2005 10:15 PM
To: Daley, Cybele
Subject: Re: CFA consult timeline and draft response (MOV 9/11)

Thanks, Cybele. I'll take a closer look at this when I return. In the meantime, could you help me with some of the acronyms in the timeline. I can't figure some of them out. And can you please identify the individuals (as well as the offices) who worked on the project.

Thx

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Daley, Cybele <Cybele.Daley@usdoj.gov>
To: Elwood, Courtney <Courtney.Elwood@SMOJMD.USDOJ.gov>
Sent: Wed Aug 24 17:48:32 2005
Subject: CFA consult timeline and draft response (MOV 9/11)

Courtney -- Attached for your review when you return is a timeline of events leading up to the AG memo and draft response. Based on what we learned from timeline and our discussions with CFA we recommend that someone here sign the response to CFA not the AG.

Let me know what else you need and how you want to proceed on response.

Hope you are having a great time.

Cybele

CG

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/29/2005
DATE RECEIVED: 08/03/2005

WORKFLOW ID: 845861
DUE DATE: 08/26/2005

FROM:
Mr. Thomas Luebke
Secretary
U.S. Commission of Fine Arts
401 F Street NW, Suite 312
Washington, DC 20001

TO: AG

MAIL TYPE: General

SUBJECT: Advising of the public meeting held on 7/21/05 to discuss the design of the Department of Justice 9/11 Heroes Medal of Valor that was submitted for review to the Commission by the Department of the Army Institute of Heraldry. Advises of the Commission members disappointment in the quality of the design for the medal. Advising that they regret the unfortunate timing of the medal's submission resulting in a brief period allowed for the review and a missed opportunity to improve what should be the highest-quality artistic display of our nation's commemorative expression.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
08/12/2005	For component response. Office of Justice Programs

INFO COMPONENT: OAG, ODAG, OASG

COMMENTS:

FILE CODE:

EXECSEC POC: Shirley McKay: 202-514-5305

845861

U.S. COMMISSION OF FINE ARTS

ESTABLISHED BY CONGRESS 17 MAY 1910

NATIONAL BUILDING MUSEUM
401 F STREET, N.W., SUITE 312
WASHINGTON, D.C. 20001-2728

202-504-2200
202-504-2195 FAX

29 July 2005

Dear Mr. Attorney General:

At the recent public meeting of the Commission of Fine Arts on 21 July 2005, the Commission members discussed the design for the Department of Justice 9/11 Heroes Medal of Valor which was submitted to the Commission for their review as required under the medal's authorizing legislation. The medal was submitted by the Department of the Army Institute of Heraldry and we responded on 8 July 2005 to the Institute's Director, Mr. Fritz Kirklighter, that due to the brief period allowed for the review, the Commission would not be able to review the medal as required.

The Commission members requested during the public meeting that we communicate to you their disappointment in the quality of the design for the 9/11 Heroes Medal of Valor, which they feel is not commensurate with the medal's importance. They regret the unfortunate timing of the medal's submission to the Commission of Fine Arts, resulting in a missed opportunity to improve what should be the highest-quality artistic display of our nation's commemorative expression.

We look forward to closer coordination in the future with your agency when the review of design for medals and other commemorative items is required.

Sincerely,

Thomas Luebke, AIA
Secretary

The Honorable Alberto Gonzales, The Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

cc: Fritz Kirklighter, Acting Director, U. S. Department of the Army Institute of Heraldry

THE COMMISSION OF FINE ARTS
NATIONAL BUILDING MUSEUM
401 F STREET, N.W., SUITE 312
WASHINGTON, D.C. 20001-2728

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE, $300

PM
29 JUL
2005

The Honorable Alberto Gonzales
The Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Department of Justice
Mailroom
AUG - 3 2005

20530-0001

1042849

U.S. Department of Justice

Office of Justice Programs

Bureau of Justice Statistics

Washington, D.C. 20531

AUG 2 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 8/4/06

THROUGH: Regina B. Schofield
Assistant Attorney General
Office of Justice Programs

FROM: Jeffrey L. Sedgwick
Director, Bureau of Justice Statistics

SUBJECT: **Advance Notification of BJS Publication**

PURPOSE: To provide the Attorney General with advance copies and notification of the pending publication **State Court Organization, 2004** (NCJ 212351), by David Rottman and Shauna Strickland of the Conference of State Court Administrators and National Center for State Courts, for BJS.

DISCUSSION: **State Court Organization, 2004** presents detailed comparative data by State trial and appellate courts in the United States. Topics covered include: the number of courts and judges; process for judicial selection; governance of court systems, including judicial funding, administration, staffing, and procedures; jury qualifications and verdict rules; and processing and sentencing procedures for criminal cases. Diagrams of court structure summarize the key features of each State's court organization.

COORDINATION: This volume is the 5th release in a series from which data collection and report preparation was carried out by the National Center for State Courts (NCSC). Review of tables was coordinated with Conference of State Court Administrators and staff from BJS.

DISSEMINATION: The more than 300 pages of text will be made available on the Internet for instantaneous dissemination at the time of release. When printed, this report will be distributed to judges, court administrators, and other members of the court community, as well as by federal and state policymakers, criminologists, researchers, journalists, and members of the public.

TIMETABLE: BJS will make this publication available, in its entirety, 30 days from the date of this memorandum.

If we may provide additional information about this document, please contact 307-3813.

cc Steven R. Schlesinger, Director, Statistics Division, Administrative Office of the U.S. Courts
Thomas R. Kane, Assistant Director, Bureau of Prisons
Michael Battle, Director, Executive Office for United States Attorneys
Maryvictoria Pyne, Chief, FBI Criminal Justice Information Service Div., Communications Unit
Frank Shults, Senior Advisor, Office of the Deputy Attorney General

cc: Kyle Sampson, OAG

Robyn Thiemann, ODAG

Assistant Attorney General, OLP

Assistant Attorney General, OLA

Director, PAO

Director, COPS

OASG CORRESPONDENCE ROUTING AND ACTION

From: Jeffrey Sedgwick	Date: 8/4/2006	Due Date: 8/9/2006	Workflow ID: 1042849
Subject: Memo providing advance copies and notification of the pending BJS publication entitled State Court Organization - 2004			
Reviewer: Andi Bottner		Due Back for Processing to Exec Sec:	8/8/2006
Instructions: **Please review and provide written comments.**			
From: Andi Bottner	To: **Neil Gorsuch/Greg Katsas**		Date:
Comments: Looks fine. 8/4/06			
From:	To: **Neil Gorsuch/Greg Katsas**		Date:
Comments:			

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 08/02/2006 **WORKFLOW ID:** 1042849
DATE RECEIVED: 08/03/2006 **DUE DATE:** 08/09/2006

FROM: The Honorable Jeffrey L. Sedgwick
Director
Office of Justice Programs
Bureau of Justice Statistics
Washington, DC 20531

TO: AG (cc indicated for BOP Kane, EOUSA Battle, FBI Pyne, ODAG Shults, Thiemann, OAG Sampson, OLP, OLA, PAO, COPS)

MAIL TYPE: Information Memorandum

SUBJECT: Memo providing advance copies and notification of the pending BJS publication entitled, State Court Organization, 2004. (NCJ212351)

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
08/04/2006	For ASG initialing on Information Memorandum. Return to ES for forwarding to the AG and DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

OASG CORRESPONDENCE ROUTING AND ACTION

From: Jeffrey Sedgwick	Date: 8/4/2006	Due Date: 8/9/2006	Workflow ID: 1042849
Subject: Memo providing advance copies and notification of the pending BJS publication entitled State Court Organization - 2004			
Reviewer: Andi Bottner		Due Back for Processing to Exec Sec: 8/8/2006	
Instructions: **Please review and provide written comments.**			
From: Andi Bottner	To: **Neil Gorsuch/Greg Katsas**		Date:
Comments: Looks fine. 8/4/06			
From:	To: **Neil Gorsuch/Greg Katsas**		Date:
Comments:			

10427762

U.S. Department of Justice

Office of Justice Programs

Bureau of Justice Statistics

Washington, D.C. 20531

AUG 2 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 8/4/06

THROUGH: Regina B. Schofield
Assistant Attorney General
Office of Justice Programs

FROM: Jeffrey L. Sedgwick
Director, Bureau of Justice Statistics

SUBJECT: **Advance Notification of BJS Publication**

PURPOSE: To provide the Attorney General with advance copies and notification of the pending publication of **Federal Criminal Justice Trends, 2003** (NCJ 205331), by Mark Motivans of BJS.

DISCUSSION: **Federal Criminal Justice Trends, 2003** presents data on Federal criminal justice trends from 1994-2003. This report summarizes the activities of agencies at each stage of the Federal criminal case process. It includes 10-year trend statistics on the number arrested (with detail on drug offenses); number and disposition of suspects investigated by U.S. attorneys; number of persons detained prior to trial; number of defendants in cases filed, convicted, and sentenced; and number of offenders under Federal correctional supervision (incarceration, supervised release, probation, and parole). Highlights include the following:

• **From 1994 to 2003 the number of suspects/defendants increased steadily across the stages of the Federal criminal justice system:**

Stage	Number of suspects/ defendants processed 1994	2003
Suspects investigated	99,251	130,078
Suspects arrested and booked	80,730	131,064
Defendants charged	62,327	92,085
Defendants convicted	50,701	75,805
Defendants sentenced to prison	33,022	57,629

• **Growth in immigration and weapons offenders**
The 10-year average annual increase was greatest for immigration (ranging from 14% for arrests to 25% for prison sentences imposed) and weapon offenses (ranging from 10% for prosecution to 11% for matters investigated by U.S. attorneys).

• **Southwest United States produced a disproportionate share of suspects and defendants processed**
Five of 94 Federal judicial districts (Southern District of California, District of Arizona, District of New Mexico and Southern and Western Districts of Texas) comprised 31% of all suspects arrested and booked, 19% of suspects investigated, 23% of defendants in cases filed in U.S. district court, and 28% of offenders sentenced to prison (1994-2003).

• **Greater likelihood of suspects prosecuted, defendants convicted, and offenders sentenced to prison**
The percent of suspects prosecuted (of matters concluded by U.S. attorneys) increased from 54% in 1994 to 62% in 2003.

DISSEMINATION: The text and data tabulations will be made available on the Internet for instantaneous dissemination at the time of the press release. When printed, this report will be distributed to criminal justice practitioners, policymakers, and others who have indicated an interest in this subject. We have consulted with the OJP Office of Communications, and they have made preliminary plans to issue a press release.

TIMETABLE: The press release is anticipated for Sunday, August 27, 2006, at 4:30 p.m. EDT. BJS will begin distributing this publication at that time.

If we may provide additional information about this document, please contact 616-3282.

cc Steven R. Schlesinger, Director, Statistics Division, Administrative Office of the U.S. Courts
Thomas R. Kane, Assistant Director, Bureau of Prisons
Michael Battle, Director, Executive Office for United States Attorneys
Maryvictoria Pyne, Chief , FBI Criminal Justice Information Service Div., Communications Unit
Frank Shults, Senior Advisor, Office of the Deputy Attorney General

cc: Kyle Sampson, OAG

Robyn Thiemann, ODAG

Assistant Attorney General, OLP

Assistant Attorney General, OLA

Director, PAO

Director, COPS

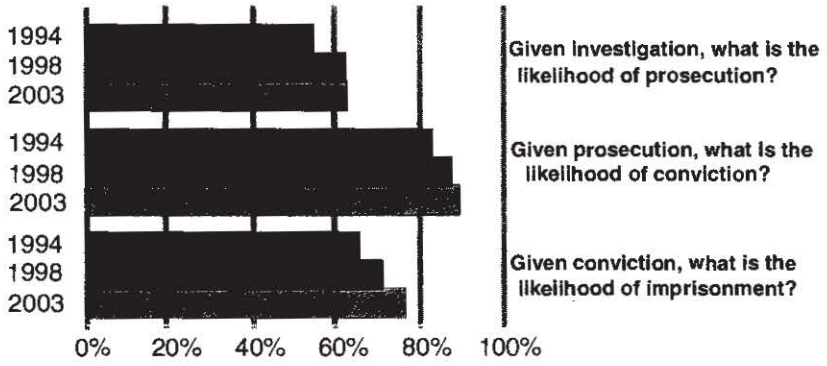
Q & A's for Federal Criminal Justice Trends, 2003

Federal Criminal Justice Trends, 2003 is the first in a new series designed to track trends in the Federal justice system. BJS uses data received from eight Federal justice agencies to describe the enforcement of several thousand Federal statutes in the U.S. Criminal Code. Publication of this report, while not mandated by statute, serves as a uniform reference volume on Federal criminal case processing trends.

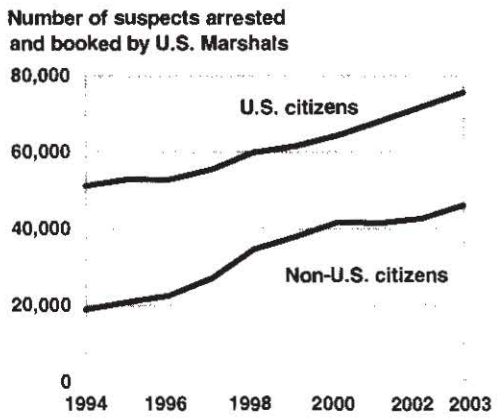
Q. What are significant findings from this report?

A. The number of suspects/defendants processed in the Federal criminal justice system increased to record levels. Over 130,000 suspects were investigated by U.S. attorneys in 2003 up from 99,000 in 1994. Federal legislation and Justice's enforcement initiatives addressing the problem of illegal immigration resulted in immigration being the offense with the greatest 10-year average increase across case processing stages (14% average yearly increase in immigration arrests and 25% increase in prison sentences imposed). The number of drug offenders sentenced to prison increased a yearly average of 6% and weapon offenders increased 10% over this period.

From 1994-2003 suspects had a greater likelihood of being prosecuted, defendants convicted, and offenders sentenced to prison.

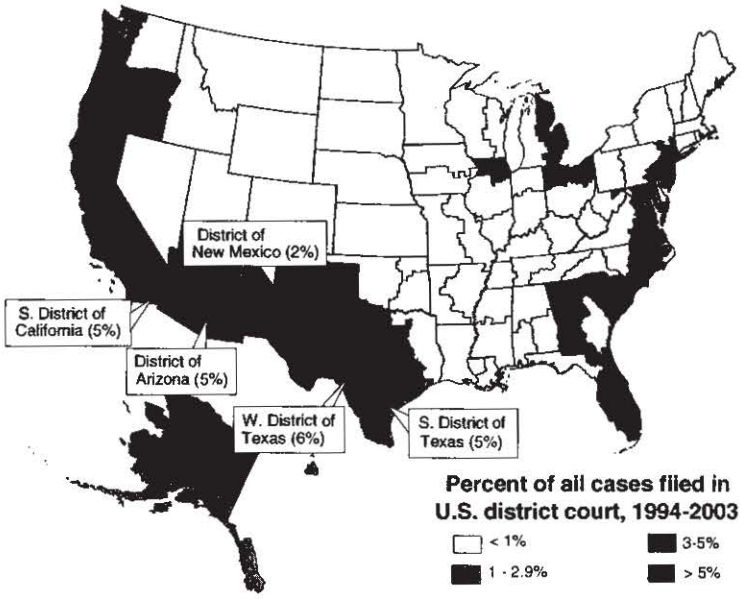


The number of non-U.S. citizens in the Federal criminal justice system steadily increased from 1994-2003. Thirty-eight percent of suspects arrested and booked by the U.S. Marshals Service (USMS) in 2003 were non-citizens compared to 27% in 1994. Of the 152,459 prisoners in custody of the Federal Bureau of Prisons, 28% were non-U.S. citizens.



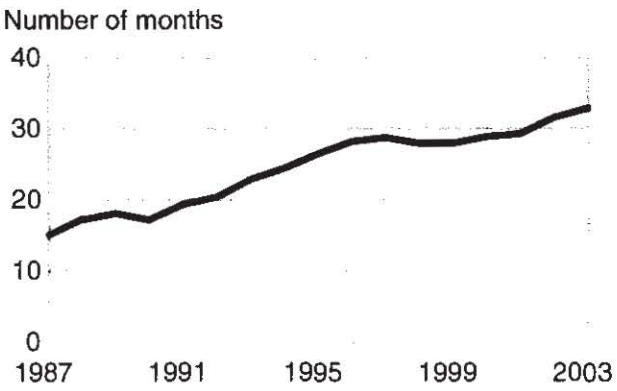
Q: How were Federal criminal cases distributed across the U.S. over this period?
A: From 1994-2003 a notable share of suspects and defendants were processed in the Southwest. Five Federal judicial districts (Southern District of California, District of Arizona, District of New Mexico and Southern and Western Districts of Texas) comprised 31% of all suspects arrested and booked, 20% of suspects investigated, 23% of defendants in cases filed in U.S. district court, and 28% of offenders sentenced to prison (1994-2003).

Five out of 94 Federal judicial districts comprised 23% of all criminal cases filed in U.S. district court from 1994-2003



Q. How much time did inmates released from prison serve (on average)?
A: During 2003, 40,780 prisoners were released for the first time from Federal prison after commitment by a U.S. district court. The average time served for all offenses was 33 months. Average time served by Federal offenders increased from 25 months for those released in 1994 to 33 months for offenders released in 2003.

Time served of offenders released from prison



OASG CORRESPONDENCE ROUTING AND ACTION

From: Jeffrey Sedgwick	Date: 8/4/2006	Due Date: 8/9/2006	Workflow ID: 1042762
Subject: Memo providing advance copies and notification of the pending BJS publication entitled - Federal Criminal Justice Trends - 2003			
Reviewer: Andi Bottner		Due Back for Processing to Exec Sec: 8/8/2006	
Instructions: **Please review and provide written comments.**			
From: Andi Bottner	To: **Neil Gorsuch/Greg Katsas**		Date:
Comments: Interesting immigration #'s. Looks OK. 8/4/06			
From:	To: **Neil Gorsuch/Greg Katsas**		Date:
Comments:			

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 08/02/2006 **WORKFLOW ID:** 1042762
DATE RECEIVED: 08/03/2006 **DUE DATE:** 08/09/2006

FROM: The Honorable Jeffrey L. Sedgwick
Director
Office of Justice Programs
Bureau of Justice Statistics
Washington, DC 20531

TO: AG (cc indicated for BOP Kane, EOUSA Battle, FBI Pyne, ODAG Shults, Thiemann, OAG Sampson, OLP, OLA, PAO, COPS)

MAIL TYPE: Information Memorandum

SUBJECT: Memo providing advance copies and notification of the pending BJS publication entitled, Federal Criminal Justice Trends, 2003. (NCJ205331)

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
08/04/2006	For ASG initialing on Information Memorandum. Return to ES for forwarding to the AG and DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

OASG CORRESPONDENCE ROUTING AND ACTION

From: Jeffrey Sedgwick	Date: 8/4/2006	Due Date: 8/9/2006	Workflow ID: 1042762
Subject: Memo providing advance copies and notification of the pending BJS publication entitled - Federal Criminal Justice Trends - 2003			
Reviewer: Andi Bottner		Due Back for Processing to Exec Sec:	8/8/2006
Instructions: **Please review and provide written comments.**			

From: Andi Bottner	To: **Neil Gorsuch/Greg Katsas**	Date:

Comments:

Interesting immigration #'s.
Looks OK.

8/4/06

From:	To: **Neil Gorsuch/Greg Katsas**	Date:

Comments:

1041386

U.S. Department of Justice

Office of Justice Programs

Office of Juvenile Justice and Delinquency Prevention

Office of the Administrator

Washington, D.C. 20531

JUL 28 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 8/14/06

THROUGH: Regina B. Schofield
Assistant Attorney General
Office of Justice Programs

FROM: J. Robert Flores
Administrator

SUBJECT: Advance Notification of an OJJDP Publication

PURPOSE: To provide you with advance copies and notification of the pending release of *National Evaluation of the Title V Community Prevention Grants Program* (Online Report) (NCJ 212214).

DISCUSSION: This Online Report presents the findings from a multiyear, multisite national evaluation of the Title V Community Prevention Grants Program. Through Title V, OJJDP provides communities with funding and a guiding framework for developing and implementing comprehensive juvenile delinquency prevention plans that meet their unique circumstances and risk conditions.

This Report presents the experiences of 11 communities in 6 states that implemented the basic principles of the Community Prevention Grants Program. Specifically, the Report examines how the program affected these communities, including the benefits they received and the challenges they encountered. It also analyzes the national evaluation team's efforts to design and implement a national assessment that balanced the information needs of the federal government with the evaluation capacity of local Title V communities.

Talking Points for
National Evaluation of the Title V
Community Prevention Grants Program
(OJJDP Online Report)

Recognizing that community-based programs and local involvement are critical components of delinquency prevention efforts, OJJDP provides communities with funding and a guiding framework for developing and implementing comprehensive delinquency prevention plans. For more than a decade, OJJDP's Title V Community Prevention Grants Program has helped communities prevent delinquency and improve the lives of youth and their families.

Beginning in 1998, OJJDP undertook a multiyear, multijurisdictional evaluation of the Community Prevention Grants Program to examine the viability and effectiveness of its delinquency prevention model. Based on input from national experts in designing and conducting evaluations of comprehensive program initiatives, the evaluation tests the key assumptions on which the program model rests.

This Report presents the experiences of 11 communities in 6 states that implemented the basic principles of the Community Prevention Grants Program. Specifically, the Report examines how the program affected these communities, including the benefits they received and the challenges they encountered. Evaluation findings include the following:

- Title V means different things to different communities. For some communities, it means communitywide systems change; for others, it means implementation of one or more specific prevention programs. These differences can be attributed to whether the community was previously exposed to comprehensive prevention planning at the time it was introduced to the Title V model.

- A reasonable plan generally means communities are trying to affect no more than three risk factors and are implementing no more than two or three prevention strategies.

- Having subscribed to "program first" thinking for years, some local prevention policy board members were reluctant to embrace a more comprehensive planning model that emphasized "assessment first, program planning later."

- Because the Title V model is complex, especially for communities with little experience with collaborative, communitywide prevention efforts, it is important to encourage local leaders to start small. Over time, after communities have reassessed their local risk and protective factors, they can modify or enhance existing efforts or put new programs and strategies in place.

- Most of the communities struggled to develop and implement local evaluation plans. Suggestions for improving evaluation efforts include: emphasizing program evaluation and risk-factor tracking; building state-level evaluation capacity to monitor and support local-

level evaluation; mandating evaluation and set-aside funds to support it; and requiring the use of evidence-based programs.

Since the inception of the Title V Community Prevention Grants Program in 1992, overall, progress has been made. Communities have become better at collaborating, assessing their local needs, identifying appropriate strategies, and institutionalizing and evaluating local efforts.

cc: Kyle Sampson, OAG

Robyn Thiemann, ODAG

Assistant Attorney General, OLP

Assistant Attorney General, OLA

Director, PAO

Director, COPS

The national evaluation described in this Report provides a framework for understanding both the process and progress of the Title V Program. As one of the nation's first comprehensive, community-based prevention initiatives, Title V offers a unique opportunity for OJJDP and others in the field of delinquency prevention to observe communities nationwide as they attempt to translate theory into practice. Findings from the national evaluation have helped OJJDP refine the Title V model.

The national evaluation provided opportunities to learn firsthand about the challenges of evaluating comprehensive, community-based initiatives like Title V. As the evaluation progressed, so did other national evaluations of comprehensive, community-based initiatives. In combination, these national evaluation team experiences can help inform future national evaluations of programs like Title V by identifying what works in terms of methodology, design, and data collection activities and how best to support communities to participate fully in large evaluation projects.

GRANT INFORMATION:

- **Project:** OJJDP's Management and Evaluation Contract
- **Grantee:** Caliber Associates, Inc.
- **Award Amount:** $1.3 million

COORDINATION: This Report was developed by OJJDP.

DISSEMINATION: We have consulted with the OJP Office of Communications, which has made preliminary plans to issue a publication advisory. The report will be posted on OJJDP's Web site 30 days from the date of this memorandum.

We will take advantage of a range of e-mail lists of our targeted audiences to send an electronic notification of the publication's availability and a link to it on the OJJDP Web site to approximately 30,100 of our customers.

If you need additional information regarding this document, please call 202–307–5911.

OASG CORRESPONDENCE ROUTING AND ACTION

From: Robert Flores	Date: 8/2/2006	Due Date: 8/7/2006	Workflow ID: 1041386
Subject: Memo providing advance copies and notification of the pending release of the OJJDP publication entitled National Evaluation of the Title V Community Prevention Grants Program (Online Report) (NCJ212214)			
Reviewer:		Due Back for Processing to Exec Sec: 8/6/2006	
Instructions: **Please review and provide written comments.**			
From: Andi Bottner	To: **Neil Gorsuch**		Date:
Comments: Looks fine to move forward. Thanks. Andi 8/3/06			
From:	To: **Neil Gorsuch**		Date:
Comments:			

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/28/2006 **WORKFLOW ID:** 1041386
DATE RECEIVED: 08/01/2006 **DUE DATE:** 08/07/2006

FROM: The Honorable J. Robert Flores
Administrator
Office of Juvenile Justice and Delinquency Prevention
Office of Justice Programs
Washington, DC 20531

TO: AG (cc indicated for OAG Sampson, ODAG Thiemann, OLP, OLA, PAO, COPS)

MAIL TYPE: Information Memorandum

SUBJECT: Memo providing advance copies and notification of the pending release of the OJJDP publication entitled, National Evaluation of the Title V Community Prevention Grants Program (Online Report) (NCJ212214).

DATE ASSIGNED 08/02/2006

ACTION COMPONENT & ACTION REQUESTED
For ASG initialing on Information Memorandum. Return to ES for forwarding to the AG and DAG.
Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Shirley McKay: 202-514-5305

OASG CORRESPONDENCE ROUTING AND ACTION

From: Robert Flores	Date: 8/2/2006	Due Date: 8/7/2006	Workflow ID: 1041386
Subject: Memo providing advance copies and notification of the pending release of the OJJDP publication entitled National Evaluation of the Title V Community Prevention Grants Program (Online Report) (NCJ212214)			
Reviewer:		Due Back for Processing to Exec Sec: 8/6/2006	
Instructions: **Please review and provide written comments.**			
From: Andi Bottner	To: **Neil Gorsuch**		Date:
Comments: looks fine to me forward. Thanks. Andi 8/3/06			
From:	To: **Neil Gorsuch**		Date:
Comments:			

1034908

U.S. Department of Justice

Office of Justice Programs

Bureau of Justice Statistics

Washington, D.C. 20531

JUL [redacted] 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 7/28/06

THROUGH: Regina B. Schofield
Assistant Attorney General
Office of Justice Programs

FROM: Jeffrey L. Sedgwick
Director, Bureau of Justice Statistics

SUBJECT: **BJS Statistical Release Report, July 2006**

This memorandum contains three sections:

1) Publications
2) Statistical tables and web content that are not printed
3) Recently released materials.

Each section is sequenced by expected release date.

Final release dates are determined by receipt and verification of final data.

Publications:

Press release:
Yes [blank means No]

Bureau of Justice Statistics Publications Collection CD-ROM, as of December 31, 2005

(P. Middleton) Contains all of the BJS publications that are available electronically and were published before December 31, 2005. Linked lists of titles are presented alphabetically, chronologically, and topically for use with a web browser. Materials are presented in Portable Document Format (PDF), ASCII text, or spreadsheet formats. Expected release date around 07/15/2006.

National Corrections Reporting Program, 2002 CD-ROM
(T. Hughes, A. Beck) Presents data on admissions, releases, and parole outcomes of persons in the Nation's State prisons and parole systems, including demographic characteristics, offenses, sentence length, type of admission, time to be served, method of release, and actual time served of inmates exiting prison and parole. In 2002, 39 States reported data. Included on the CD-ROM are ASCII files that require the use of specific statistical software packages, a code book, statistical software setup files, and explanatory notes. Expected release date around 07/15/2006.

Improving Criminal History Records for Background Checks, 2005
(G. Ramker) Describes the achievements of the National Criminal History Improvement Program (NCHIP), its authorizing legislation and program history. This annual Bulletin summarizes NCHIP-funded criminal record improvement efforts, including improved accessibility of records, full participation in the Interstate Identification Index, the automation of records and fingerprint data, and improvements in the National Instant Criminal Background Check, National Sex Offender Registry, and domestic violence and protection order systems. The report provides examples of projects aimed at enhancing the involvement of the courts and system integration in improving disposition reporting. The report also discusses the Bureau of Justice Statistics' efforts to improve performance measurement including the development and use of a Records Quality Index. Expected release around 07/21/2006.

Prosecutors in State Courts, 2005
(S. Perry) Presents findings from the 2005 National Survey of Prosecutors, the latest in a series of data collections from among the Nation's 2,300 State court prosecutors' offices that tried felony cases in State courts of general jurisdiction. This study provides information on the number of staff, annual budget, and felony cases closed for each office. Information is also available on the use of DNA evidence, computer-related crimes, and terrorism cases prosecuted. Other survey data include special categories of felony offenses prosecuted, types of nonfelony cases handled, number of felony convictions, number of juvenile cases proceeded against in criminal court, and work-related threats or assaults against office staff. Expected release date around 07/30/2006.

Yes **Sexual Violence Reported by Correctional Authorities, 2005**
(A. Beck, P. Harrison) Presents data from the Survey on Sexual Violence, 2005, an administrative records collection of incidents of inmate-on-inmate and staff-on-inmate sexual violence reported to correctional authorities. The report provides counts of sexual violence, by type, for adult prisons, jails, and other adult correctional facilities. The report provides an indepth analysis of substantiated incidents, including where the incidents occur, time of day, number and characteristics of victims and perpetrators, nature of the injuries, impact on the victims and sanctions imposed on the perpetrators.

The appendix tables include counts of sexual violence, by type, for all State systems, the Federal Bureau of Prisons, and all sampled jail jurisdictions. The report also includes an update on BJS activities related to implementation of the data collections required under the Prison Rape Elimination Act of 2003 (Public Law 108-79). Expected release around 07/30/2006.

Federal Law Enforcement Officers, 2004

(B. Reaves) Reports the results of a biennial census of Federal agencies employing personnel with arrest and firearms authority. Using agency classifications, the report presents the number of officers working in the areas of police patrol and response, criminal investigation and enforcement, security and protection, court operations, and corrections, by agency and State, as of September 2004. Data on gender and race of officers are also included. Expected release date around 07/31/2006.

Yes **Violent Felons in Large Urban Counties**

(B. Reaves) Presents data collected from a representative sample of felony cases that resulted in a felony conviction for a violent offense in 40 of the Nation's 75 largest counties. The study tracks cases for up to 1 year from the date of filing through final disposition. Defendants convicted of murder, rape, robbery, assault or other violent felony are described in terms of demographic characteristics (gender, race, Hispanic origin, age), prior arrests and convictions, criminal justice status at time of arrest, type of pretrial release or detention, type of adjudication, and sentence received. Expected release around 08/06/2006.

Background Checks for Firearm Transfers, 2005

(M. Hickman, D. Adams) Describes background checks for firearm transfers conducted in 2005. This annual report provides the number of applications checked by State points of contact, estimates of the number of applications checked by local agencies, the number of applications rejected, the reasons for rejection, and estimates of applications and rejections conducted by each type of approval system. It also provides information about appeals of rejected applications and arrests for falsified applications. The Firearm Inquiry Statistics Program is an ongoing data collection effort focusing on the procedures and statistics related to background checks in selected States. Expected release around 08/15/2006.

Black Victims of Violent Crime, 1993-2004

(E. Harrell) Presents findings about violent crime experienced by non-Hispanic blacks. Data on nonfatal violent victimization (rape/sexual assault, robbery, aggravated and simple assault) are drawn from the National Crime Victimization Survey. Data on homicides are drawn from the FBI Uniform Crime Reporting Program's Supplementary

Homicide Reports. Comparisons are made with the victimization experience of other racial/ethnic groups. Findings include 1993-2004 violent victimization rates by victim characteristics. Also examined are crime characteristics, including weapon use, police reporting and police response to violent crime incidents. Trends in violent victimization are also discussed. Expected release date around 08/15/2006.

Compendium of Federal Justice Statistics, 2004
(M. Motivans) Presents national-level statistics describing characteristics of persons processed and the distribution of case processing outcomes at each major stage of the Federal criminal justice system. This annual report includes data on investigations by U.S. attorneys, prosecutions and declinations, pretrial release and detention, convictions and acquittals, and sentencing and appeals. This report also provides statistics on fugitive investigations by the U.S. Marshals Service. Electronic only. Expected release around 08/15/2006.

Yes **Drug Use and Dependence, State and Federal Prisoners, 2004**
(C. Mumola) Presents data from the 2004 Survey of Inmates in State and Federal Correctional Facilities on prisoners' prior use, dependence, and abuse of illegal drugs. Tables include trends in the levels of drug use, type of drugs used, and treatment reported by State and Federal prisoners since the last national survey was conducted in 1997. The report also presents measures of dependence and abuse by gender, race, Hispanic origin, and age. It provides data on the levels of prior drug use (with an indepth look at methamphetamine use), dependence, and abuse by selected characteristics, such as family background, criminal record, type of drug used, and offense. Expected release date around 08/15/2006.

Yes **HIV in Prisons, 2004**
(L. Maruschak) Reports the number of female and male prisoners who were HIV positive or AIDS active, the number of AIDS-related deaths in State and Federal prisons, a profile of those inmates who died, and a comparison of AIDS rates for the general and prisoner populations. This annual bulletin uses yearend 2004 data from the National Prisoner Statistics and the Deaths in Custody series. Supplemental information from the 2004 Survey of Inmates in State and Federal Correctional Facilities is provided in this report including estimates of HIV infection among prison inmates by age, gender, race, Hispanic origin, education, marital status, current offense, and selected risk factors such as prior drug use. Expected release date around 08/15/2006.

Yes **Medical Problems of Jail Inmates**
(L. Maruschak) Presents findings on jail inmates who reported a current medical problem, a physical impairment or mental condition, or an injury since admission based

on data from the 2002 Survey of Inmates in Local Jails. The prevalence of specific medical problems and conditions are also included. The report examines medical problems and other conditions by gender, age, time served since admission, and select background characteristics. Expected release date around 08/15/2006.

Yes **Mental Health Problems of Prison and Jail Inmates**

(D. James, L. Glaze) Presents estimates of the prevalence of mental health problems among prison and jail inmates using self-reported data on recent history and symptoms of mental disorders. The report compares the characteristics of offenders with a mental health problem to other inmates, including current offense, criminal record, sentence length, time expected to be served, co-occurring substance dependence or abuse, family background, and facility conduct since current admission. It presents measures of mental problems by gender, race, Hispanic origin, and age. The report describes mental health problems and mental health treatment among inmates since admission to jail or prison. Findings are based on the Surveys of Inmates in State and Federal Adult Correctional Facilities, 2004, and the Survey of Inmates in Local Jails, 2002. Expected release date around 08/15/2006.

State Court Organization, 2004

(D. Rottman, S. Strickland, T. Cohen, BJS project monitor) Presents detailed comparative data by State trial and appellate courts in the United States. Topics covered include: the number of courts and judges; process for judicial selection; governance of court systems, including judicial funding, administration, staffing, and procedures; jury qualifications and verdict rules; and processing and sentencing procedures for criminal cases. Diagrams of court structure summarize the key features of each State's court organization. This fifth edition of State Court Organization is a joint effort of the Conference of State Court Administrators, the National Center for State Courts, and BJS. Expected release date around 08/15/2006.

Yes **Criminal Victimization, 2005**

(S. Catalano) Presents estimates of national levels and rates of personal and property victimization for the year 2005. Rates and levels are provided for personal and property victimization by victim characteristics, type of crime, victim-offender relationship, use of weapons, and reporting to police. Annual average victimization rates for 2004-05 are compared with those of the previous two years, 2002-03. A section is devoted to trends in victimization from 1993 to 2005. Estimates are from data collected using the National Crime Victimization Survey (NCVS), an ongoing survey of households that interviews about 76,000 persons in 42,000 households twice annually. Violent crimes included in the report are rape/sexual assault, robbery, aggravated assault and simple assault (from the NCVS), and homicide (from the FBI's UCR program). Property crimes examined are burglary, motor vehicle theft, and property theft. Expected release around 08/20/2006.

Yes **Federal Criminal Justice Trends, 2003**

(M. Motivans) Presents data on Federal criminal justice trends from 1994-2003. This report summarizes the activities of agencies at each stage of the Federal criminal case process. It includes 10-year trend statistics on the number arrested (with detail on drug offenses); number and disposition of suspects investigated by U.S. attorneys; number of persons detained prior to trial; number of defendants in cases filed, convicted, and sentenced; and number of offenders under Federal correctional supervision (incarceration, supervised release, probation, and parole). Expected release around 08/27/2006.

Census of State and Local Law Enforcement Agencies, 2004

(B. Reaves) Reports the results of a census, conducted every four years, of all State and local law enforcement agencies operating nationwide. The report provides the number of employees of State and local law enforcement agencies as of September 2004, including State-by-State data for sheriffs' offices, local police departments, State police and highway patrol agencies, and special jurisdiction police. Expected release date around 08/31/2006.

Jails in Indian Country, 2004

(T. Minton) Presents findings from the 2004 Survey of Jails in Indian Country, an enumeration of 68 confinement facilities, detention centers, jails, and other facilities operated by tribal authorities or the Bureau of Indian Affairs. BJS conducted the survey on June 30, 2004. Included are the numbers of adults and juveniles held, seriousness of offense, persons confined on the last weekday of each month, average daily population, peak population and admissions for June, and inmate deaths. Numerical tables also summarize rated capacity, facility crowding, and jail staffing.

For the first time, information was collected on four infectious diseases, including HIV, hepatitis B and C, and tuberculosis. Other new information is presented on inmate medical and mental health services, suicide prevention, substance dependency programs, domestic violence counseling, sex offender treatment, educational programs, and inmate work assignments. Expected release date around 08/31/2006.

Organizations as Defendants in the Federal Justice System, 1994-2005

(M. Motivans) Describes criminal cases brought against organizations including business entities set-up to conduct commercial activities and hold assets as well associations, unions, and unincorporated and nonprofit organizations. Federal statutes for the most part do not differentiate between organizational and individual defendants, applying similarly to both. This special report describes criminal case processing of organizational defendants, the crimes that bring them to the Federal justice system, and case outcomes. It includes the number of organizations in matters investigated by U.S. attorneys, the

number prosecuted, convicted and sentenced, and organizations on Federal supervision. Expected release date around 08/31/2006.

Survey of State Procedures Relating to Firearm Sales, Midyear 2005
(D. Adams) Provides an overview of the firearm check procedures in each State and State interaction with the National Instant Criminal Background Check System (NICS), operated by the FBI. The report summarizes issues about State procedures, including persons prohibited from purchasing firearms, restoration of rights of purchase to prohibited persons, permits, prohibited firearms, waiting periods, fees, and appeals. Supplemental tables contain data on 2004 applications to purchase firearms and rejections, as well as tabular presentations of State-by-State responses. This is one of a series of reports published from the BJS Firearm Inquiry Statistics (FIST) project, managed under the BJS National Criminal History Improvement Program (NCHIP). Expected release around 08/31/2006.

Law Enforcement Management and Administrative Statistics, 2003: Data for Individual State and Local Agencies with 100 or More Officers
(B. Reaves) Presents agency-specific data collected from more than 800 State and local law enforcement agencies employing 100 or more officers based on the 2003 Law Enforcement Management and Administrative Statistics (LEMAS) survey. The report provides agency-specific information on the characteristics of the largest law enforcement agencies nationwide. Large agencies are described in detail for such issues as staff and financial resources, technologies and equipment in use, and policies and practices of the agencies on a wide array of law enforcement and administrative concerns. Summary data for State police and highway patrol agencies, municipal police departments, county police departments, and sheriffs' offices are also included. Expected release date around 09/15/2006.

Statistical table updates and web content (electronic only):

Yes **Intimate Partner Violence**
(S. Catalano) Examines fatal and non-fatal violence by intimates (current or former spouses, girlfriends, or boyfriends) since the redesign of the National Crime Victimization Survey (NCVS) in 1993. Victim characteristics such as race, sex, age, income, and ethnicity are presented. Measured crimes include murder, rape, robbery, aggravated assault, and simple assault experienced by males and females age 12 years and older. In addition, characteristics of the victimization are presented such as offender use of alcohol/drugs, offender use of weapons, location, time of day, reporting to police, injury and medical treatment, and presence of children in the household. Data for this Internet only release are from the NCVS and FBI's Supplementary Homicide Reports. Expected release date around 08/15/2006.

Recently released:

Crime and the Nation's Households, 2004
(P. Klaus) Released on 04/19/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/cnh04.htm*. Printed copies available.

Justice Expenditure and Employment in the United States, 2003
(K. Hughes) Released on 04/30/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/jeeus03.htm*. Printed copies available.

Local Police Departments, 2003
(M. Hickman, B. Reaves) Released on 05/02/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/lpd03.htm*. Printed copies available around 07/31/2006.

Sheriffs' Offices, 2003
(M. Hickman, B. Reaves) Released on 05/02/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/so03.htm*. Printed copies available around 07/31/2006.

Prison and Jail Inmates, Midyear 2005
(P. Harrison, A. Beck) Released on 05/21/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/pjim05.htm*. Printed copies available.

Characteristics of Drivers Stopped by Police, 2002
(E. Smith, M. Durose) Released on 06/02/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/cdsp02.htm*. Printed copies available around 07/31/2006.

Citizen Complaints about Police Use of Force
(M. Hickman) Released on 06/25/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/ccpuf.htm*. Printed copies available around 08/15/2006.

Criminal Victimization in the United States - Statistical Tables, 2004
(C. Maston) Released on 06/29/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/cvusst.htm*. Website update.

Homicide Trends in the United States
(M. Zawitz, J. Fox, BJS Visiting Fellow) Released on 06/29/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/homicide/homtrnd.htm*. Website update.

Appeals from General Civil Trials in 46 Large Counties, 2001-2005
(T. Cohen) Released on 07/06/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/agctlc05.htm*. Printed copies available around 08/15/2006.

cc: Rachel L. Brand, OLP
Frank Shults, ODAG
Tasia Scolinos, PAO
Nicholas J. Tzitzon, OAAG
David Hagy, OAAG
Cybele Daley, OAAG
Beth McGarry, OAAG
Laura Keehner, OAAG
Domingo Herraiz, BJA
J. Robert Flores, OJJDP
John Gillis, OVC
Glenn Schmitt, NIJ
Denise Viera, CCDO
Diane Stuart, OVW
Thomas R. Kane, BOP
Maryvictoria Pyne, FBI-CJIS
Steven R. Schlesinger, AOUSC
Michael Battle, EOUSA

OASG CORRESPONDENCE ROUTING AND ACTION

From: Jeffrey Sedgwick	Date: 07/21/2006	Due Date: 7/24/2006	Workflow ID: 1034908
Subject: Memo providing the BJS Statistical Release Report - July 2006.			
Reviewer: Jeff Senger		Due Back for Processing to Exec Sec:	7/23/2006
Instructions: **Please review and provide written comments.**			
From: **Jeff Senger**	To: **Neil Gorsuch**		Date: 7/27/06
Comments: looks okay. Jeff			
From: **Neil Gorsuch**	To: **Robert McCallum**		Date:
Comments:			

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/14/2006 **WORKFLOW ID:** 1034908
DATE RECEIVED: 07/19/2006 **DUE DATE:** 07/24/2006

FROM: The Honorable Jeffrey L. Sedgwick
Director
Bureau of Justice Statistics
Washington, DC 20531

TO: AG (cc indicated for OLP Brand, ODAG Shults, PAO Scolinos, BOP Kane, FBI Pyne, EOUSA Battle)

MAIL TYPE: Information Memorandum

SUBJECT: Memo providing the BJS Statistical Release Report, July 2006.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
07/19/2006	For ASG initialing on Information Memorandum. Return to ES for forwarding to the AG and DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Shirley McKay: 202-514-5305

OASG CORRESPONDENCE ROUTING AND ACTION

From: Jeffrey Sedgwick	Date: 07/21/2006	Due Date: 7/24/2006	Workflow ID: 1034908
Subject: Memo providing the BJS Statistical Release Report - July 2006.			
Reviewer: Jeff Senger		Due Back for Processing to Exec Sec:	7/23/2006
Instructions: **Please review and provide written comments.**			

From: **Jeff Senger**	To: **Neil Gorsuch**	Date: 7/27/06
Comments: looks okay. Jeff		

From: **Neil Gorsuch**	To: **Robert McCallum**	Date:
Comments:		

1033193

U.S. Department of Justice

Office of Justice Programs

Bureau of Justice Statistics

Washington, D.C. 20531

JUL 12 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE Acting ASSOCIATE ATTORNEY GENERAL HM 7/20/06

THROUGH: Regina B. Schofield RBS
Assistant Attorney General
Office of Justice Programs

FROM: Jeffrey L. Sedgwick
Director, Bureau of Justice Statistics

SUBJECT: **Advance Notification of BJS Publication**

PURPOSE: To provide the Attorney General with advance copies and notification of the pending publication of (NCJ 212750), by Brian Reaves of BJS.

DISCUSSION: **Federal Law Enforcement Officers, 2004** reports the results of a biennial census of Federal agencies employing personnel with arrest and firearms authority. Using agency classifications, the report presents the number of officers working in the areas of police response and patrol, criminal investigation and enforcement, inspections, security and protection, court operations, and corrections, by agency and State, as of September 2004. Data on gender and race of officers are also included. Highlights include the following:

- As of September 2004, about 3 in 4 Federal law enforcement officers working outside the Armed Forces were employed within the Department of Homeland Security or the Department of Justice.

- Federal officers' duties included criminal investigation (38%), police response and patrol (21%), corrections and detention (16%), inspections (16%), court operations (5%), and security and protection (4%).

• The largest employers of Federal officers were U.S. Customs and Border Protection (CBP) (27,705), the Federal Bureau of Prisons (15,214), the FBI (12,242), and U.S. Immigration and Customs Enforcement (ICE) (10,399). Ten other agencies employed at least 1,000 officers.

• The combined officer employment of CBP and ICE in 2004 was 21% greater than the comparable combined totals of the INS, U.S. Customs Service, and Federal Protective Service in 2002.

• Women accounted for 16% of Federal officers in 2004. A third of Federal officers were members of a racial or ethnic minority in 2004. This included 17.7% who were Hispanic or Latino, and 11.4% who were black or African American.

• About half of the Federal officers in the U.S. were employed in Texas (14,633), California (13,365), the District of Columbia (9,201), New York (8,159), or Florida (6,627). New Hampshire and Delaware, with 112 each, had the fewest Federal officers.

• Nationwide, there were 36 Federal officers per 100,000 residents. Outside the District of Columbia, which had 1,662 per 100,000, State ratios ranged from 90 per 100,000 in Arizona to 7 per 100,000 in Iowa.

COORDINATION: As in the previous versions of this report for 1996, 1998, 2000, and 2002, the data are the result of a cooperative effort involving BJS and staff in all Federal agencies employing personnel with arrest and firearms authority. Within the Department of Justice, this included the BOP, FBI, DEA, USMS, ATF, and IG Office.

DISSEMINATION: The text and data tabulations will be made available on the Internet for instantaneous dissemination upon release. When printed, this report will be distributed to criminal justice practitioners, policymakers, and others who have indicated an interest in this subject.

TIMETABLE: BJS will make this publication available 30 days from the date of this memorandum.

If we may provide additional information about this document, please contact 307-3813.

cc Steven R. Schlesinger, Director, Statistics Division, Administrative Office of the U.S. Courts
Thomas R. Kane, Assistant Director, Bureau of Prisons
Michael Battle, Director, Executive Office for United States Attorneys
Maryvictoria Pyne, Chief, FBI Criminal Justice Information Service Div., Communications Unit
Frank Shults, Senior Advisor, Office of the Deputy Attorney General

cc: Kyle Sampson, OAG

Office of the Deputy Attorney General

Assistant Attorney General, OLP

Assistant Attorney General, OLA

Director, PAO

Director, COPS

Federal Law Enforcement Officers, 2004

Every two years the Bureau of Justice Statistics conducts a census of Federal law enforcement officers. The census provides basic information about Federal officers, including their employing agency, gender, race, ethnicity, primary job function, and the State in which they primarily perform their duties. The most recent census collected data for the reference date of September 30, 2004.

Q. Which agencies does the BJS Census cover?
A. The 2004 Census of Federal Law Enforcement Officers covers 65 Federal agencies employing full-time personnel with the authority to make arrests and carry a firearm. The total includes 27 offices of inspector general. Because of limitations on the availability of data for some agencies, the BJS census does not include the Armed Forces (Army, Navy, Air Force, Marines, and Coast Guard), the Federal Air Marshals (in the Department of Homeland Security), or the Central Intelligence Agency.

Q. Is the number of Federal law enforcement officers increasing?
A. The Federal agencies included in the 2004 BJS Census of Federal Law Enforcement Officers, collectively employed about 105,000 officers as of September 2004. This was about 13% more than in 2002.

Q. What are the duties of Federal law enforcement officers?
A. According to the 2004 Census, 38% primarily performed duties related to criminal investigation and enforcement, and 21% provided patrol and response services. Corrections and detention-related duties were performed by 16% of officers, and another 16% performed inspections duties related to customs and immigration laws.

Q. Which Federal agency employs the most officers?
A. As of September 2004, U.S. Customs and Border Protection in the Department of Homeland Security (DHS) was the largest agency with 27,705 personnel authorized to make arrests and carry firearms in the 50 States and the District of Columbia. Other agencies with at least 10,000 officers included two Justice Department agencies - the Federal Bureau of Prisons (15,214) and the FBI (12,242) - and another DHS agency, U.S. Immigration and Customs Enforcement (10,399).

Q. What is the representation of women and minorities among Federal officers?
A. In 2004, women accounted for about a sixth of Federal officers. A third were members of a racial or ethnic minority. This included about 18% who were Hispanic or Latino, and 11% who were black or African American.

Q. Relative to the population, how many Federal officers are there? Which States have the most officers? Which States have the fewest?
A. Nationwide there were 36 Federal officers with arrest and firearm authority for every 100,000 U.S. residents. Outside the District of Columbia which had 1,662 officers per 100,000 residents, State ratios ranged from 90 per 100,000 in Arizona, to 7 per 100,000 in Iowa. In actual numbers Texas (14,633) and California (13,365) had the most Federal officers while New Hampshire and Delaware, with 112 each, had the fewest.

OASG CORRESPONDENCE ROUTING AND ACTION

From: Jeffrey Sedgwick	Date: 07/19/2006	Due Date: 7/21/2006	Workflow ID: 1033193
Subject: Memo providing advance copies and notification of the pending release of the BJS publication entitled, Federal Law Enforcement Officers - 2004 (NCJ212750)			
Reviewer: Jeff Senger		Due Back for Processing to Exec Sec:	7/20/2006
Instructions: **Please review and provide written comments.**			
From: **Jeff Senger**	To: **Neil Gorsuch**		Date: 7/27/06
Comments: Looks okay. Jeff			
From: **Neil Gorsuch**	To: **Robert McCallum**		Date:
Comments:			

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/12/2006 **WORKFLOW ID:** 1033193
DATE RECEIVED: 07/14/2006 **DUE DATE:** 07/21/2006

FROM: The Honorable Jeffrey L. Sedgwick
Director
Bureau of Justice Statistics

Washington, DC 20531

TO: AG (cc indicated for BOP Kane, EOUSA Battle, FBI Pyne, ODAG Shults, OAG Sampson, OLP, OLA, PAO, COPS)

MAIL TYPE: Information Memorandum

SUBJECT: Memo providing advance copies and notification of the pending release of the BJS publication entitled, Federal Law Enforcement Officers, 2004 (NCJ212750).

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
07/18/2006	For ASG initialing on Information Memorandum. Return to ES for forwarding to the AG and DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Paula Stephens: 202-616-0074

OASG CORRESPONDENCE ROUTING AND ACTION

From: Jeffrey Sedgwick	Date: 07/19/2006	Due Date: 7/21/2006	Workflow ID: 1033193
Subject: Memo providing advance copies and notification of the pending release of the BJS publication entitled, Federal Law Enforcement Officers - 2004 (NCJ212750)			
Reviewer: Jeff Senger		Due Back for Processing to Exec Sec: 7/20/2006	
Instructions: **Please review and provide written comments.**			
From: **Jeff Senger**	To: **Neil Gorsuch**		Date: 7/27/06
Comments: Looks okay. JSH			
From: **Neil Gorsuch**	To: **Robert McCallum**		Date:
Comments:			

1033186

U.S. Department of Justice

Office of Justice Programs

Bureau of Justice Statistics

Washington, D.C. 20531

JUL 12 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 7/28/06

THROUGH: Regina B. Schofield
Assistant Attorney General
Office of Justice Programs

FROM: Jeffrey L. Sedgwick
Director, Bureau of Justice Statistics

SUBJECT: **Advance Notification of BJS Publication**

PURPOSE: To provide the Attorney General with advance copies and notification of the pending publication of **Violent Felons in Large Urban Counties** (NCJ 205289), by Brian Reaves of BJS.

DISCUSSION: **Violent Felons in Large Urban Counties** presents data collected from a representative sample of felony cases that resulted in a felony conviction for a violent offense in 40 of the Nation's 75 largest counties. The study tracks cases for up to 1 year from the date of filing through final disposition. Defendants convicted of murder, rape, robbery, assault or other violent felonies are described in terms of demographic characteristics (gender, race, Hispanic origin, age), prior arrests and convictions, criminal justice status at time of arrest, type of pretrial release or detention, type of adjudication, and sentence received. Highlights include the following:

- From 1990 to 2002, 18% of felony convictions in the 75 largest counties were for violent offenses, including 7% for assault and 6% for robbery.

• Six percent of those convicted of violent felonies were under age 18, and 25% were under age 21. Ten percent of murderers were under 18, and 30% were under 21.

• Thirty-six percent of violent felons had an active criminal justice status at the time of their arrest. This included 18% on probation, 12% on release pending disposition of a prior case, and 7% on parole.

• Seventy percent of violent felons had a prior arrest record, and 57% had at least one prior arrest for a felony. Sixty-seven percent of murderers and 73% of those convicted of robbery or assault had an arrest record.

• A majority (56%) of violent felons had a prior conviction record. Thirty-eight percent had a prior felony conviction and 15% had a previous conviction for a violent felony.

• Forty-one percent of murder convictions occurred at a trial rather than through a guilty plea. Trials accounted for 12% of rape and robbery convictions and 11% of assault convictions.

• Eighty-one percent of violent felons were sentenced to incarceration with 50% going to prison and 31% to jail. Nineteen percent received a probation term without incarceration.

• Median prison sentences received included a maximum of 240 months for murder, 120 months for rape, 60 months for robbery, and 48 months for other violent felonies.

DISSEMINATION: The text and data tabulations will be made available on the Internet for instantaneous dissemination at the time of the press release. When printed, this report will be distributed to criminal justice practitioners, policymakers, and others who have indicated an interest in this subject. We have consulted with the OJP Office of Communications, and they have made preliminary plans to issue a press release.

TIMETABLE: The press release is anticipated for Sunday, August 6, 2006, at 4:30 p.m. EDT. BJS will begin distributing this publication at that time.

If we may provide additional information about this document, please contact 307-3813.

cc Steven R. Schlesinger, Director, Statistics Division, Administrative Office of the U.S. Courts
Thomas R. Kane, Assistant Director, Bureau of Prisons
Michael Battle, Director, Executive Office for United States Attorneys
Maryvictoria Pyne, Chief, FBI Criminal Justice Information Service Div., Communications Unit
Frank Shults, Senior Advisor, Office of the Deputy Attorney General

cc: Kyle Sampson, OAG

Office of the Deputy Attorney General

Assistant Attorney General, OLP

Assistant Attorney General, OLA

Director, PAO

Director, COPS

Violent Felons in Large Urban Counties

Q. What violent offenders does this report cover?

A. The report presents analyses covering a sample of 9,000 convicted violent felons representing 33,000 cases from State courts in the 75 largest counties. These cases were selected during seven separate studies conducted in even-numbered years from 1990 through 2002. A sample of felony cases filed during the month of May was selected in each of these years. They were included in the analyses as long as they resulted in the defendant being convicted of a violent felony.

Q. What proportion of violent crimes are committed by youthful offenders?

A. Six percent of violent felons in the 75 largest counties were under the age of 18, and 25% were under the age of 21. Ten percent of murderers were under the age of 18, and 30% were under 21.

Q. Is it true that many violent crimes are committed by repeat offenders?

A. Thirty-six percent of violent felons had an active criminal justice status at the time of their arrest. This included 18% on probation, 12% on release pending disposition of a prior case, and 7% on parole. Seventy percent had a prior arrest record, and 56% had a conviction record. Thirty-eight percent had at least 1 prior felony conviction, and 15% had been previously convicted of a violent felony.

Q. Do persons convicted of a violent felony typically receive a prison sentence?

A. Overall, 50% of those convicted of a violent felony received a prison sentence, and another 31% received a jail sentence. Nearly all (96%) murderers were sentenced to prison. A majority of those convicted of robbery (69%) or rape (62%) were sentenced to prison as well. About a fifth of rape and robbery sentences were to jail. For those convicted of felony assault, equal percentages (38%) were sentenced to prison and jail. Nearly all violent felons not sentenced to incarceration received a probation term.

Q. How long are the prison sentences for violent felons?

A. The median sentence length was 20 years for murderers, 10 years for rape, 5 years for robbery, and 4 years for assault.

OASG CORRESPONDENCE ROUTING AND ACTION

From: Jeffrey L. Sedgwick	Date: 7/17/2006	Due Date: 7/20/2006	Workflow ID: 1033186
Subject: Memo providing advance copies and notification of the pending BJS publication entitled, sexual Violent Felons in Large Urban Counties			
Review: I , **Jeffrey Senger**		Due Back for processing to Exec Secy: **7/18/2006**	
Instructions: **Please review and provide written comments.**			
From: **Jeffrey Senger**	To: **Neil M. Gorsuch**		Date: 7/27/06
Comments: Looks okay. Jeff			
From: **Neil M. Gorsuch**	To: **Robert D. McCallum, Jr.**		Date:
Comments:			

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/12/2006 **WORKFLOW ID:** 1033186
DATE RECEIVED: 07/14/2006 **DUE DATE:** 07/20/2006

FROM: The Honorable Jeffrey L. Sedgwick
Director
Bureau of Justice Statistics
Washington, DC 20531

TO: AG (cc indicated for BOP Kane, EOUSA Battle, FBI Payne, ODAG Shults, OAG Sampson, OLP, OLA, PAO, COPS)

MAIL TYPE: Information Memorandum

SUBJECT: Memo providing advance copies and notification of the pending BJS publication entitled, Violent Felons in Large Urban Counties (NCJ205289).

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
07/17/2006	For ASG initialing on Information Memorandum. Return to ES for forwarding to the AG and DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

OASG CORRESPONDENCE ROUTING AND ACTION

From: Jeffrey L. Sedgwick	Date: 7/17/2006	Due Date: 7/20/2006	Workflow ID: 1033186

Subject: Memo providing advance copies and notification of the pending BJS publication entitled, sexual Violent Felons in Large Urban Counties

Review: L , Jeffrey Senger	Due Back for processing to Exec Secy: **7/18/2006**

Instructions: **Please review and provide written comments.**

From: **Jeffrey Senger**	To: **Neil M. Gorsuch**	Date: 7/27/06

Comments:

Looks okay.

Jeff

From: **Neil M. Gorsuch**	To: **Robert D. McCallum, Jr.**	Date:

Comments:

1033190

U.S. Department of Justice

Office of Justice Programs

Bureau of Justice Statistics

Washington, D.C. 20531

JUL 12 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 7/28/06

THROUGH: Regina B. Schofield
Assistant Attorney General
Office of Justice Programs

FROM: Jeffrey L. Sedgwick
Director, Bureau of Justice Statistics

SUBJECT: **Advance Notification of BJS Publication**

PURPOSE: To provide the Attorney General with advance copies and notification of the pending publication of **Sexual Violence Reported by Correctional Authorities, 2005** (NCJ 214646), by Allen Beck and Paige Harrison of BJS.

DISCUSSION: **Sexual Violence Reported by Correctional Authorities, 2005** presents data from the Survey on Sexual Violence, 2005, an administrative records collection of incidents of inmate-on-inmate and staff-on-inmate sexual violence reported to correctional authorities. The report provides counts of sexual violence by type and includes tables on reporting capabilities, how investigations are handled, and characteristics of victims and perpetrators of sexual violence. In 2005, the survey was expanded to collect detailed information on substantiated incidents, including the circumstances surrounding each incident, characteristics of victims and perpetrators, the type of pressure or coercion, victim injuries, sanctions imposed, and victim assistance. The appendix tables include counts of sexual violence, by type, for the 1,867 facilities included in the survey. The report also includes an update on BJS activities related to implementation of the data collections required under the Prison Rape Elimination Act of 2003 (Public Law 108-79). Highlights include the following:

- 6,241 allegations of sexual violence in prison and jail reported in 2005, up from 5,386 in 2004. 38% of allegations involved staff sexual misconduct; 35%, inmate-on-inmate nonconsensual sexual acts; 17%, staff sexual harassment; and 10%, abusive sexual contact.

• Correctional authorities reported 2.83 allegations of sexual violence per 1,000 inmates in 2005, up from 2.46 in 2004.

• Correctional authorities substantiated 885 incidents of sexual violence in 2005, 15% of completed investigations. There were an estimated 0.40 substantiated incidents of sexual violence per 1,000 inmates in 2005, down from the 0.55 recorded in 2004.

• Based on completed investigations only, 37% of allegations of staff sexual misconduct in local jails and 15% in State prisons were substantiated.

• Half of inmate-on-inmate sexual violence involved physical force or threat of force; two-thirds of staff misconduct was romantic. In prisons 67% of the victims involved in staff sexual misconduct were male, while 62% of the perpetrators were female. In jails 78% of victims of staff sexual misconduct were female; 87% of the perpetrators, male.

• Staff were arrested or prosecuted in 45% of substantiated incidents of staff sexual misconduct; discharged, fired or resigned in 82%.

COORDINATION: The Census Bureau of the U.S. Department of Commerce assisted with data collection and processing of the survey.

DISSEMINATION: The text and data tabulations will be made available on the Internet for instantaneous dissemination at the time of the press release. When printed, this report will be distributed to criminal justice practitioners, policymakers, and others who have indicated an interest in this subject. We have consulted with the OJP Office of Communications, and they have made preliminary plans to issue a press release.

TIMETABLE: The press release is anticipated for Sunday, July 30, 2006, at 4:30 p.m. EDT. BJS will begin distributing this publication at that time.

If we may provide additional information about this document, please contact 307-3813.

cc Steven R. Schlesinger, Director, Statistics Division, Administrative Office of the U.S. Courts
Thomas R. Kane, Assistant Director, Bureau of Prisons
Michael Battle, Director, Executive Office for United States Attorneys
Maryvictoria Pyne, Chief, FBI Criminal Justice Information Service Div., Communications Unit
Frank Shults, Senior Advisor, Office of the Deputy Attorney General

cc: Kyle Sampson, OAG

Office of the Deputy Attorney General

Assistant Attorney General, OLP

Assistant Attorney General, OLA

Director, PAO

Director, COPS

Sexual Violence Reported by Correctional Authorities, 2005

Presents data from the Survey on Sexual Violence, 2005, an administrative records collection of incidents of inmate-on-inmate and staff-on-inmate sexual violence reported to correctional authorities. The report provides counts of sexual violence in all State prison systems, the Federal prison system, and a sample of privately-operated and local jail facilities, by type of violence. The 2005 survey also collected individual level data on substantiated incidents, which expands our knowledge on the characteristics of the victims, perpetrators, and circumstances of sexual assault incidents. Finally, the report also includes an update on activities related to implementation of the data collections required under the Prison Rape Elimination Act of 2003 (Public Law 108-79). The publication of this report is mandated by statute and is prepared on June 30 of each year. Data on sexual violence as reported to the juvenile justice authorities will be published later this year.

1. What is the Prison Rape Elimination Act of 2003?

- The Prison Rape Elimination Act of 2003 was signed into law on September 4, 2003, by President George W. Bush. The Act establishes a zero-tolerance policy for inmate-on-inmate and staff-on-inmate sexual violence in correctional facilities.
- Under the Act, the Bureau of Justice Statistics (BJS) is required to conduct an annual data collection to measure the incidence and prevalence of sexual violence in at least 10% of the Nation's 5,220 adult correctional facilities and 3,470 juvenile facilities. This includes State and Federal prisons, local jails, private adult correctional facilities, jails in Indian Country, facilities operated by the U.S. Military or by the Bureau of Immigration and Customs Enforcement, State juvenile facilities, and local and private juvenile facilities.
- BJS is required to submit a report to Congress on June 30 of each year on the activities related to the Act for the preceding year and to provide a listing of institutions ranked according to the incidence of sexual violence.

2. How is sexual violence measured?

- Incidents of inmate-on-inmate sexual violence were separated into two categories: *nonconsensual sexual acts* and *abusive sexual contacts*. Incidents of staff-on-inmate sexual violence were categorized into *staff sexual misconduct* and *staff sexual harassment*.
- Most correctional systems and facilities were able to report information on the most serious incidents of sexual violence.
- Additional information was collected on substantiated incidents, including victim and perpetrator characteristics, time and place of incident, and actions taken following the report.

3. How extensive is sexual violence in the Nation's correctional facilities?

- During 2005 an estimated 6,241 allegations of sexual violence were reported by correctional authorities -- the equivalent of 2.8 allegations per 1,000 inmates, up from 2.5 per 1,000 inmates in prison, jails, and other adult correctional facilities in 2004.
- State and Federal prison systems reported 74% of all allegations; local jails, 22%.
- Approximately 38% of the reported allegations of sexual violence involved staff-on-inmate sexual misconduct; 35% involved inmate-on-inmate nonconsensual sexual acts; 17% staff sexual harassment of inmates; and 10% inmate-on-inmate abusive sexual contacts.

4. What additional information is learned from the 2005 survey?

- Correctional authorities substantiated 885 incidents of sexual violence in 2005, 15% of completed investigations.
- Relative to the number of inmates, there were 0.40 substantiated incidents of sexual violence per 1,000 inmates reported in 2005, down from 0.55 per 1,000 inmates in adult facilities in 2004.
- Half of inmate-on-inmate incidents of sexual violence involved physical force or threat of force.
- In more than two-thirds of inmate-on-inmate incidents, the sexual violence occurred in the victim's cell or living area. In only 20% of the incidents did the violence occur in a common area, such as a shower or dayroom.
- Victims received physical injuries in 15% of substantiated incidents of inmate-on-inmate sexual violence. Victims received medical attention, counseling or mental health treatment in two-thirds of the incidents of nonconsensual sexual acts.
- Half of the victims of nonconsensual sexual acts were placed in protective custody or administrative segregation.
- In half of the incidents of inmate-on-inmate sexual violence, the perpetrators were arrested or referred for prosecution; in more than two-thirds of the incidents, the perpetrator was placed in solitary confinement.

5. What is learned about staff sexual misconduct and harassment in prisons and jails?

- Two-thirds of incidents of staff sexual misconduct with inmates were reported to be romantic in nature. Fewer than 15% of the substantiated incidents involved physical force, abuse of power or pressure by staff.
- In State prison and Federal prisons 67% of the victims of staff misconduct were male; while 62% of the perpetrators were female. In local jails 78% of the victims were female; 87% of the perpetrators, male.
- Most substantiated incidents of staff sexual misconduct and harassment involved correctional officers (69%). About 13% of the incidents involved contract employees or vendors.
- Nearly 90% of the perpetrators of staff misconduct were arrested, referred for prosecution or discharged.
- In incidents involving a romantic relationship between inmate and staff, more than half of the inmates were either transferred to another facility or placed in administrative segregation.

6. When will the other PREA data collections be implemented?

- *The National Inmate Survey of Sexual Assault*, an ACASI self-report instrument designed for adult prisons and jails, has completed the testing stage, and BJS and RTI staff are analyzing the results (report of pretest results will be issued in September). National implementation in 120 prisons and 330 jails, with a yield of 60,000 interviews, will begin in November, 2006. Results from the survey will be included in the report to Congress on June 30, 2007.
- *The National Survey of Sexual Assault in Juvenile Facilities*, an ACASI self-report instrument designed for youth, is currently undergoing cognitive testing and will be fully tested in 10 facilities with up to 600 youth is planned for September 2006. Full national implementation in up to 180 juvenile facilities (with 14,000 adjudicated youth) is expected in 2007.

- *The National Survey of Sexual Assault Reported by Former Inmates*, an ACASI self-report instrument designed for former inmates under active supervision, will undergo pretesting in 10-20 parole offices in fall 2006. National implementation is expected to occur in 285 parole offices (with up to 11,500 interviews) in 2007.
- *National Prison Rape Surveillance Project,* a collection using medical indicators as an additional measure of sexual violence, is currently being developed in partnership with the National Institute of Justice and the Centers for Disease Control and Prevention.

OASG CORRESPONDENCE ROUTING AND ACTION

From: Jeffrey L. Sedgwick	Date: 7/17/2006	Due Date: 7/20/2006	Workflow ID: 1033190

Subject: Memo providing advance copies and notification of the pending BJS publication entitled, sexual Violence Reported by Correctional Authorities, 2005.

Review: Jeffrey Senger	Due Back for processing to Exec Secy: **7/18/2006**

Instructions: **Please review and provide written comments.**

From: Jeffrey Senger	To: **Neil M. Gorsuch**	Date: 7/27/06

Comments:

Looks okay. This one is likely to attract attention with its sordid subject matter and race- and sex-based findings.

Jeff

From: **Neil M. Gorsuch**	To: **Robert D. McCallum, Jr.**	Date:

Comments:

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/12/2006 **WORKFLOW ID:** 1033190
DATE RECEIVED: 07/14/2006 **DUE DATE:** 07/20/2006

FROM: The Honorable Jeffrey L. Sedgwick
Director
Bureau of Justice Statistics
Washington, DC 20531

TO: AG (cc indicated for BOP Kane, EOUSA Battle, FBI Pyne, ODAG Shults, OAG Sampson, OLP, OLA, PAO, COPS)

MAIL TYPE: Information Memorandum

SUBJECT: Memo providing advance copies and notification of the pending BJS publication entitled, Sexual Violence Reported by Correctional Authorities, 2005. (NCJ214646).

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
07/17/2006	For ASG initialing on Information Memorandum. Return to ES for forwarding to the AG and DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

OASG CORRESPONDENCE ROUTING AND ACTION

From: Jeffrey L. Sedgwick	Date: 7/17/2006	Due Date: 7/20/2006	Workflow ID: 1033190

Subject: Memo providing advance copies and notification of the pending BJS publication entitled, sexual Violence Reported by Correctional Authorities, 2005.

Review: **Jeffrey Senger**	Due Back for processing to Exec Secy: **7/18/2006**

Instructions: **Please review and provide written comments.**

From: **Jeffrey Senger**	To: **Neil M. Gorsuch**	Date: 7/27/06

Comments:

Looks okay. This one is likely to attract attention with its sordid subject matter and race- and sex-based findings.

JLS

From: **Neil M. Gorsuch**	To: **Robert D. McCallum, Jr.**	Date:

Comments:

1033178

U.S. Department of Justice

Office of Justice Programs

Bureau of Justice Statistics

Washington, D.C. 20531

JUL 12 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 7/29/06

THROUGH: Regina B. Schofield
Assistant Attorney General
Office of Justice Programs

FROM: Jeffrey L. Sedgwick
Director, Bureau of Justice Statistics

SUBJECT: **Advance Notification of BJS Publication**

PURPOSE: To provide the Attorney General with advance copies and notification of the pending publication of **Prosecutors in State Courts, 2005** (NCJ 213799), by Steven W. Perry of BJS.

DISCUSSION: **Prosecutors in State Courts, 2005** presents findings from the 2005 National Survey of Prosecutors, the latest in a series of data collections from among the Nation's 2,300 State court prosecutors' offices that tried felony cases in State courts of general jurisdiction. This study provides information on the number of staff, annual budget, and felony cases closed for each office. Information is also available on the use of DNA evidence, computer-related crimes, and terrorism cases prosecuted. Other survey data include special categories of felony offenses prosecuted, types of non-felony cases handled, number of felony convictions, number of juvenile cases proceeded against in criminal court, and work-related threats or assaults against office staff. Highlights include the following:

• At least two-thirds of the State court prosecutors had litigated a computer-related crime such as credit card fraud (80%), identity theft (69%), or transmission of child pornography (67%).

• Nearly all the prosecutors' offices (98%) reported their State had a domestic violence statute; 28% of the offices maintained a domestic violence prosecution unit.

• A quarter (24%) of the offices participated in a State or local task force for homeland security; one-third reported an office member attended training on homeland security issues.

• Most prosecutors (95%) relied on State operated forensic laboratories to perform DNA analysis, with about a third (34%) also using privately operated DNA labs.

• Two-thirds of prosecutors' offices had prosecuted a juvenile case in criminal court during 2005. A third of the offices had a designated attorney for these special cases.

• In 2005, nearly 40% of the prosecutors considered their office a community prosecution site actively involving law enforcement and the community to improve public safety.

COORDINATION: The Bureau of Justice Statistics coordinated with the following entities, who performed data collection and processing, pre-testing, non-response, and/or reviewed the report: the National Opinion Research Center (NORC) at the University of Chicago, the National District Attorneys Association (NDAA), the Prosecutor Coordinator Offices in each State, and the Office of Research & Evaluation for the American Prosecutors Research Institute.

DISSEMINATION: The text and data tabulations will be made available on the Internet for instantaneous dissemination upon release. When printed, this report will be distributed to criminal justice practitioners, policymakers, and others who have indicated an interest in this subject.

TIMETABLE: BJS will make this publication available in late July, in preparation for the National District Attorneys Association Summer Conference in Santa Fe, New Mexico, July 30 – August 2, 2006.

If we may provide additional information about this document, please contact 307-3813.

cc Steven R. Schlesinger, Director, Statistics Division, Administrative Office of the U.S. Courts
Thomas R. Kane, Assistant Director, Bureau of Prisons
Michael Battle, Director, Executive Office for United States Attorneys
Maryvictoria Pyne, Chief, FBI Criminal Justice Information Service Div., Communications Unit
Frank Shults, Senior Advisor, Office of the Deputy Attorney General

cc: Kyle Sampson, OAG

Office of the Deputy Attorney General

Assistant Attorney General, OLP

Assistant Attorney General, OLA

Director, PAO

Director, COPS

OASG CORRESPONDENCE ROUTING AND ACTION

From: Jeffrey L. Sedgwick	Date: 7/17/2006	Due Date: 7/20/2006	Workflow ID: 1033178

Subject: Memo providing advance copies and notification of the pending BJS publication entitled, Prosecutors in State Courts, 2005.

Review: **Jeffrey Senger**	Due Back for processing to Exec Secy: **7/18/2006**

Instructions: **Please review and provide written comments.**

From: **Jeffrey Senger**	To: **Neil M. Gorsuch**	Date: 7/26/06

Comments:

Looks okay.
Jeff

From: **Neil M. Gorsuch**	To: **Robert D. McCallum, Jr.**	Date:

Comments:

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/12/2006 **WORKFLOW ID:** 1033178
DATE RECEIVED: 07/14/2006 **DUE DATE:** 07/20/2006

FROM: The Honorable Jeffrey L. Sedgwick
Director
Bureau of Justice Statistics
Washington, DC 20531

TO: AG (cc indicated for BOP Kane, EOUSA Battle, FBI Payne, ODAG, Shults, OAG Sampson, OLP, OLA, PAO, COPS)

MAIL TYPE: Information Memorandum

SUBJECT: Memo providing advance copies and notification of the pending BJS publication entitled, Prosecutors in State Courts, 2005 (NCJ213799).

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
07/17/2006	For ASG initialing on Information Memorandum. Return to ES for forwarding to the AG and DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

U.S. Department of Justice
Office of Justice Programs

Bureau of Justice Statistics
Bulletin

March 2006, NCJ 212213

First Estimates from the National Crime Victimization Survey

Identity Theft, 2004

By Katrina Baum, Ph.D.
BJS Statistician

In 2004, 3.6 million households, representing 3% of the households in the United States, discovered that at least one member of the household had been the victim of identity theft during the previous 6 months. The households most likely to experience identity theft —

- earned $75,000 or more
- were headed by persons ages 18-24
- were in urban or suburban areas.

These findings represent 6-month prevalence estimates and are drawn from interviews conducted from July to December 2004 for the National Crime Victimization Survey (NCVS). (See *Methodology*).

For the NCVS, identity theft was defined to include three behaviors (see *Appendix*) —

- unauthorized use or attempted use of existing credit cards
- unauthorized use or attempted use of other existing accounts such as checking accounts
- misuse of personal information to obtain new accounts or loans, or to commit other crimes.

Estimates in this report are drawn from interviews with knowledgeable respondents age 18 or older in each sample household about discoveries of identity theft of anyone in their household during the previous 6 months.

Highlights

In 2004, 1 in 33 households discovered at least one type of identity theft during the previous 6 months

Did households discover identity theft in previous 6 months?	Number of households	Percent of households	Percent of victimized households
Yes	3,589,100	3.0%	100.0%
Unauthorized use of:			
Existing credit cards	1,736,700	1.5	48.4
Other existing accounts	896,500	0.8	25.0
Misuse of personal information	538,700	0.5	15.0
Multiple types of theft during the same episode	417,100	0.3	11.6
No	111,773,400	93.8%	--
Don't know	261,800	0.2%	--

- Credit card theft was the most common type of identity theft (1.5% of households).
- Households headed by persons age 18-24 and those in the highest income bracket ($75,000 or more) were the most likely to experience identity theft.
- Rural households were less likely than urban or suburban households to have a member experience identity theft (2% versus 4% and 3%, respectively).
- 3 in 10 households experiencing any type of identity theft discovered it by missing money or noticing unfamiliar charges on an account; almost 1 in 4 were contacted by a credit bureau.
- Overall a third of households experienced one or more problems as the result of the episode of identity theft.
- The most common problems encountered included being contacted by a debt collector or creditor, banking problems, or problems with credit card accounts.
- 1 in 5 of victimized households with problems spent at least one month resolving problems.
- Credit card thefts were the least likely among identity thefts to still be causing problems at the time of the interview to the victims or their households (9%).
- The estimated loss as a result of identity theft was about $3.2 billion.
- About two-thirds of households experiencing identity theft reported some type of a monetary loss as a result of theft.

Characteristics of identity theft

About 6% of households experiencing identity theft during the 6-month reference period reported that they experienced multiple episodes. If more than one episode was discovered during the previous 6 months, the characteristics of the most recent episode are discussed.

Number of episodes	Number	Percent of households
2+	216,600	6%
1	3,372,500	94

Awareness

Almost a third of households experiencing any type of identity theft discovered it by missing money or noticing unfamiliar charges on an account (table 2). One in five victimized households were contacted by a credit bureau, and 1 in 9 became aware of the theft as a result of having banking problems. About 1 in 18 households experiencing identity theft discovered the theft as the result of noticing an error in a credit report.

The way in which members of a household experiencing identify theft discovered the theft varied by type of theft. Households experiencing theft of other existing accounts were more likely than households with credit card theft, personal information theft, or multiple types of theft at the same time to discover the theft by missing money or noticing charges on an account (42% versus 31%, 8%, and 30%).

Households with credit card thefts were equally likely to have missed money/noticed charges on an account or have been contacted by a credit company or bureau (31% and 31%, respectively). Almost a fifth of households experiencing theft of personal information discovered it by being contacted by a credit bureau.

Table 2. How victim became aware of identity theft, by type of identity theft

	Percent of thefts involving–				
How theft was discovered	Total	Existing credit cards	Other existing accounts	Personal information	Multiple types of theft during the same episode
Block placed on account	3.8%	4.5%	3.3%	1.0%*	5.3%*
Missing money or noticed charges on account	30.4	31.2	42.1	7.9	29.5
Contacted by credit bureau	22.8	30.7	9.0	18.6	25.2
Banking problems	10.8	11.8	11.7	6.2	10.7
Noticed credit card or checkbook was missing	6.2	5.9	7.7	1.5*	9.7
Notified by police	1.1	0.4*	0.6*	3.8*	1.7*
Denied phone or utility service	2.4	0.1*	4.4	3.7*	5.7*
Noticed an error in credit report	5.6	4.4	3.0*	13.0	6.7*
Other way	28.6	19.3	35.2	49.0	27.5

Note: Table excludes 1% of households victimized by identity theft that did not provide an answer to how they became aware of the identity theft.
*Estimate based on 10 or fewer cases.

Problems experienced

Overall a third of households that experienced identity theft reported they experienced one or more problems as the result of the theft.

	Percent of households experiencing identity theft
No problems	66.7%
Any problem	33.3%

Note: Table excludes 39% of households who did not provide an answer to whether or not they experienced problems as a result of the identity theft.

Among households that had problems, households were equally likely to have been contacted by a debt collector or have banking problems (34% versus 31%) (table 3). They were somewhat more likely to be contacted by a debt collector than they were to have problems with their credit card accounts (34% versus 26%).

About 1 in 6 victimized households had to pay higher interest rates as the result of the identity theft, and 1 in 9 households were denied phone or utility service. Households were equally likely to be turned down for insurance or pay higher rates, be the subject of a civil suit or judgment, or be the subject of a criminal investigation (7%, 5%, and 4%, respectively). About a fifth of households reported they experienced some other kind of problem.

Table 3. Problems experienced as a result of identity theft

Types of problems	Percent of households experiencing problems due to identity theft
Contacted by a debt collector or creditor	34.1%
Banking problems	30.5
Problems with credit card accounts	25.8
Had to pay higher interest rates	15.4
Denied phone or utility service	11.5
Turned down or had to pay higher insurance rates	6.7
Subject of a civil suit or judgment	4.6
Subject of criminal investigation	4.4
Had some other problems	17.8

Note: Respondents could select more than one type of problem.

Economic loss

The estimated loss as a result of identity theft was about $3.2 billion (not referenced in a table).[3] Although 6% of the victimized households reported more than one theft, information about the characteristics of identity theft including loss is based on only the most recent episode and of those who provided a dollar amount. The losses reported include money that may have been reimbursed by others such as credit card companies or insurance companies and exclude such things as costs associated with paying higher interest rates and wages lost from time spent clearing up problems associated with the theft. It is possible that households for which misuse was still ongoing at the time of the interview may have continued to suffer losses after the interview.

Most households incurred a monetary loss as a result of the identity theft. Of the households experiencing identity theft —

- 69.2% reported a monetary loss
- 17.1% reported no loss
- 13.8% did not know the amount of the loss.

Households experiencing misuse of personal information were more likely than other types of households to have no money involved (33% versus 14%, 16%, and 10%) (table 6). About a sixth of households experiencing thefts of existing credits cards or other existing accounts reported no money was involved in the theft.

Fifteen percent of households experiencing any type of identity theft sustained losses of at least $1 but less than $100. Households experiencing thefts of existing credit cards or other existing accounts were equally likely to sustain losses in this range (18% and 19%).

Overall, 1 in 20 households reported $5,000 or more was involved. Households experiencing multiple types of theft at the same time were more likely than those with thefts of existing credit cards or misuse of personal information to have $5,000 or more involved (12% versus 5% and 5%). Similar proportions of households experiencing thefts of existing credit cards or misuse of personal information sustained losses of $5,000 or more (5% and 5%).

Among households actually sustaining a loss and for which the amount of the loss was known, over half (55%) reported less than $500 was involved (figure 2). Three in ten of the victimized households that sustained a loss reported the amount of money involved was between $500 to $2,499.

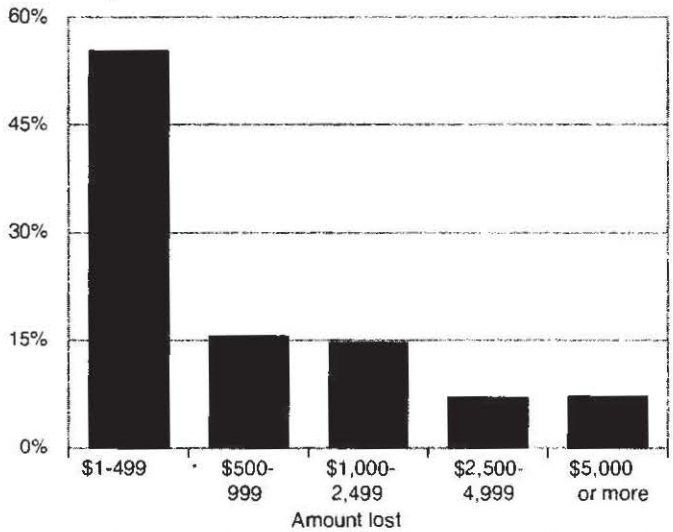
[3]Estimate does not include all losses as a result of identity theft. For example, costs or losses to businesses as a result of identity theft are not included.

Table 6. Amount lost in theft, by type of identity theft

	Percent of households experiencing theft involving–				
Amount lost	Total	Existing credit cards	Other existing accounts	Personal information	Multiple types of theft during the same episode
Total	100.0%	100.0%	100.0%	100.0%	100.0%
$0	17.1	14.3	16.3	32.9	10.1
$1-99	15.3	18.1	19.3	4.0*	9.4
$100-249	12.6	15.2	15.2	4.6*	6.2*
$250-499	10.3	9.5	14.3	7.2	9.1
$500-999	10.8	9.8	13.8	9.7	9.5
$1,000-2,499	10.2	8.9	10.8	8.3	16.4
$2,500-4,999	4.9	4.3	1.6*	5.7	14.0
$5,000 or more	5.0	5.4	1.4*	4.9	11.5
Don't know	13.8	14.4	7.4	22.7	13.9

Note: Amount lost includes money that may have been reimbursed by others such as credit card companies or insurance companies and excludes 2% of households that did not provide an answer.
*Estimate based on 10 or fewer cases.

Percent of households experiencing identity theft, by amount lost in theft ($1 or more)



Note: Excludes thefts for which the victims did not know the amount lost.

Figure 2

Appendix. Identity theft questions included in the National Crime Victimization Survey

45c. During the last 6 months, that is since _____ ____, 20___ have you or anyone in your household discovered that someone —

(a) Used or attempted to use any existing credit cards or credit card numbers without permission to place charges on an account?

(b) Used or attempted to use any existing accounts other than a credit card account — for example, a wireless telephone account, bank account or debit/check cards — without the account holder's permission to run up charges or to take money from accounts?

(c) Used or attempted to use personal information without permission to obtain NEW credit cards or loans, run up debts, open other accounts, or otherwise commit theft, fraud, or some other crime?

45d. Was the misuse of — (the credit card account(s)/any existing accounts other than credit cards/personal information or new account(s)) one episode or more than one episode of identity theft?

45e. Did these episodes occur separately or at the same time?

45f. Which episode of identity theft was most recently discovered?

45g. How did you become aware of the identity theft?

45h. What was the total dollar amount of the credit, loans, cash, services, and anything else the person obtained while misusing (the credit card account(s)/any existing accounts other than credit cards/personal information or new account(s))?

45i. Has the misuse of — (the credit card account(s)/any existing accounts other than credit cards/personal information or new account(s)) stopped (e.g. you or a household member closed a checking account)?

45j. Is the misuse of — (the credit card account(s)/any existing accounts other than credit cards/personal information or new account(s)) still causing problems for you or any other household member? For example, are you still spending time clearing up credit accounts or your credit report.

45k. How much time did it take to resolve ALL PROBLEMS associated with the misuse of — (the credit card account(s)/any existing accounts other than credit cards/personal information or new account(s)) after the misuse was discovered?

45l. As a result of (any of) the misuse of — (the credit card account(s)/any existing accounts other than credit cards/personal information or new account(s)) discovered in the last 6 months, have you or anyone in your household. . .

Been turned down for a loan?
Had banking problems?
Had problems with credit card accounts?
Had phone or utilities cut off or been denied new service?
Had to pay higher interest rates on credit cards, loans, etc.?
Been turned down for insurance or had to pay higher rates?
Been contacted by a debt collector or creditor?
Been the subject of a civil suit or judgment?
Been the subject of a criminal investigation, warrant, proceeding, or conviction?
Had some other problems? Specify _____
_____

The full NCVS questionnaire and additional methodology are available at the BJS World Wide Web Internet site: <http://www.ojp.usdoj.gov/bjs/cvict.htm#ncvs>.

Crime and the Nation's Households, 2004

Crime and the Nation's Households, 2004 is an annual BJS report presenting national prevalence estimates for the percentage of households who were victimized by crime as measured by the National Crime Victimization Survey (NCVS). Analyses provide household prevalence estimates for violent and property crimes and information on those households experiencing vandalism and intimate partner violence. The report provides comparisons with 2003 victimization data, as well as overall trends since 1994.

1. How does this measure of crime differ from the annual reports on the rate of criminal victimization?

This report complements the earlier report entitled "Criminal Victimization, 2004" (CV04). The CV04 report represents an annual measure of the incidence of criminal victimization answering those questions related to the number of times certain measured crimes occur and which individuals are the most vulnerable to criminal victimization. This report, by contrast, provides a measure of the extent to which households may have members who became victims of crime – it provides a sense of the magnitude of the impact of criminal victimization since crime may affect all members of a household regardless of how many in the household became crime victims or how often it occurred. The data in this report are based upon the number and percentage of U.S. households in which a victim reported 1 or more crimes during the year. For example, if a household experienced 2 household burglaries and 3 simple assaults during the year, each of these crimes would be counted in CV04. In this report, the household would be counted once as having experienced crime of some type during the year, once as having experienced one or more household burglaries and once as having a member or members who experienced simple assault.

2. What are the major findings of this report?

In 2004, 14% of the households in the United States, accounting for 16 million households, experienced 1 or more violent or property crimes as measured by the NCVS. This represents a decline from 25% in 1994. In 2004, 3% of households had a member age 12 or older who was the victim of at least one violent crime, down from 7% in 1994. There were no significant changes in the percentage of households experiencing crime between 2003 and 2004.

3. Why is vandalism included in this report and not in the annual report on criminal victimization?

Vandalism in NCVS is measured as a prevalence measure because an entire household is usually considered the victim of vandalism. In 2004, 4.8% of households experienced 1 or more vandalism incidents. If vandalism were included in the overall measure of households experiencing crime, the total percentage of households experiencing crime would rise from 14% to 17%.

4. How many households experienced intimate partner violence? Crimes by strangers?

Intimate partner violence affected about 1 in 250 households during 2004. These households

represented less than 1% of all U.S. households, with members age 12 or older. The prevalence of households affected by intimate partner violence declined from 1994 to 2004.

In 2004, about 1 in every 27 U.S. households reported that a household member had been a victim of violence by a stranger or the household had experienced a burglary. These crimes declined from 1994, but did not change between 2003 and 2004.

5. Which types of households are most affected by crime?

In 2004, households headed by blacks (16%) and Hispanics (17%) were more vulnerable to crime than those headed by whites (14%) or non-Hispanics (14%). The prevalence of crime was higher for urban households (18%), large households, and those in the West (18%). The household prevalence indicator is very sensitive to household size — twenty-five percent of households with six or more persons experienced crime, compared with 9% of one-person households and 14% of households with two or three persons.

U.S. Department of Justice
Office of Justice Programs

Bureau of Justice Statistics
Bulletin

March 2006, NCJ 211511

National Crime Victimization Survey

Crime and the Nation's Households, 2004

By Patsy Klaus
BJS Statistician

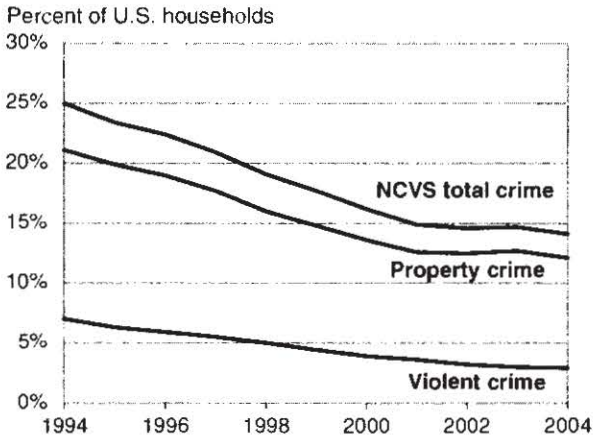
In 2004, 14% of households in the United States, accounting for 16 million households, experienced 1 or more violent or property victimizations as measured by the National Crime Victimization Survey (NCVS). These crimes include rape/sexual assault, robbery, aggravated and simple assault, purse snatching or pocket picking, household burglary, motor vehicle theft, and property theft.

In 2004, 3% of households had a member age 12 or older who experienced one or more violent crimes. Simple assault was the type of violent crime sustained by most households. Twelve percent of of households experienced one or more property crimes, with theft the most widely sustained. There were no real differences between 2003 and 2004 in the percentage of households experiencing total crimes.

Both violent and property crime declined between 1994 and 2004. The percentage of U.S. households experiencing one or more crimes dropped from 25% in 1994 to 14% in 2004.

Highlights

The percentage of U.S. households experiencing one or more crimes dropped from 25% in 1994 to 14% in 2004



- Both violent and property crimes declined between 1994 and 2004.
- Households with at least one member who experienced a violent crime declined from 7% in 1994 to 3% in 2004.
- Households experiencing property crimes declined from 21% in 1994 to 12% in 2004.
- In 2004 about 16 million households experienced one or more property crimes or had a member age 12 or older who experienced one or more violent crimes.
- About 1 in every 27 households in 2004 were either burglarized or had a member age 12 or older who was a victim of a violent crime committed by a stranger. The portion of households affected by these crimes has fallen since 1994, but did not change between 2003 and 2004.
- In 2004 about 1 in 250 households included a member victimized by a intimate partner, such as a spouse, ex-spouse, boyfriend, or girlfriend.
- About 5% of households had at least one incident of vandalism in 2004. Over 5.6 million households were vandalized during this period.

Table 1. Households experiencing crime, by type of crime, 2004

Type of victimization	Households Number	Percent
Any NCVS crime	16,365,700	14.1%
Personal crime	3,534,890	3.1%
Violent crime	3,383,160	2.9
Rape	79,250	0.1
Sexual assault	75,960	0.1
Robbery	377,060	0.3
Assault	2,943,930	2.5
Aggravated	756,230	0.7
Simple	2,328,530	2.0
Purse snatching/ pocket picking	179,010	0.2%
Property crime	14,032,570	12.1%
Household burglary	2,899,610	2.5
Motor vehicle theft	929,520	0.8
Theft	11,169,800	9.6

Note: Detail does not add to total or crime subtotals because of overlap in households experiencing various crimes. There were a total of 115,775,572 households in 2004. If vandalism is included among the victimizations, a total of 20,259,649 households (17.5%) experienced at least one crime in 2004.
*Violent crime does not include homicide.

Fourteen percent of U.S. households experienced one or more crimes in 2004

About 16 million households experienced 1 or more of the victimizations measured by the NCVS, an ongoing household survey that collects information about crimes both unreported and reported to police. These victimized households made up about 14% of the 115.8 million households in the United States.

Crime	Percent of households 2003	2004
Any NCVS	14.7%	14.1%
Violent	3.0	2.9
Property	12.7	12.1

About 3% of households had an adolescent or adult member who was victimized by one or more crimes of violence during the year. NCVS interviews all members of a household age 12 or older and does not estimate victimizations of children younger than 12. The measured violent crimes, which include rape, sexual assault, robbery and simple and aggravated assault, affected members of about 1 in every 34 U.S. households. There were no significant changes in violent crimes in any of the categories between 2003 and 2004. About 2.3 million households had members who experienced simple assault, the most frequently encountered crime of violence. Simple assault does not result in serious injury and does not involve a weapon.

About 12% of all households in 2004 experienced one or more property crimes, such as household burglary, motor vehicle theft or property theft. Theft, affecting 1 in 10 households, was the most frequently encountered property crime. There was some evidence that the percentage of households victimized by overall property crime decreased between 2003 and 2004. There was no change for household burglary, motor vehicle theft or property theft for these years.

Few households experienced the same type of crime more than once

For the households-victimized-by-crime measure, households that experienced the same type of crime more than once were counted only once for that victimization.

In 2004, about 1% of households had members victimized by more than one type of violence, including rape, sexual assault, robbery, and assault. About 1% of households were victimized by both violent and property crimes. Such households were counted once in the violent crime measure, once in the property crime measure, and once in the overall measure.

Vandalism of residences or other property owned by an individual remains unchanged

Over 5.6 million households, 4.8% of all U.S. households had at least one incident of vandalism in 2004. First compiled by the NCVS in 2000, vandalism is not included in the overall measure of households experiencing victimization. If vandalism is included in the overall measure, the total percentage of households experiencing crime increases from 14% to 17%. There was no change in the percentage of households affected by vandalism between 2003 and 2004.

"Crimes of high concern" were experienced by 4% of households

Violence by strangers or household burglary are often cited as the most fear provoking crimes. The portion of these crimes has fallen since 1994 but did not change between 2003 and 2004. About 1 in every 27 households experienced household burglary or had a household member who experienced violence by a stranger during 2004 (figure 1). About 4.3 million households experienced these "crimes of high concern" in 2004.

Intimate partner violence affected about 1 in 250 households during 2004

Less than 1% of all households experienced intimate partner violence, which is violence committed by a current or former spouse, boyfriend, or girlfriend (figure 2). Intimate partner violence declined between 1994 and 2004, but did not change between 2003 and 2004. One or more members

Violence by strangers or burglary, 1994-2004

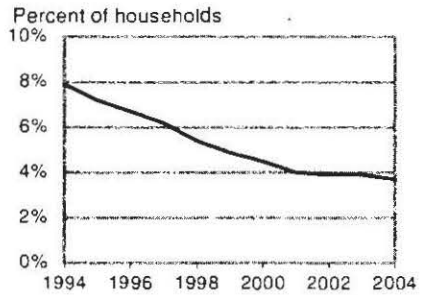


Figure 1

Intimate partner violence, 1994-2004

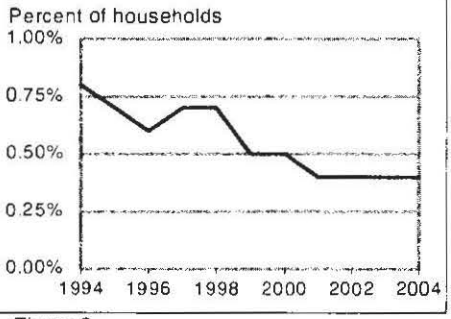


Figure 2

of about 458,000 households experienced at least one intimate partner victimization during 2004.

Black and Hispanic households were more vulnerable to crime

In 2004 households headed by blacks were more likely to experience crime (16%) than those headed by whites (14%) (table 2). Households headed by Hispanics were more likely to sustain one or more crimes than those headed by non-Hispanics (17% vs. 14%).

Crime	Percent of households	
	Hispanic head	Non-Hispanic head
Any NCVS crime	17.5%	13.8%
Violent	2.7	3.0
Property	15.5	11.7
Violence by strangers or burglary	4.4%	3.6%
Intimate partner violence	0.4%	0.4%

Table 2. Households experiencing crime, by race of the household head, 2004

Type of crime in the household	Percent of heads of household			
	White	Black	Other race	More than one race
Any NCVS crime	13.9%	15.9%	12.8%	21.0%
Violent crime	2.9	3.3	1.9	6.2
Property crime	11.9	13.7	11.3	16.9
Violence by strangers or burglary	3.6%	4.8%	3.0%	7.3%
Intimate partner violence	0.4%	0.6%	0.1%	0.5%

Note: Beginning in 2003, multiple race entries were allowed. *White* refers to a household head who listed only white as racial background; *black* refers to those listing only black. Other race heads of household were Asians, American Indians, Alaska Natives, Native Hawaiians, or Pacific Islanders reporting a single racial background. Murder and vandalism are not measured in this table.

Table 3. Households experiencing crime, by urban, suburban, and rural location, 2004

Type of crime in the household	Percent of households		
	Urban	Suburban	Rural
Any NCVS crime	18.2%	12.7%	11.6%
Violent crime	3.8	2.5	2.8
Property crime	15.7	11.0	9.7
Violence by strangers or burglary	5.4	3.0	3.1
Intimate partner violence	0.5	0.3	0.5

Note: Murder and vandalism are not measured in this table.

Prevalence of crime was higher for urban households, large households, and those in the West

Households in urban areas (18%) were more likely to experience one or more crimes than suburban households (13%) and rural households (12%) in 2004 (table 3).

Household size affected the likelihood of experiencing criminal victimization in 2004 (table 4). Twenty-five percent of households with six or more persons experienced one or more crimes compared with 20% of households made up of four or five persons, 14% of households with two or three persons, and 9% of one-person households.

Households located in the West were more likely to experience one or more crimes when compared with households in other regions of the country.

Type of crime	Percent of households, 2004
Northeast	
Any NCVS crime	10.0%
Violent	2.2
Property	8.3
Midwest	
Any NCVS crime	14.8%
Violent	3.3
Property	12.5
South	
Any NCVS crime	13.7%
Violent	2.6
Property	12.0
West	
Any NCVS crime	17.7%
Violent	3.7
Property	15.2

Prevalence of crime in households decreased from 1994 to 2004

About 14% of households experienced one or more crimes in 2004, compared to about 25% households in 1994 (table 5). The percentage of households experiencing either violent or property crime also declined. In 2004, about 3% of households had a member who experienced at least one violent crime, compared with 7% in 1994. For property crimes, 12% of households were affected in 2004, compared to 21% in 1994.

Table 4. Households experiencing crime, by number of household members, 2004

Type of crime in the household	Percent of households, by number of members			
	1 member	2-3	4-5	6 or more
Any NCVS crime	9.5%	13.6%	20.4%	25.4%
Violent crime	1.9	2.7	4.5	6.3
Property crime	8.1	11.7	17.6	21.6
Violence by strangers or burglary	2.9%	3.6%	4.6%	6.9%
Intimate partner violence	0.3%	0.4%	0.5%	0.9%

Note: Murder and vandalism are not measured in this table.

Table 5. Households experiencing crime, by type of crime, 1994 and 2004

	Percent of households	
	1994	2004
Any NCVS crime	25.0%	14.1%
Violent crime	7.0	2.9
Property crime	21.1	12.1
Violence by strangers or burglary	7.9%	3.7%
Intimate partner violence	0.8%	0.4%
Number of households experiencing some type of crime	25,103,670	16,365,700
U.S. total of all households	100,544,570	115,775,570

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics

Washington, DC 20531

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NCJ 211511

PRESORTED STANDARD
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Methodology

This Bulletin presents data on nonlethal violence and property crimes from the National Crime Victimization Survey (NCVS). In 2004, 84,360 households and 149,000 individuals age 12 or older were interviewed. For the 2004 NCVS data presented here, the response rate was 91.3% of eligible households and 85.5% of eligible individuals.

The households-victimized-by-crime measure counts each household once for the calendar year, regardless of the number of times a household experienced a particular type of crime. For the overall indicator, household-based crime estimates are derived from NCVS statistics on rape/sexual assault, robbery, assault, personal theft, household burglary, household theft, and motor vehicle theft. A household is counted if anyone in the household experienced one or more of any of these crimes within the year. For categories such as violent crime by a stranger or intimate partner crime, a household is counted if person(s) in the households were victimized one or more times by that particular type of crime.

Detailed information about the construction of the households-victimized-by-crime measure, as well as data about households in prior years, is available in *Crime and the Nation's Households, 2000, with Trends, 1994-2000* <http://www.ojp.usdoj.gov/bjs/abstract/cnh00.htm>. For more explanation about general survey methodology and estimates of error, see the BJS Bulletin *Criminal Victimization 2004*, <http://www.ojp.usdoj.gov/bjs/abstract/cv04htm>.

This report in portable document format and in ASCII and its related statistical data and tables—including five appendix tables—are available at the BJS World Wide Web Internet site: <http://www.ojp.usdoj.gov/bjs/>

Office of Justice Programs

Partnerships for Safer Communities
http://www.ojp.usdoj.gov

The Bureau of Justice Statistics is the statistical agency of the U.S. Department of Justice. Maureen Henneberg, acting deputy director.

BJS Bulletins present the first release of findings from permanent data collection programs.

Patsy A. Klaus, BJS, wrote this report under the supervision of Michael R. Rand. Cathy T. Maston provided the statistical review. Tina Dorsey produced and edited the report. Jayne Robinson prepared the report for final printing.

March 2006, NCJ 211511

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U.S. Department of Justice

Office of Justice Programs

Bureau of Justice Statistics

Washington, D.C. 20531

MAR 0 7 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE ACTING DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL

THROUGH: Regina B. Schofield RBS
Assistant Attorney General
Office of Justice Programs

FROM: Maureen A. Henneberg MAHenneberg
Acting Deputy Director, Bureau of Justice Statistics

SUBJECT: **BJS Statistical Release Report, March 2006**

This memorandum contains three sections:
1) Publications
2) Statistical tables and web content that are not printed
3) Recently released materials.

Each section is sequenced by expected release date.

Final release dates are determined by receipt and verification of final data.

Publications:

Press release:
Yes [blank means No]

Survey of State Criminal History Information Systems, 2003
(SEARCH Group Inc.) Describes the status of State criminal history records systems at yearend 2003. The data presented are used as the basis for estimating the percentage of total State records that are immediately available through the FBI's Interstate Identification Index and the percentage that include dispositions. Other data presented include the number of records maintained by each State, the percentage of automated records in the system, and the number of States participating in the FBI's Interstate Identification Index. The publication also contains information regarding the timeliness

of data in State record systems, and procedures employed to improve data quality. The report is an update of Survey of State Criminal History Information Systems, 2001, released in September 2003, and is the eighth in the series that began with 1989 data. Expected release around 03/02/2006.

Yes **Identity Theft, 2004**

(K. Baum) Presents data on identity theft victimization and its consequences from the National Crime Victimization Survey (NCVS). This is the first report from new questions about identity theft added to the survey in July 2004 and encompasses credit card thefts, thefts from existing accounts, misuse of personal information, and multiple types at the same time. The report, based on interviews with 40,000 household residents drawn to be nationally representative, describes age, race, and ethnicity of the household head; household income; and location of the household (urbanicity). Characteristics of the theft presented include economic loss, how the theft was discovered, whether misuse is ongoing, and problems experienced as a result of the identity theft. Expected release around 03/15/2006.

Crime and the Nation's Households, 2004

(P. Klaus) Presents information on the percentage of households or persons in households who are victimized as measured by the National Crime Victimization Survey. Findings are presented by region; by urban, suburban or rural location; and by household size. This annual report also includes overall trends since 1994, vandalism, and intimate partner violence. Expected release around 03/31/2006.

Improving Criminal History Records for Background Checks, 2005

(G. Ramker) Describes the achievements of the National Criminal History Improvement Program (NCHIP), its authorizing legislation and program history. This annual Bulletin summarizes NCHIP-funded criminal record improvement efforts, including improved accessibility of records, full participation in the Interstate Identification Index, the automation of records and fingerprint data, and improvements in the National Instant Criminal Background Check, National Sex Offender Registry, and domestic violence and protection order systems. The report provides examples of projects aimed at enhancing the involvement of the courts and system integration in improving disposition reporting. The report also discusses the Bureau of Justice Statistics' efforts to improve performance measurement including the development and use of a Records Quality Index. Expected release around 03/31/2006.

Characteristics of Drivers Stopped by Police, 2002

(E. Smith, M. Durose) Presents data on the nature and characteristics of traffic stops, as collected in the 2002 Police Public Contact Survey, a supplement to the National Crime Victimization Survey. Detailed demographic information is presented on the 16.8

million drivers stopped by police in 2002. The report provides statistics about various outcomes of traffic stops, including searches conducted by police, tickets issued to drivers stopped for speeding, arrests of stopped drivers, and police use of force during a traffic stop. The report also discusses the relevance of the survey findings to the issue of racial profiling and provides comparative analysis with prior survey findings. Expected release around 04/15/2006.

Justice Expenditure and Employment in the United States, 2003

(K. Hughes) Provides selected data from the U.S. Census Bureau's Annual General Finance and Employment Surveys. Data presented include police protection, judicial and legal services, and corrections expenditure and employment for Federal, State, and local governments in 2003 and national trend data for 1982 to 2003. Expenditure data are provided for fiscal year 2003; employment and payroll data are for the month of March 2003. The report compares justice expenditure to spending for other governmental services and analyzes trends in justice spending and employment. It also presents per capita employment data relative to other State and government services, as well as per capita expenditure data by governmental function. Expected release date around 04/15/2006.

Local Police Departments, 2003

(M. Hickman, B. Reaves) Presents data collected from a representative sample of local police departments nationwide on a variety of agency characteristics based on the 2003 Law Enforcement Management and Administrative Statistics (LEMAS) survey. National estimates for local police departments are provided for such issues as staff and financial resources, technologies and equipment in use, and policies and practices of the agencies on a wide array of law enforcement and administrative concerns. Expected release around 04/15/2006.

Sheriffs' Offices, 2003

(M. Hickman, B. Reaves) Presents data collected from a representative sample of sheriffs' offices nationwide on a variety of agency characteristics based on the 2003 LEMAS survey. National estimates for sheriffs' offices are provided for such issues as staff and financial resources, technologies and equipment in use, and agency policies and practices covering a wide array of law enforcement and administrative concerns. Expected release date around 04/15/2006.

Federal Criminal Justice Trends, 2003

(M. Motivans) Presents data on Federal criminal justice trends from 1994-2003. This report summarizes the activities of agencies at each stage of the Federal criminal case process. It includes 10-year trend statistics on the number arrested (with detail on drug offenses); number and disposition of suspects investigated by U.S. attorneys; number of

persons detained prior to trial; number of defendants in cases filed, convicted, and sentenced; and number of offenders under Federal correctional supervision (incarceration, supervised release, probation, and parole). Expected release around 04/30/2006.

National Corrections Reporting Program, 2002 CD-ROM

(T. Hughes, A. Beck) Presents data on admissions, releases, and parole outcomes of persons in the Nation's State prisons and parole systems, including demographic characteristics, offenses, sentence length, type of admission, time to be served, method of release, and actual time served of inmates exiting prison and parole. In 2002, 39 States reported data. Included on the CD-ROM are ASCII files that require the use of specific statistical software packages, a code book, statistical software setup files, and explanatory notes. Expected release date around 04/30/2006.

Prison and Jail Inmates, Midyear 2005

(P. Harrison, A. Beck) Presents data on prison and jail inmates, collected from National Prisoner Statistics counts and the Annual Survey of Jails in 2005. This annual report provides for each State and the Federal system, the number of inmates and the overall incarceration rate per 100,000 residents. It offers trends since 1995 and percentage changes in prison populations since midyear and yearend 2004. The midyear report presents the number of prison inmates held in private facilities and the number of prisoners under 18 years of age held by State correctional authorities. It includes total numbers for prison and jail inmates by gender, race, and Hispanic origin as well as counts of jail inmates by conviction status and confinement status. The report also provides findings on rated capacity of local jails, percent of capacity occupied, and capacity added. Standard errors for jail estimates are provided in the appendix tables of the electronic version of this report. Expected release date around 04/30/2006.

Violent Felons in Large Urban Counties: State Court Processing Statistics, 1990-2002

(B. Reaves) Presents data collected from a representative sample of felony cases that resulted in a felony conviction for a violent offense in 40 of the Nation's 75 largest counties. The study tracks cases for up to 1 year from the date of filing through final disposition. Defendants convicted of murder, rape, robbery, assault or other violent felony are described in terms of demographic characteristics (gender, race, Hispanic origin, age), prior arrests and convictions, criminal justice status at time of arrest, type of pretrial release or detention, type of adjudication, and sentence received. Expected release around 04/30/2006.

State Court Organization, 2004
(D. Rottman, S. Strickland, T. Cohen, BJS project monitor) Presents detailed comparative data by State trial and appellate courts in the United States. Topics covered include: the number of courts and judges; process for judicial selection; governance of court systems, including judicial funding, administration, staffing, and procedures; jury qualifications and verdict rules; and processing and sentencing procedures for criminal cases. Diagrams of court structure summarize the key features of each State's court organization. This fifth edition of State Court Organization is a joint effort of the Conference of State Court Administrators, the National Center for State Courts, and BJS. Expected release date around 05/01/2006.

Federal Law Enforcement Officers, 2004
(B. Reaves) Reports the results of a biennial census of Federal agencies employing personnel with arrest and firearms authority. Using agency classifications, the report presents the number of officers working in the areas of police patrol and response, criminal investigation and enforcement, security and protection, court operations, and corrections, by agency and State, as of September 2004. Data on gender and race of officers are also included. Expected release date around 05/15/2006.

Medical Problems of Jail Inmates, 2002
(L. Maruschak) Presents findings on jail inmates who reported a current medical problem, a physical impairment or mental condition, or an injury since admission based on data from the 2002 Survey of Inmates in Local Jails. The prevalence of specific medical problems and conditions are also included. The report examines medical problems and other conditions by gender, age, time served since admission, and select background characteristics. Expected release date around 05/15/2006.

Appeals from General Civil Trials in 46 Large Counties, 2001-2005
(T. Cohen) Presents information on general civil cases concluded by bench or jury trial in 2001 that were subsequently appealed to a State's intermediate appellate court or court of last resort. Information presented includes the flow of civil cases through the appeals process and the affect of appeals on trial court outcomes. The report describes the types of civil bench and jury trials appealed, the characteristics of litigants filing an appeal, the frequency in which appellate courts affirm, reverse, or modify trial court outcomes, and the percentage of appeals that produced a published opinion. Cases further appealed from an intermediate appellate court to a State court of last resort and the impact of that final level of appeal on litigation outcomes are also described. This report is part of a series examining civil litigation in the United States. Expected release date around 06/01/2006.

Census of State and Local Law Enforcement Agencies, 2004
(B. Reaves) Reports the results of a census, conducted every four years, of all State and local law enforcement agencies operating nationwide. The report provides the number of employees of State and local law enforcement agencies as of September 2004, including State-by-State data for sheriffs' offices, local police departments, State police and highway patrol agencies, and special jurisdiction police. Expected release date around 06/15/2006.

Law Enforcement Management and Administrative Statistics, 2003: Data for Individual State and Local Agencies with 100 or More Officers
(B. Reaves) Presents agency-specific data collected from more than 800 State and local law enforcement agencies employing 100 or more officers based on the 2003 Law Enforcement Management and Administrative Statistics (LEMAS) survey. The report provides agency-specific information on the characteristics of the largest law enforcement agencies nationwide. Large agencies are described in detail for such issues as staff and financial resources, technologies and equipment in use, and policies and practices of the agencies on a wide array of law enforcement and administrative concerns. Summary data for State police and highway patrol agencies, municipal police departments, county police departments, and sheriffs' offices are also included. Expected release date around 06/15/2006.

Statistical table updates and web content (electronic only):

Homicide Trends in the United States
(M. Zawitz, J. Fox, BJS Visiting Fellow) Updates the section of the BJS website (www.ojp.usdoj.gov/bjs/homicide/homtrnd.htm) about homicide patterns and trends through 2004. This site includes over 50 charts and 100 tables. Topics covered include long term trends, demographic trends, multiple victims and offenders, infanticide, eldercide, homicides by intimates, law enforcement officers killed, weapons trends, clearances, regional trends, and trends by city size. The data analyzed are from the FBI Uniform Crime Reporting Program's Supplementary Homicide Reports. Expected release date around 04/15/2006.

Intimate Partner Violence
(S. Catalano) Examines fatal and non-fatal violence by intimates (current or former spouses, girlfriends, or boyfriends) since the redesign of the National Crime Victimization Survey (NCVS) in 1993. Victim characteristics such as race, sex, age, income, and ethnicity are presented. Measured crimes include murder, rape, robbery, aggravated assault, and simple assault experienced by males and females age 12 years and older. In addition, characteristics of the victimization are presented such as offender use of alcohol/drugs, offender use of weapons, location, time of day, reporting to police,

injury and medical treatment, and presence of children in the household. Data for this Internet only release are from the NCVS and FBI's Supplementary Homicide Reports. Expected release date around 04/30/2006.

Recently released:

Hate Crimes Reported by Victims and Police
(C. Harlow) Released on 11/13/2005. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/hcrvp.htm*. Printed copies available.

Capital Punishment, 2004
(T. Bonczar, T. Snell) Released on 11/13/2005. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/cp04.htm*. Printed copies available around 03/01/2006.

Census of Tribal Justice Agencies in Indian Country, 2002
(S. Perry) Released on 12/22/2005. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/ctjaic02.htm*. Printed copies available around 03/01/2006.

Felony Defendants in Large Urban Counties, 2002
(T. Cohen, B. Reaves) Released on 02/06/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/fdluc02.htm*. Printed copies available around 03/31/2006.

cc: Rachel L. Brand, OLP
Uttam Dhillon, ODAG
Frank Shults, ODAG
Tasia Scolinos, PAO
Nicholas J. Tzitzon, OAAG
David Hagy, OAAG
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Nancy Segerdahl, OCOM
Diane Stuart, OVW
Thomas R. Kane, BOP
Maryvictoria Pyne, FBI-CJIS
Steven R. Schlesinger, AOUSC
Michael Battle, EOUSA

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Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 02/07/2006
DATE RECEIVED: 02/14/2006
WORKFLOW ID: 953679
DUE DATE: 03/02/2006

FROM: The Honorable Dave Weldon
U.S. House of Representatives

Washington, DC 20515

TO: AG

MAIL TYPE: Congressional Grants

SUBJECT: Requesting consideration of the application submitted by the City of Palm Bay, FL, for funding through BJA's Sex Offender Management Discretionary Grant Program.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
02/15/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: OAG, ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Paula Stephens: 202-616-0074

953679

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Congress of the United States
House of Representatives
Washington, DC 20515

DAVE WELDON, M.D.
15TH DISTRICT, FLORIDA

COMMITTEE:
APPROPRIATIONS
SUBCOMMITTEES:
VA, HUD, INDEPENDENT AGENCIES
LABOR, HEALTH AND HUMAN SERVICES
THE DISTRICT OF COLUMBIA

February 7, 2006

The Honorable Alberto R. Gonzalez, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Gonzalez:

It is my understanding that the city of Palm Bay has applied for federal assistance under the Bureau of Justice Assistance's (BJA) Sex Offender Management Discretionary Grant, and I am pleased to learn of their continued efforts to provide safety for this growing area of my Congressional district.

As I understand it, there are 90 registered sexual offenders and predators living throughout the Palm Bay community and only one sworn officer to monitor them. To successfully manage the sexual offenders and predators, the city proposes to use the funding to add two staff positions to the police department that will assist the Palm Bay Sexual Offender and Predator Unit (PBSOPU) in implementing state, county, and local registration laws. These two new staff positions will also assist in the evaluation of the effectiveness of the current enforcement strategy in the city of Palm Bay.

Any consideration you may give to the city of Palm Bay's application for the BJA Sex Offender Management Discretionary Grant will be greatly appreciated by my constituents. Please let me know the outcome of this important application by contacting my District Office address listed above.

With warm regards and best wishes, I remain,

Sincerely,

Dave Weldon
Member of Congress

DW/mrm

Cc: Mr. Domingo S. Herraiz, Director, Bureau of Justice Assistance

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT:
DATE RECEIVED: 02/13/2006

WORKFLOW ID: 952705
DUE DATE: 03/02/2006

FROM: The Honorable Deborah Pryce
U.S. House of Representatives

Washington, DC 20515

TO: AG

MAIL TYPE: Congressional Priority

SUBJECT: Advising that between 10/2003 and 2/2004, the Franklin County Sheriff's Office (FCSO) in OH spent significant resources investigating a series of sniper shootings that occurred on the federal highway system in and around Columbus. Requests assistance in determining whether DOJ can compensate the FCSO for any or all of these activities involving the sniper shootings. Encls.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
02/15/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: OAG, ODAG, OASG, JMD, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Shirley McKay: 202-514-5305

952705

Congress
of the
United States
House of Representatives

DEBORAH PRYCE
OHIO
15th DISTRICT

The Honorable Alberto Gonzales
U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530

Dear Attorney General Gonzales,

Between October of 2003 and February of 2004, the Franklin County Sheriff's Office (FCSO) in Ohio spent significant resources investigating a series of sniper shootings on the federal highway system in and around Columbus, OH. These shootings left one person dead, and the ensuing investigation led to the arrest, conviction, and 27-year sentencing of Charles McCoy, Jr.

The enormous cost of this crime's investigation has had a significant impact on the FCSO's budget, which in turn affects the viability of other law enforcement operations. Additionally, the terrorizing nature of these events as well as their occurrence on the federal highway system has raised the question of federal reimbursement for the FCSO's activities. Therefore, I would like to respectfully request you consider any way in which the Department of Justice could compensate the FCSO for any or all of these activities. I have enclosed documentation from the FCSO which details overtime expenses for your reference.

Please do not hesitate to contact me if you require any additional information to move this request forward.

Thank you for your assistance in this matter. I appreciate your time and your consideration.

Very truly yours,

DEBORAH PRYCE
Member of Congress

Enclosures

204 CANNON HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515
(202) 225-2015
http://www.house.gov/pryce/

500 SOUTH FRONT STREET
ROOM 1130
COLUMBUS, OHIO 43215
(614) 469-5614

Franklin County
Where Government Works

Commissioners
Dewey R. Stokes Arlene Shoemaker Mary Jo Kilroy

April 29, 2004

The Honorable Deborah D. Pryce, Member
United States House of Representatives
113 Cannon House Office Building
Washington, D.C. 20515

Dear Congresswomen Pryce:

I am writing to request that you introduce an appropriations bill that will place funds into CFDA: 16.577, the Emergency Federal Law Enforcement Assistance Program.

This allocation of funds will allow the state attorney general to apply to the Bureau of Justice Assistance for the reimbursement of costs incurred by the State of Ohio, the Franklin County Sheriff's Office and the City of Columbus during the Central Ohio Sniper Shooting Task Force investigation.

Additionally, I have been informed that the Office of Criminal Justice Services has agreed to use Local Law Enforcement Block Grant funds to reimburse smaller jurisdictions that also participated in the sniper shooting investigation.

I respectfully request your assistance in introducing this necessary appropriations bill.

Sincerely,

Mark A. Gibson
Franklin County Administrator

373 South High Street, Columbus, Ohio 43215-6314
Tel: 614-462-3322 Fax: 614-462-5999 www.co.franklin.oh.us

INTERSTATE 270 SHOOTINGS

OVERALL TOTALS

Week Ending	Personal Service Regular Pay	Personal Service Overtime Pay	Personal Service Total Pay	Equipment	Totals
12/06/2003 *	$34,979.14	$29,933.30	[redacted]	$1,596.87	[redacted]
12/13/2003	$26,849.85	$14,027.31		$106.38	
12/20/2003	$23,641.39	$16,376.38		$0.00	
12/27/2003	$25,839.62	$18,055.24		$0.00	
01/03/2004	$31,179.26	$18,844.65		$20,746.18 **	
01/10/2004	$27,805.46	$16,730.04		$10,158.77	
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01/24/2004	$23,703.81	$18,796.92		$9,087.17	
01/31/2004	$25,069.68	$14,525.06		$0.00	
02/07/2004	$22,055.69	$15,476.23		$6,729.65 ***	
02/14/2004	$36,979.47	$22,367.44		$12,730.61	
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TOTALS	$435,917.57	$298,717.84	[redacted]	$147,762.87	[redacted]

Note-Equipment costs thru week ending 2/14/04 inflated in error -- corrected on 2/17/04

*Includes 11/25 thru 12/6
**Equipment cost for weeks 12/27/03 & 1/3/04
***Equipment cost for weeks 1/31/04 & 2/7/04

Huff, Beverly R

From: Stritenberger, Mileah R.
Sent: Monday, May 10, 2004 3:49
To: Martin, Stephan L.
Subject: 270 OT Costs

Chief,

Attached is the information you requested on overtime costs for the I-270 shooting investigation. The total for wages alone is $520,378.12. The approximate total, including PERS & Medicare is $614,826.75 This will be a good estimate to provide Washington; however, if we get awarded any monies, we will have to detail out the PERS and Medicare as these are just estimates based on 16.7% for PERS and Medicare applying to everyone. As you know, there were some civilians paid overtime, whose PERS rate is 13.55%, and not everyone has to contribute Medicare.

If you have any questions, give me a call.

Mileah

Mileah Stritenberger
Finance Director
Franklin County Sheriff's Office

966499

U.S. Department of Justice

Office of Justice Programs

Bureau of Justice Statistics

Washington, D.C. 20531

MAR 0 7 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE ACTING DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL

THROUGH: Regina B. Schofield RBS
Assistant Attorney General
Office of Justice Programs

FROM: Maureen A. Henneberg MAHenneberg
Acting Deputy Director, Bureau of Justice Statistics

SUBJECT: **BJS Statistical Release Report, March 2006**

This memorandum contains three sections:
1) Publications
2) Statistical tables and web content that are not printed
3) Recently released materials.

Each section is sequenced by expected release date.

Final release dates are determined by receipt and verification of final data.

Publications:

Press release:
Yes [blank means No]

Survey of State Criminal History Information Systems, 2003
(SEARCH Group Inc.) Describes the status of State criminal history records systems at yearend 2003. The data presented are used as the basis for estimating the percentage of total State records that are immediately available through the FBI's Interstate Identification Index and the percentage that include dispositions. Other data presented include the number of records maintained by each State, the percentage of automated records in the system, and the number of States participating in the FBI's Interstate Identification Index. The publication also contains information regarding the timeliness

of data in State record systems, and procedures employed to improve data quality. The report is an update of Survey of State Criminal History Information Systems, 2001, released in September 2003, and is the eighth in the series that began with 1989 data. Expected release around 03/02/2006.

Yes **Identity Theft, 2004**

(K. Baum) Presents data on identity theft victimization and its consequences from the National Crime Victimization Survey (NCVS). This is the first report from new questions about identity theft added to the survey in July 2004 and encompasses credit card thefts, thefts from existing accounts, misuse of personal information, and multiple types at the same time. The report, based on interviews with 40,000 household residents drawn to be nationally representative, describes age, race, and ethnicity of the household head; household income; and location of the household (urbanicity). Characteristics of the theft presented include economic loss, how the theft was discovered, whether misuse is ongoing, and problems experienced as a result of the identity theft. Expected release around 03/15/2006.

Crime and the Nation's Households, 2004

(P. Klaus) Presents information on the percentage of households or persons in households who are victimized as measured by the National Crime Victimization Survey. Findings are presented by region; by urban, suburban or rural location; and by household size. This annual report also includes overall trends since 1994, vandalism, and intimate partner violence. Expected release around 03/31/2006.

Improving Criminal History Records for Background Checks, 2005

(G. Ramker) Describes the achievements of the National Criminal History Improvement Program (NCHIP), its authorizing legislation and program history. This annual Bulletin summarizes NCHIP-funded criminal record improvement efforts, including improved accessibility of records, full participation in the Interstate Identification Index, the automation of records and fingerprint data, and improvements in the National Instant Criminal Background Check, National Sex Offender Registry, and domestic violence and protection order systems. The report provides examples of projects aimed at enhancing the involvement of the courts and system integration in improving disposition reporting. The report also discusses the Bureau of Justice Statistics' efforts to improve performance measurement including the development and use of a Records Quality Index. Expected release around 03/31/2006.

Characteristics of Drivers Stopped by Police, 2002

(E. Smith, M. Durose) Presents data on the nature and characteristics of traffic stops, as collected in the 2002 Police Public Contact Survey, a supplement to the National Crime Victimization Survey. Detailed demographic information is presented on the 16.8

million drivers stopped by police in 2002. The report provides statistics about various outcomes of traffic stops, including searches conducted by police, tickets issued to drivers stopped for speeding, arrests of stopped drivers, and police use of force during a traffic stop. The report also discusses the relevance of the survey findings to the issue of racial profiling and provides comparative analysis with prior survey findings. Expected release around 04/15/2006.

Justice Expenditure and Employment in the United States, 2003
(K. Hughes) Provides selected data from the U.S. Census Bureau's Annual General Finance and Employment Surveys. Data presented include police protection, judicial and legal services, and corrections expenditure and employment for Federal, State, and local governments in 2003 and national trend data for 1982 to 2003. Expenditure data are provided for fiscal year 2003; employment and payroll data are for the month of March 2003. The report compares justice expenditure to spending for other governmental services and analyzes trends in justice spending and employment. It also presents per capita employment data relative to other State and government services, as well as per capita expenditure data by governmental function. Expected release date around 04/15/2006.

Local Police Departments, 2003
(M. Hickman, B. Reaves) Presents data collected from a representative sample of local police departments nationwide on a variety of agency characteristics based on the 2003 Law Enforcement Management and Administrative Statistics (LEMAS) survey. National estimates for local police departments are provided for such issues as staff and financial resources, technologies and equipment in use, and policies and practices of the agencies on a wide array of law enforcement and administrative concerns. Expected release around 04/15/2006.

Sheriffs' Offices, 2003
(M. Hickman, B. Reaves) Presents data collected from a representative sample of sheriffs' offices nationwide on a variety of agency characteristics based on the 2003 LEMAS survey. National estimates for sheriffs' offices are provided for such issues as staff and financial resources, technologies and equipment in use, and agency policies and practices covering a wide array of law enforcement and administrative concerns. Expected release date around 04/15/2006.

Federal Criminal Justice Trends, 2003
(M. Motivans) Presents data on Federal criminal justice trends from 1994-2003. This report summarizes the activities of agencies at each stage of the Federal criminal case process. It includes 10-year trend statistics on the number arrested (with detail on drug offenses); number and disposition of suspects investigated by U.S. attorneys; number of

persons detained prior to trial; number of defendants in cases filed, convicted, and sentenced; and number of offenders under Federal correctional supervision (incarceration, supervised release, probation, and parole). Expected release around 04/30/2006.

National Corrections Reporting Program, 2002 CD-ROM

(T. Hughes, A. Beck) Presents data on admissions, releases, and parole outcomes of persons in the Nation's State prisons and parole systems, including demographic characteristics, offenses, sentence length, type of admission, time to be served, method of release, and actual time served of inmates exiting prison and parole. In 2002, 39 States reported data. Included on the CD-ROM are ASCII files that require the use of specific statistical software packages, a code book, statistical software setup files, and explanatory notes. Expected release date around 04/30/2006.

Prison and Jail Inmates, Midyear 2005

(P. Harrison, A. Beck) Presents data on prison and jail inmates, collected from National Prisoner Statistics counts and the Annual Survey of Jails in 2005. This annual report provides for each State and the Federal system, the number of inmates and the overall incarceration rate per 100,000 residents. It offers trends since 1995 and percentage changes in prison populations since midyear and yearend 2004. The midyear report presents the number of prison inmates held in private facilities and the number of prisoners under 18 years of age held by State correctional authorities. It includes total numbers for prison and jail inmates by gender, race, and Hispanic origin as well as counts of jail inmates by conviction status and confinement status. The report also provides findings on rated capacity of local jails, percent of capacity occupied, and capacity added. Standard errors for jail estimates are provided in the appendix tables of the electronic version of this report. Expected release date around 04/30/2006.

Violent Felons in Large Urban Counties: State Court Processing Statistics, 1990-2002

(B. Reaves) Presents data collected from a representative sample of felony cases that resulted in a felony conviction for a violent offense in 40 of the Nation's 75 largest counties. The study tracks cases for up to 1 year from the date of filing through final disposition. Defendants convicted of murder, rape, robbery, assault or other violent felony are described in terms of demographic characteristics (gender, race, Hispanic origin, age), prior arrests and convictions, criminal justice status at time of arrest, type of pretrial release or detention, type of adjudication, and sentence received. Expected release around 04/30/2006.

State Court Organization, 2004
(D. Rottman, S. Strickland, T. Cohen, BJS project monitor) Presents detailed comparative data by State trial and appellate courts in the United States. Topics covered include: the number of courts and judges; process for judicial selection; governance of court systems, including judicial funding, administration, staffing, and procedures; jury qualifications and verdict rules; and processing and sentencing procedures for criminal cases. Diagrams of court structure summarize the key features of each State's court organization. This fifth edition of State Court Organization is a joint effort of the Conference of State Court Administrators, the National Center for State Courts, and BJS. Expected release date around 05/01/2006.

Federal Law Enforcement Officers, 2004
(B. Reaves) Reports the results of a biennial census of Federal agencies employing personnel with arrest and firearms authority. Using agency classifications, the report presents the number of officers working in the areas of police patrol and response, criminal investigation and enforcement, security and protection, court operations, and corrections, by agency and State, as of September 2004. Data on gender and race of officers are also included. Expected release date around 05/15/2006.

Medical Problems of Jail Inmates, 2002
(L. Maruschak) Presents findings on jail inmates who reported a current medical problem, a physical impairment or mental condition, or an injury since admission based on data from the 2002 Survey of Inmates in Local Jails. The prevalence of specific medical problems and conditions are also included. The report examines medical problems and other conditions by gender, age, time served since admission, and select background characteristics. Expected release date around 05/15/2006.

Appeals from General Civil Trials in 46 Large Counties, 2001-2005
(T. Cohen) Presents information on general civil cases concluded by bench or jury trial in 2001 that were subsequently appealed to a State's intermediate appellate court or court of last resort. Information presented includes the flow of civil cases through the appeals process and the affect of appeals on trial court outcomes. The report describes the types of civil bench and jury trials appealed, the characteristics of litigants filing an appeal, the frequency in which appellate courts affirm, reverse, or modify trial court outcomes, and the percentage of appeals that produced a published opinion. Cases further appealed from an intermediate appellate court to a State court of last resort and the impact of that final level of appeal on litigation outcomes are also described. This report is part of a series examining civil litigation in the United States. Expected release date around 06/01/2006.

Census of State and Local Law Enforcement Agencies, 2004
(B. Reaves) Reports the results of a census, conducted every four years, of all State and local law enforcement agencies operating nationwide. The report provides the number of employees of State and local law enforcement agencies as of September 2004, including State-by-State data for sheriffs' offices, local police departments, State police and highway patrol agencies, and special jurisdiction police. Expected release date around 06/15/2006.

Law Enforcement Management and Administrative Statistics, 2003: Data for Individual State and Local Agencies with 100 or More Officers
(B. Reaves) Presents agency-specific data collected from more than 800 State and local law enforcement agencies employing 100 or more officers based on the 2003 Law Enforcement Management and Administrative Statistics (LEMAS) survey. The report provides agency-specific information on the characteristics of the largest law enforcement agencies nationwide. Large agencies are described in detail for such issues as staff and financial resources, technologies and equipment in use, and policies and practices of the agencies on a wide array of law enforcement and administrative concerns. Summary data for State police and highway patrol agencies, municipal police departments, county police departments, and sheriffs' offices are also included. Expected release date around 06/15/2006.

Statistical table updates and web content (electronic only):

Homicide Trends in the United States
(M. Zawitz, J. Fox, BJS Visiting Fellow) Updates the section of the BJS website (www.ojp.usdoj.gov/bjs/homicide/homtrnd.htm) about homicide patterns and trends through 2004. This site includes over 50 charts and 100 tables. Topics covered include long term trends, demographic trends, multiple victims and offenders, infanticide, eldercide, homicides by intimates, law enforcement officers killed, weapons trends, clearances, regional trends, and trends by city size. The data analyzed are from the FBI Uniform Crime Reporting Program's Supplementary Homicide Reports. Expected release date around 04/15/2006.

Intimate Partner Violence
(S. Catalano) Examines fatal and non-fatal violence by intimates (current or former spouses, girlfriends, or boyfriends) since the redesign of the National Crime Victimization Survey (NCVS) in 1993. Victim characteristics such as race, sex, age, income, and ethnicity are presented. Measured crimes include murder, rape, robbery, aggravated assault, and simple assault experienced by males and females age 12 years and older. In addition, characteristics of the victimization are presented such as offender use of alcohol/drugs, offender use of weapons, location, time of day, reporting to police,

injury and medical treatment, and presence of children in the household. Data for this Internet only release are from the NCVS and FBI's Supplementary Homicide Reports. Expected release date around 04/30/2006.

Recently released:

Hate Crimes Reported by Victims and Police
(C. Harlow) Released on 11/13/2005. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/hcryp.htm*. Printed copies available.

Capital Punishment, 2004
(T. Bonczar, T. Snell) Released on 11/13/2005. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/cp04.htm*. Printed copies available around 03/01/2006.

Census of Tribal Justice Agencies in Indian Country, 2002
(S. Perry) Released on 12/22/2005. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/ctjaic02.htm*. Printed copies available around 03/01/2006.

Felony Defendants in Large Urban Counties, 2002
(T. Cohen, B. Reaves) Released on 02/06/2006. Available from the Bureau of Justice Statistics website at *http://www.ojp.usdoj.gov/bjs/abstract/fdluc02.htm*. Printed copies available around 03/31/2006.

cc: Rachel L. Brand, OLP
Uttam Dhillon, ODAG
Frank Shults, ODAG
Tasia Scolinos, PAO
Nicholas J. Tzitzon, OAAG
David Hagy, OAAG
Cybele Daley, OAAG
Beth McGarry, OAAG
Laura Keehner, OAAG
Domingo Herraiz, BJA
J. Robert Flores, OJJDP
John Gillis, OVC
Glenn Schmitt, NIJ
Nelson Hernandez, CCDO
Nancy Segerdahl, OCOM
Diane Stuart, OVW
Thomas R. Kane, BOP
Maryvictoria Pyne, FBI-CJIS
Steven R. Schlesinger, AOUSC
Michael Battle, EOUSA

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 02/07/2006
DATE RECEIVED: 02/14/2006
WORKFLOW ID: 953679
DUE DATE: 03/02/2006

FROM: The Honorable Dave Weldon
U.S. House of Representatives

Washington, DC 20515

TO: AG

MAIL TYPE: Congressional Grants

SUBJECT: Requesting consideration of the application submitted by the City of Palm Bay, FL, for funding through BJA's Sex Offender Management Discretionary Grant Program.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/15/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: OAG, ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Paula Stephens: 202-616-0074

953679

WASHINGTON OFFICE:
2347 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-3671

DISTRICT OFFICE:
BREVARD CO. GOVT. COMPLEX
2725 JUDGE FRAN JAMIESON WAY
BUILDING C
MELBOURNE, FL 32940
(321) 632-1776
http://www.house.gov/weldon

Congress of the United States
House of Representatives
Washington, DC 20515

DAVE WELDON, M.D.
15TH DISTRICT, FLORIDA

COMMITTEE:
APPROPRIATIONS
SUBCOMMITTEES:
VA, HUD, INDEPENDENT AGENCIES
LABOR, HEALTH AND HUMAN SERVICES
THE DISTRICT OF COLUMBIA

February 7, 2006

The Honorable Alberto R. Gonzalez, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Gonzalez:

It is my understanding that the city of Palm Bay has applied for federal assistance under the Bureau of Justice Assistance's (BJA) Sex Offender Management Discretionary Grant, and I am pleased to learn of their continued efforts to provide safety for this growing area of my Congressional district.

As I understand it, there are 90 registered sexual offenders and predators living throughout the Palm Bay community and only one sworn officer to monitor them. To successfully manage the sexual offenders and predators, the city proposes to use the funding to add two staff positions to the police department that will assist the Palm Bay Sexual Offender and Predator Unit (PBSOPU) in implementing state, county, and local registration laws. These two new staff positions will also assist in the evaluation of the effectiveness of the current enforcement strategy in the city of Palm Bay.

Any consideration you may give to the city of Palm Bay's application for the BJA Sex Offender Management Discretionary Grant will be greatly appreciated by my constituents. Please let me know the outcome of this important application by contacting my District Office address listed above.

With warm regards and best wishes, I remain,

Sincerely,

Dave Weldon
Member of Congress

DW/mrm

Cc: Mr. Domingo S. Herraiz, Director, Bureau of Justice Assistance

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT:
DATE RECEIVED: 02/13/2006

WORKFLOW ID: 952705
DUE DATE: 03/02/2006

FROM: The Honorable Deborah Pryce
U.S. House of Representatives

Washington, DC 20515

TO: AG

MAIL TYPE: Congressional Priority

SUBJECT: Advising that between 10/2003 and 2/2004, the Franklin County Sheriff's Office (FCSO) in OH spent significant resources investigating a series of sniper shootings that occurred on the federal highway system in and around Columbus. Requests assistance in determining whether DOJ can compensate the FCSO for any or all of these activities involving the sniper shootings. Encls.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/15/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: OAG, ODAG, OASG, JMD, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Shirley McKay: 202-514-5305

952705

Congress
of the
United States
House of Representatives

DEBORAH PRYCE
OHIO
15th DISTRICT

The Honorable Alberto Gonzales
U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530

Dear Attorney General Gonzales,

Between October of 2003 and February of 2004, the Franklin County Sheriff's Office (FCSO) in Ohio spent significant resources investigating a series of sniper shootings on the federal highway system in and around Columbus, OH. These shootings left one person dead, and the ensuing investigation led to the arrest, conviction, and 27-year sentencing of Charles McCoy, Jr.

The enormous cost of this crime's investigation has had a significant impact on the FCSO's budget, which in turn affects the viability of other law enforcement operations. Additionally, the terrorizing nature of these events as well as their occurrence on the federal highway system has raised the question of federal reimbursement for the FCSO's activities. Therefore, I would like to respectfully request you consider any way in which the Department of Justice could compensate the FCSO for any or all of these activities. I have enclosed documentation from the FCSO which details overtime expenses for your reference.

Please do not hesitate to contact me if you require any additional information to move this request forward.

Thank you for your assistance in this matter. I appreciate your time and your consideration.

Very truly yours,

DEBORAH PRYCE
Member of Congress

Enclosures

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WASHINGTON, D.C. 20515
(202) 225-2015
http://www.house.gov/pryce/

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ROOM 1130
COLUMBUS, OHIO 43215
(614) 469-5614

Franklin County
Where Government Works

Commissioners
Dewey R. Stokes Arlene Shoemaker Mary Jo Kilroy

April 29, 2004

The Honorable Deborah D. Pryce, Member
United States House of Representatives
113 Cannon House Office Building
Washington, D.C. 20515

Dear Congresswomen Pryce:

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This allocation of funds will allow the state attorney general to apply to the Bureau of Justice Assistance for the reimbursement of costs incurred by the State of Ohio, the Franklin County Sheriff's Office and the City of Columbus during the Central Ohio Sniper Shooting Task Force investigation.

Additionally, I have been informed that the Office of Criminal Justice Services has agreed to use Local Law Enforcement Block Grant funds to reimburse smaller jurisdictions that also participated in the sniper shooting investigation.

I respectfully request your assistance in introducing this necessary appropriations bill.

Sincerely,

Mark A. Gibson
Franklin County Administrator

373 South High Street, Columbus, Ohio 43215-6314
Tel: 614-462-3322 Fax: 614-462-5999 www.co.franklin.oh.us

INTERSTATE 270 SHOOTINGS

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**Equipment cost for weeks 12/27/03 & 1/3/04
***Equipment cost for weeks 1/31/04 & 2/7/04

Huff, Beverly R

From: Stritenberger, Mileah R.
Sent: Monday, May 10, 2004 3:49
To: Martin, Stephan L.
Subject: 270 OT Costs

Chief,

Attached is the information you requested on overtime costs for the I-270 shooting investigation. The total for wages alone is $520,378.12. The approximate total, including PERS & Medicare is $614,826.75 This will be a good estimate to provide Washington; however, if we get awarded any monies, we will have to detail out the PERS and Medicare as these are just estimates based on 16.7% for PERS and Medicare applying to everyone. As you know, there were some civilians paid overtime, whose PERS rate is 13.55%, and not everyone has to contribute Medicare.

If you have any questions, give me a call.

Mileah

Mileah Stritenberger
Finance Director
Franklin County Sheriff's Office

JIP 22
10-0128.00
OHP 0128
Rev. 04/07/04

INTER-OFFICE COMMUNICATION

Date May 3, 2004 File 2PAY

To Major R. L. Cassidy Attention Lt. Col. M. W. Finamore
Lt. Col. A. A. Reitz

From Captain D. W. Dicken, Commander, Fiscal Services Section

Subject Interstate 270 Shootings

The Division of the State Highway Patrol was involved with the multi-agency task force for the Interstate 270 Shootings detail from November 25, 2003 through March 22, 2004.

During this time the Office of Finance and Logistic Services tracked the allocation of resources toward this initiative. Please consider the following totals.

Personal Service Regular Pay	Personal Service Overtime Pay	Personal Service Total Pay	Equipment	Total
$ 435,917.57	$ 298,717.84	$ 774,230.16	$ 147,762.87	$ 921,993.03

DWD/tg
Attachment

FCSO

	Pay Date	Wage Amt.	Est. PERS	Est. Medicare	TOTAL
FY 2003	12/12/03	$35,768.83	$5,973.39	$518.65	$42,260.87
	12/26/03	81,342.50	13,584.20	1,179.47	96,106.16
		$117,111.33	$19,557.59	$1,698.11	$138,367.04
FY 2004	01/09/04	$54,203.11	$9,051.92	$785.95	$64,040.97
	01/23/04	57,300.75	9,569.23	830.86	67,700.84
	02/06/04	59,129.45	9,874.62	857.38	69,861.45
	02/20/04	60,495.18	10,102.70	877.18	71,475.06
	03/05/04	64,426.65	10,759.25	934.19	76,120.09
	03/19/04	52,433.30	8,756.36	760.28	61,949.94
	04/02/04	49,129.14	8,204.57	712.37	58,046.08
	04/16/04	5,681.38	948.79	82.38	6,712.55
	04/30/04	467.83	78.13	6.78	552.74
		$403,266.79	$67,345.55	$5,847.37	$476,459.71
TOTAL		$520,378.12	$86,903.15	$7,545.48	$614,826.75

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

Doj ack

DATE OF DOCUMENT:	02/16/2006	**WORKFLOW ID:**	955769
DATE RECEIVED:	02/16/2006	**DUE DATE:**	03/06/2006

FROM: The Honorable Edward M. Kennedy
United States Senate

Washington, DC 20510

TO: AG

MAIL TYPE: Congressional Priority

SUBJECT: Ltr (fax) from the RMM, Subcomte on Immigration, Border Security and Citizenship, Judiciary Comte, requesting that the AG seek a peer-review analysis of the research conducted by Professor Mark Fleisher of Case Western Reserve University, who received $939,233 under the Prison Rape Elimination Act of 2003 to conduct a study on prison rape. Advises that Mr. Fleisher has been publicizing his research and the funding provided by NIJ, although the NIJ has called the report incomplete. Urges DOJ to clarify its position on the research and respond to enclosed questions pertaining to this matter.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/17/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: OAG, ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Paula Stephens: 202-616-0074

955769

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

February 16, 2006

The Honorable Alberto Gonzales
Attorney General
United States Department of Justice
Washington, DC

Dear Attorney General Gonzales,

I am writing to express my concern about the research conducted by Professor Mark Fleisher of Case Western Reserve University, using funds allocated under the Prison Rape Elimination Act of 2003. Fleisher received $939,233 to conduct a study on prison rape. Although the National Institute of Justice has called the report incomplete, Fleisher has been publicizing his research and the funding provided by the National Institute of Justice and the Department of Justice. I urge the Department to clarify its position on the research.

First, I am concerned that the study did not follow the most fundamental research requirements, let alone reach the high standards expected of a government-funded study of this magnitude and cost. While Fleisher claims to have conducted 705 hours of interviews with 564 inmates between February 2003 and September 2005, he has provided virtually no details about his research subjects or the raw data from his interviews. He has provided unclear information about his research methodology and research subject selection process. He did not seek corroborating or conflicting evidence and cites no academic work in his report. He makes broad and contentious assertions that are often conflicting, and his work as a whole is incoherent.

Fleisher concludes that "prison rape occurs infrequently" and prison sexual activity is largely consensual. To arrive at this conclusion, his report excludes inmates who have acknowledged being raped from the interview sample. He also discounts the stories of inmates who have described forced sexual abuse without using the word "rape" and creates an exceedingly narrow definition of rape in the prison context. For instance, Fleisher describes an inmate forced to provide sexual favors because he has borrowed a package of soup as a "socio-economic interaction," not as rape, sexual assault or prostitution. Further, he uses an inmate's description of surrendering to his rapist after being choked as a demonstration of "the ambiguity of the convergence between rape and consent." Fleisher's conclusions are unsubstantiated by the interviews he cites and are in direct conflict with virtually all other research conducted on the subject.[1]

[1] *See* U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF CORRECTIONS, ANNOTATED BIBLIOGRAPHY OF PRISON RAPE / INMATE SEXUAL ASSAULT (July 20, 2004).

Second, this report underscores prior concerns about Fleisher's objectivity. His latest study is based on the hypothesis that prison rape is an "idea," not a reality. One month after the Act was signed into law, he stated that he had been delegated the responsibility of designing a National Institute of Justice study on prison rape. In an e-mail in 2003 to Stanford Law School Professor Robert Weisberg before beginning his research, he asserted the same conclusions he claims to have now documented through government-funded research. In this email, he described forced sexual relations as "infrequent" and providing an "informal social control function" within prisons; he noted the benefit of "a suspension of unsupported, stereotypic assumptions about American prisons"; and he framed a "better question" about "why...we want to believe the inmate who alleges rape and disregard the majority of inmates who say they weren't rape [sic] or have not seen such incidents." Based on these concerns, my office raised concerns about Fleisher's objectivity with Adam Specter at the Office of Justice Programs on October 17, 2003, specifically identifying concerns about Fleisher's objectivity and questioning his alarming and inappropriate statements. In particular, we raised concerns about Fleisher's reliance on anecdotes to challenge what he described as the "Oz myth of rape." The outcome of his research has underscored these pre-existing concerns, and I request that more information on the process by which the National Institute of Justice selected Fleisher to direct this study be provided to the Senate Judiciary Committee.

Third, I am concerned about the position of the Department of Justice and the National Institute of Justice on Fleisher's report. The Department and the Institute have made no official statement on the report except to state that it is incomplete – even though Fleisher has been promoting his affiliation with the Institute and the report has been mentioned in various newspapers across the country.

I respectfully request that you seek a peer-review analysis of Fleisher's research and that you clarify the public position of the Institute and the Department on his conclusions. I also request your response to the following critical questions:

1. *What was the procedure for selecting Fleisher to direct this study?* In its guidelines, the Institute states that proposals are reviewed by independent peer review panels consisting of researchers and practitioners, and that assessments and reports are submitted to the Institute's Director. Please provide these assessments and reports as well as any additional information to clarify the process used to select Fleisher to direct a study of this magnitude and importance.
2. *What were the guidelines established by the Institute and Fleisher for this research?* The Institute's guidelines state that application files consist of a program proposal and narrative, and these would clarify what Fleisher intended to research. Please provide Fleisher's application, the contract reached between the Institute and Fleisher, and any changes made to the proposal that would clarify the parameters of Fleisher's research and his obligations to the Institute.

3. *How was the $939,233 allocated for Fleisher's research spent?* The Institute requires narrative progress and financial reports throughout the period of all research grants. Please provide the Judiciary Committee and the Prison Rape Elimination Commission access to Fleisher's progress and financial reports to understand the use of the funds expended on this project. If an audit has been conducted, as is often done for such substantial allocations, please make the reports of the auditors available as well.

4. *Has Fleisher provided a more in-depth analysis of his research subjects and methodology than was included in the draft report?* Under the Institute's post-award reporting requirements grant recipients must provide a final report including a detailed description of the project design, data, and methods, and a full presentation of scientific findings. The draft report provides an insufficient description of the research conducted. The Senate Judiciary Committee and the Prison Rape Elimination Commission should be granted immediate access to the final report when it becomes available, as well as any additional information currently available that would provide more information about Fleisher's methodology.

I hope that this study and the surrounding questions will receive your immediate attention, and I look forward to your response.

With respect and appreciation,

Sincerely,

Edward M. Kennedy

CC: The Honorable Arlen Specter
The Honorable Patrick J. Leahy
The Honorable Frank R. Wolf
The Honorable Bobby Scott
The Honorable Jeff Sessions

SENATOR EDWARD M. KENNEDY **FACSIMILE**

Senate Judiciary Committee
Subcommittee on Immigration
520 Dirksen Office Building
Washington, D.C. 20510

(202) 224-7878 Telephone
(202) 228-0464 Fax

TO:
Attorney General Alberto Gonzales

FAX #:
202-514-4507

DATE:
February 16, 2006

FROM:

_____ Jim Flug	_____ Janice Kaguyutan
_____ Charlotte Burrows	_____ Christine Leonard
_____ Esther Olavarria	___X___ Gaurav Laroia

Number of Pages, including cover sheet ___4___

Subject:
Attached letter from Senator Kennedy for Attorney General Alberto Gonzales.

If there is a problem with this fax transmission, please call (202) 224-7878.

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/18/2006
DATE RECEIVED: 02/09/2006
WORKFLOW ID: 951815
DUE DATE:

FROM: Mr. Craig Middleton
Executive Director
The Presidio Trust
34 Graham Street
P.O. Box 29052
San Francisco, CA 94129-0052

TO: AG and OMB

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: Pursuant to section 2(a) of the President's Executive Order No. 13392, "Improving Agency Disclosure of Information," advising that he has designated Karen A. Cook, General Counsel, as the Chief FOIA Officer for The Presidio Trust. See related corres in ES.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/16/2006	For information.

INFO COMPONENT: OAG, ODAG, OASG, OIP, JMD

COMMENTS:

FILE CODE:

EXECSEC POC: Shirley McKay: 202-514-5305

95815

January 18, 2006

Joshua B. Bolten
Director of the Office of Management and Budget
The Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Alberto R. Gonzales
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Designation of Chief FOIA Officer

Dear Director and Attorney General:

In accordance with Section 2(a) of Executive Order 13392 ("Improving Agency Disclosure of Information"), I hereby designate Karen A. Cook, General Counsel, as the Presidio Trust's Chief FOIA Officer.

Please contact me at (415) 561-5300 should you have any questions about this designation.

Sincerely,

Craig Middleton
Executive Director

34 Graham Street, Post Office Box 29052, San Francisco, California 94129-0052
415/561-5300 Fax 561-5315 presidio@presidiotrust.gov

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

Gersuch

DATE OF DOCUMENT: 02/14/2006 **WORKFLOW ID:** 954353
DATE RECEIVED: 02/15/2006 **DUE DATE:** 03/15/2006

FROM: Mr. Philip F. Mangano
Executive Director
U.S. Interagency Council on Homelessness
451 7th Street, SW
Washington, DC 20410

TO: AG

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: (Fax) Regarding Section 203(c) of the McKinney-Vento Homeless Assistance Act, as amended, which requires the U.S. Interagency Council on Homelessness and each member agency of the Council to prepare an annual report on their activities. Attaches a suggested outline and detailed submission instructions. DOJ's report is due by 3/15/2006. See WF 799337 and other related corres in ES.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/16/2006	For appropriate handling. Advise ES of any action taken. Office of Justice Programs

INFO COMPONENT: OAG, ODAG, OASG, CRT, OLA, JMD, OLP

COMMENTS:

FILE CODE:

EXECSEC POC: Paula Stephens: 202-616-0074

Philip F. Mangano
Executive Director

February 14, 2006

The Honorable Alberto Gonzales
Attorney General of the United States
U.S. Department of Justice
Tenth Street and Constitution Avenues, NW
Washington, DC 20530

Mr. Attorney General:

I am writing to you as a member of the United States Interagency Council on Homelessness concerning the 2005 Annual Report of the Council.

Section 203[c] of the McKinney-Vento Homeless Assistance Act, as amended, (42 USC 11313) requires the Interagency Council and each member agency of the Council to prepare an annual report on their activities. Under the Act, which was reauthorized in 2001, each agency is required to prepare and submit a report to the Congress and the Council that describes:

- "Each program to assist homeless individuals administered by [your agency] and the number of homeless individuals served by such program;

- Impediments, including any statutory and regulatory restrictions, to the use by homeless individuals of each such program and to obtaining services or benefits under each such program; and

- Efforts made by your agency to increase the opportunities for homeless individuals to obtain shelter, food and supportive services."

The Council itself is required to prepare a report to the President and Congress that assesses the nature and extent of homelessness, describes USICH accomplishments and those of other agencies, and provides recommendations for legislative and administrative actions. HUD, HHS, VA and Labor have additional Congressionally mandated reporting requirements.

Council staff traditionally work with the member agencies to coordinate a single submission that includes the agency reports and an overview of its own activities. We will continue that practice this year.

- more -

To allow sufficient time for review, editing and clearance, please ensure that we receive your agency's report by Wednesday, March 15, 2006.

Attached is an outline for your agency submission and detailed submission and formatting instructions. Please contact Mary Ellen Hombs, USICH Deputy Director, if you have questions, at 202/708-4663.

Thank you for your cooperation and support.

Sincerely,

Philip F. Mangano
Executive Director

Attachments

United States Interagency Council on Homelessness

2005 ANNUAL REPORT:

SUBMISSION REQUIREMENTS FOR COUNCIL MEMBER AGENCIES

Please provide a hard copy and an electronic copy of your submission in Microsoft Word by March 15, 2006. Your electronic file should be named as follows:

2005 [Your Agency Name] USICH Annual Report Submission

Your electronic file should be submitted to: Maryellen.hombs@usich.gov

Your document submitted to USICH should be formatted as follows:

1. Use Microsoft Word format only.
2. Use Arial 12pt. font throughout.
3. Use 1" margins throughout.
4. All pages and tables should be portrait (vertical/normal) layout only.
5. Complete the Agency Name section of the header.
6. Use header numbering system only – do not add other page numbers.
7. Please do not tab paragraphs.

Templates are attached for narrative and table sections following the prescribed format.

Files that do not meet these requirements will be returned to the submitting agency before further review.

Your submission should include:

1. Overview of agency homeless assistance responsibilities and 2005 activities and accomplishments.

2. For *each program* that provides homeless assistance, a description of the following:

   a) Statutory authority

   b) *For targeted homeless assistance programs:* 2005 and 2006 appropriation, 2007 President's Request

c) *For non-targeted programs:* Best estimate of the amount of that program's assistance to the homeless for the most recent year for which information is available

d) Program description (purpose, eligible applicants/recipients, eligible activities, etc.)

e) Planned evaluations or other studies or reports of the program's administration, performance or impact.

NOTE: In 2000 the Senate Appropriations Committee instructed the Council to specifically require HUD, HHS, Labor and VA to:

- quantify the number of their program participants who become homeless
- address ways in which mainstream programs can prevent homelessness among those they serve
- describe specifically how they provide assistance to people who are homeless.

The four agencies named above should provide this specific information on mainstream programs in addition to the general information above.

3. For *each program* that provides homeless assistance, a description of the following (*not to exceed one page*):

   a) Known impediments to access by homeless people or homeless service providers (as appropriate) and the current or planned agency response to remove those impediments; and

   b) Efforts to increase participation in the program by (as appropriate) homeless people or organizations serving homeless people.

We will also be compiling a list of currently available Federal publications on homelessness to be included as an appendix to the report. Please also provide:

1. One copy of each such publication
2. Information on how to order the publication (name, address, telephone number and cost, if any)
3. The Web address, if the publication is available on the Web.

Please address your submission of publications or other hard-copy material to:

U.S. Interagency Council on Homelessness
Federal Center SW
409 Third Street, S.W., Suite 310
Washington, DC 20024

954353

United States Interagency Council on Homelessness

Fax

To:	The Honorable Alberto Gonzales Attorney General of the United States	From:	Philip F. Mangano Executive Director
Fax:	202-307-2825	Pages:	5 (including coversheet)
Re:	COUNCIL 2005 ANNUAL REPORT	Date:	February 14, 2006

Federal Center SW ♦ 409 Third Street SW, Suite 310 ♦ Washington, DC 20024
202-708-4663 PH ♦ 202-708-1216 FAX ♦ www.usich.gov
Philip F. Mangano, Executive Director

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 05/05/2005 **WORKFLOW ID:** 799337
DATE RECEIVED: 05/16/2005 **DUE DATE:** 06/10/2005

FROM: Mr. Philip F. Mangano
Executive Director
U.S. Interagency Council on Homelessness
451 7th Street, SW
Washington, DC 20410

TO: AG

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: (Fax rec'd from OAG) Regarding Section 203(c) of the McKinney-Vento Homeless Assistance Act, as amended, which requires the U.S. Interagency Council on Homelessness and each member agency of the Council to prepare an annual report on their activities. Attaches a suggested outline and detailed submission instructions. DOJ's report is due by 6/10/05. See WFs 498043, 220080 & 184434.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
05/17/2005	For appropriate handling. Advise ES of any action taken. Office of Justice Programs

INFO COMPONENT: OAG, ODAG, OASG, CRT, OLA, JMD, OLP

COMMENTS: 6/9/2005: OJP replied by letter dated 6/2/05.

FILE CODE: AG FILE: COUNCILS U.S. Interagency Council on Homelessness

EXECSEC POC: Barbara Wells: 202-616-0025

Mersuch

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 02/01/2006
DATE RECEIVED: 02/13/2006
WORKFLOW ID: 953182
DUE DATE: 03/03/2006

FROM: Ms. Mary Jo Kilroy
Commissioner
Franklin County
373 South High Street, 26th Floor
Columbus, OH 43215-6314

TO: AG

MAIL TYPE: General

SUBJECT: Requesting assistance in obtaining federal funds to reimburse the cost of a 5-month multi-jurisdictional task force investigation into a series of sniper shootings that occurred on the I-270 outer-belt in central Ohio in 4/2004. Advising that the Franklin County Sheriff's Office requested the assistance of MC Pryce in 2004 to introduce an appropriations bill to place funds into the Federal Law Enforcement Assistance Program but, to date, they have not had a response to their request and are requesting the AG's direction and assistance in resolving this long standing issue. Ltr also signed by Franklin County Commissioner Dewey R. Stokes, and President Paula Brooks. See WF 952705.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
02/16/2006	For component response. Office of Justice Programs

INFO COMPONENT: OAG, ODAG, OASG, JMD, OIPL, OLA

COMMENTS: OIPL to review OJP's response prior to dispatch.

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

Gerson

DATE OF DOCUMENT: 02/14/2006
DATE RECEIVED: 02/15/2006
WORKFLOW ID: 954353
DUE DATE: 03/15/2006

FROM: Mr. Philip F. Mangano
Executive Director
U.S. Interagency Council on Homelessness
451 7th Street, SW
Washington, DC 20410

TO: AG

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: (Fax) Regarding Section 203(c) of the McKinney-Vento Homeless Assistance Act, as amended, which requires the U.S. Interagency Council on Homelessness and each member agency of the Council to prepare an annual report on their activities. Attaches a suggested outline and detailed submission instructions. DOJ's report is due by 3/15/2006. See WF 799337 and other related corres in ES.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/16/2006	For appropriate handling. Advise ES of any action taken. Office of Justice Programs

INFO COMPONENT: OAG, ODAG, OASG, CRT, OLA, JMD, OLP

COMMENTS:

FILE CODE:

EXECSEC POC: Paula Stephens: 202-616-0074

Philip F. Mangano
Executive Director

February 14, 2006

The Honorable Alberto Gonzales
Attorney General of the United States
U.S. Department of Justice
Tenth Street and Constitution Avenues, NW
Washington, DC 20530

Mr. Attorney General:

I am writing to you as a member of the United States Interagency Council on Homelessness concerning the 2005 Annual Report of the Council.

Section 203[c] of the McKinney-Vento Homeless Assistance Act, as amended, (42 USC 11313) requires the Interagency Council and each member agency of the Council to prepare an annual report on their activities. Under the Act, which was reauthorized in 2001, each agency is required to prepare and submit a report to the Congress and the Council that describes:

- "Each program to assist homeless individuals administered by [your agency] and the number of homeless individuals served by such program;

- Impediments, including any statutory and regulatory restrictions, to the use by homeless individuals of each such program and to obtaining services or benefits under each such program; and

- Efforts made by your agency to increase the opportunities for homeless individuals to obtain shelter, food and supportive services."

The Council itself is required to prepare a report to the President and Congress that assesses the nature and extent of homelessness, describes USICH accomplishments and those of other agencies, and provides recommendations for legislative and administrative actions. HUD, HHS, VA and Labor have additional Congressionally mandated reporting requirements.

Council staff traditionally work with the member agencies to coordinate a single submission that includes the agency reports and an overview of its own activities. We will continue that practice this year.

- more -

To allow sufficient time for review, editing and clearance, please ensure that we receive your agency's report by Wednesday, March 15, 2006.

Attached is an outline for your agency submission and detailed submission and formatting instructions. Please contact Mary Ellen Hombs, USICH Deputy Director, if you have questions, at 202/708-4663.

Thank you for your cooperation and support.

Sincerely,

Philip F. Mangano
Executive Director

Attachments

United States Interagency Council on Homelessness

2005 ANNUAL REPORT:

SUBMISSION REQUIREMENTS FOR COUNCIL MEMBER AGENCIES

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2. Use Arial 12pt. font throughout.
3. Use 1" margins throughout.
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7. Please do not tab paragraphs.

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   b) *For targeted homeless assistance programs:* 2005 and 2006 appropriation, 2007 President's Request

c) *For non-targeted programs:* Best estimate of the amount of that program's assistance to the homeless for the most recent year for which information is available

d) Program description (purpose, eligible applicants/recipients, eligible activities, etc.)

e) Planned evaluations or other studies or reports of the program's administration, performance or impact.

NOTE: In 2000 the Senate Appropriations Committee instructed the Council to specifically require HUD, HHS, Labor and VA to:

- quantify the number of their program participants who become homeless
- address ways in which mainstream programs can prevent homelessness among those they serve
- describe specifically how they provide assistance to people who are homeless.

The four agencies named above should provide this specific information on mainstream programs in addition to the general information above.

3. For *each program* that provides homeless assistance, a description of the following (*not to exceed one page*):

   a) Known impediments to access by homeless people or homeless service providers (as appropriate) and the current or planned agency response to remove those impediments; and

   b) Efforts to increase participation in the program by (as appropriate) homeless people or organizations serving homeless people.

We will also be compiling a list of currently available Federal publications on homelessness to be included as an appendix to the report. Please also provide:

1. One copy of each such publication
2. Information on how to order the publication (name, address, telephone number and cost, if any)
3. The Web address, if the publication is available on the Web.

Please address your submission of publications or other hard-copy material to:

U.S. Interagency Council on Homelessness
Federal Center SW
409 Third Street, S.W., Suite 310
Washington, DC 20024

954353

United States Interagency Council on Homelessness

Fax

To:	The Honorable Alberto Gonzales Attorney General of the United States	From:	Philip F. Mangano Executive Director
Fax:	202-307-2825	Pages:	5 (including coversheet)
Re:	COUNCIL 2005 ANNUAL REPORT	Date:	February 14, 2006

Federal Center SW ♦ 409 Third Street SW, Suite 310 ♦ Washington, DC 20024
202-708-4663 PH ♦ 202-708-1216 FAX ♦ www.usich.gov
Phllip F. Mangano, Executive Director

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 05/05/2005 **WORKFLOW ID:** 799337
DATE RECEIVED: 05/16/2005 **DUE DATE:** 06/10/2005

FROM: Mr. Philip F. Mangano
Executive Director
U.S. Interagency Council on Homelessness
451 7th Street, SW
Washington, DC 20410

TO: AG

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: (Fax rec'd from OAG) Regarding Section 203(c) of the McKinney-Vento Homeless Assistance Act, as amended, which requires the U.S. Interagency Council on Homelessness and each member agency of the Council to prepare an annual report on their activities. Attaches a suggested outline and detailed submission instructions. DOJ's report is due by 6/10/05. See WFs 498043, 220080 & 184434.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
05/17/2005	For appropriate handling. Advise ES of any action taken. Office of Justice Programs

INFO COMPONENT: OAG, ODAG, OASG, CRT, OLA, JMD, OLP

COMMENTS: 6/9/2005: OJP replied by letter dated 6/2/05.

FILE CODE: AG FILE: COUNCILS U.S. Interagency Council on Homelessness

EXECSEC POC: Barbara Wells: 202-616-0025

Hersuch

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 02/01/2006
DATE RECEIVED: 02/13/2006

WORKFLOW ID: 953182
DUE DATE: 03/03/2006

FROM: Ms. Mary Jo Kilroy
Commissioner
Franklin County
373 South High Street, 26th Floor
Columbus, OH 43215-6314

TO: AG

MAIL TYPE: General

SUBJECT: Requesting assistance in obtaining federal funds to reimburse the cost of a 5-month multi-jurisdictional task force investigation into a series of sniper shootings that occurred on the I-270 outer-belt in central Ohio in 4/2004. Advising that the Franklin County Sheriff's Office requested the assistance of MC Pryce in 2004 to introduce an appropriations bill to place funds into the Federal Law Enforcement Assistance Program but, to date, they have not had a response to their request and are requesting the AG's direction and assistance in resolving this long standing issue. Ltr also signed by Franklin County Commissioner Dewey R. Stokes, and President Paula Brooks. See WF 952705.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/16/2006	For component response. Office of Justice Programs

INFO COMPONENT: OAG, ODAG, OASG, JMD, OIPL, OLA

COMMENTS: OIPL to review OJP's response prior to dispatch.

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

453182
Exec. Sec.

Franklin County
Where Government Works

February 1, 2006

The Honorable Alberto Gonzales
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Gonzales:

In late 2003, the I-270 outer-belt in central Ohio was the target of a serial shooter. The Franklin County Sheriff's Office led a five-month multi-jurisdictional task force investigation that culminated in the arrest of the perpetrator in April 2004. The estimated cost to Franklin County for law enforcement overtime wages and fringe benefits totaled $614,826.71. We are seeking your assistance in obtaining federal assistance to reimburse that cost to Franklin County.

The Ohio Office of Criminal Justice Services utilized Local Law Enforcement Block Grant (LLEBG) funds to provide reimbursement to the smaller jurisdictions that participated in the I-270 Serial Shooter investigation. Because Franklin County is a direct recipient of LLEBG funds we are unable to apply for reimbursement at the state level and were directed to apply through the Federal Law Enforcement Assistance Program CFDA: 16.577. We were subsequently notified that congress had failed to appropriate funds in CFDA: 16.577.

On April 29, 2004, Franklin County requested the assistance of Congresswoman Deborah Pryce to introduce an appropriations bill to place funds into CFDA: 16.577, the Federal Law Enforcement Assistance Program. This request was made to allow the Ohio Attorney General to apply to the Bureau of Justice Assistance for reimbursement of extraordinary costs incurred by state and local law enforcement during the I-270 Serial Shooter investigation. To date, we have had no response to our request and we are respectfully requesting your direction and assistance in resolving this long standing issue.

Sincerely,

The Franklin County Board of Commissioners

Mary Jo Kilroy
Commissioner

Dewey R. Stokes
Commissioner

Paula Brooks
President

Cc: Congressman Tiberi
Congressman Hobson
Congresswoman Pryce

373 South High Street, 26th Floor, Columbus, Ohio 43215-6314
Tel: 614-462-3322 Fax: 614-462-5999 www.FranklinCountyOhio.gov

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT:
DATE RECEIVED: 02/13/2006

WORKFLOW ID: 952705
DUE DATE: 03/02/2006

FROM: The Honorable Deborah Pryce
U.S. House of Representatives
Washington, DC 20515

TO: AG

MAIL TYPE: Congressional Priority

SUBJECT: Advising that between 10/2003 and 2/2004, the Franklin County Sheriff's Office (FCSO) in OH spent significant resources investigating a series of sniper shootings that occurred on the federal highway system in and around Columbus. Requests assistance in determining whether DOJ can compensate the FCSO for any or all of these activities involving the sniper shootings. Encls.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/15/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: OAG, ODAG, OASG, JMD, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Shirley McKay: 202-514-5305

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

Darouch

DATE OF DOCUMENT: 01/26/2006
DATE RECEIVED: 02/16/2006
WORKFLOW ID: 956186
DUE DATE: 03/07/2006

FROM: The Honorable Debbie Stabenow
United States Senate

Washington, DC 20510

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: (Rec'd from OJP) Supporting the grant application submitted by the Women's Survival Center of Oakland County (WSC) and Help Against Violent Encounters Now (HAVEN) for funding under DOJ's Legal Assistance for Victims Grant Program. See WF 939924.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
02/21/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: OASG, ODAG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Paula Stephens: 202-616-0074

DEBBIE STABENOW
MICHIGAN

956186

COMMITTEES:
AGRICULTURE, NUTRITION, AND FORESTRY
BANKING, HOUSING, AND URBAN AFFAIRS
BUDGET

United States Senate

WASHINGTON, DC 20510–2204

January 26, 2006

Diane Stuart
U.S. Department of Justice Office on Violence Against Women
810 7th Street Northwest
Washington, DC 20001

I am writing . . .

. . . in support of the Legal Assistance for Victims Grant Program request submitted by Help Against Violent Encounters Now (HAVEN) and the Women's Survival Center of Oakland County (WSC).

This funding will enable WSC and HAVEN to develop a Legal Education and Access Program (LEAP) for low-income and minority women and families in Oakland County, who are victims of domestic violence and sexual assault. Working collaboratively with community agencies, faith-based entities and attorneys, LEAP will provide victims with access to legal assistance, counseling, safety planning and training. With a growing population, economic diversity and the second highest number of reported domestic violence cases in Michigan, Oakland County has a need for an innovative program of this type.

I am impressed by the efforts of WSC and HAVEN to provide legal services and counseling to Oakland County's vulnerable and underserved populations. I hope you will give strong consideration to their grant request.

Sincerely,

Debbie

Debbie Stabenow
United States Senator

DS:lw

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT:	01/18/2006	**WORKFLOW ID:**	939924
DATE RECEIVED:	01/19/2006	**DUE DATE:**	02/03/2006

FROM: The Honorable Joe K. Knollenberg
U.S. House of Representatives

Washington, DC 20515-0001

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: Ltr (fax rec'd from OJP) supporting the grant application submitted by the Women's Survival Center of Oakland County (WSC) and Help Against Violent Encounters Now (HAVEN) for funding under DOJ's Legal Assistance for Victims Grant program.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
01/20/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

Neil

DATE OF DOCUMENT:	02/01/2006	**WORKFLOW ID:**	950901
DATE RECEIVED:	02/08/2006	**DUE DATE:**	02/24/2006

FROM: Mr. Norman R. Wolfinger
State Attorney
Office of the State Attorney
2725 Judge Fran Jamieson Way
Building D
Viera, FL 32940-6605

TO: AG

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: As an acknowledgement of the AG's concern for enhancing crime prevention, particularly gun violence prevention through Project Safe Neighborhoods, encloses a Rap Against Violence CD which was released on 1/26/2006 and is available for downloading or copying from their Web site. States that he would appreciate any comments or ideas.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/09/2006	For component response. Office of Justice Programs

INFO COMPONENT: OAG, ODAG, OASG, OIPL

COMMENTS: OIPL to review OJP's response prior to dispatch.CD forwarded to OJP. OJP to return CD once action is complete.

FILE CODE:

EXECSEC POC: Paula Stephens: 202-616-0074

OFFICE OF THE STATE ATTORNEY

950901

Brevard County Office
2725 Judge Fran Jamieson Way
Bldg. D
Viera, FL 32940-6605
(321) 617-7510

EIGHTEENTH JUDICIAL CIRCUIT OF FLORIDA
BREVARD AND SEMINOLE COUNTIES

Seminole County Office
101 Bush Blvd.
P.O. Box 8006
Sanford, FL 32772-8006
(407) 665-6000

NORMAN R. WOLFINGER
STATE ATTORNEY

Reply To:

Viera

February 1, 2006

Mr. Alberto R. Gonzales
U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Gonzales:

Knowing that you have a great concern for enhancing crime prevention, particularly gun violence prevention through Project Safe Neighborhoods, I wanted to share our Rap Against Violence CD with you. It was released January 26 and is available for downloading or copying on our website at http://www.sa18.state.fl.us.

The CD, which will be distributed free across Central Florida, is the culmination of a contest which chose the 10 best original songs for professional production at Lou Pearlman's Trans Continental Studios in Orlando, one of the contest co-sponsors. The songs will be aired on 102 JAMZ and public service announcements featuring each of the winners will be broadcast on Bright House Networks channels. Both Bright House and 102 JAMZ are also contest co-sponsors.

The contest is an effort to address mounting gun crime by recruiting local hip hop artists to rap against gun violence. We have the right message—put the guns down or do hard time. Now we have the right messengers.

The 10 winning songs come from a diverse group and represent people who live in six Central Florida counties. The winners include a U.S. Airman stationed now in Iraqi, a rap-writing grandmother from Deltona, high school students from Seminole, Osceola, Orange, Lake, and Brevard counties, and a business man from Orlando.

I extend a challenge to other Florida communities to promote gun violence prevention rap competitions, as well as challenge the hip hop community to change direction. Leaders in the hip hop world should expand their influence to address real problems and real solutions to make communities better and not just glorify violence. From what I have experienced in working on this competition, I think that day is here.

Tony Dungy, coach of the Indianapolis Colts, said it best at his son Jamie's funeral in December when he commented that "our boys are getting a lot of wrong messages about what it means to be a man in this world. And about how to act." He called upon those attending the service to continue sending the right message and to become even bolder as positive role models for our youth.

Hopefully, our talented rappers will be able to do just that and spread a word-of-mouth epidemic against gun violence throughout Florida, making every community safer from gun violence. After listening to the CD, I would appreciate any comments or ideas you may have.

Sincerely,

NORMAN R. WOLFINGER

NRW:kq

Enclosure (Rap Against Violence CD)

P.S. U.S. Attorney Perez has been a fabulous partner in PSN and is always there for us.

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 02/03/2006
DATE RECEIVED: 02/06/2006
WORKFLOW ID: 948515
DUE DATE: 02/24/2006

FROM: The Honorable Arlen Specter
United States Senate

Washington, DC 20510

TO: OLA

MAIL TYPE: Congressional Grants

SUBJECT: Ltr (fax rec'd from OLA) advising that his office is working towards compiling a database of contact information for local faith organizations in Pennsylvania and would appreciate DOJ's assistance and input.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
02/09/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Shirley McKay: 202-514-5305

ARLEN SPECTER
PENNSYLVANIA

COMMITTEES:
JUDICIARY
APPROPRIATIONS
VETERANS' AFFAIRS

☐ 711 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510-3802
202-224-4254

United States Senate

WASHINGTON, DC 20510-3802
specter.senate.gov

STATE OFFICES:
☑ 600 ARCH STREET, SUITE 9400
PHILADELPHIA, PA 19106
215-597-7200

☐ REGIONAL ENTERPRISE TOWER
425 SIXTH AVENUE, SUITE 1450
PITTSBURGH, PA 15219
412-644-3400

☐ STE B-120, FEDERAL BUILDING
17 SOUTH PARK ROW
ERIE, PA 16501
814-453-3010

☐ ROOM 1104, FEDERAL BUILDING
HARRISBURG, PA 17101
717-782-3951

☐ ROOM 102, POST OFFICE BUILDING
ALLENTOWN, PA 18101
610-434-1444

☐ 310 SPRUCE STREET, SUITE 201
SCRANTON, PA 18503
570-346-2005

☐ ROOM 306, 116 S. MAIN STREET
WILKES-BARRE, PA 18701
717-826-6266

94/8515

February 3, 2006

Mr. William E. Moschella
Assistant Attorney General for Office
Of Legislative Affairs
Office of Legislative Affairs
U.S. Department of Justice
950 Pennsylvania Avenue, NW, Room 1145
Washington, DC 20530

Dear Mr. Moschella:

In an effort to increase communications with Faith-Based and Community Initiatives in Pennsylvania, my office is working towards compiling a database of contact information for local faith organizations.

I would appreciate your agency's assistance and input in this matter. Should you have any additional questions, please contact John Schnaedter in my Philadelphia Regional Office at (P) (215)-597-7200, (F) (215)-597-0406, or john_schnaedter@specter.senate.gov.

Thank you very much.

Sincerely,

Arlen Specter
United States Senator

U.S. SENATOR ARLEN SPECTER

9400 William Green Federal Building
600 Arch Street, Philadelphia, PA 19106
215-597-7200 voice, 215-597-0406 fax
http://specter.senate.gov

DATE : 03/02/06
TO : Department of Justice
FROM : John Schnaedter
# of PAGES (including cover) : 2

Comments : Thank you for your assistance.

john-schnaedter@specter.senate.gov

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 02/06/2006 **WORKFLOW ID:** 950258
DATE RECEIVED: 02/07/2006 **DUE DATE:**

FROM: The Honorable John W. Gillis
Director, Office for Victims of Crime
Office of Justice Programs

Washington, DC 20531

TO: OAG (Beach)

MAIL TYPE: DOJ Invitations

SUBJECT: (Fax) Memo requesting that the AG participate in and provide remarks at the 2006 National Crime Victims' Candlelight Observance on 4/20/2006 at 6:30 p.m. at the U.S. Chamber of Commerce, and the 2006 National Crime Victims Rights Week Awards Ceremony on 4/21/2006 at 2:30 p.m., at the Andrew W. Mellon Auditorium. Advising that OVC is available to provide talking points for the AG if he accepts one or both invitations. See WF 942107.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
02/09/2006	Forward to OAG. For OAG(Beach). Office of the Attorney General

INFO COMPONENT: OASG, ODAG

COMMENTS:

FILE CODE:

EXECSEC POC: Shirley McKay: 202-514-5305

950258

U.S. Department of Justice

Office of Justice Programs

Office for Victims of Crime

Washington, D.C. 20531

FEB 0 6 2006

MEMORANDUM

TO: Andy Beach
Assistant to the Attorney General for Scheduling

THROUGH: Regina B. Schofield
Assistant Attorney General
Office of Justice Programs

FROM: John W. Gillis
Director
Office for Victims of Crime

BACKGROUND: This April will mark the 26th commemoration of National Crime Victims' Rights Week (NCVRW). President Reagan proclaimed the first National Crime Victims' Rights Week in 1981 and hosted the first Victims' Rights Week Awards Ceremony at the White House three years later. Every April since then, local communities throughout the Nation have held public rallies, candlelight vigils, and a host of other events to commemorate this week and to promote awareness of victims' rights and needs. This year's theme for NCVRW is "Victims' Rights: Strength in Unity."

REQUEST: The Office for Victims of Crime (OVC) was honored to have Attorney General Gonzales preside over last year's National Crime Victims' Candlelight Observance and the National Crime Victims' Rights Week Awards Ceremony. OVC requests that the Attorney General again provide remarks at the 2006 National Crime Victims' Candlelight Observance on Thursday, April 20, and at the 2006 National Crime Victims' Rights Week Awards Ceremony on Friday, April 21.

PURPOSE: OVC will kick off the national observance of National Crime Victims' Rights Week, April 23 through 29, 2006, with a candlelight observance to pay tribute to crime victims and with an awards ceremony to honor individuals and organizations for their work in serving crime victims and advancing victims' rights.

DATE & TIME:	The National Crime Victims' Candlelight Observance is scheduled to begin at 6:30 p.m. on Thursday, April 20, 2006, at the U.S. Chamber of Commerce. The National Crime Victims' Rights Week Awards Ceremony is scheduled to begin at 2:30 p.m. on Friday, April 21, 2006, at the Andrew W. Mellon Auditorium. Of the two events, the Awards Ceremony is the event for which we request the Attorney General's higher priority, if he is unable to attend both. The Awards Ceremony will be followed by a reception.
LOCATION:	The National Crime Victims' Candlelight Observance will be held at the U.S. Chamber of Commerce Hall of Flags at 1615 H Street, NW., Washington, D.C. (across from Lafayette Square). The National Crime Victims' Rights Week Awards Ceremony will be held at the Andrew W. Mellon Auditorium, 1301 Constitution Avenue, NW., Washington, D.C.
DURATION:	The National Crime Victims' Candlelight Observance is expected to last one hour. We request that the Attorney General speak for up to 10 minutes. The National Crime Victims' Rights Week Awards Ceremony is expected to last one and one-half hours with a one hour reception to follow. We request that the Attorney General speak for up to 20 minutes, present the honorees with their awards, and be photographed with them.
PRESS COVERAGE:	National and local media are expected at both events.
POSSIBLE PARTICIPANTS:	Approximately 500 participants are expected to attend the April 20 candlelight observance. At the candlelight observance it is expected that a crime victim will share his or her story of victimization and survival. Approximately 200 to 300 participants are expected at the awards ceremony on April 21. The Assistant Attorney General for the Office of Justice Programs has been invited to attend and deliver remarks at both events.
REMARKS REQUIRED:	At the candlelight observance on April 20, OVC requests remarks that honor the memory of victims and the work of victim advocates. At the awards event on April 21, OVC requests remarks that acknowledge award recipients and that highlight the Attorney General's and the Justice Department's efforts on behalf of crime victims. OVC is available to prepare talking points for the AG if he accepts one or both invitations.

RECOMMENDED BY: John W. Gillis, Director, OVC

APPROVED BY: Regina B. Schofield, Assistant Attorney General, Office of Justice Programs

EVENT CONTACTS AND PHONE NUMBERS: **Kimberly Kelberg, Program Specialist, Office for Victims of Crime, 202–305–2903 and e-mail at Kimberly.Kelberg@usdoj.gov; or Maria Acker, Program Specialist, Office for Victims of Crime, 202–305–8649 and e-mail at Maria.Acker@usdoj.gov.**

Enclosures

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT:
DATE RECEIVED: 01/23/2006

WORKFLOW ID: 942107
DUE DATE:

FROM: The Honorable John W. Gillis
Director, Office for Victims of Crime
Office of Justice Programs

Washington, DC 20531

TO: AG

MAIL TYPE: DOJ Invitations

SUBJECT: Inviting the AG to attend the national-level activities to commemorate National Crime Victims' Rights Week in the Nation's capital. Advising that the 4th Annual National Observance and Candlelight Ceremony will be held in the evening on 4/20/2006 and the National Crime Victims' Rights Week Awards Ceremony will be held in the afternoon on 4/21/2006. Encloses a copy of the 2006 National Crime Victims' Rights Week Resource Guide.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
01/30/2006	Forward to OAG. For OAG(Beach). Office of the Attorney General

INFO COMPONENT: OASG, ODAG, without encls.

COMMENTS: 2/2/2006: OAG Scheduling regretted on 1/3/06.

FILE CODE: AG FILE: OFFICE OF JUSTICE PROGRAMS OVC

EXECSEC POC: Shirley McKay: 202-514-5305

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/24/2006
DATE RECEIVED: 01/31/2006
WORKFLOW ID: 946301
DUE DATE: 02/22/2006

FROM: The Honorable Carl Levin
United States Senate

Washington, DC 20510

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: Supporting the grant application submitted by Kalamazoo County, MI, for funding through the Safe Haven Supervised Visitation and Safe Exchange Grant Program.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/07/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Shirley McKay: 202-514-5305

946301

CARL LEVIN
MICHIGAN

RUSSELL SENATE OFFICE BUILDING
WASHINGTON, DC 20510-2202
(202) 224-6221

United States Senate

WASHINGTON, DC 20510-2202

COMMITTEES:
ARMED SERVICES
GOVERNMENTAL AFFAIRS
SMALL BUSINESS
INTELLIGENCE

January 24, 2006

Dianne M. Stewart, Director
U.S. Department of Justice
Office of Violence Against Women
800 K Street NW, Suite 920
Washington D.C. 20530

Dear Ms. Stewart:

I am writing in support of Kalamazoo County's application for the Safe Haven Supervised Visitation and Safe Exchange Grant. This grant will help Kalamazoo County deal with the visitation and exchange of kids involved in domestic violence situations. This program is an important part of managing and helping everyone involved in domestic violence, particularly the children.

Kalamazoo County will partner with the Children and Family Services, YWCA, Department of Human Services, Probation Office and the Office of the Prosecuting Attorney to help make this program a success. These agencies and groups have a history of working collaboratively and effectively together for the benefit of the communities they serve.

Children are our most precious resource and programs like this are vital to benefit the families and children of Kalamazoo County.

Again, I strongly support Kalamazoo County's application for a Safe Haven grant and trust that it will receive full and fair consideration.

Sincerely,

Carl Levin

Carl Levin

CL/dc

STATE OFFICES

DETROIT
477 MICHIGAN AVENUE
SUITE 1860
DETROIT, MI 48226
(313) 226-6020

ESCANABA
524 LUDINGTON STREET
SUITE LL103
ESCANABA, MI 49829
(906) 789-0052

GRAND RAPIDS
FEDERAL BUILDING
SUITE 720
110 MICHIGAN AVENUE, N.W.
GRAND RAPIDS, MI 49503
(616) 456-2531

LANSING
124 WEST ALLEGAN
SUITE 1810
LANSING, MI 48933
(517) 377-1508

SAGINAW
515 NORTH WASHINGTON
SUITE 402
SAGINAW, MI 48607
(989) 754-2494

TRAVERSE CITY
107 CASS STREET
SUITE E
TRAVERSE CITY, MI 49684
(231) 947-9569

WARREN
30500 VAN DYKE
SUITE 206
WARREN, MI 48093
(586) 573-9145

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/23/2006
DATE RECEIVED: 01/31/2006
WORKFLOW ID: 946419
DUE DATE: 02/23/2006

FROM: The Honorable Arlen Specter
United States Senate
Washington, DC 20510

TO: OLA

MAIL TYPE: Congressional Grants

SUBJECT: Supporting the application submitted by the YWCA Legal Clinic for funding under DOJ's Legal Assistance for Victims Grant Program.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
02/09/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

ARLEN SPECTER
PENNSYLVANIA

1969 19

COMMITTEES:
JUDICIARY
APPROPRIATIONS
VETERANS' AFFAIRS

United States Senate

WASHINGTON, DC 20510-3802
specter.senate.gov

January 23, 2006

Mr. William Moschella
Assistant Attorney General for Office of Legislative Affairs
U.S. Department of Justice
950 Pennsylvania Avenue, NW, Room 1145
Washington, DC 20530

Dear Mr. Moschella:

I am writing to you on behalf on the YWCA Legal Clinic. It is my understanding that the YWCA has submitted an application to the United States Department of Justice, Office on Violence Against Women for a Legal Assistance for Victims grant. Funding from this grant would enable the YWCA to provide civil legal services to victims of domestic violence, sexual assault, and/or stalking in Dauphin County, Pennsylvania.

I am advised that the YWCA Legal Clinic would use the funding to provide a full-time attorney to provide legal representation for the underserved populations of Dauphin County, both rural and urban. The YWCA Legal Clinic plans to collaborate with Widener Law School's Civil Law Clinic, as well as maintain a satellite legal office at the Community Check-Up Center in order to provide the most access and services to victims. In addition, I am told the YWCA will offer educational programs on domestic violence and sexual assault to both staff and Widener students, as well as to targeted community members.

It appears that this proposal would benefit victims of domestic violence in Dauphin County, Pennsylvania. Accordingly, I urge you to give it your full and fair consideration for funding approval. Please direct your reply to my Director of Special Projects, Kate Kelly, at 711 Hart Senate Office Building, Washington, DC 20510.

Sincerely,

Arlen Specter

AS/kk

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

Neil

DATE OF DOCUMENT: 01/24/2006
DATE RECEIVED: 02/01/2006

WORKFLOW ID: 947200
DUE DATE: 02/23/2006

FROM: The Honorable Betty McCollum
U.S. House of Representatives
Washington, DC 20515

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: (Rec'd from OJP) Supporting the grant application submitted by Civil Society, in partnership with the Asian Women United and Domestic Abuse Project, for funding through DOJ's Legal Assistance for Victims Grant Program. See WFs 736526 & 736462.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/08/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

947200

BETTY McCOLLUM
4TH DISTRICT, MINNESOTA

1029 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-6631
FAX: (202) 225-1966

165 WESTERN AVENUE NORTH
SUITE 17
ST. PAUL, MN 55102
(651) 224-9191
FAX: (651) 224-3056

COMMITTEE ON
EDUCATION AND THE WORKFORCE

COMMITTEE ON
INTERNATIONAL RELATIONS

www.house.gov/mccollum

UNITED STATES
HOUSE OF REPRESENTATIVES

January 24, 2006

Ms. Diane M. Stuart
Director of the Office on Violence Against Women
U.S. Department of Justice
810 Seventh Street, NW
Washington, D.C., D.C. 20531

RE: Civil Society's grant application, CFDA #: 16.524 (OVW-2006-1204)

Dear Ms. Stuart:

I write in support of a joint application submitted by Civil Society (CS), Domestic Abuse Project (DAP) and Asian Women United (AWUM) for a $450,000 grant to support their partnership that provides legal services and advocacy programs for immigrant women of domestic abuse, sexual assault and stalking in Minnesota.

I support the mission of these organizations to provide culturally appropriate and competent legal and support services to crime victims of domestic violence. Since its inception in 1996, Civil Society has offered free legal advice and advocacy for our growing immigrant and refugee crime victim population in Minnesota. With funding support from the Office of Violence Against Women, Civil Society and its partners will be able to continue providing legal services and advocacy to serve low-income women and children who are victims of crime.

I urge your support of this application, and I thank you for your consideration of this request.

Sincerely,

Betty McCollum
Member of Congress

BM: CL

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/24/2005 **WORKFLOW ID:** 736526
DATE RECEIVED: 01/31/2005 **DUE DATE:**

FROM: The Honorable Betty McCollum
U.S. House of Representatives
Washington, DC 20515

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: Supporting the grant application submitted by Civil Society, in partnership with the Asian Women and Domestic Abuse Project, for funding through the Legal Assistance for Victims Grant Program. See WF 736462.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/11/2005	For OLA signature. Office of Legislative Affairs

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS: 4/5/05: OLA replied by letter dated 3/29/05. cc: OVW & CG files.
2/11/05: OVW submitted proposed response for OLA signature.

FILE CODE: CONG

EXECSEC POC: Barbara Wells: 202-616-0025

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/21/2005
DATE RECEIVED: 01/31/2005
WORKFLOW ID: 736462
DUE DATE:

FROM: The Honorable Mark Dayton
United States Senate
Washington, DC 20510

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: (Rec'd from OJP) Supporting the application submitted by Civil Society, in partnership with the Asian Women United and Domestic Abuse Program, for renewed funding through the Legal Assistance for Victims Grant Program.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/14/2005	For OLA signature. Office of Legislative Affairs

INFO COMPONENT: OASG, ODAG, OLA

COMMENTS: 04/04/05: OLA replied by ltr dtd 03/29/05. cc: OJP, CG files.
02/15/05: OVW submitted prepared response for OLA signature.

FILE CODE: CONG

EXECSEC POC: Paula Stephens: 202-616-0074

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 02/06/2006 **WORKFLOW ID:** 951765
DATE RECEIVED: 02/09/2006 **DUE DATE:**

FROM: Ms. Melissa Bennett
Deputy Assistant to the President and Director of Appointments and Scheduling
The White House

Washington, DC 20502-0001

TO: AG

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: Thanking the AG for inviting President Bush to address the attendees of the Project Safe Neighborhood National Conference in Denver, CO, on 5/2/2006. As the President's schedule continues to develop, the AG's request will be given every consideration. See WF 939476.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/10/2006	For information.

INFO COMPONENT: OAG, ODAG, OASG, EOUSA

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

95765

THE WHITE HOUSE

WASHINGTON

February 6, 2006

Dear General Gonzales:

Thank you for your letter inviting President Bush to address the attendees of the Project Safe Neighborhood National Conference in Denver, Colorado, on May 2, 2006.

We appreciate your invitation and the valuable opportunity it presents. As the President's schedule continues to develop, your request will be given every consideration. We will contact you once a final decision has been made. If you have any questions regarding your request, you may contact the Office of Appointments and Presidential Scheduling at 202-456-5324.

Sincerely,

Melissa S. Bennett
Deputy Assistant to the President
and Director of Appointments and Scheduling

The Honorable Alberto R. Gonzales
Attorney General
Office of the Attorney General
United States Department of Justice
Washington, D.C. 20530-0001

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/24/2006
DATE RECEIVED: 01/31/2006
WORKFLOW ID: 946301
DUE DATE: 02/22/2006

FROM: The Honorable Carl Levin
United States Senate

Washington, DC 20510

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: Supporting the grant application submitted by Kalamazoo County, MI, for funding through the Safe Haven Supervised Visitation and Safe Exchange Grant Program.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/07/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Shirley McKay: 202-514-5305

946301

CARL LEVIN
MICHIGAN

RUSSELL SENATE OFFICE BUILDING
WASHINGTON, DC 20510-2202
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United States Senate

WASHINGTON, DC 20510-2202

COMMITTEES:
ARMED SERVICES
GOVERNMENTAL AFFAIRS
SMALL BUSINESS
INTELLIGENCE

January 24, 2006

Dianne M. Stewart, Director
U.S. Department of Justice
Office of Violence Against Women
800 K Street NW, Suite 920
Washington D.C. 20530

Dear Ms. Stewart:

I am writing in support of Kalamazoo County's application for the Safe Haven Supervised Visitation and Safe Exchange Grant. This grant will help Kalamazoo County deal with the visitation and exchange of kids involved in domestic violence situations. This program is an important part of managing and helping everyone involved in domestic violence, particularly the children.

Kalamazoo County will partner with the Children and Family Services, YWCA, Department of Human Services, Probation Office and the Office of the Prosecuting Attorney to help make this program a success. These agencies and groups have a history of working collaboratively and effectively together for the benefit of the communities they serve.

Children are our most precious resource and programs like this are vital to benefit the families and children of Kalamazoo County.

Again, I strongly support Kalamazoo County's application for a Safe Haven grant and trust that it will receive full and fair consideration.

Sincerely,

Carl Levin

Carl Levin

CL/dc

STATE OFFICES

DETROIT
477 MICHIGAN AVENUE
SUITE 1860
DETROIT, MI 48226
(313) 226-6020

ESCANABA
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515 NORTH WASHINGTON
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30500 VAN DYKE
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(586) 573-9145

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/23/2006
DATE RECEIVED: 01/31/2006
WORKFLOW ID: 946419
DUE DATE: 02/23/2006

FROM: The Honorable Arlen Specter
United States Senate
Washington, DC 20510

TO: OLA

MAIL TYPE: Congressional Grants

SUBJECT: Supporting the application submitted by the YWCA Legal Clinic for funding under DOJ's Legal Assistance for Victims Grant Program.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
02/09/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

ARLEN SPECTER
PENNSYLVANIA

1969 19

COMMITTEES:
JUDICIARY
APPROPRIATIONS
VETERANS' AFFAIRS

United States Senate

WASHINGTON, DC 20510-3802
specter.senate.gov

January 23, 2006

Mr. William Moschella
Assistant Attorney General for Office of Legislative Affairs
U.S. Department of Justice
950 Pennsylvania Avenue, NW, Room 1145
Washington, DC 20530

Dear Mr. Moschella:

I am writing to you on behalf on the YWCA Legal Clinic. It is my understanding that the YWCA has submitted an application to the United States Department of Justice, Office on Violence Against Women for a Legal Assistance for Victims grant. Funding from this grant would enable the YWCA to provide civil legal services to victims of domestic violence, sexual assault, and/or stalking in Dauphin County, Pennsylvania.

I am advised that the YWCA Legal Clinic would use the funding to provide a full-time attorney to provide legal representation for the underserved populations of Dauphin County, both rural and urban. The YWCA Legal Clinic plans to collaborate with Widener Law School's Civil Law Clinic, as well as maintain a satellite legal office at the Community Check-Up Center in order to provide the most access and services to victims. In addition, I am told the YWCA will offer educational programs on domestic violence and sexual assault to both staff and Widener students, as well as to targeted community members.

It appears that this proposal would benefit victims of domestic violence in Dauphin County, Pennsylvania. Accordingly, I urge you to give it your full and fair consideration for funding approval. Please direct your reply to my Director of Special Projects, Kate Kelly, at 711 Hart Senate Office Building, Washington, DC 20510.

Sincerely,

Arlen Specter

AS/kk

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

Neil

DATE OF DOCUMENT: 01/24/2006
DATE RECEIVED: 02/01/2006
WORKFLOW ID: 947200
DUE DATE: 02/23/2006

FROM: The Honorable Betty McCollum
U.S. House of Representatives
Washington, DC 20515

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: (Rec'd from OJP) Supporting the grant application submitted by Civil Society, in partnership with the Asian Women United and Domestic Abuse Project, for funding through DOJ's Legal Assistance for Victims Grant Program. See WFs 736526 & 736462.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
02/08/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

BETTY McCOLLUM
4TH DISTRICT, MINNESOTA

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WASHINGTON, DC 20515
(202) 225-6631
FAX: (202) 225-1968

165 WESTERN AVENUE NORTH
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ST. PAUL, MN 55102
(651) 224-9191
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9417200

COMMITTEE ON
EDUCATION AND THE WORKFORCE

COMMITTEE ON
INTERNATIONAL RELATIONS

www.house.gov/mccollum

UNITED STATES
HOUSE OF REPRESENTATIVES

January 24, 2006

Ms. Diane M. Stuart
Director of the Office on Violence Against Women
U.S. Department of Justice
810 Seventh Street, NW
Washington, D.C., D.C. 20531

RE: Civil Society's grant application, CFDA #: 16.524 (OVW-2006-1204)

Dear Ms. Stuart:

I write in support of a joint application submitted by Civil Society (CS), Domestic Abuse Project (DAP) and Asian Women United (AWUM) for a $450,000 grant to support their partnership that provides legal services and advocacy programs for immigrant women of domestic abuse, sexual assault and stalking in Minnesota.

I support the mission of these organizations to provide culturally appropriate and competent legal and support services to crime victims of domestic violence. Since its inception in 1996, Civil Society has offered free legal advice and advocacy for our growing immigrant and refugee crime victim population in Minnesota. With funding support from the Office of Violence Against Women, Civil Society and its partners will be able to continue providing legal services and advocacy to serve low-income women and children who are victims of crime.

I urge your support of this application, and I thank you for your consideration of this request.

Sincerely,

Betty McCollum
Member of Congress

BM: CL

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/24/2005
DATE RECEIVED: 01/31/2005
WORKFLOW ID: 736526
DUE DATE:

FROM: The Honorable Betty McCollum
U.S. House of Representatives
Washington, DC 20515

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: Supporting the grant application submitted by Civil Society, in partnership with the Asian Women and Domestic Abuse Project, for funding through the Legal Assistance for Victims Grant Program. See WF 736462.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/11/2005	For OLA signature. Office of Legislative Affairs

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS: 4/5/05: OLA replied by letter dated 3/29/05. cc: OVW & CG files.
2/11/05: OVW submitted proposed response for OLA signature.

FILE CODE: CONG

EXECSEC POC: Barbara Wells: 202-616-0025

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/21/2005 **WORKFLOW ID:** 736462
DATE RECEIVED: 01/31/2005 **DUE DATE:**

FROM: The Honorable Mark Dayton
United States Senate
Washington, DC 20510

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: (Rec'd from OJP) Supporting the application submitted by Civil Society, in partnership with the Asian Women United and Domestic Abuse Program, for renewed funding through the Legal Assistance for Victims Grant Program.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/14/2005	For OLA signature. Office of Legislative Affairs

INFO COMPONENT: OASG, ODAG, OLA

COMMENTS: 04/04/05: OLA replied by ltr dtd 03/29/05. cc: OJP, CG files.
02/15/05: OVW submitted prepared response for OLA signature.

FILE CODE: CONG

EXECSEC POC: Paula Stephens: 202-616-0074

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 02/06/2006 **WORKFLOW ID:** 951765
DATE RECEIVED: 02/09/2006 **DUE DATE:**

FROM: Ms. Melissa Bennett
Deputy Assistant to the President and Director of Appointments and Scheduling
The White House

Washington, DC 20502-0001

TO: AG

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: Thanking the AG for inviting President Bush to address the attendees of the Project Safe Neighborhood National Conference in Denver, CO, on 5/2/2006. As the President's schedule continues to develop, the AG's request will be given every consideration. See WF 939476.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/10/2006	For information.

INFO COMPONENT: OAG, ODAG, OASG, EOUSA

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

95176S

THE WHITE HOUSE

WASHINGTON

February 6, 2006

Dear General Gonzales:

Thank you for your letter inviting President Bush to address the attendees of the Project Safe Neighborhood National Conference in Denver, Colorado, on May 2, 2006.

We appreciate your invitation and the valuable opportunity it presents. As the President's schedule continues to develop, your request will be given every consideration. We will contact you once a final decision has been made. If you have any questions regarding your request, you may contact the Office of Appointments and Presidential Scheduling at 202-456-5324.

Sincerely,

Melissa S. Bennett
Deputy Assistant to the President
and Director of Appointments and Scheduling

The Honorable Alberto R. Gonzales
Attorney General
Office of the Attorney General
United States Department of Justice
Washington, D.C. 20530-0001

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/24/2006
DATE RECEIVED: 01/31/2006
WORKFLOW ID: 946301
DUE DATE: 02/22/2006

FROM: The Honorable Carl Levin
United States Senate

Washington, DC 20510

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: Supporting the grant application submitted by Kalamazoo County, MI, for funding through the Safe Haven Supervised Visitation and Safe Exchange Grant Program.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/07/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Shirley McKay: 202-514-5305

946301

CARL LEVIN
MICHIGAN

RUSSELL SENATE OFFICE BUILDING
WASHINGTON, DC 20510-2202
(202) 224-6221

United States Senate

WASHINGTON, DC 20510-2202

COMMITTEES:
ARMED SERVICES
GOVERNMENTAL AFFAIRS
SMALL BUSINESS
INTELLIGENCE

January 24, 2006

Dianne M. Stewart, Director
U.S. Department of Justice
Office of Violence Against Women
800 K Street NW, Suite 920
Washington D.C. 20530

Dear Ms. Stewart:

I am writing in support of Kalamazoo County's application for the Safe Haven Supervised Visitation and Safe Exchange Grant. This grant will help Kalamazoo County deal with the visitation and exchange of kids involved in domestic violence situations. This program is an important part of managing and helping everyone involved in domestic violence, particularly the children.

Kalamazoo County will partner with the Children and Family Services, YWCA, Department of Human Services, Probation Office and the Office of the Prosecuting Attorney to help make this program a success. These agencies and groups have a history of working collaboratively and effectively together for the benefit of the communities they serve.

Children are our most precious resource and programs like this are vital to benefit the families and children of Kalamazoo County.

Again, I strongly support Kalamazoo County's application for a Safe Haven grant and trust that it will receive full and fair consideration.

Sincerely,

Carl Levin

Carl Levin

CL/dc

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Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/23/2006
DATE RECEIVED: 01/31/2006
WORKFLOW ID: 946419
DUE DATE: 02/23/2006

FROM: The Honorable Arlen Specter
United States Senate
Washington, DC 20510

TO: OLA

MAIL TYPE: Congressional Grants

SUBJECT: Supporting the application submitted by the YWCA Legal Clinic for funding under DOJ's Legal Assistance for Victims Grant Program.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
02/09/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

ARLEN SPECTER
PENNSYLVANIA

1469 19

COMMITTEES:
JUDICIARY
APPROPRIATIONS
VETERANS' AFFAIRS

United States Senate

WASHINGTON, OC 20510–3802
specter.senate.gov

January 23, 2006

Mr. William Moschella
Assistant Attorney General for Office of Legislative Affairs
U.S. Department of Justice
950 Pennsylvania Avenue, NW, Room 1145
Washington, DC 20530

Dear Mr. Moschella:

I am writing to you on behalf on the YWCA Legal Clinic. It is my understanding that the YWCA has submitted an application to the United States Department of Justice, Office on Violence Against Women for a Legal Assistance for Victims grant. Funding from this grant would enable the YWCA to provide civil legal services to victims of domestic violence, sexual assault, and/or stalking in Dauphin County, Pennsylvania.

I am advised that the YWCA Legal Clinic would use the funding to provide a full-time attorney to provide legal representation for the underserved populations of Dauphin County, both rural and urban. The YWCA Legal Clinic plans to collaborate with Widener Law School's Civil Law Clinic, as well as maintain a satellite legal office at the Community Check-Up Center in order to provide the most access and services to victims. In addition, I am told the YWCA will offer educational programs on domestic violence and sexual assault to both staff and Widener students, as well as to targeted community members.

It appears that this proposal would benefit victims of domestic violence in Dauphin County, Pennsylvania. Accordingly, I urge you to give it your full and fair consideration for funding approval. Please direct your reply to my Director of Special Projects, Kate Kelly, at 711 Hart Senate Office Building, Washington, DC 20510.

Sincerely,

Arlen Specter

AS/kk

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

Neil

DATE OF DOCUMENT: 01/24/2006
DATE RECEIVED: 02/01/2006
WORKFLOW ID: 947200
DUE DATE: 02/23/2006

FROM: The Honorable Betty McCollum
U.S. House of Representatives
Washington, DC 20515

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: (Rec'd from OJP) Supporting the grant application submitted by Civil Society, in partnership with the Asian Women United and Domestic Abuse Project, for funding through DOJ's Legal Assistance for Victims Grant Program. See WFs 736526 & 736462.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/08/2006	Office of Justice Programs Prepare response for AAG/OLA signature.

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

BETTY McCOLLUM
4TH DISTRICT, MINNESOTA

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947200

COMMITTEE ON
EDUCATION AND THE WORKFORCE

COMMITTEE ON
INTERNATIONAL RELATIONS

www.house.gov/mccollum

UNITED STATES
HOUSE OF REPRESENTATIVES

January 24, 2006

Ms. Diane M. Stuart
Director of the Office on Violence Against Women
U.S. Department of Justice
810 Seventh Street, NW
Washington, D.C., D.C. 20531

RE: Civil Society's grant application, CFDA #: 16.524 (OVW-2006-1204)

Dear Ms. Stuart:

I write in support of a joint application submitted by Civil Society (CS), Domestic Abuse Project (DAP) and Asian Women United (AWUM) for a $450,000 grant to support their partnership that provides legal services and advocacy programs for immigrant women of domestic abuse, sexual assault and stalking in Minnesota.

I support the mission of these organizations to provide culturally appropriate and competent legal and support services to crime victims of domestic violence. Since its inception in 1996, Civil Society has offered free legal advice and advocacy for our growing immigrant and refugee crime victim population in Minnesota. With funding support from the Office of Violence Against Women, Civil Society and its partners will be able to continue providing legal services and advocacy to serve low-income women and children who are victims of crime.

I urge your support of this application, and I thank you for your consideration of this request.

Sincerely,

Betty McCollum
Member of Congress

BM: CL

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/24/2005 **WORKFLOW ID:** 736526
DATE RECEIVED: 01/31/2005 **DUE DATE:**

FROM: The Honorable Betty McCollum
U.S. House of Representatives
Washington, DC 20515

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: Supporting the grant application submitted by Civil Society, in partnership with the Asian Women and Domestic Abuse Project, for funding through the Legal Assistance for Victims Grant Program. See WF 736462.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/11/2005	For OLA signature. Office of Legislative Affairs

INFO COMPONENT: ODAG, OASG, OLA

COMMENTS: 4/5/05: OLA replied by letter dated 3/29/05. cc: OVW & CG files.
2/11/05: OVW submitted proposed response for OLA signature.

FILE CODE: CONG

EXECSEC POC: Barbara Wells: 202-616-0025

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT:	01/21/2005	**WORKFLOW ID:**	736462
DATE RECEIVED:	01/31/2005	**DUE DATE:**	

FROM: The Honorable Mark Dayton
United States Senate
Washington, DC 20510

TO: OVW

MAIL TYPE: Congressional Grants

SUBJECT: (Rec'd from OJP) Supporting the application submitted by Civil Society, in partnership with the Asian Women United and Domestic Abuse Program, for renewed funding through the Legal Assistance for Victims Grant Program.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/14/2005	For OLA signature. Office of Legislative Affairs

INFO COMPONENT: OASG, ODAG, OLA

COMMENTS: 04/04/05: OLA replied by ltr dtd 03/29/05. cc: OJP, CG files.
02/15/05: OVW submitted prepared response for OLA signature.

FILE CODE: CONG

EXECSEC POC: Paula Stephens: 202-616-0074

Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 02/06/2006 **WORKFLOW ID:** 951765
DATE RECEIVED: 02/09/2006 **DUE DATE:**

FROM: Ms. Melissa Bennett
Deputy Assistant to the President and Director of Appointments and Scheduling
The White House

Washington, DC 20502-0001

TO: AG

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: Thanking the AG for inviting President Bush to address the attendees of the Project Safe Neighborhood National Conference in Denver, CO, on 5/2/2006. As the President's schedule continues to develop, the AG's request will be given every consideration. See WF 939476.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
02/10/2006	For information.

INFO COMPONENT: OAG, ODAG, OASG, EOUSA

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

95765

THE WHITE HOUSE

WASHINGTON

February 6, 2006

Dear General Gonzales:

Thank you for your letter inviting President Bush to address the attendees of the Project Safe Neighborhood National Conference in Denver, Colorado, on May 2, 2006.

We appreciate your invitation and the valuable opportunity it presents. As the President's schedule continues to develop, your request will be given every consideration. We will contact you once a final decision has been made. If you have any questions regarding your request, you may contact the Office of Appointments and Presidential Scheduling at 202-456-5324.

Sincerely,

Melissa S. Bennett
Deputy Assistant to the President
and Director of Appointments and Scheduling

The Honorable Alberto R. Gonzales
Attorney General
Office of the Attorney General
United States Department of Justice
Washington, D.C. 20530-0001

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 01/17/2006 **WORKFLOW ID:** 939476
DATE RECEIVED: 01/19/2006 **DUE DATE:** 01/27/2006

FROM: Mr. John S. Irving
Counsel to the Deputy Attorney General
Office of the Deputy Attorney General
Washington, DC 20530

TO: AG

MAIL TYPE: Action Memorandum

SUBJECT: Memo requesting the AG's approval and signature on the attached letter inviting the President to attend the 2006 Project Safe Neighborhoods National Conference in Denver, Colorado, being held on 5/2-5/4/2006. Also invites the President to speak at the conference's opening ceremony being held on 5/2/2006 at 9 a.m. or a time that is more convenient.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
01/19/2006	For AG signature. Office of the Attorney General

INFO COMPONENT:

COMMENTS: 1/27/2006: AG approved recommendation and signed letter dated 1/26/06. Original letter w/disk handcarried to ODAG for appropriate handling and dispatch.
1/19/2006: Acting DAG initialed on 1/18/06.

FILE CODE: AG FILE: CONFERENCES General, AG Chron AS-01-26-06

EXECSEC POC: Barbara Wells: 202-616-0025

U.S. Department of Justice

Office of Justice Programs

Washington, D.C. 20531

FEB 0 6 2006

MEMORANDUM TO: Neil Gorsuch
Principal Deputy Associate Attorney General
Office of the Associate Attorney General

THROUGH: Regina B. Schofield
Assistant Attorney General

FROM: Domingo Herraiz
Director
Bureau of Justice Assistance

SUBJECT: Violent Offender Incarceration/Truth-in-Sentencing (VOI/TIS) Incentive Formula Grant Program

Overview

The Violent Offender Incarceration and Truth-in-Sentencing (VOI/TIS) Incentive Formula Grant Program provided states with funding to build or expand correctional facilities and jails. From fiscal years (FYs) 1996 through 2001, half of the funds were made available for Violent Offender Incarceration Grants, and half were available as incentive awards to states that implement truth-in-sentencing laws.

VOI/TIS grant funds allowed states to build or expand correctional facilities to increase the bed capacity for the confinement of persons convicted of Part 1 violent crimes or adjudicated delinquents for an act that, if committed by an adult, would be a Part 1 violent crime. Funds could also be used to build or expand temporary or permanent correctional facilities, including facilities on military bases, prison barges, and boot camps; to confine convicted nonviolent offenders and criminal aliens; or to free suitable existing prison space for the confinement of persons convicted of Part 1 violent crimes. States also were able to award subgrants of up to 15 percent of their award to local units of government to build or expand jails, and up to 10 percent of a state's VOI/TIS award (1) to the costs of offender drug testing or intervention programs during periods of incarceration and post-incarceration criminal justice supervision and/or (2) to pay the costs of providing the required reports on prison drug use. While the primary purpose of the VOI/TIS program is to build or expand long term medium to maximum security correctional facilities, VOI/TIS funds can also be used for the following:

1) Community based correctional options that free up secure institutional bed space. These can either be early release options or direct sentencing options. Examples include but are not limited to:

a) Half-way houses;
b) Home detention programs;
c) Bracelet programs;
d) GPS tracking programs;
e) Day-reporting centers;
f) Work-release programs;
g) Community based treatment programs (substance abuse, mental health, sex offender, etc.);
h) Family reunification programs (centers or facilities where parent and children are allowed to live on a trial basis under intensive supervision).

2) Parole Centers, these can either be pre-release or revocation centers but they keep this population out of the more secure, general population beds.

3) Reception and diagnostic centers, these must be long-term placements that free up secure beds.

4) Geriatric facilities, as the prison population ages, these would provide for more suitable correctional settings and free up secure beds.

5) Infirmaries, again these must be long-term housing options.

6) Leasing of Space, VOI/TIS funds can also be used for the short or long-term leasing of space from private or non-profit providers. These facilities can be either operated by the private firm or the state.

7) Juvenile Correctional facilities, these can be all of the projects listed above plus straight housing of non-violent juveniles. This purpose is capped at 10% unless the state declares exigent circumstances and then all of the grant funds can be used on juvenile programs.

8) Jail-based programs, this purpose is capped at 15% but allows for renovation and maintenance cost of local jail or detention facilities which cannot be funded elsewhere.

9) Drug testing, treatment and interventions, of the money received since FY 1999, 10% percent may be used for this purpose. Projects funded under this purpose can include but are not limited to:

a) Treatment programs and/or treatment staff;
b) Testing equipment and supplies;
c) K-9 units or other detection programs;
d) Staff overtime for contraband searches, prevention activities, treatment, etc.;
e) Aftercare services such as community-based treatment, housing, job placement, educational services, etc.

Current Status
As of the January expenditure reports:

*There is currently still $569,998,539 remaining to be drawndown by grantees.

*At current expenditure rates we anticipate as much as $280,000,000 still remaining in September of 2006 when most of these grants are scheduled to expire.

*11 jurisdictions have already drawndown all their funds. They are: Alaska; Delaware; Washington, DC; Florida; Idaho; Iowa; Maine; Michigan; Montana; New York; and North Dakota.

*The 10 jurisdictions with the most still be drawndown (by percentage of their total grant award) are: N. Marianas Islands; Hawaii; Tennessee; Texas; Rhode Island; Puerto Rico; Pennsylvania; Illinois; Missouri; and Louisiana.

*All grants are scheduled to expire as of 9/30/06 except the following which have received at least a one year no-cost extension to their grant: Alabama; California; Georgia; Hawaii; Illinois; Minnesota; Missouri; Ohio; Puerto Rico; and Wisconsin.

*While still waiting on a formal opinion from OJP's Office of General Counsel, it is our belief that upon the expiration of the grants, any deobligated funds will revert to OJP for use by the OAAG.

Robt
Reyes
Neil

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 11/22/2005
DATE RECEIVED: 11/23/2005
WORKFLOW ID: 912029
DUE DATE: 12/12/2005

FROM: The Honorable Linda M. Springer
Director
United States Office of Personnel Management
Office of the Director
Washington, DC 20415

TO: Heads of Executive Departments and Agencies

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: (Fax) Memo advising that the grandfather provision for determining the applicability of certain post-employment conflict-of-interest restrictions to members of the Senior Executive Service (SES) and other individuals will expire on 11/24/2005. States that on 10/15/2004, the Office of Personnel Management (OPM) published interim regulations to establish a new-salary-based threshold for determining the applicability of certain post-employment conflict-of-interest restrictions under 18 USC 207(c). See WFs 902809 & 583437 and other related corres in ES.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
11/25/2005	For appropriate handling. Advise ES of any action taken. Justice Management Division

INFO COMPONENT: OAG, ODAG, OASG, OLP, OLC

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

912029

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, DC 20415-1000

OFFICE OF THE DIRECTOR

NOV 2 2 2005

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: **LINDA M. SPRINGER**
Director

Subject: **Post-Employment Restrictions**

The grandfather provision for determining the applicability of certain post-employment conflict-of-interest restrictions to members of the Senior Executive Service (SES) and other individuals will expire on November 24, 2005. However, beginning November 25, 2005, an employee with a rate of basic pay equal to or greater than 86.5 percent of the rate for level II of the Executive Schedule (i.e., $140,217 in 2005) will continue to be subject to the post-employment restrictions in 18 U.S.C. 207(c).

On October 15, 2004, the Office of Personnel Management (OPM) published interim regulations (69 FR 61143) to implement section 1125(b) of Public Law 108-136 to establish a new salary-based threshold for determining the applicability of certain post-employment conflict-of-interest restrictions under 18 U.S.C. 207(c). (See OPM's regulations at http://www.opm.gov/fedregis/html/oct04.asp.) Section 1125(b)(1) amended 18 U.S.C. 207(c)(2)(A)(ii) to require SES members and other individuals who are paid at a rate of basic pay equal to or greater than 86.5 percent of the rate for level II of the Executive Schedule to be subject to the post-employment restrictions in 18 U.S.C. 207(c). The salary-based threshold became effective on January 11, 2004.

The law also included a grandfather provision in section 1125(b)(1) that applied to certain SES members and other individuals for a period of 2 years, through November 24, 2005. If such individuals, on November 23, 2003, were subject to 18 U.S.C. 207(c) and were employed in positions with a rate of basic pay, exclusive of locality payments under 5 U.S.C. 5304, equal to or greater than the rate of basic pay payable for former level 5 of the SES as of that date (i.e., $134,000), they were subject to the post-employment restrictions in 18 U.S.C. 207(c) until November 24, 2005, without regard to any subsequent changes in position or pay.

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT:	10/26/2005	**WORKFLOW ID:**	902809
DATE RECEIVED:	11/08/2005	**DUE DATE:**	12/12/2005

FROM: The Honorable Linda M. Springer
Director
United States Office of Personnel Management
Office of the Director
Washington, DC 20415

TO: AG

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: Requesting DOJ's views on the enclosed draft final regulations regarding the notification of members of the Senior Executive Service (SES) and other employees in senior positions of their coverage under certain post-employment conflict-of-interest restrictions. On 10/15/2004, OPM issued interim regulations (FR 69-61143) and did not receive any comments. Requesting that DOJ's concurrence and comments be submitted within 30 days. See WF 583437 and other related corres in ES.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
11/10/2005	For appropriate handling. Advise ES of any action taken. Justice Management Division

INFO COMPONENT: OAG, ODAG, OASG, OLC, OLP

COMMENTS:

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-0075

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT:	05/12/2004	**WORKFLOW ID:**	583437
DATE RECEIVED:	05/12/2004	**DUE DATE:**	

FROM: The Honorable Kay Coles James
Director
United States Office of Personnel Management
Washington, DC 20415

TO: AG

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: Requesting DOJ's views on the enclosed draft regulation regarding the notification of federal employees in senior positions of their coverage under certain post-employment conflict-of-interest restrictions. Requests that comments be provided by 5/21/2004. See WFs 500002 & 510162.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
05/13/2004	For appropriate handling. Advise ES of any action taken. Justice Management Division

INFO COMPONENT: OLP, OASG, ODAG, OAG

COMMENTS: 6/2/04: JMD replied by ltr dtd 5/25/04.

FILE CODE: AG FILE: OFFFICE OF PERSONNEL MANAGEMENT

EXECSEC POC: Pat Morgan: 202-616-0081

U.S. Department of Justice **Attorney's Bar Re-Certification**

I, Neil M. Gorsuch, understand that each Department of Justice

(Name)

attorney must, at all times while employed at the Department, maintain "active" membership in the bar of at least one State, territory, or the District of Columbia.. I hereby certify that I am an "active" member of the bar in Colorado and that my Bar

(State, territory or District of Columbia)

membership number (if any) is 024235.

I further understand that failure on my part to maintain an "active" bar membership at any time during my employment as an attorney with the Department will subject me to Office of Professional Responsibility referral and may result in my pay being withheld and disciplinary action.

Signature

December 2, 2005

Date

TO LILY + GORDON

In case you or others you know might be interested. NMG

PRESIDENT'S COMMISSION
ON WHITE HOUSE FELLOWSHIPS
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March 8, 2006

MEMORANDUM

TO: Harry S. Truman Scholarship Alumni

FROM: Janet Slaughter Eissenstat, Director

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CC: Mr. Louis Blair
Executive Secretary
The Harry S. Truman Scholarship Foundation

712 Jackson Place, NW / Washington, DC 20503
202-395-4522 / FAX 202-395-6179

ROUTING AND TRANSMITTAL SLIP	DATE	February 3, 2006	
TO: (Name, office symbol, room number, Agency/Post)		Initials	Date
Neil Gorsuch			
John Davis			
Lily Swenson			

REMARKS:

See attached letter to ASG Robert McCallum from Dan Metcalfe re: Creation of Privacy and Civil Liberties Offices.

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions.

FROM: (Name, org. symbol, Agency/Post)	Room No. --Bldg.
Currie Gunn	Phone No. **202-514-9500**

Please respond to:
Stephen L. Tober
Tober Law Offices, PA
381 Middle Street
Portsmouth, NH 03801
Phone: 603.431.1003
Fax: 603.431.9426
E-mail: stober@toberlaw.com

AMERICAN BAR ASSOCIATION

Standing Committee on Federal Judiciary
740 Fifteenth Street, NW
Washington, DC 20005-1022
Facsimile: (202) 662-1762

BY FACSIMILE AND MAIL

June 20, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Neil M. Gorsuch, Esq.
United States District Court of Appeals for the Tenth Circuit

Dear Senator Specter:

By this letter we transmit for your consideration this Committee's evaluation pertaining to the nomination of **Neil M. Gorsuch, Esq.** as Judge of the **United States Court of Appeals for the Tenth Circuit.**

It is a pleasure to report that as a result of our investigation, the Committee is of the unanimous opinion that **Neil M. Gorsuch** is **Well Qualified** for appointment as Judge of the **United States Court of Appeals for the Tenth Circuit.**

A copy of this letter has been sent to Attorney Gorsuch for his information.

Yours very truly,

Stephen L. Tober
Chair

SLT/sst
cc: Neil M. Gorsuch, Esq.
Harriet Miers, Esq.
Rachel Brand, Esq.
ABA Standing Committee on Federal Judiciary
Denise A. Cardman, Esq.

This letter was sent to the following members of the Committee on the Judiciary, United States Senate, 224 Dirksen Senate Office Building, Washington, D.C. 20510-6275

Majority:	Hon. Arlen Specter, Chairman
	Hon. Orrin G. Hatch
	Hon. Charles E. Grassley
	Hon. Jon Kyl
	Hon. Mike DeWine
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	Hon. Lindsey Graham
	Hon. John Cornyn
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	Hon. Tom Coburn
Minority:	Hon. Patrick J. Leahy
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	Hon. Joseph R. Biden, Jr.
	Hon. Herbert H. Kohl
	Hon. Dianne Feinstein
	Hon. Russell D. Feingold
	Hon. Charles E. Schumer
	Hon. Richard Durbin

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

FACSIMILE TRANSMISSION

DATE: **May 23, 2006**

FROM: **Theresa E. Preston**
Management Analyst, Article III Judges Division

TO: Neil M. Gorsuch, Esq.

FAX NUMBER: 202-514-0238

COMMENT:	The Office of the Director has requested this communication be faxed to you.

Number of pages, including this cover sheet:

Transmitted by: **Theresa E. Preston, Article III Judges Division**

Voice Number: **202-502-1871**

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

May 19, 2006

Neil M. Gorsuch, Esq.
United States Department of Justice
Office of the Associate Attorney General
Principal Deputy to the Associate Attorney General
950 Pennsylvania Avenue, N.W., Room 5706
Washington, DC 20530

Dear Mr. Gorsuch:

Congratulations on your nomination to serve as a United States Circuit Judge for the Tenth Circuit.

As you may know, the Administrative Office was created to provide administrative and management support and services to the federal judiciary. Toward that end, we sponsor a judicial nominee orientation program that normally is scheduled in conjunction with your visit to Washington for your confirmation hearing. If you attend this one-day program, you will be briefed on various functions of this office and advised about a variety of matters that will require your attention upon confirmation.

Margaret A. Irving, Chief of the Article III Judges Division, will contact you to provide additional information about the orientation program and to set up an itinerary should you decide to attend. If you are unable to attend, Peggy and her staff will make other arrangements to ensure that you receive all relevant information regarding your appointment. If you have any questions, please call Ms. Irving at 202-502-1860.

Sincerely,

Leonidas Ralph Mecham
Director

cc: Honorable Deanell Reece Tacha

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

MARGARET A. IRVING
Chief

Article III Judges Division

May 23, 2006

Neil M. Gorsuch, Esq.
United States Department of Justice
Office of the Associate Attorney General
Principal Deputy to the Associate Attorney General
950 Pennsylvania Avenue, N.W., Room 5706
Washington, DC 20530

Dear Mr. Gorsuch:

Congratulations on your nomination to serve as a United States Circuit Judge for the Tenth Circuit. To assist you with your transition to this appointment, you are invited to attend an orientation sponsored by the Administrative Office (AO). The orientation normally is scheduled in conjunction with your confirmation hearing.

During the one-day orientation, key AO personnel will brief you on court and judicial administration, chambers staffing, pay and benefits (including health and life insurance plans, retirement, and survivor annuities), court and personal security issues, ethical concerns, and other matters. Additionally, the orientation addresses matters that will require your attention before taking the oath of office. You also will meet with senior officials of the Federal Judicial Center, the agency responsible for research and educational programs within the judiciary.

As soon as you learn your hearing date, please call Theresa E. Preston of my staff at (202) 502-1860. It is important that you contact Ms. Preston so that the program presenters can be notified and you can be provided any necessary information.

You have excellent court support available to you through Circuit Executive David J. Tighe at (303) 335-2829, Circuit Clerk Elisabeth A. Shumaker at (303) 335-2824, and Circuit Librarian J. Terry Hemming at (393) 844-3591. I encourage you to call them.

Of course, my staff and I also are available to address any immediate questions or concerns. Please call us at (202) 502-1860.

We wish you the best and look forward to talking with you soon.

Sincerely,

Margaret Ann Irving

Margaret A. Irving

Enclosures

cc: Honorable Deanell Reece Tacha
Mr. David J. Tighe
Ms. Elisabeth A. Shumaker
Mr. J. Terry Hemming

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Attorney Registration

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- On the blue receipt. Cross out the incorrect information and write in the corrected/new information. Sign and return the receipt to the address noted on the form.
- Via a personal e-mail to: attyreg@courts.state.ny.us
  Requests for address changes will not be accepted if e-mailed from another person, secretary, etc.
- Via US mail to:
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  PO BOX 2806
  Church Street Station
  New York, NY 10008
- Via fax to Attorney Registration: (212) 428-2804

Name Changes must be made with the Appellate Division in which you were admitted. The Attorney Registration Unit will only accept name changes upon written order from an Appellate Division. Please contact the appropriate Appellate Division to obtain instructions for changing your name officially. The phone numbers for the respective Appellate Divisions are as follows:

- First Department - (212) 779-1779
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- Fourth Department - (585) 530-3100

If you have already made an official name change but this information is not reflected on your Attorney Registration record, please attach a copy of the Appellate Division order to the receipt and return it to:

- Via US mail to:

Office of Court Administration, Attorney Registration Unit
PO BOX 2806
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Meal:	Food for Purchase	**Smoking:**	No
Aircraft:	BOEING 757 200 SERIES JET	**Mileage:**	2426
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To:	WASHINGTON DULLES, DC (IAD)	**Arrives:**	12:24am **Sat, Jun 17**
Class:	Economy	**Seat:**	07C
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No. 02-603

IN THE

Supreme Court of the United States

UNITED STATES TOBACCO COMPANY, ET AL.,
Petitioners,

v.

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

RICHARD C. ROBERTS
WHITLOW, ROBERTS, HOUSTON & STRAUB
Old National Bank Building
300 Broadway
Paducah, Kentucky 42002
(270) 443-4516

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
DAVID C. FREDERICK
NEIL M. GORSUCH
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Respondents

November 20, 2002

No. 03-932

IN THE
Supreme Court of the United States

DURA PHARMACEUTICALS, INC. ET AL.,
Petitioners,
v.
MICHAEL BROUDO ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
STEPHANIE A. MARTZ
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20036
(202) 463-5337

NEIL M. GORSUCH
Counsel of Record
PAUL B. MATEY
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Amicus Curiae

September 13, 2004

No. 01-417

In the Supreme Court of the United States

ROBERT J. DEVLIN, Petitioner,

v.

ROBERT A. SCARDELLETTI, *et al.*, Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* COUNCIL OF INSTITUTIONAL INVESTORS IN SUPPORT OF PETITIONER

MARK C. HANSEN
NEIL M. GORSUCH*
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
Sumner Square
1615 M Street, NW
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Amicus Curiae

*Counsel of Record

January 24, 2002

No. 97-1732

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM and FLORIDA STATE BOARD OF ADMINISTRATION,
Petitioners,

v.

PAUL FELZEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

MARK C. HANSEN
Counsel of Record
MICHAEL K. KELLOGG
NEIL M. GORSUCH
SEAN A. LEV
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

No. 97-1732

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM and FLORIDA STATE BOARD OF ADMINISTRATION,
Petitioners,

v.

PAUL FELZEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

MARK C. HANSEN
Counsel of Record
MICHAEL K. KELLOGG
NEIL M. GORSUCH
SEAN A. LEV
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

No. 97-1732

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM and FLORIDA STATE BOARD OF ADMINISTRATION,
Petitioners,

v.

PAUL FELZEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY BRIEF TO OPPOSITIONS OF ARCHER DANIELS MIDLAND COMPANY AND DIRECTORS OF ARCHER DANIELS MIDLAND COMPANY

MARK C. HANSEN
Counsel of Record
NEIL M. GORSUCH
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
and FLORIDA STATE BOARD OF ADMINISTRATION,
Petitioners,

v.

PAUL FELZEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

MARK C. HANSEN
Counsel of Record
NEIL M. GORSUCH
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

December 1, 2005

MEMORANDUM

TO: INTELLECTUAL PROPERTY TASK FORCE MEMBERS
Thomas Barnett, Asst. Attorney General, ATR
Michael Battle, Director, EOUSA
Rachel Brand, Asst. Attorney General, OLP
Paul Clement, Solicitor General
Alice Fisher, Asst. Attorney General, Criminal Division
Neil Gorsuch, Principal Deputy Associate Attorney General
Peter Keisler, Asst. Attorney General, Civil Division
William Moschella, Asst. Attorney General, OLA
Louis Reigel, Assistant Director, FBI
Debra Wong Yang, U.S. Attorney, CDCA

FROM: Arif Alikhan
Senior Counsel to the Deputy Attorney General
Vice Chair & Exec. Director, IP Task Force
Office of Deputy Attorney General

SUBJECT: IPTF REPORT AND COVER LETTER

Congratulations on your appointment to the Department of Justice's Task Force on Intellectual Property. In preparation for the December 13, 2005 meeting of the Task Force, attached please find a copy of the Report and the Attorney General's April 15, 2005 memorandum regarding the implementation of the Task Force's recommendations. Should you have any questions, please feel free to contact me by e-mail or at x61621. I look forward to seeing you at the meeting on December 13.

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

April 15, 2005

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL
DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
DIRECTOR, EXECUTIVE OFFICE FOR U.S. ATTORNEYS
ALL UNITED STATES ATTORNEYS

FROM: THE ATTORNEY GENERAL

SUBJECT: Department of Justice's Task Force on Intellectual Property

On October 12, 2004, Attorney General John Ashcroft released the *Report of the Department of Justice's Task Force on Intellectual Property*. This Report, a copy of which is enclosed for your review, recognizes the tremendous accomplishments of the Department to address all aspects of intellectual property, including criminal, civil, and antitrust enforcement; international coordination; legislation; and prevention. In addition, the Report makes important recommendations to bolster investigative and prosecutorial resources, streamline global enforcement efforts, strengthen the law to protect intellectual property rights, and raise public awareness to prevent intellectual property crime.

On March 9, 2005, I announced my determination to continue the significant work of the Intellectual Property Task Force and fully implement the Task Force's recommendations. I am confident that by implementing the recommendations put forward in the Report, the Department of Justice will build the strongest, most aggressive program against intellectual property crime in our Nation's history.

I have appointed my Deputy Chief of Staff and Counselor, Kyle Sampson, to lead this effort as the Task Force's new Chairman. Over the next several months, he will work closely with you to continue our aggressive efforts to combat the evolving challenge of intellectual property crime.

I thank the Task Force, the Task Force's staff, and all who contributed to the Report for their hard work, insight, and support in producing a remarkable plan to further strengthen our commitment to protect our Nation's creative and intellectual resources. I also thank you for your active participation in the implementation of this important effort.

U.S. Department of Justice
Office of the Attorney General

REPORT OF THE DEPARTMENT OF JUSTICE'S TASK FORCE ON INTELLECTUAL PROPERTY

October 2004

United States Department of Justice

United States Interagency Council on Homelessness

September 13, 2005, 11 A.M. – 12:30 P.M.

Eisenhower Executive Office Building, Room 350

AGENDA

I. **Welcome and Introductions**

The Honorable Jim Nicholson, Chairperson
The Honorable Alphonso Jackson
Philip Mangano, Executive Director

II. **Remarks by Council Chair Secretary Nicholson**

III. **Action Item**

- Council Leadership Election

IV. **Remarks by Incoming Council Chair**

V. **Administration Response to Hurricane Katrina: Agency Contributions**

VI. **Administration Initiatives to End Chronic Homelessness: Agency Announcements**

VII. **Council Guest Presenters - Faith-based and Private Sector Partnerships**

Genette Eaton, CEO, HomeAid America
Karen Olsen, Founder, Interfaith Hospitality Network

VIII. **Next Council Meeting - December 13**
Adjournment

United States Interagency Council on Homelessness

COUNCIL MEMBERS

U.S. Department of Agriculture
U.S. Department of Commerce
U.S. Department of Defense
U.S. Department of Education
U.S. Department of Energy
U.S. Department of Health and Human Services
U.S. Department of Homeland Security
U.S. Department of Housing and Urban Development
U.S. Department of the Interior
U.S. Department of Justice
U.S. Department of Labor
U.S. Department of Transportation
U.S. Department of Veterans Affairs
USA Freedom Corps
United States Postal Service
Social Security Administration
General Services Administration
Office of Management and Budget
Corporation for National and Community Service
White House Office of Faith Based and Community Initiatives

United States Interagency Council on Homelessness

Mission. Revitalized by President Bush in 2002 and under the leadership of Executive Director Philip F. Mangano, the mission of the United States Interagency Council on Homelessness is to develop and implement a comprehensive national strategy to end chronic homelessness in the United States through interagency, intergovernmental, and intercommunity collaborations.

In its initiatives, the Council partners with federal, state, and local government, advocates, providers, and consumers to:

- Eliminate chronic homelessness through the development and implementation of jurisdictional 10-year plans to end chronic homelessness
- Undertake prevention and intervention using evidence-based and results-oriented approaches
- Collaborate at the interagency, intra-agency, and intergovernmental levels
- Identify innovation driven by data, research, and consumer preference, leading to performance-based outcomes
- Access mainstream resources for the benefit of homeless persons and families

The Interagency Council works to improve access to and coordination of federal investments among its federal member departments and agencies; ensure the effectiveness of federal activities and programs; engage and assist state and local governments, advocates, service providers, and customers in creating effective local solutions; and provide technical assistance and evidence-based best practice information to partners at every level of government and in every sector of partnership through its weekly e-news and Web site.

Interagency Collaboration - Federal. The Council is an independent agency within the federal executive composed of twenty Cabinet Secretaries and agency heads. Meeting regularly at the White House, the Interagency Council is currently chaired by Department of Veterans Affairs Secretary James Nicholson. The Vice-chair is Department of Labor Secretary Elaine Chao.

Intergovernmental Collaboration. As part of the Council's strategy to establish intergovernmental partnerships to end chronic homelessness, specific initiatives have been fostered with state and local government. To date, Governors of 53 states and territories have taken steps to create State Interagency Councils on Homelessness. Almost 200 Mayors and County Executives are underway with 10-Year Plans to End Chronic Homelessness.

Intercommunity Collaboration. To carry out the strategy of intergovernmental and inter-sector partnership, the Council has developed community partnerships with the National Governors Association, U.S. Conference of Mayors, National League of Cities, National Association of Counties, United Way, Chamber of Commerce, International Downtown Association, National Alliance for the Mentally Ill, and the National Alliance to End Homelessness.

Technical Assistance and Support. To administer and facilitate the Council's mission at the local and regional level, the Interagency Council has Regional Coordinators throughout the country. Each of the Coordinators is responsible for working with federal partners and state and local governments, homeless advocates, providers, and consumers to encourage and coordinate their collective efforts to end chronic homelessness. The Coordinators foster the creation of state and regional federal interagency councils and disseminate innovations and best practice information.

For more information, please visit the Council's website at www.ich.gov.

United States Interagency Council on Homelessness
Phone: 202/708-4663 FAX: 202/708-1216


UNITED STATES INTERAGENCY COUNCIL ON HOMELESSNESS
DOMICILIA OMNIBUS AMERICANIS

UNITED STATES INTERAGENCY COUNCIL ON HOMELESSNESS

Eisenhower Executive Office Building

September 13, 2005

11:00 AM

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Phone: 202/708-4663 FAX: 202/708-1216

United States Interagency Council on Homelessness

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U.S. Department of Transportation
U.S. Department of Veterans Affairs
USA Freedom Corps
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Social Security Administration
General Services Administration
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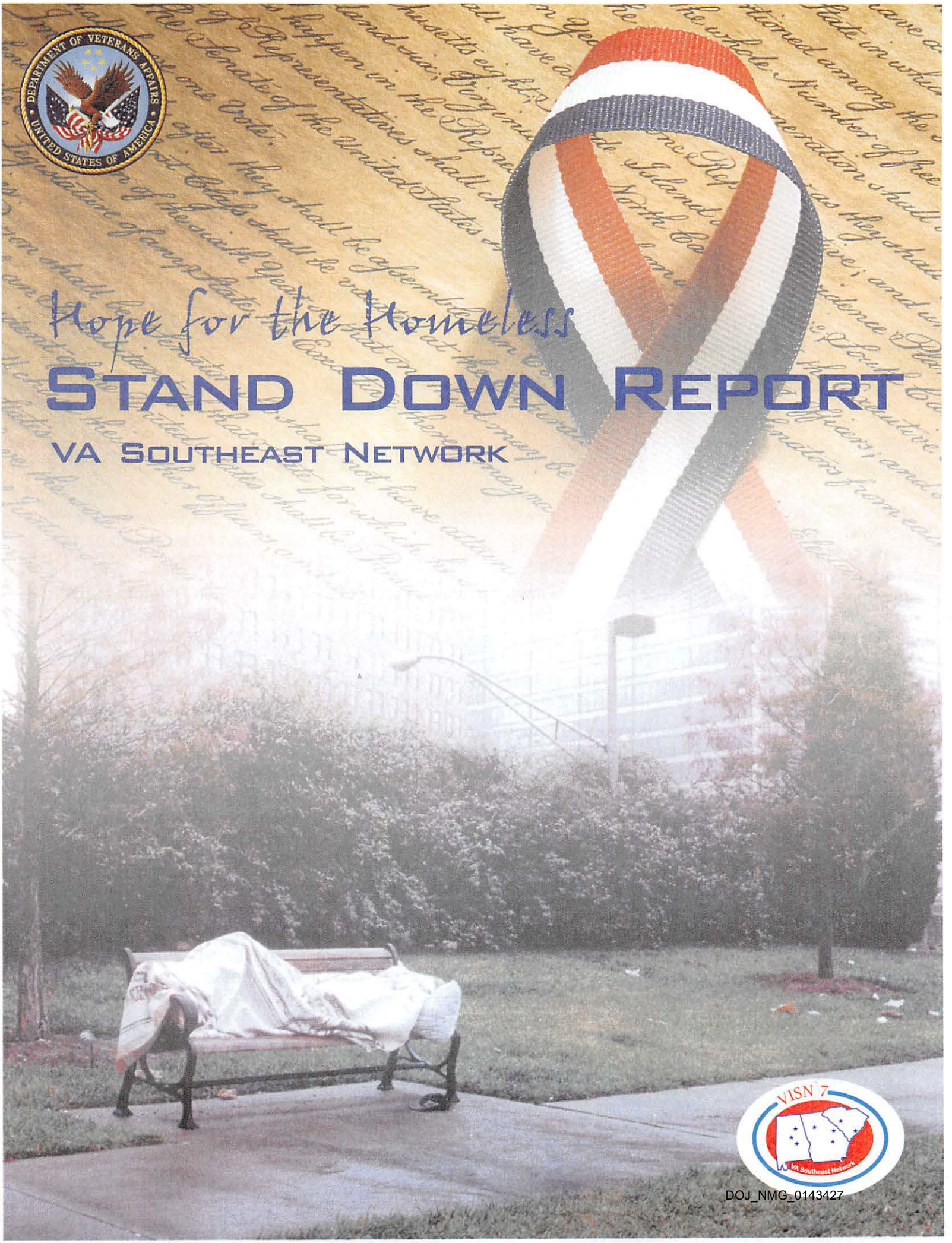
Corporation for National and Community Service
White House Office of Faith Based and Community Initiatives



VETERANS INTEGRATED SERVICE NETWORK (VISN) 7

Atlanta VA Medical Center
1670 Clairmont Road
Decatur, GA 30033
(404) 321-6111

Augusta VA Medical Center
1 Freedom Way
Augusta, GA 30904
(706) 733-0188

Birmingham VA Medical Center
700 South 19th Street
Birmingham, AL 35233
(205) 933-8101

Central Alabama Veterans Health Care System
West Campus: Montgomery
215 Perry Hill Road
Montgomery, AL 36109
(334) 272-4670
East Campus: Tuskegee
2400 Hospital Road
Tuskegee, AL 36083
(334) 727-0550

Ralph H. Johnson VA Medical Center
109 Bee Street
Charleston, SC 29401
(843) 577-5011

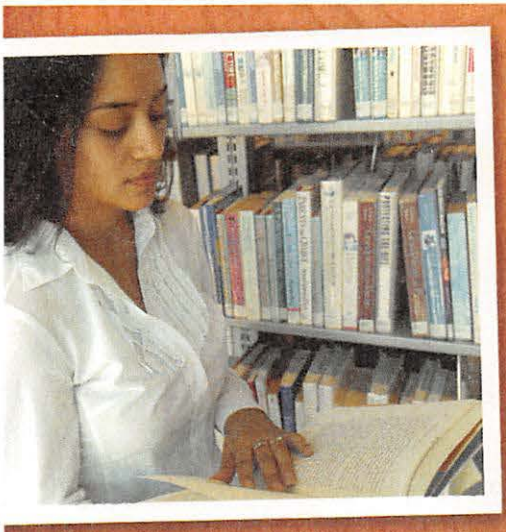
W.J.B. Dorn VA Medical Center
6439 Garners Ferry Road
Columbia, SC 29209
(803) 776-4000

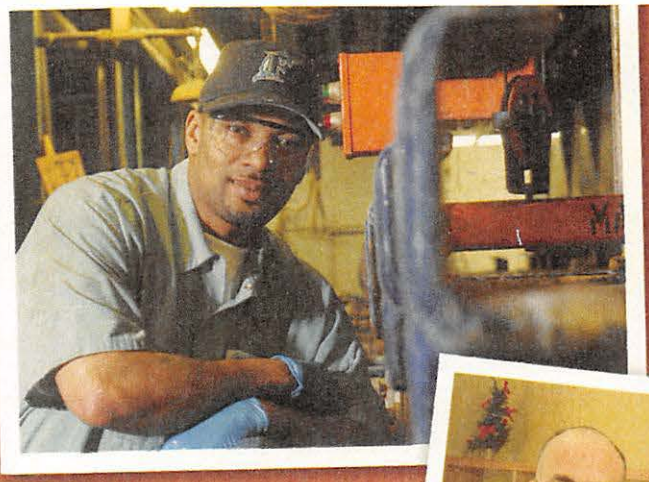
Carl Vinson VA Medical Center
1826 Veterans Boulevard
Dublin, GA 31021
(478) 272-1210

Tuscaloosa VA Medical Center
3701 Loop Road, East
Tuscaloosa, AL 35404
(205) 554-2000

For information about VA financial payments, call 1-800-827-1000
For information about VA health care, call 1-877-222-8387
Visit the VA web page at www.va.gov

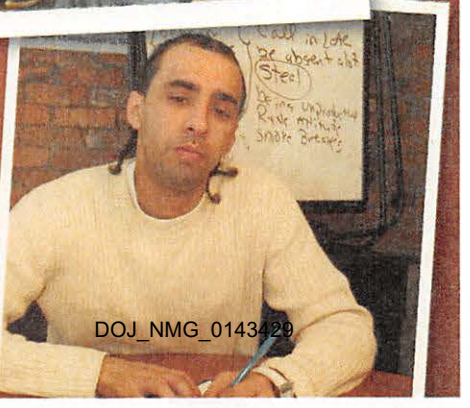
Department of Veterans Affairs

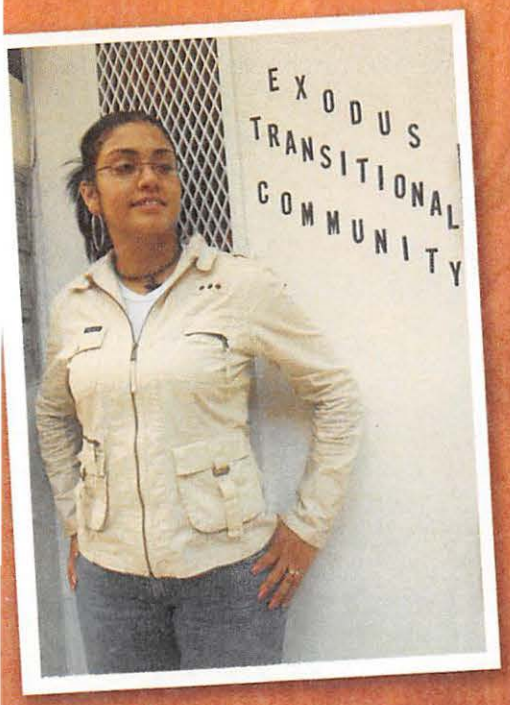


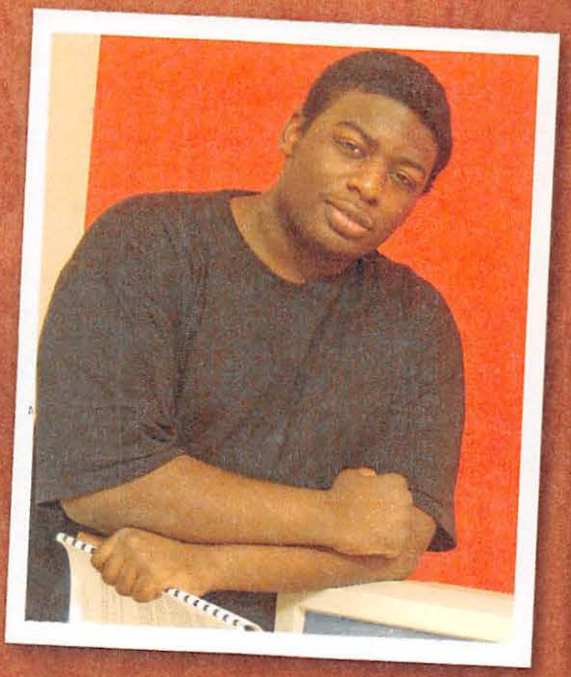


THE FAITH-BASED AND COMMUNITY INITIATIVE
AT THE U.S. DEPARTMENT OF LABOR

Compassion at Work







CENTER FOR FAITH-BASED AND
COMMUNITY INITIATIVES AT
THE U.S. DEPARTMENT OF LABOR

200 Constitution Ave, NW, Room S-2235
Washington DC 20210
Phone: (202) 693-6450

Department of Justice

FOR IMMEDIATE RELEASE
THURSDAY, MARCH 10, 2005
WWW.USDOJ.GOV

CRT
(202) 514-2008
TDD (202) 514-1888

JUSTICE DEPARTMENT FILES LAWSUIT TO DEFEND EMPLOYMENT RIGHTS OF ARMY RESERVIST

WASHINGTON, D.C. - The Justice Department today announced the filing of a lawsuit against International Ethical Laboratories, Inc. (IEL), alleging violations of the Uniformed Services Employment and Re-employment Rights Act of 1994 (USERRA). The complaint, filed in the U.S. District Court for Puerto Rico, alleges that IEL violated USERRA by denying Benito A. Colon Ortiz re-employment rights upon his return from military service, and by discharging Mr. Colon.

"This lawsuit reflects the Justice Department's ongoing commitment to ensure that employment rights of the men and women of our military are protected when they return from duty," said R. Alexander Acosta, Assistant Attorney General for the Civil Rights Division. "No person should be denied an employment opportunity because of his or her decision to don the nation's uniform."

According to the government's complaint, Mr. Colon served as a sergeant in the Army National Guard from 1991 to 2000. He was hired by IEL as a pharmaceutical sales representative in January 2003. While employed with IEL, Mr. Colon re-enlisted in the Army National Guard in January 2004 and attended its officer basic training course until March 2004. He then sought but was denied re-employment with IEL.

In its complaint, the Justice Department is asking that the court order IEL to reinstate Mr. Colon, pay him for his loss of earnings and pre-judgment interest, and pay him liquidated damages in an amount equal to his lost earnings.

The Justice Department's lawsuit was filed after the Veterans' Employment and Training Service (VETS) of the Labor Department referred Mr. Colon's complaint to the Justice Department upon completion of its investigation and failed settlement efforts.

This is the second USERRA complaint filed by the Justice Department since the Civil Rights Division received enforcement authority for USERRA cases in September 2004. To learn more about USERRA, go to http:www.dol.gov/vets/programs/userra/main.htm.

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05-114

Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, JULY 16, 2004
WWW.USDOJ.GOV

CRT
(202) 514-2008
TDD (202) 514-1888

JUSTICE DEPARTMENT SECURES INJUNCTION PROTECTING RIGHTS OF OVERSEAS CITIZENS TO VOTE IN JULY 20TH FEDERAL PRIMARY ELECTION IN GEORGIA

WASHINGTON, D.C. - A federal court in Atlanta entered an order today granting the Justice Department's request for emergency relief to ensure overseas uniformed and civilian voters can vote in Georgia's July 20 federal primary election.

"We are very pleased that the court took such prompt action on this matter," said R. Alexander Acosta, Assistant Attorney General for the Civil Rights Division. "As a result, the rights of Georgians overseas, particularly those serving in and protecting democracy with the armed forces are more secure. We will continue to protect vigorously the rights of all voters to equal and open ballot access."

The Department filed suit on July 13 after election officials in many Georgia counties failed to mail requested absentee ballots to citizens living overseas with sufficient time to allow them to vote in the July 20 federal primary election, as required by the federal Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"). After an emergency hearing in Atlanta on July 14, the court announced it would require immediate steps to ensure that qualified overseas voters have a reasonable opportunity to vote.

Judge Pannell's order, signed Thursday evening, extends the deadline by which qualified overseas ballots may be accepted from July 20 to July 23. It permits overseas voters to receive and return their ballots by fax, electronic mail, or express mail at the state's expense. It permits voters to use a federal write-in absentee ballot

if they do not receive their state absentee ballot in time. Federal write-in ballots are widely available at military bases and embassies around the world. The federal write-in ballot is authorized by the UOCAVA as a "back-up" ballot if voters do not receive their state ballots for federal general elections on time. The court also ordered that voters whose ballots were sent out after July 23 be personally notified of the order.

The order extends the same emergency voting opportunities to any runoff that may be necessary. Were a federal primary runoff necessary, it would occur August 10, leaving insufficient time for overseas voters to participate by regular mail. Also, an order was entered simultaneously today in the state's 2003 redistricting lawsuit extending the same relief to overseas voters who wish to vote for state offices in the July 20 or August 10 elections.

UOCAVA requires states to allow uniformed services voters and other overseas citizens to register to vote and vote absentee for all elections for federal office. The Justice Department has brought numerous federal lawsuits under the UOCAVA to ensure that overseas voters are not deprived of an opportunity to vote due to late mailing of absentee ballots by election officials. The Department recently obtained an emergency order in Pennsylvania extending the deadline for return of absentee ballots in Pennsylvania's April 27 primary election, and worked with state and local officials in Alabama to remedy a problem caused by a county's late mailing of absentee ballots for the June 1 primary election.

More information about the Uniformed and Overseas Citizens Absentee Voting Act and other federal voting laws is available on the Department of Justice website, www.usdoj.gov. Complaints about discriminatory voting practices may be called in to the Voting Section of the Justice Department's Civil Rights Division at 1-800-253-3931.

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04-490

2005 MAR 29 PM 4:06

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CHARLES W. GOODREAU, Plaintiff, v. BRIDGESTONE / FIRESTONE NORTH AMERICAN TIRE, LLC, Defendant.	Civil Action No. 3 05 0253 JURY DEMAND JUDGE HAYNES

COMPLAINT

Plaintiff, Charles W. Goodreau ("Goodreau"), by the undersigned attorneys, makes the following averments:

1. This is a civil action brought pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301 - 4333 ("USERRA").

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to 38 U.S.C. § 4323(b).

3. Venue is proper in this district under 38 U.S.C. § 4323(c)(2) and 28 U.S.C. § 1391(b) because Defendant, Bridgestone / Firestone North American Tire, LLC ("Bridgestone"), maintains a place of business in this judicial district.

PARTIES

4. Goodreau resides at 241A Blue Hill Drive, Nashville, Tennessee 37214, within the jurisdiction of this Court.

5. Bridgestone maintains a place of business at 535 Marriott Drive, Nashville, Tennessee 37214. Nashville is in Davidson County. Bridgestone also maintains a place of business at its plant in Clarksville, Tennessee. Clarksville is in Montgomery County. Both Davidson County and Montgomery County are within the jurisdiction of this Court.

CLAIM FOR RELIEF

6. Goodreau enlisted in the United States Army in 1980. He was honorably discharged in 1992. On August 5, 2000, Goodreau joined the Army National Guard.

7. On May 29, 2002 Goodreau commenced employment for Bridgestone at its plant in Clarksville, Tennessee, as an Operator Banbury.

8. Bridgestone has a progressive pay schedule which is a step rate compensation system based on time at work. Bridgestone has the following progressive pay schedule for employees such as Goodreau: 70% for 1-179 days; 75% on and after 180 days; 80% on and after 360 days; 85% on and after 540 days; 90% on and after 720 days; 95% on and after 900 days; and 100% on and after 1,080 days.

9. Goodreau was hired at a pay rate of $16.14 per hour, or 70% of the applicable wage rate, on Bridgestone's progressive pay schedule. Goodreau was moved to $17.44 per hour, or 75% of the applicable wage rate, on November 24, 2002.

10. Goodreau was activated as a member of the Army National Guard under Operation Enduring Freedom / Iraqi Freedom from December 27, 2002 to March 24, 2004, for a total of approximately 453 days.

11. Upon his return to Bridgestone from service, in late March 2004, Goodreau was paid the same pay rate of $17.44 per hour that he was receiving when he went on active duty. Goodreau was moved to $18.60 per hour, or 80% of the applicable wage rate, on August 17, 2004.

12. Bridgestone violated Section 4316 of USERRA, among other ways, by denying Goodreau an advancement of approximately 453 days on its progressive pay schedule and other employment benefits due to his membership in, or obligation to perform service in, the uniformed services.

13. As a result of Bridgestone's unlawful denial of advancement to Goodreau on Bridgestone's progressive pay schedule, Goodreau has suffered loss of earnings and other benefits of employment.

PRAYER FOR RELIEF

WHEREFORE, Goodreau prays that the Court enter judgment against Bridgestone, its officers, agents, employees, successors and all persons in active concert or participation with it, as follows:

14. Declare that Bridgestone's denial of advancement to Goodreau on its progressive pay schedule was unlawful and in violation of USERRA;

15. Require that Bridgestone fully comply with the provisions of USERRA by reinstating Goodreau at the level of seniority, status and compensation that he would have enjoyed had he remained employed continuously with Bridgestone, and by paying Goodreau for his loss of wages and other benefits suffered by reason of Bridgestone's failure or refusal to comply with the provisions of this law;

16. Enjoin Bridgestone from taking any action against Goodreau that fails to comply with the provisions of USERRA;

17. Award Goodreau prejudgment interest on the amount of lost wages found due; and

18. Grant such other and further relief as may be just and proper.

ALBERTO R. GONZALES
Attorney General

R. ALEXANDER ACOSTA
Assistant Attorney General
Civil Rights Division

BY: _____

DAVID J. PALMER (DC Bar No. 417834)
Chief

_____

WILLIAM B. FENTON (DC Bar No. 414990)
Deputy Chief
DERRICK BRENT (IL Bar No. 6230794)
Senior Trial Attorney
KEVIN HOSN (CA Bar No. 199122)
Trial Attorney
U.S. Department of Justice
Civil Rights Division
Employment Litigation Section
950 Pennsylvania Avenue, NW
Patrick Henry Building, Room 4036
Washington, DC 20530
Telephone: (202) 514-3851
Facsimile: (202) 514-1105

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CHARLES W. GOODREAU,

Plaintiff,

v.

BRIDGESTONE / FIRESTONE NORTH AMERICAN TIRE, LLC,

Defendant.

Civil Action No. 3 05 - 0252

JUDGE HAYNES

CONSENT DECREE

This matter is before the Court for entry of this judgment by consent of all parties to effectuate a compromise and settlement of all claims. After review and consideration, the Court believes that entry of this judgment is in the interest of justice.

1. Plaintiff, Charles W. Goodreau ("Goodreau"), commenced this action in the United States District Court for the Middle District of Tennessee, Nashville Division, alleging that Defendant Bridgestone / Firestone North American Tire, LLC ("Bridgestone") violated the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") by denying Goodreau advancement on its progressive pay schedule and other employment benefits due to Goodreau's membership in, or obligation to perform service in, the uniformed services.

2. As a result of settlement discussions, Goodreau and Bridgestone have resolved their differences and have agreed that this action should be settled by entry of this Consent Decree. It is the intent of the parties that this Consent Decree be a final and binding settlement in

full disposition of any and all claims alleged against Bridgestone that could have been alleged in the Complaint filed on behalf of Goodreau. Goodreau, by his signature to this document and the attached release, has indicated his acceptance of the terms and conditions contained in this Consent Decree.

STIPULATED FACTS

3. Pursuant to USERRA, the parties acknowledge the jurisdiction of the United States District Court for the Middle District of Tennessee (Nashville Division) over the subject matter of this action and of the parties to this case for the purpose of entering this Decree and, if necessary, enforcing this Decree.

4. Venue is proper in this district for purposes of this Decree and any proceedings related to this Decree only. Bridgestone agrees that all statutory conditions precedent to the institution of this lawsuit have been fulfilled.

FINDINGS

5. Having examined the terms and provisions of the Consent Decree, the Court finds the following:

a. The Court has jurisdiction over the subject matter of this action and the parties to this action.

b. The terms and provisions of this Consent Decree are fair, reasonable, and just. The rights of Bridgestone and Goodreau are protected adequately by this Decree.

c. This Consent Decree conforms with the Federal Rules of Civil Procedure and USERRA, and is not in derogation of the rights and privileges of any person. The entry of this Consent Decree will further the objectives of the USERRA and other applicable law, and will be in the best interests of the parties.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

NON-ADMISSION

6. This Decree, being entered with the consent of the United States Department of Justice – Civil Rights Division, Goodreau, and Bridgestone, shall not constitute an adjudication or finding on the merits of the case and shall not be construed as an admission by Bridgestone of any violations of USERRA, or any other law, rule or regulation dealing with or in connection with equal employment opportunities. Bridgestone denies any wrongdoing.

NON-RETALIATION

7. Bridgestone shall not take any action against any person that constitutes retaliation or interference with the exercise of such person's rights under USERRA, or Goodreau's claim herein that forms the basis for the present case, or because such person gave testimony or assistance or participated in any manner in any investigation or proceeding in connection with this case.

REMEDIAL REQUIREMENTS

8. Bridgestone shall grant Goodreau the level of seniority, status and compensation that he would have enjoyed had he remained employed continuously with Bridgestone during the time of his active duty service in the military, *i.e.*, on or about December 27, 2002 through on or about March 24, 2004, including loss of wages, with interest, in the amount of $6,128.00. Bridgestone shall provide documentary evidence of having paid Goodreau and credited him with the above benefits by mailing the same to the following address within fourteen (14) days after this Consent Decree has been entered by the Court:

Derrick Brent, Kevin Hosn
United States Department of Justice
950 Pennsylvania Avenue NW
Civil Rights Division
Employment Litigation Section, PHB, Room 4500
Washington, D.C. 20530

DISPUTE RESOLUTION AND COMPLIANCE

9. The Court shall retain jurisdiction and will have all available equitable powers, including injunctive relief, to enforce this Decree. Upon motion of either party, the Court may schedule a hearing for the purpose of reviewing compliance with this Decree. The parties shall engage in good faith efforts to resolve any dispute concerning compliance prior to seeking review by the Court. The parties shall be required to give notice to each other ten (10) days before moving for review by the Court. All parties may conduct expedited discovery under the Federal Rules of Civil Procedure for the purpose of determining compliance with this Decree or defending against a claim of non-compliance.

MISCELLANEOUS

10. All parties shall bear their own costs and expenses of litigation, including attorneys' fees.

11. This Consent Decree constitutes the entry of final judgment within the meaning of Rule 54 of the Federal Rules of Civil Procedure on all claims asserted in or that could have been asserted by Goodreau in this action. The Court retains jurisdiction over this matter, however, for the purpose of entering appropriate orders interpreting and enforcing this judgment.

12. If any provision of this Consent Decree is found to be unlawful, only the specific provision in question shall be affected and the other provisions will remain in full force and effect.

13. The terms of this Consent Decree are and shall be binding upon the present and future owners, officers, directors, employees, creditors, agents, trustees, administrators, successors, representatives, and assigns of Bridgestone and upon the heirs, successors, and assigns of Goodreau.

14. This Consent Decree constitutes the entire agreement and commitments of the parties. Any modifications to this Decree must be mutually agreed upon and memorialized in a writing signed by Bridgestone and Goodreau.

EFFECTIVE DATE

15. The effective date of this Consent Decree shall be the date upon which it is entered by the Court.

16. This Consent Decree shall expire, and this action shall be dismissed, without further order of this Court one year from the date of entry of this Consent Decree. Goodreau, by and through his attorneys, may move, for good cause, to extend the Consent Decree if the remedial relief called for herein has not been effectuated. The Consent Decree will not be extended, however, unless the Court grants Goodreau's motion. Any such extension may be granted by the Court only for such time as is necessary to effectuate the relief set forth in this Consent Decree.

APPROVED and ORDERED this 4th day of April, 2005.

UNITED STATES DISTRICT JUDGE

DAVID J. PALMER (DC Bar No. 417834)
Chief

WILLIAM B. FENTON (DC Bar No. 414990)
Deputy Chief
DERRICK BRENT (IL Bar No. 6230794)
Senior Trial Attorney
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CHARLES W. GOODREAU
ON BEHALF OF PLAINTIFF CHARLES GOODREAU

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(216) 586-7227
ON BEHALF OF DEFENDANT BRIDGESTONE / FIRESTONE NORTH AMERICAN TIRE, LLC

APPENDIX A
RELEASE OF ALL CLAIMS

STATE OF TENNESSEE)
) ss:
COUNTY OF DAVIDSON)

For and in consideration of my acceptance of the relief, or any part of it, to be provided to me pursuant to the provisions of the Consent Decree I have signed and that is to be entered in the case of Charles W. Goodreau v. Bridgestone / Firestone North American Tire, LLC, to be filed in the United States District Court for the Middle District of Tennessee, Nashville Division, I, Charles W. Goodreau, hereby forever release and discharge Defendant in this case, Bridgestone / Firestone North American Tire, LLC ("Bridgestone"), as well as its current, former and future officials, employees, agents, and successors from all legal and equitable claims arising out of the Complaint to be filed in this action and USERRA Case No. 04-TN-2004-00019-10-G filed with the United States Department of Labor.

I understand that the relief to be provided to me by Bridgestone under the terms of the Consent Decree does not constitute an admission by any of the parties hereby released of the validity of any claim raised by me, or on my behalf. I further understand that Bridgestone expressly denies having violated any of my legal rights and that the payments and other terms and conditions set forth in this release are in settlement of disputed claims.

This release constitutes the entire agreement between Bridgestone and me, without exception or exclusion.

I acknowledge that a copy of the Consent Decree this action has been made available to me for my review.

I HAVE READ THIS RELEASE AND UNDERSTAND THE CONTENTS THEREOF AND I EXECUTE THIS RELEASE OF MY OWN FREE ACT AND DEED.

Signature: Charles W. Goodreau
Charles W. Goodreau

Date: 3-29-05

Subscribed and sworn to before me this 29 day of March 05

Chris Patterson
Notary Public

My Commission expires:

CHRIS PATTERSON NOTARY PUBLIC AT LARGE DAVIDSON COUNTY, TN

MY COMMISSION EXPIRES: May 24, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

BENITO A. COLON ORTIZ, Plaintiff, v. INTERNATIONAL ETHICAL LABORATORIES, INC., Defendant.	Civil Action No. 05 - 1267 (HL) Jury Trial Demanded

COMPLAINT

Plaintiff, Benito A. Colon Ortiz ("Colon"), by the undersigned attorneys, makes the following averments:

1. This civil action is brought pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301 - 4333 ("USERRA").

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to 38 U.S.C. § 4323(b).

3. Venue is proper in this district under 38 U.S.C. § 4323(c)(2) and 28 U.S.C. § 1391(b) because Defendant, International Ethical Laboratories, Inc. ("IEL"), maintains a place of business in this judicial district.

PARTIES

4. Colon resides at Genis Corbalan 732, Fairview, Cupey, Puerto Rico 00926, within the jurisdiction of this Court.

5. IEL maintain a place of business at 1021 Americo Miranda Avenue, Reparto Metropolitano, Rio Piedras, Puerto Rico 00921, within the jurisdiction of this Court.

CLAIM FOR RELIEF

6. Colon served as an E-4 Specialist in the Army National Guard from 1991 to 2000. In this capacity, Colon performed military duties one weekend a month and two weeks each summer.

7. In January 2003, Colon commenced full-time employment as a pharmaceutical sales representative with IEL.

8. In January 2004, during his employment with IEL, Colon re-enlisted in the Army National Guard and received written orders to report for active duty to attend a 57-day officer basic training course that was scheduled to begin on January 31, 2004. Colon provided oral and written notice to IEL of his written orders to report for active duty.

9. Colon reported for active duty and attended the officer basic training course from January 31, 2004 to March 28, 2004.

10. On March 29, 2004, Colon attempted to return to work at IEL, but was denied reemployment. IEL discharged Colon on April 2, 2004.

11. IEL violated Sections 4311 and 4312 of USERRA, among other ways, by discriminating against Colon, denying him reemployment and other employment benefits, and discharging him because of his membership in, or obligation to perform service in, the uniformed services.

12. IEL's violations of USERRA were willful.

13. As a result of IEL's unlawful denial of Colon's reemployment and his discharge, Colon has suffered substantial loss of earnings and other benefits of employment.

PRAYER FOR RELIEF

WHEREFORE, Colon prays that the Court enter judgment against IEL, its officers, agents, employees, successors and all persons in active concert or participation with it, as follows:

14. Declare that IEL's denial of reemployment to, and discharge of, Colon were unlawful and in violation of USERRA;

15. Order that IEL fully comply with the provisions of USERRA by reinstating Colon at the level of seniority, status and compensation that he would have enjoyed had he remained employed continuously with IEL, and by paying Colon for his loss of earnings and other benefits suffered by reason of IEL's failure or refusal to comply with the provisions of this law;

16. Declare that IEL's violations of USERRA were willful;

17. Order that IEL pay Colon as liquidated damages an amount equal to the amount of his lost compensation and other benefits suffered by reason of IEL's willful violations of USERRA;

18. Enjoin IEL from taking any action against Colon that fails to comply with the provisions of USERRA;

19. Award Colon prejudgment interest on the amount of lost compensation found due; and

20. Grant such other and further relief as may be just and proper.

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Attorney General

R. ALEXANDER ACOSTA
Assistant Attorney General
Civil Rights Division

BY:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
NEWARK DIVISION

ANTHONY K. LINCOLN, Plaintiff, v. FIRST EXPRESS, INC., Defendant.	Civil Action No. 05-2742 (WJM) JURY DEMAND

COMPLAINT

Plaintiff, Anthony K. Lincoln ("Lincoln"), by the undersigned attorneys, makes the following averments:

1. This is a civil action brought pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301 - 4333 ("USERRA").

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to 38 U.S.C. § 4323(b).

3. Venue is proper in this district under 38 U.S.C. § 4323(c)(2) and 28 U.S.C. § 1391(b) because Defendant, First Express, Inc. ("First Express"), maintains a place of business in this judicial district.

PARTIES

4. Lincoln resides at 1945 JFK Boulevard, Jersey City, New Jersey, within the jurisdiction of this Court.

5. First Express maintains a place of business at 97 Third Street, South Kearny, New Jersey 07032. South Kearny is in Hudson County, and is within the jurisdiction of this Court.

CLAIM FOR RELIEF

6. Lincoln joined the United States Army National Guard on or about December 30, 1997. He is a member of the E Company, 50th MFB, located at 678 Montgomery Street, Jersey City, New Jersey 07306.

7. On or about June 30, 2003, Lincoln commenced employment for First Express as a truck driver.

8. On or about May 3, 2004, Lincoln informed First Express, through Steve Won, its owner ("Won"), that he expected to be activated as a member of the Army National Guard in

support of Operation Iraqi Freedom within the following month. Lincoln also informed First Express, through Won, of his interest in returning to his position as truck driver upon his discharge from active duty military service. Won of First Express told Lincoln to contact First Express when he returned home from active duty.

9. On or about May 24, 2004, Lincoln again provided verbal notification to First Express, through Won, of his impending military deployment.

10. By orders issued on June 2, 2004, Lincoln was ordered to active duty as a member of his Reserve Component Unit for a period not to exceed 545 days. He was also ordered to active duty for a period of no less than thirty days for mobilization processing, which was to include medical and dental screening and care.

11. On June 6, 2004, Lincoln reported to his Home Unit Station pursuant to his military orders. He then reported to Fort Dix on June 9, 2004, for mobilization processing pursuant to those orders.

12. Lincoln was released from active duty on June 22, 2004, for medical reasons.

13. On that same day, June 22, 2004, Lincoln contacted First Express, through Won, by telephone seeking reinstatement to his truck driver position with First Express. Won told Lincoln to call back in a couple of days.

14. On June 24, 2004, Lincoln contacted Won of First Express, as instructed, and was told by Won that First Express had permanently replaced him with another truck driver.

15. On July 12, 2004, Lincoln filed a complaint against First Express under USERRA with the Veterans' Employment and Training Services ("VETS") of the United States Department of Labor.

16. On July 19, 2004, a VETS investigator contacted First Express with regard to Lincoln's USERRA complaint.

17. First Express did not allow Lincoln to work with First Express until August 18, 2004.

18. First Express has refused to pay Lincoln the wages he would have earned had First Express promptly reemployed Lincoln upon his completion of active military service.

19. First Express violated USERRA, among other ways, by denying Lincoln prompt reemployment and the wages he would have earned from such prompt reemployment, after his completion of active military service in the uniformed services.

20. First Express' violations of USERRA were willful.

21. As a result of First Express' unlawful denial of Lincoln's request for prompt reemployment, and the wages he would have received from such prompt reemployment, Lincoln has suffered a loss of earnings.

PRAYER FOR RELIEF

WHEREFORE, Lincoln prays that the Court enter judgment against First Express, its officers, agents, employees, successors and all persons in active concert or participation with it, as follows:

22. Declare that First Express' denial of prompt reemployment to Lincoln was unlawful and in violation of USERRA;

23. Require that First Express fully comply with the provisions of USERRA by paying Lincoln for his loss of wages suffered by reason of First Express' failure or refusal to comply with the provisions of this law;

24. Declare that First Express' violations of USERRA were willful;

25. Order that First Express pay Lincoln as liquidated damages an amount equal to the amount of his lost wages suffered by reason of First Express' willful violations of USERRA;

26. Enjoin First Express from taking any action against Lincoln that fails to comply with the provisions of USERRA;

27. Award Lincoln prejudgment interest on the amount of lost wages found due; and

28. Grant such other and further relief as may be just and proper.

R. ALEXANDER ACOSTA
Assistant Attorney General
Civil Rights Division

BY: _____

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Chief

_____

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Attorneys for Plaintiff

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(770) 732-0175 FAX

STEVEN L COHEN, M.D.
LEE VOLLRATH, M.D.
EDEN ENGLISH, M.D.
MICHELLE BENNETT, P.A.

Copy to Lilly
Mrs

DATE 2/9/06 TIME _____ AM/PM

TO: Robert McCallum.

COMPANY NAME: _____

FAX NUMBER: 2025140238

FROM: WELLSTAR COBB MEDICAL GROUP, LLC

☐ MINDY NANTZ	☐ MICHELE LAFONT
☐ MARGIE MOSLEY	☐ CHAUKEY WHITING
☐ TRACY PICKNEY	☐ STEPHANIE CAMPBELL
☐	☐ Dr Steven Cohen
☐	☐

NUMBER OF PAGES (INCLUDING COVER PAGE): 3

COMMENTS: In follow up to our conversation last month

****CONFIDENTIALITY NOTICE****

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Steven I. Cohen, M.D.
Lee Vollrath, M.D.
Eden English, M.D.
Michelle Bennett, P.A.
Internal & Family Medicine

January 9, 2006

Robert McCallum (fax 202-514-0238)
AssociatedAttorney General
Department of Justice
Washington, D.C.

Dear Robert:

I appreciate your taking the time to consider passing this letter on to Dr. David J. Brailer, who is leading the administration's initiative to increase the use of electronic health records in this country.

I recently downloaded the Google desktop software to a new computer at my house. Google is one of several companies which provide free software which make it easier and more efficient for the user to look for files maintained on a personal computer. After downloading this software, I then accessed via the Internet some medical information on several patients I was seeing in the hospital; this was done using an Internet connection to the hospital's server. The intention with this system is that the information is kept on the server and not downloaded to the PC of the user who is accessing the information online. After disconnecting from the hospital's system, I then found that by typing in information such as the patient's name in the Google search box, I was able to retrieve the web pages that I had seen from my computer's hard drive. My concern is that these desktop search programs, which do provide a significant benefit, are likely to be downloaded by a large number of people who will not appreciate their impact on the ability to maintain confidentiality of patient information. I assume that the large health care system where I am now employed will be able to deal with vendors which we utilize and come up with a solution; however, I think that smaller practices, without such resources, are unlikely to develop solutions for this problem, assuming that they even realize that it exists. I have spoken with two physicians who

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work in the field of medical informatics at large institutions who had not been aware of this issue. (My delay in getting this to you after our conversation was in the hope that one of them might have some thoughts on dealing with this matter which I could pass on).

In view of the movement towards the use of electronic medical records, I thought this is an issue which might merit Dr. Brailer's attention. I know that in my readings I haven't seen anything dealing with this specific security issue.

While my initial concern relating to the desk top search software was related to the effect on confidentiality of medical information, this issue would also have implications for those in other fields who remotely access confidential information from a server.

Thank you very much for taking the time to consider passing this information on, when I know you are busy dealing with so many more important issues. If you have any questions, I can be contacted at 770-732-1055 or via email at Steven.Cohen@Wellstar.org.

I hope you are enjoying your time in Washington and that you and your family are doing well.

Sincerely,

Steven L. Cohen, M.D.

SLC:cb

1064320

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
Chambers of Judge Neil M. Gorsuch

Byron White U.S. Courthouse
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Denver, Colorado 80257

Telephone: 303-335-2800
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September 6, 2006

Hon. Alberto Gonzales
Kyle Sampson, Esq.
Courtney Elwood, Esq.
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

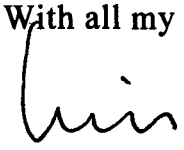
Dear Judge, Kyle, and Courtney:

I'm still very much settling in here (as you can see, no stationery yet!), but I wanted to take a moment to express my heartfelt gratitude to you for the many kindnesses you have shown me. You've given me two tremendous opportunities to serve, first working at the Department and for the President, an experience I will always cherish and recall as a highlight of my professional life, and now an opportunity to return to serve the people of the West that I love. I am not sure I will ever be able to say thank you adequately, but I very much hope to prove worthy of the trust and responsibility you've reposed in me.

As you know, I deeply admire the work you are doing to keep the American people safe and a significant part of me misses being a part of your team in that effort. If ever I can be of any help, please do let me know. And please do let me know if and when your travels take you through Denver. I very much hope our paths cross soon and often over the years, and I am

delighted and honored that the Judge will be able to make my investiture on November 20; I look forward to seeing you then.

With all my thanks and warmest regards,



Neil M. Gorsuch

1106965
YW

Judge Neil M. Gorsuch
United States Court of Appeals, Tenth Circuit
1823 Stout Street
Denver, Colorado 80257
303-335-2800

December 1, 2006

Honorable Alberto Gonzales
U.S. Attorney General
905 Pennsylvania Ave., NW
Washington, DC 20530

Dear Judge Gonzales:

Thank you so much for taking the time and trouble to speak at my investiture. You honored me and my family so greatly by your participation and kind words; I hope to live up to the great trust you have placed in me. And it was such a pleasure to see you, Kyle, Courtney, and so much of the DOJ team again – I confess it made me a little "homesick" for the Department.

David Ebel commented the other day that you sounded interested in a fly fishing expedition. I have a little place about two hours from Denver with a modest stretch of the Colorado river. If ever you or your family would like to visit for fishing, hiking, or skiing (nearby), Louise and I would love to have you. I have made a similar offer to Kyle and Courtney and very much hope one of you will take me up on it!

I wish you and the entire DOJ community the very best for the holidays and thank you again so much for honoring me with your presence last week.

Warmest regards,

Neil M. Gorsuch

NMG/hc

P.S. I regret not showing you a bit of the Byron White exhibit in our building – photos and programs from the 1938 Cotton Bowl in which Rice, at perhaps the peak of its athletic achievements, defeated C.U. and (then) "Whizzer" White 28 to 14!

WHITE COLLAR ENFORCEMENT (PART 1): ATTORNEY-CLIENT PRIVILEGE AND CORPORATE WAIVERS

Tuesday, March 7, 2006

House of Representatives,

Subcommittee on Crime, Terrorism, and Homeland Security,

Committee on the Judiciary,

Washington, D.C.

Committee Hearings

of the

U.S. HOUSE OF REPRESENTATIVES

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WHITE COLLAR ENFORCEMENT (PART 1): ATTORNEY-CLIENT PRIVILEGE AND CORPORATE WAIVERS

Tuesday, March 7, 2006

House of Representatives,

Subcommittee on Crime, Terrorism, and Homeland Security,

Committee on the Judiciary,

Washington, D.C.

The subcommittee met, pursuant to notice, at 12:00 p.m., in Room 2141, Rayburn House Office Building, Hon. Howard Coble [chairman of the subcommittee] presiding.

Mr. COBLE. Good afternoon, ladies and gentlemen. We welcome you to this important oversight hearing on white collar crime and the issue of the attorney-client privilege and waivers by corporations in criminal investigations.

At first blush, some may say that this topic is an arcane legal issue with little relevance to the general public. In fact, the attorney-client privilege is deeply rooted in our values and the legal profession. It encourages openness and honesty between clients and their attorneys so that clients hopefully can receive effective advice and counsel.

But this privilege is not inviolate. When it comes to corporate crime, there is and probably always will be an institutional tension between preserving corporate attorney-client and work product privileges and a prosecutor's quest to unearth the truth about criminal acts.

I know that one of the most important engines in our criminal justice system is cooperation. By encouraging and rewarding cooperation, prosecutors are able to unearth sophisticated fraud schemes which cause devastating harm to investors and employees and undermine our faith in the markets.

But the possible benefits of cooperation cannot be used to support a prosecutor's laundry list of demands for a cooperating corporation. Prosecutors must be zealous and

vigorous in their efforts to bring corporate actors to justice. However, zeal does not in my opinion equate with coercion in fair enforcement of these laws.

To me, the important question is whether prosecutors seeking to investigate corporate crimes can gain access to the information without requiring a waiver of the attorney-client privilege. There is no excuse for prosecutors to require privilege waivers as a routine matter, it seems to me.

The subcommittee will examine the important issue with a keen eye to determine whether Federal prosecutors are routinely requiring cooperating corporations to waive such privilege. Then-Acting Deputy Attorney General McCallum issued a memorandum on October 21, 2005 which mandated a change in Justice Department policy to try to establish a more uniform review procedure for any such requirement imposed by a prosecutor.

This is a welcome development, and the subcommittee is interested in determining how that policy has been implemented. I am also aware of the fact that the Sentencing Commission is examining its current policy of encouraging such waivers when determining the nature and extent of cooperation.

While the guidelines do not explicitly mandate a waiver of privileges for the full benefit of cooperation, in

practical terms we have to make sure that they do not operate to impose such a requirement. Our subcommittee needs to examine this issue, work closely with the Sentencing Commission, the defense bar, and the Justice Department to make sure that a fair balance is struck.

I look forward to hearing from our distinguished panel of witnesses today, and I am now pleased to recognize the distinguished gentleman from Virginia, the Ranking Member of the subcommittee, Mr. Bobby Scott.

[The statement of Mr. Coble follows:]

********** SUBCOMMITTEE INSERT **********

Mr. SCOTT. Thank you, Mr. Chairman. And I want to thank you for holding this hearing on attorney-client privilege and corporate waivers of that privilege.

Attorney-client privilege is more usually associated with the context of protecting an individual from having to disclose communications with his or her lawyer for the purpose of criminal or civil prosecution, corporations or persons, for the sake of legal processes that are also entitled to attorney-client privilege.

As noted by the United States Supreme Court in Upjohn vs. U.S., the attorney-client privilege is the oldest of privileges for confidential communications known to common law. Its purpose is to encourage full and frank communications between attorneys and their clients so that sound legal advice and advocacy can be given by counsel. Such advice or activity depends upon the lawyer being fully informed by the client.

As noted in other cases, the lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. This purpose can only be effectively carried out when the client is free from consequences or apprehensions regarding the possibility of disclosure of the information.

Exceptions to protections of the attorney--excuse me.

Exceptions to the protections of the privilege do exist, but they have generally been limited to the crime-fraud exception, which holds that the privilege does not apply to an attorney-client communication in furtherance of a crime, or other cases where the client has already waived the privilege through disclosure to a non-privileged third party.

Now it appears that the Department of Justice has determined that there may be another exception, that is, when it wishes the corporation to waive the privilege in the context of a criminal investigation. For some time now I have been concerned about reports that the Department of Justice is coercing corporations to waive their attorney-client privilege during criminal investigations of the corporation and its employees by making waiver a prerequisite for consideration by the Department and its recommendation for not challenging leniency should criminal conduct be established.

Now, this is particularly significant because under mandatory minimums and sentencing guidelines, prosecutorial motions for leniency may be the only way to get a sentence under the mandatory minimum. So in this case, a prosecutor often has more control over sentencing than the judge.

While the attorney-client privilege doctrine does apply to corporations, complications arise when the client is a corporation since the corporate privilege has to be asserted

by persons who may themselves be the target of a criminal investigation or subject to criminal charges based on the disclosed attorney-client information. Disclosed information can be used either in criminal prosecutions or civil prosecutions. Whatever fiduciary duty an official may have to the corporation and its shareholders, it is probably superseded by the official's own self-interest in the criminal investigation.

And there is no protection for employees of the corporation against waivers of the attorney-client privilege by officials who may have their own self-interest at heart. This includes information provided by employees to corporate counsel to assist internal investigations by the corporation, even if the information was under threat of an employee being fired and even if the information constituted self-incrimination by the employee.

It is one thing for officials of a corporation to break the attorney-client privilege in their own self-interest by their own volition. It is another thing for the Department to require or coerce it by making leniency considerations contingent upon it, even when it is merely on a fishing expedition on the part of the Department. Complaints have indicated that the practice of requiring a waiver of the corporate attorney-client privilege has become routine. And, of course, why wouldn't it be the case? What is the

advantage to the Department of not requiring a waiver in the corporate investigation?

Now, because of the exclusionary rule, when a confession is coerced or a search is conducted illegally, anything that is found of that becomes fruit of a poisonous tree and can't be used in a criminal prosecution. So police and prosecutors who jeopardize the case by such tainted evidence are generally disparaged by their colleagues, and thus there is a disincentive for them to pursue and collect such evidence in the first place. There is no incentive to collect evidence if it is going to ruin the case.

Although coerced confessions and illegal searches are always improper, before the exclusionary rule there was an incentive for police to coerce confessions and illegally obtain information because they could make a case based on it, and there was no penalty.

Here we have the same incentives with respect to the waiver of corporate privilege. So, not surprisingly, reports are the demand for waivers are rising, not only by the Department but by other entities as well, such as auditors as a prerequisite of issuing a clean audit.

Now, coercing corporate attorney-client privileges has not been--has not long been the practice in the Department. It has really been the last two administrations that have practiced this, and it has been growing by leaps and bounds.

Corporate attorney-client privilege has not always been the prerequisite for leniency. Providing non-privileged documents and information and providing broad access to corporate premises and employees have been traditional ways to receive benefits of corporate cooperation.

Some nine U.S. Attorneys General, Deputy Attorneys General, and Solicitors General have expressed their concerns about the current Departmental waiver policy. We will hear from witnesses today who have prosecuted corporate cases without requiring such waiver. And so, Mr. Chairman, we look forward to the testimony by witnesses and to working with you to address the concerns regarding the Department's corporate attorney-client waiver policy.

[The statement of Mr. Scott follows:]

********** SUBCOMMITTEE INSERT **********

Mr. COBLE. Thank you, Mr. Scott. And gentlemen, we have been joined by the distinguished gentleman from California, Mr. Lungren, the distinguished gentleman from Florida, Mr. Feeney, and distinguished gentleman from Massachusetts, Mr. Delahunt.

Gentlemen, what I am about to do I am very awkward in doing it. It is customary for the subcommittee to administer the oath to the panelists. I know you all. I know you don't need to be sworn in to tell the truth. But if you don't mind, would each of you please stand and raise your hands.

[Witnesses sworn.]

Mr. COBLE. Let the record show each witness answered in the affirmative. And I have had the fear if I depart with you all, then the next panel is going to wonder why I don't depart from them. But you all, I am not worried about what you all say violating the truth in any way.

As I said before, we have four distinguished witnesses with us today. Our first witness is Mr. Robert McCallum, Jr., Associate Attorney General of the Department of Justice. In this capacity, Mr. McCallum advises and assists the Attorney General and the Deputy Attorney General in formulating policies pertaining to a broad range of civil justice, Federal and local law enforcement, and public safety matters. Prior to this appointment, he served as Assistant Attorney General for the Civil Division. Mr. McCallum

received his undergraduate and law degrees from Yale University, and was a Rhodes Scholar at Oxford University.

Our second witness is returning to the Hill after some extended absence, the Honorable Dick Thornburgh of Kirkpatrick & Lockhart Nicholson Graham. Mr. Thornburgh's distinguished public career extends over a quarter of a century. He previously served as Governor of Pennsylvania, Attorney General under Presidents Reagan and Bush, and Undersecretary General of the United Nations.

Mr. Thornburgh has been awarded honorary degrees by 31 colleges and universities, and previously served as Director of the Institute of Politics at Harvard's John F. Kennedy School of Government. Mr. Thornburgh earned his undergraduate degree at Yale and his law degree at the University of Pittsburgh School of Law.

Our third witness is Mr. Thomas Donohue, President and CEO of the United States Chamber of Commerce. In his current capacity, Mr. Donohue has expanded the influence of the Chamber across the globe. He engaged the Chamber Institute for Legal Reform and revitalized the National Chamber Foundation. Previously, Mr. Donohue served for 13 years as President and CEO of the American Trucking Association, and was awarded his bachelors degree from St. Johns University and a masters degree from Adelphi University.

Our fourth and final witness today is Mr. William

Sullivan, Jr., litigation partner at Winston & Strawn. In this capacity, Mr. Sullivan concentrates on corporate internal investigations, trial practice, white collar criminal defense, and complex securities litigation.

Previously, he served for over 10 years as an Assistant United States Attorney for the District of Columbia, and has worked in private practice as a litigator. Additionally, Mr. Sullivan has addressed the World Trade Organization on Sarbanes-Oxley issues. He received his bachelors and masters degrees from Tufts University and his law degree from Cornell University.

Gentlemen, it is good to have you all with us. And as we have previously told you, without hamstringing you too severely, we try to apply the 5-minute rule here. And when you all see that amber light on your panel appear, that tells you that the ice on which you are skating is becoming thin. You have about a minute to go. And we're not going to keelhaul anybody for violating it, but if you can wrap up in as close to 5 minutes as you can.

Mr. McCallum, why don't you kick us off.

TESTIMONY OF ROBERT D. McCALLUM, JR., ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE; HON. DICK THORNBURGH, KIRKPATRICK & LOCKHART NICHOLSON GRAHAM LLP; THOMAS J. DONOHUE, PRESIDENT AND CEO, U.S. CHAMBER OF COMMERCE; AND WILLIAM M. SULLIVAN, JR., LITIGATION PARTNER, WINSTON & STRAWN

TESTIMONY OF ROBERT D. McCALLUM, JR.

Mr. MCCALLUM. Thank you, Mr. Chairman, Ranking Member Scott, and members of the committee. We appreciate at the Department of Justice this opportunity to appear before you today.

Now, President Bush, this Congress, and the American people have all embraced a zero tolerance policy when it comes to corporate fraud. In passing the landmark Sarbanes-Oxley legislation in 2002, Congress gave the Department of Justice clear marching orders: prosecute fully those who would use their positions of power and influence in corporate America to enrich themselves unlawfully, and thereby restore confidence in our financial markets.

And we have done exactly that, Mr. Chairman. From July 2002 through December 2005, the Department has secured more than 900 corporate fraud convictions, including 85 presidents, 82 chief executive officers, 40 chief financial

officers, 14 chief operating officers, 17 corporate counsel or attorneys, and 98 vice presidents, as well as millions of dollars in damages for victims of fraud.

Much of our success depends on our ability to secure cooperation. As Chairman Sensenbrenner noted recently, and I quote, ''By encouraging and rewarding corporate cooperation, our laws serve the public interest in promoting corporate compliance, minimizing use of our enforcement resources, and leading to the prosecution and punishment of the most culpable actors.''

The Department's approach to corporate fraud is set forth in the so-called Thompson Memorandum, issued by Larry D. Thompson as Deputy Attorney General. Pursuant to that memorandum, the degree to which a corporation cooperates with a criminal investigation may be a factor to be considered by prosecutors when determining whether or not to charge the corporation with criminal misconduct.

Cooperation in turn depends on--and here I quote the Thompson Memorandum--''the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protections.''

Some critics have suggested that the Department is contemptuous of legal privileges. Nothing could be further

from the truth. We recognize the ability to communicate freely with counsel can serve legitimate and important functions and encourage responsible corporate stewardship and corporate governance.

But at the same time, we all must recognize that corporate fraud is often highly difficult to detect. Indeed, in recent years we have witnessed a series of highly complex corporate scandals which would have been difficult to prosecute in a timely and efficient manner without corporate cooperation, including in some instances the waiver of privileges.

The Thompson Memorandum carefully balances the legitimate interests furthered by the privilege, and the societal benefits of rigorous enforcement of the laws supporting ethical standards of conduct.

There is also a so-called McCallum Memorandum, issued during my tenure as Acting Deputy Attorney General last year, which adds to this balancing of the competing interests. The McCallum memorandum first ensures that no Federal prosecutor may request a waiver without supervisory review. And second, it requires each United States Office to institute a written waiver review policy governing such requests.

Mr. Chairman, I recognize that despite these limitations and restrictions, there are some critics of the Department's approach. While I look forward to addressing specific

concerns of the members of this subcommittee that may occur during the questioning, let me make a few preliminary observations.

First, voluntary disclosure is but one factor in assessing cooperation, and cooperation in turn is but one factor among many considered in any charging decisions. Disclosures thus is not required to obtain credit for cooperation in all cases; cooperation may be had by corporations most readily without waiving anything, simply by identifying the employees best situated to provide the Government with relevant information.

Nor can the Government compel corporations to give waivers. Corporations are generally represented by sophisticated and accomplished counsel who are fully capable of calculating the benefits or harms of disclosures. Sometimes they agree; sometimes they do not agree. Whether to disclose information voluntarily always remains within the corporation's choice. And in fact, voluntary disclosures are frequently initiated by the corporate counsel and not by the Government.

Second, under our process, waivers of privileges should not be routinely sought, and we believe are not routinely sought. Indeed, they should be sought based upon a need for three things: timely, complete, and accurate information. And they should be requested pursuant to the established

guidelines, and only with supervisory approval.

Third, our approach does not diminish a corporation's willingness to undertake investigations, in our view. Wholly apart from the Government's criminal investigations, corporate management owes to its shareholders, not to itself or to its employees, but to its shareholders, a fiduciary duty to investigate potential wrongdoing and to take corrective action. To the extent that shareholders are best served by timely internal investigations, responsible management will always do so.

And finally, in some jurisdictions, voluntary disclosure to the Government waives privileges in civil litigation seeking monetary damages, thus, it is said, compounding the corporation's litigation risk. Addressing this concern, the committee should be aware that the Evidence Committee of the Advisory Rules of the Judicial Conference is currently considering a rule that would limit use by others of privileged material voluntarily provided by a corporation in its cooperation with a Government investigation. We at the Department of Justice will be involved in the Federal Rules Advisory Committee on Evidence considering that, and we will watch that debate with interest.

In sum, Mr. Chairman, we believe that the Department has struck an appropriate balance between traditional privileges and the American people's legitimate law enforcement needs

and the necessity of establishing standards.

Thank you for the opportunity to testify.

[The statement of Mr. McCallum follows:]

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Mr. COBLE. Thank you, Mr. McCallum.

Mr. Thornburgh.

TESTIMONY OF HON. DICK THORNBURGH

Mr. THORNBURGH. Chairman Coble, Ranking Member Scott, members of the subcommittee, I want to thank you for the invitation to speak to you today about the grave dangers posed to the attorney-client privilege and work product doctrine by current governmental policies and practices.

At the outset, let me commend you for being the first Congressional body to convene a hearing on this very worrisome situation. The attorney-client privilege, as we all know, is a fundamental element of the American system of justice, and I fear that we have all been too slow in recognizing how seriously the privilege has been undermined in the past several years by Government action. Your focus on this issue today is vitally needed and much appreciated.

The attorney-client privilege is the oldest of the evidentiary privileges originating in the common law of England in the 1500s. Although the privilege shields from disclosure evidence that might otherwise be admissible, courts have found that this potential loss of evidence is outweighed by the benefits to the immediate client, who receives better advice, and to society as a whole, which obtains the benefits of voluntary legal compliance.

These ideas have been embraced time and time again by our courts. In the words of the Supreme Court, the privilege

encourages ''full and frank communication between attorneys and their clients, and thereby promotes broader public interest in the observance of law and the administration of justice.'' The attorney-client privilege is thus a core element in a law-abiding society and a well-ordered commercial world.

And yet the previously solid protection that attorney-client communications have enjoyed has been profoundly shaken by a trend in law enforcement for the Government to, in effect, demand a waiver of a corporation's privilege as a precondition for granting the benefits of cooperation that might prevent indictment or diminish punishment. These pressures emanate chiefly from the Department of Justice and the Securities and Exchange Commission.

Beginning with the 1999 Holder Memorandum, and as more forcefully stated in the 2003 Thompson Memorandum, the Department of Justice has made clear its policy that waiver of the attorney-client and work product protections is an important element in determining whether a corporation may get favorable treatment for cooperation. The SEC, in a public report issued at the conclusion of an investigation, outlined a similar policy.

Finally, the U.S. Sentencing Commission in 2004 amended the commentary to its sentencing guidelines so that waiver of

privilege becomes a significant factor in determining whether an organization has engaged in timely and thorough cooperation necessary for obtaining leniency. Following the Federal lead, State law enforcement officials are beginning to demand broad privilege waivers, as are self-regulatory organizations and the auditing profession.

While the tone of these documents may be moderate, and officials representing these entities stress their intent to implement them in reasonable ways, it has now become abundantly clear that in actual practice, these policies pose overwhelming temptations to prosecutors seeking to save time and resources and to target organizations desperate to save their very existence. And each waiver has a ripple effect that creates more demands for greater disclosures, both in individual cases and as a matter of practice. Once a corporation discloses a certain amount of information, then the bar is raised for the next situation, and each subsequent corporation will need to provide more information to be deemed cooperative.

The result is documented in a survey released just this week to which over 1400 in-house and outside counsel responded, in which almost 75 percent of both groups agreed--almost 40 percent agreeing strongly--that a culture of waiver has evolved in which Government agencies believe it is reasonable and appropriate for them to expect a company

under investigation to broadly waive attorney-client privilege or work product protections.

I practice law at a major firm with a significant white collar criminal defense practice. My partners generally report that they now encounter waiver requests in virtually every organizational criminal investigation in which they are involved. In their experience, waiver has become a standard expectation of Federal prosecutors. Others with whom I have spoken in the white collar defense bar tell me the same thing.

I am prepared to concede that the significance of these developments took some time to penetrate beyond the Beltway and the relatively small community of white collar defense lawyers. It is clear, however, that as the legal profession has become aware of the problem, it has resulted in a strong and impassioned defense of the attorney-client privilege and the work product protection.

This issue was the hottest topic at last summer's annual meeting of the American Bar Association, and at its conclusion, the ABA House of Delegates unanimously passed a resolution that strongly supports the preservation of the attorney-client privilege and opposes policies, practices, and procedures of Government bodies that have the effect of eroding the attorney-client privilege.

I was one of those nine former Department of Justice

officials from both Republican and Democratic administrations who, as the Chairman noted, signed a letter to the Sentencing Commission last summer urging it to reconsider its recent amendment regarding waiver.

It is never a simple matter to enlist such endorsements, particularly in the summertime and on short notice. And yet it was not difficult at all to secure those nine signatures because all feel so strongly about the fundamental role the attorney-client privilege and work product protections play in our system of justice.

We feel just as strongly that the other governmental policies and practices outlined above seriously undermine those protections. As you know, I served as a Federal prosecutor for many years, and I supervised other Federal prosecutors in my capacities as U.S. Attorney, Assistant Attorney General in charge of the Criminal Division, and Attorney General of the United States. Throughout those years, requests to organizations we were investigating to hand over privileged information never came to my attention. One wonders what has changed in the past decade to warrant such a dramatic encroachment on the attorney-client privilege.

Clearly, in order to be deemed cooperative, an organization under investigation must provide to the Government all relevant factual information and documents in

its possession, and it should assist the Government by explaining the relevant facts and identifying individuals with knowledge of them. But in doing so, it should not have to reveal privileged communications or attorney work product.

That limitation is necessary to maintain the primacy of those protections in our system of justice. It is a fair limitation on prosecutors, who have extraordinary powers to gather information for themselves. This balance is one I found workable in my years of Federal service, and it should be restored.

I was pleased to see the Sentencing Commission earlier this year request comment on whether it should delete or amend the commentary sentence regarding waiver. In testimony last fall, I urged it to provide affirmatively that waiver should not be a factor in assessing cooperation. I understand that the American Bar Association will shortly approach the Department of Justice with a request that the Thompson Memorandum be revised in similar fashion. These are promising developments.

Mr. Chairman, I thank you again for beginning a much-needed process of Congressional oversight of the privilege waiver crisis. This is not an issue that Washington lobby groups have orchestrated, but it is one that likely will take Congressional attention to resolve.

Thank you. I look forward to your questions.

[The statement of Mr. Thornburgh follows:]

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Mr. COBLE. Thank you, Mr. Thornburgh.

And Mr. Donohue, in a sense of equity and fairness, since I permitted Mr. McCallum and Mr. Thornburgh to exceed the red light, I will not crack the hammer on you once that red light illuminates.

You are now recognized.

TESTIMONY OF THOMAS J. DONOHUE

Mr. DONOHUE. Thank you, Mr. Chairman, Mr. Scott, members of the committee.

I am here today representing the Chamber and on behalf of a coalition to preserve the attorney-client privilege, which includes many of the major legal and business associations in our country, including the American Chemistry Council, the American Civil Liberties Union, the Association of Corporate Counsel, the Business Civil Liberties, Inc., the Business Roundtable, the Financial Services Roundtable, Frontiers of Freedom, the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, the National Defense Industrial Association, the Retail Industry Leaders Association, and the Washington Legal Foundation.

I should add that the coalition is working closely with the American Bar Association, which has separately submitted written testimony here today detailing its concerns about the erosion of the attorney-client privilege. ABA policy prevents the organization from being listed as a member of broader coalitions.

The privilege to consult with an attorney freely, candidly, and confidentially is a fundamental constitutional right that in our opinion is under attack. Recent policy

changes at the Department of Justice and, very importantly, at the SEC have permitted and encouraged the Government to demand or expect companies to waive their attorney-client privilege or work product protections during an investigation.

A company is required to waive its privilege in order to be seen as cooperating with Federal investigators. A company that refuses to waive its privilege risks being labeled as uncooperative, which all but guarantees that it will not get a chance to come to a settlement or receive, if it needs to, leniency in sentencing or fines.

But it goes far beyond that, Mr. Chairman. The uncooperative label can severely damage a company's brand, its shareholder value, their relationship with suppliers and customers, and their very ability to survive.

The enforcement agencies argue that waiver of attorney-client privilege is necessary for improving compliance and conducting effective and thorough investigation. The opposite, in my opinion, is true. An uncertain and unprotected attorney-client privilege actually diminishes compliance with the law.

If company employees responsible for compliance with complicated statutes and regulations know that their conversations with attorneys are not protected, they will simply choose not to seek appropriate legal guidance. The

result is that companies may fall out of compliance, often not intentionally, but because of a lack of communication and trust between a company's employees and its attorneys.

Similarly, during an investigation, if employees suspect that anything they say to their attorneys can be used against them, they won't say anything at all. That means that both the company and the Government will be unable to find out what went wrong, to punish wrongdoers, and to correct the company's compliance system.

And there is one other major consequence. Once the privilege is waived, third party private plaintiffs' lawyers can gain access to attorney-client conversations and use them to sue the company or other massive settlements. By the way, right now there are some arguments in the court about partial protection in waiving, and the question has been raised that perhaps the Government cannot even guarantee that.

How pervasive has this waiving of the attorney-client privilege become? Well, last November we presented findings to the U.S. Sentencing Commission showing that approximately a third of inside counsel respondents, and as many as 48 percent of outside counsel respondents, say they had personally experienced erosion of attorney-client privilege or work product protections.

After that presentation, the Sentencing Commission asked us for even more information about the frequency of waivers

and their impact. So our coalition commissioned a second, more detailed survey and got an even greater response rate from the members of our coalition partners. We publicly released the results of this second survey just this morning. They have been provided to the committee, along with more detailed coalition written statements on the subject.

Here are a couple of highlights, and I am going to skip them because General Thornburgh mentioned them, but 75 percent of both inside and outside counsel agreed with the statement that a culture of waiver has evolved to the point the Government agencies believe it is responsible and appropriate to expect a company under investigation to broadly waive attorney-client privilege or waiver protections. Of those who have been investigated, 55 percent of outside counsel say that that is the experience that they had.

Now, our coalition is aggressively seeking to reverse this erosion of confidence in the attorney-client provision and the conversations covered there. We are pleased that the U.S. Sentencing Committee has decided to revisit recently amended commentary to the guidelines that allow the waiver to be a cooperation factor in sentencing, and we have submitted more detailed materials to them.

We would encourage this committee to weigh in with its support of the attorney-client privilege to the Sentencing

Commission as it reconsiders its guidelines. It is important to note that the Department of Justice and other regulatory agencies have created this erosion of the privilege without seeking input, oversight, or approval from the Congress or the judiciary. And the plan, Mr. Chairman, that is on the table now, would allow all 92 jurisdictions of the Department of Justice across the country to have their own plan, their own determination, of what is covered and what is protected. That is going to be a circus.

We seek your input and strongly urge you to exercise your oversight of the Department of Justice and the SEC to ensure the protection of attorney-client privilege. Now, let me be very clear as I close: Our efforts are not about trying to protect corrupt companies or businesspeople. Nobody wants corporate wrongdoers caught and punished more than I do and the legitimate and honest businesspeople that I represent. Rather, this is about protecting a well-established and vital constitutional right.

Mr. Chairman, I thank you and the members of the committee, and I look forward to your questions.

[The statement of Mr. Donohue follows:]

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Mr. COBLE. Thank you, Mr. Donohue.

Mr. Sullivan.

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TESTIMONY OF WILLIAM M. SULLIVAN, JR.

Mr. SULLIVAN. Thank you. Good afternoon, Chairman Coble, Ranking Member Scott, and members of the subcommittee. Thank you for your kind invitation to address you today concerning the Department of Justice policies and practices with regard to seeking attorney-client privilege and work product protection waivers from corporations, and whether the waiver of such privilege and protection should be relevant to assessing the corporations' cooperation efforts within the meaning of the organizational guidelines.

I am currently a partner at the law firm of Winston & Strawn, where I specialize in white collar criminal defense and corporate internal investigations. For 10 years, from 1991 to 2001, I served as an assistant U.S. Attorney for the District of Columbia. In these capacities, I have been involved in virtually all aspects of white collar investigations and corporate defense.

I have overseen both criminal investigations as a prosecutor and internal corporate investigations as a defense attorney. And I have represented both corporations and individuals in internal investigations and before Federal law enforcement authorities and regulators as well as in class action, derivative, and ERISA litigation.

My perspective on corporate cooperation and the waiver of attorney-client and attorney work product privileges has therefore been forged not only by my experiences on both sides of the criminal justice system, but by my participation in the civil arena as well. This afternoon, I am eager to give you a view from the arena.

The real issue is not the waiver but what is being waived and how it was assembled. For business organizations today, the traditional protections afforded by the attorney-client privilege and the work product doctrine are under siege. The privilege reflects the public priority of facilitating the observance of law through candor with counsel.

Prosecutors and regulators now routinely demand that in return for the mere prospect of leniency, corporations engage in intensive internal investigations of alleged wrongdoing and submit detailed written reports documenting both the depth and breadth of their inquiry as well as the basis for their conclusions. Attorney impressions, opinions, and evaluations are necessarily included.

When pressed on this practice, many prosecutors and regulators will publicly insist that they are only seeking a roadmap--the identity of the individuals involved, the crucial acts, and the supporting documentation. However, this has not been my personal experience.

Just last week I was asked by a Government regulator in our very first meeting to broadly waive attorney-client private and work product protection and to provide copies of interview notes, even before I had completed my client's internal investigation myself, and accordingly, even before I had determined as corporate counsel that cooperation would be in my client's best interest.

Incredibly, I was further asked whether or not I was appearing as an advocate for my client the corporation or whether I was an independent third party. Presumably, the regulators had hoped that I would undertake their investigation for them, despite the fact that I would be paid by my client to do so.

Most importantly, however, such roadmap requests fail to relieve the valid concerns of corporations related to privilege and work product waivers. A less than carefully drawn roadmap risks a broad subject matter waiver of attorney-client privilege and attorney work product protection under a current authority applicable in just about every jurisdiction.

The waiver of attorney-client communications arriving in connection with a factual roadmap subsequently disclosed to law enforcement extends beyond the disclosure itself and encompasses all communications on that subject matter. The consequences of this result can be extreme, in that even a

rudimentary roadmap is the product of information obtained through thousands of hours of legal work spent conducting interviews, parsing statements from hundreds of pages of interview notes, and analyzing thousands and perhaps millions of pages of both privileged and nonprivileged corporate documents.

Furthermore, the waiver would be applicable not only to the law enforcement officials receiving the information, but would also embrace future third parties, including other Government agencies and opportunistic plaintiffs' counsel seeking fodder for class action and derivative strike suits.

In addressing the practice of conditioning leniency for disclosure of otherwise privileged reports, I believe that a balance must be struck between the legitimate interests of law enforcement in pursuing and punishing the legal conduct, the benefits to be retained by corporations which assist this process and determine to take remedial action, and the rights of individual employees.

It is imperative that we do not sacrifice accuracy and fundamental fairness for expedience and convenience now routinely requested by the Government. An equilibrium much achieved between the aforementioned competing concerns.

The issues being addressed today in this committee meeting are not simply part of an academic debate. Across the country, there are dozens of corporations scrutinized in

internal investigations at any one time, with real consequences for real people. These investigations directly impact the lives of thousands of workers and millions of shareholders.

In conditioning leniency upon the disclosure of otherwise privileged information, we need to accommodate the competing interests of effective law enforcement, the benefits down to deserving corporations, the corporation's own interests and its ability to observe law through consultation with counsel, and the fundamental rights of individual employees.

Reaching a consensus on the information sought by the Government, limiting that information to non-opinion factual work product or perhaps the adoption of a selective waiver for cooperating corporations, and lucid, comprehensive standards to guide internal investigations, are each important first steps.

Thank you, and I look forward to your questions.

[The statement of Mr. Sullivan follows:]

********** SUBCOMMITTEE INSERT **********

Mr. COBLE. Thank you, Mr. Sullivan.

Mr. McCallum, I think--by the way, we apply the 5-minute rule to ourselves as well, so we will try to move along here.

Mr. McCallum, I think Mr. Donohue may have touched on this. And where I am coming from is: Does the policy require uniform review? That is to say, a United States Attorney in the Middle District of North Carolina, would it be likely or unlikely that he or she would be operating under a policy that would be identical to the Eastern District of Virginia?

Your mike is not on, Mr. McCallum.

Mr. MCCALLUM. Mr. Chairman, in response to that question, the memorandum that I issued does allow for the different United States Attorneys to institute a review policy in accordance with the peculiar circumstance of their particular district.

For instance, the Southern District of New York may be very different than the District of Montana in terms of the number of sophisticated corporate cases that involve allegations of corporate fraud, and therefore the number of people that are in the Southern District of New York, the number of Assistant United States Attorneys that are available for the review process, may be very different than the number of attorneys that are in a different district.

So it is not identical, but it affords the type of

prosecutorial discretion in the United States Attorney to determine what it will be, and that is coordinated through the Executive Office of United States Attorneys in the Department of Justice as well.

Mr. COBLE. I thank you, sir. Now, you indicated, Mr. McCallum, that in some instances, the corporate defendant may well be the one to initiate the waiver. Do you have any figures as to, comparatively speaking, Government initiated or defendant initiated?

Mr. MCCALLUM. Mr. Chairman, we do not have statistical figures like that. And most of the surveys, including, we believe, the survey that we have not yet seen that the Chamber of Commerce just issued this morning, are based more on perception and anecdotal evidence than they are on very, very specific identification of particular cases.

We have been involved in a dialogue with various business representatives, including the task force of the American Bar Association that is dealing with this issue, with its chairman. And we invited him and Jamie Conrad, who is here today, to come out and talk with the United States Attorneys last year at their annual conference to make sure that the United States Attorneys were aware of exactly the concerns and the issues that the business community was seeing in this.

And we were told at that time that a very detailed study

of particular cases would be prepared and would be provided to us. And just last week, Mr. Ide, the ABA chairman, indicated to me that that was forthcoming. That will allow us to dig down into the specifics because each case is really unique, Mr. Chairman. And it is that sort of detailed analysis that will be necessary to determine or refute the ''routineness'' with which these waivers are requested. We do not believe that they are ''routinely'' requested.

Mr. COBLE. I thank you, Mr. McCallum.

Mr. Thornburgh, during your many years of public service, were you ever aware of any criminal case in which the Justice Department sought or required an attorney-client privilege waiver from a cooperating corporation, A; and if so, what was and is your position on that issue?

Mr. THORNBURGH. I am not aware of any such request, Mr. Chairman, although I can't absolutely verify that such a request was not made at any time during the 25 years that I have been affiliated one way or another with the Department of Justice. It is a development of the last decade or so.

I would just like to add a footnote to Mr. McCallum's response. It seems to me that the Department is giving up too much by permitting each United States Attorney to frame his own set of policies on this kind of question. Uniformity and internal Department of Justice review has been adopted in any number of areas that are sensitive, such as issuing a

subpoena to an attorney or to a reporter, or using undercover sting operations. Those are not within the discretion of the U.S. Attorney. And when we are dealing with such a sensitive and venerable privilege as the attorney-client privilege, it seems to me that ought to be the kind of rule that is applied.

Secondly, I think that there is a controversy, at least, with regard to statistics about whether or not frequent use is made of this waiver request. And the easiest way to do that is to promulgate a review process within the Department so that you have readily available at your fingertips the absolute number of times it has been carried out.

If, as the Department claims, these are limited and infrequent, it would not impose any undue burden. If, on the other hand, they are as the perceptions indicate from this report, it would provide a solid base for evaluating whether or not this process is going forward in the right manner.

Mr. COBLE. I thank you, Mr. Thornburgh. I see my time has expired. Gentlemen, we probably will have a second round of questioning because I have questions for Mr. Sullivan and Mr. Donohue. This is significant enough, I think, to do that.

The gentleman from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, we have a public policy on the

attorney-client privilege which we are trying to protect. There are other kind of public policies that can't be--where you can't use certain things as evidence when you are trying to investigate and fix a problem. You can't--the fact that you fixed a product subsequently can't be used to show negligence of the former product because that would obviously discourage fixing. Evidence that you tried to settle a case can't be used as an admission because that would discourage settlements.

Is there a public policy that we want to protect in trying to protect, to the extent possible, the attorney-client privilege, Mr. McCallum?

Mr. MCCALLUM. Ranking Member Scott, there is unquestionably recognized within the Department of Justice the societal benefits that attend to the attorney-client privilege and work product privilege and various other privileges. And it is certainly something that the United States Attorneys are--and the other Federal prosecutors are mindful of.

And I think that one of the things that you are alluding to is something that all three of my distinguished panelists have touched on, and that is the providing of information to the Government, whether to a regulator or to a prosecutor, and the consequences of that disclosure in the civil litigation area.

Now, that, I mentioned previously, is an area that the Federal Rules Advisory Committee on Evidence is looking at. It is also an area that there have been bills introduced and the Congress to address that issue. So I think that there is certainly recognition.

Mr. SCOTT. Well, I think Mr. Donohue kind of alluded to civil litigation because if somebody blurts something out in a criminal investigation totally unrelated to what may be said affecting civil litigation, you could open yourself up to all kinds of problems including massive punitive damages if all that information got out. Is that right?

Mr. MCCALLUM. There is a consequence of a waiver of attorney-client privilege, and one context being a waiver in other contexts. That is correct, Mr. Scott.

Mr. SCOTT. Okay. Well, have you ever asked for waivers in individual cases?

Mr. MCCALLUM. I am sure that, like former Attorney General Thornburgh, I can't tell you that that has never happened. I am--it has never happened in any case that I am involved in. And I think there is one issue that needs to be focused on here, is that there is an issue of attorney-client waivers, privilege waivers, by the corporation. That is, the lawyers who represent the corporation. In my opening statement, I made the point that they do not represent the management. They do not represent employees.

And I am sure that Mr. Sullivan, every time he does an internal investigation and interviews a witness, he explains to them exactly who he represents, i.e., that it is the corporation, and that that individual who is being interviewed is not his client and there is no attorney-client privilege between him and that individual.

Mr. SCOTT. Well, I mean, in an individual criminal case where an individual is the defendant, have you ever asked for a waiver of attorney-client privilege?

Mr. MCCALLUM. I never have, Mr. Scott. But my experience over my 35-year career has been predominately in the civil litigation area. So I would not be someone who would be able to respond to that effectively.

Mr. SCOTT. Have you ever had cases that the defendant, the corporate defendant, got leniency for cooperation when they had not waived attorney-client privilege?

Mr. MCCALLUM. I cannot personally testify to that. I can tell you that within the Department, I am informed by those that have extensive experience in the criminal area that that is indeed the case, that cooperation is but one factor in the Thompson Memorandum in determining whether to indict someone. And it is a factor, of course, in the Sentencing Commission current matters.

Mr. SCOTT. Can you get the cooperation benefit without waiving attorney-client privilege?

Mr. MCCALLUM. There are--there are any number of instances, I am informed, in which that is indeed the case, yes, and that the circumstances of a corporation providing information may not require the waiver of attorney-client privileged information of work product information.

Mr. SCOTT. Let me ask one further question. Mr. Sullivan, you represent corporations, many of whom have multi-jurisdictional activities. Would there be a problem in having 92 different processes in terms of what the attorney-client privilege may be?

Mr. SULLIVAN. Ranking Member Scott, yes. I think that would be a very difficult road to navigate. It is difficult enough working with prosecutors and regulators who are insistent that you do their work for them. And in fact, if I am in a situation where I am evaluating a cooperative mode for purposes of obtaining favorable treatment by the Government in exchange for a new compliance program, ferreting out wrongdoing--which would be my obligation in any event--to the extent that I would have to, in a multi-district context, deal with a variety of competing considerations along the same lines would make my job much more difficult and would also cause intractable problems on the part of the corporation in terms of negotiating a resolution.

Let me also add that I know the context here is

cooperation, but I don't think the presumption of innocence should be forgotten. And when I addressed the committee a few minutes ago and mentioned that at the very first meeting I was asked to waive the privilege, I also mentioned that I had not even conducted an internal investigation and therefore had not made up my mind as to whether I have defensible conduct or not. So I think that also illuminates the mindset that corporate counsel are dealing with today.

Mr. COBLE. I thank the gentleman.

We have been joined by the distinguished gentleman from Ohio, Mr. Chabot.

And in order of appearance, the Chair recognizes the distinguished gentleman from Florida, Mr. Feeney.

Mr. FEENEY. Thank you, Mr. Chairman. And I am grateful for the testimony from all our distinguished panel.

You know, I had an observation I thought perhaps you could talk a little bit about because I think you have gone into some details about the importance historically of the attorney-client privilege.

By the way, I would point out that most of us who, you know, practiced law at one point think of this more in the context of criminal--of violent crime as opposed to corporate crime, exactly for the reasons that former Attorney General Thornburgh laid out. This really hasn't been used until the last 8 or 10 years, this waiver requirement.

But the average violent criminal doesn't have deep pockets. And other than the fact that if he fails to comply and waive privilege, for example, there is very little incentive. He is not subject to fines because he has got the empty pocket defense. He is not worried about civil litigants. But for a lot of the reasons that Mr. Donohue laid out, the pressure on corporate clients and business clients is immense to find favor as they cooperate, and there is an enormous pressure on them.

I do understand the necessity at times to try in a corporate context, especially with respect to fraud, to find out what everybody knew, and that would include corporate counsel. What I am worried about, and I guess I want to put it in this respect--Mr. Sullivan might be the best person to answer this--we live in a very new climate on Wall Street. I mean, investors appropriately expect a lot more transparency. We had things like Enron and WorldCom.

But in some ways, we may have overreacted. Post-Sarbanes-Oxley, directors have some real problems. Number one, we don't have a standard set of accounting principles, so that a major international corporate firm may be responsible, and the directors individually liable, to know where every box of pencils or paper clips are. And we don't have standards to protect people based on de minimis standards.

When directors or executives with corporations go and they hire an independent auditor nowadays, they are not allowed to seek the guidance of their auditor. They can't get help from one of the top four accounting firms that they have to pay. That firm is not allowed to tell them how to comply with Sarbanes-Oxley.

Now we are in a position where if we are going to have what amounts to blanket waivers or, in some jurisdictions, anyway, what amounts to blanket waivers, where corporate executives and corporate directors, who are going to be held personally responsible even if they didn't necessarily know about mis-actions that somebody else in the corporation took over, can't be candid with their lawyer and cannot count on candid advice back.

That type of chilling effect makes it almost impossible for anybody with any sense to agree to be a member of the board of directors today, and I thought maybe Mr. Sullivan and Mr. Donohue could talk about this in the totality of the circumstances today in corporate law. I mean, this is just one more burden that makes it almost impossible to try to do your job in an honest way as a member of a board or an executive at a major corporation.

Mr. Sullivan, go ahead.

Mr. SULLIVAN. Thank you, Mr. Feeney. Well, in fact, you are absolutely correct. Corporations have noticed a

dearth of willing applicants in terms of individuals who are willing to serve on boards. What is attempted these days is to maintain a level of independence, both with outside counsel as well as special audit committees, special litigation committees, and as you mentioned, even accountants.

But it also goes right back to what Mr. McCallum said, and he is absolutely correct. I am well aware of the Upjohn warnings, and when I am pursuing an internal investigation, I am obligated and I do advise the individuals whom I am interviewing that I do not represent them.

But in fact, if we move forward and they are led to believe that not only do I not represent them but I am also going to turn over everything they say to the Government at a moment's notice, upon caprice or whim because I am interested in maintaining the best possible position of the corporation, we are in a situation where, as Mr. Donohue mentioned, I won't get any information at all.

The corporate entity is an artificial entity, true. It has legal responsibilities, true. But it also is run and managed by people. The acts of the employees are imputed to the corporation. So you must deal with the people because they are the ones who bind the corporation.

And for my--from my perspective as well as the perspective of independent directors or board members or

auditors or management, we need to be able to access facts. We need to be able to do it freely, without any concerns about where those facts may ultimately go. And we need to be able to manage the information we have so that we can evaluate properly how to respond to Government inquiries.

As I mentioned before, all too often the first mode that a corporation will pursue is cooperation. They will find or seek to find responsible employees and throw them under the bus. That is not necessarily the best policy. In a free-flowing exchange of information environment where the lawyer can carefully evaluate the information he has, he can make the best decision for that corporation in how to deal with regulators and ultimately save everybody a lot of money, shareholders and individual investors.

Mr. SCOTT. Mr. Donohue?

Mr. DONOHUE. I serve on three public company boards of directors. And I will say in response to your inquiry that, first of all, it is getting harder and harder to attract competent directors, not only because of the fear of liability, which is getting greater, but because of the extraordinary amount of time and process that has to be followed following the Sarbanes-Oxley rules and their implementation.

What directors most worry about, other than running the company, leading the company and having good management that

operates in an honorable way, are two things, and that is dealing with regulators of every type and shape and dealing with the Justice Department. And by the way, when you get people like Mr. McCallum here, if he were to come out and deal with the issues that individual companies have to deal with, we would do fine.

But they have the greatest collection of young, soon-to-make-it, want-to-be-famous kinds of lawyers all around the country who, by the way, don't have the same amount of judgment and experience, and many have little or no idea what corporations do and how they are supposed to work.

So when 92 different groups--by the way, and when there is an approval, it will be approval by the U.S. Attorney for one of his underlings--they are going to have 92 different approaches to do this, it is going to get a little more complicated for most of the companies on whose boards I serve.

And I am not--we are not talking about huge criminal issues; there are always questions with the SEC and others. And it gets very, very complicated when everybody has got a different rule. Everybody has got a different way of approaching it. And standing behind them like vultures on a fence are the class action and the mass action lawyers that are sucking the vitality out of American industry. And they are doing it, maybe unintended, but they are doing it with

the help of our Government, who is putting us in that kind of a position that it shouldn't happen.

Mr. COBLE. The gentleman's time has expired.

The distinguished gentleman from Massachusetts, Mr. Delahunt, recognized for 5 minutes.

Mr. DELAHUNT. I would think, Mr. Sullivan, that you must find yourself in a position where not only do you have to inform the employee that you are not his lawyer, but there is going to be a likelihood that what he tells you will become--you will at some point in time be compelled to reveal to the Government exactly what he says.

Have you run into that situation?

Mr. SULLIVAN. Yes, Mr. Delahunt. As part of the Upjohn warnings, I am required to advise the employee that I represent the company, that the privilege resides with the company, and that the privilege can be waived by the company at any time--

Mr. DELAHUNT. And that--

Mr. SULLIVAN. --and in any manner.

Mr. DELAHUNT. --in a significant number of cases, the privilege is waived.

You know what I can't understand, Mr. McCallum, is what happened in the past 10 years? You know, for 20 years of my own professional life, I was a--I was a prosecutor. Did a number of sophisticated white collar crime investigations.

And, I mean, there are grand juries. There is the use of informants. You know, we knew how to squeeze people without sacrificing or eroding the attorney-client privilege.

You know, I just have this very uneasy feeling that it is the easy way to do it, you know. There is a certain level of, you know, why should I--why should I have to really exercise myself to secure the truth?

You know, from what I understand, there has been no review in terms of the frequency of the waiver. There is no data. There is nothing empirical. But, you know, Mr. Thornburgh and Mr. Sullivan, you know, I am sure they have had extensive practices. At least anecdotally, you know, they are here. They are concerned.

Is there something that I am missing that the traditional law enforcement investigatory techniques were insufficient?

Mr. MCCALLUM. Mr. Delahunt--

Mr. DELAHUNT. I got to tell you something. I am a little annoyed with the Sentencing Commission, too, making this a factor. You know, where did that come from? Go ahead.

Mr. MCCALLUM. I believe it came from the defense bar, who wanted to pin down for certain that if there was a waiver--to answer the second question first--

Mr. DELAHUNT. Sure. Thanks.

Mr. MCCALLUM. --if there was a waiver, that it would necessarily be deemed cooperation for purposes of a downward departure. But let me--

Mr. DELAHUNT. Well, I would just dwell on that for a minute because we will get a second round.

Mr. MCCALLUM. Okay.

Mr. DELAHUNT. I would want to--I would want to hear that coming from, you know, some criminal defense lawyer, saying that that is the import of it. Because that tells me that if they are looking for that kind of certainty, that this is being used frequently. This is--this is becoming the rule rather than the exception. But go ahead and take a shot at my--

Mr. MCCALLUM. Let me respond to the first question, Mr. Delahunt, and that is what has happened recently over the years? I think we only have to look back to the 1997 through 2006 era to see a spate of very complicated, very complex, very arcane, very difficult to determine corporate frauds of immense proportions in terms of the dollar amounts involved which also--

Mr. DELAHUNT. With all due respect, Mr. McCallum, I got to tell you something. That just doesn't--that doesn't hold water. You know, I am sure immense complex fraud has been being perpetrated, you know, since the days of the robber barons. If we don't have the resources in the Department of

Justice to conduct the necessary investigations to deal with it, then let's assess it on a resource basis. Let's not do it the easy way that erodes, I believe, a fundamental principal of American jurisprudence.

I mean, if that is what you are telling me, I won't accept it because of my own experience. You know, fraud is nothing new. Uncovering it maybe is, but, I mean, there is--you have--you know, you can use immunity. There are informants. There are grand juries. There are all kinds of ways to do it.

And I am sure Mr. Thornburgh, being a former Attorney General and a former, I think, Attorney General in a State, I am sure he supervised or conducted a series of heavy investigations that are as complex as anything that, you know, occurred from 1997 to date, and did it in a way that didn't erode significant legal principles that are embedded in our jurisprudence.

I will be back, and you can think about the question.

Mr. MCCALLUM. Thank you.

Mr. COBLE. The gentleman's time has expired.

The distinguished gentleman from California.

Mr. LUNGREN. Mr. Chairman, it is always fun being with my friend from Massachusetts. I was trying to figure out what he said when he said ''partay,'' and then I thought he was talking about getting a drink and going out someplace.

[Laughter.]

Mr. DELAHUNT. I can't understand what you are talking about.

Mr. LUNGREN. But I understand. You weren't talking about a party, you were talking about a part A. I got that. Okay.

And Mr. Sullivan, I have been informed by counsel here that the two of you used to work together, so that you used to be one of those fellows that resembled the remarks of Mr. Donohue.

[Laughter.]

Mr. LUNGREN. But now you have made it.

Mr. SULLIVAN. Mr. Volkoff was a fine mentor.

Mr. LUNGREN. And I wondered if you had to deal with 92 different jurisdictions. It would certainly improve your billables.

[Laughter.]

Mr. SULLIVAN. I try to get involved in--

Mr. LUNGREN. But those Italian suits could be kept up, as it was.

Just to put it on the record, I have submitted a letter last August to the Sentencing Commission regarding my concerns about the Sentencing Commission's commentary with respect to the rule. It looks to me like that amendment authorizes and encourages the Government to require entities

to waive the attorney-client privilege and work product protections as a condition of showing cooperation. And that is the huge concern I have here.

Let me ask you this, Mr. McCallum: Should we in the Congress believe that any time the administration refuses to waive executive privilege, that the administration is not cooperating with the Congress?

Mr. MCCALLUM. Absolutely not, Mr. Lungren. I would--I would hesitate to make that argument. There are benefits, and I think that in my opening statement I described that there are definitely benefits, societal benefits, from attorney-client privilege.

Mr. LUNGREN. But, see, that--I understand. See, that is my problem. If we in the Congress were to every time the President says that there is a reason to protect executive privilege, not only for his administration but for future administrations, that every time he did that he was violating the sense of cooperation that should prevail between two equal branches of government, I think we would be wrong.

And I see the Justice Department taking a position that if a corporate defendant or potential defendant refuses to waive that privilege, that is a priori evidence of the fact that they are not cooperating. And that is the problem I really have here.

See, the President makes the arguments--and I think that

you should--and the Department makes the arguments that there is a reason for those privileges that at the executive branch has. And the reason is part institutional, but part to have that ability to speak within yourselves, that is, that institution of the administration, which is more than the President but is personified by the President. He can talk to his advisors without believing that we are going to hear everything he says.

And here you have a situation where you want a corporation to follow the law, I presume. And you would want the corporation to listen to good counsel, I would think. And here we have got a rule that seems to me to work in the opposite direction.

And I think that that weighs heavy on me and other members here on this panel. And so I would ask, don't you see the creeping intrusion here? I mean, first you have the first memorandum. Now we have the second memorandum, which is a little tighter and a little tougher. And then, following that, you have the Sentencing Commission saying, well, that is a bad idea. As a matter of fact, we are going to have that as evidence of cooperation, and the lack of it as evidence of lack of cooperation.

What is a corporate counsel to do under those circumstances?

Mr. MCCALLUM. Well, there are a series of questions

there, Mr. Lungren. Number one, with respect to the Sentencing Commission, the Department's position has been we would be comfortable with the Sentencing Commission going back to where it was before that amendment.

Mr. LUNGREN. Well, is that your position? Is that the administration's position?

Mr. MCCALLUM. I believe that that is the Department of Justice's review--

Mr. LUNGREN. That is what I mean.

Mr. MCCALLUM. --underway at this particular time. I do not know whether that has been absolutely finalized. But my review of that is that there would not necessarily be an objection to going back to the way it was before, where it was not addressed.

Number two, let me talk about the issue of cooperation. Attorney-client privilege waivers are only one factor with respect to cooperation. There are many other ways for a corporation under the Thompson Memorandum to indicate and to provide a degree of cooperation that will impact both the decisions on the charging of the corporation and on the determination of recommendations to be made to any sentencing commission about--or to any sentencing body about a downward deviation. So I don't--I don't think that it is accurate to assert that privilege waivers are the sine qua non or the absolute requirement in order to achieve a status of

cooperation with prosecutors.

With respect to the diversity of jurisdictions, the 92 different districts, as I indicated previously, this is not a situation in which one size fits all. And what the McCallum Memorandum really did was to recognize a best practices that was, in my view, attendant to United States Attorneys across the United States in which privilege waiver requests, formal ones from the Government, as opposed to privilege waiver offers voluntarily from corporations, would go through some sort of supervisory review that would preserve for the peculiar circumstances of that particular district and the United States Attorney there a degree of flexibility.

But all of that would be done in coordination through the Executive Office of United States Attorneys. So I don't think it is an accurate picture to paint, 92 different definitions of what is attorney-client privileged and what is not attorney-client privileged. It is a second set of eyes to reassure that there is a deliberate and considered process before attorney-client privilege waivers are requested by the Department of Justice.

Mr. LUNGREN. Thank you.

Mr. COBLE. The gentleman's time is expired.

The distinguished gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman.

Mr. Donohue, if I could begin with you. Can you give

the subcommittee any examples from your members of instances where a request for a Department of Justice--for an attorney-client waiver resulted in unnecessary consequences for the corporation, perhaps a third party suit, for example, and arguably the information could have been gathered without a waiver?

Mr. DONOHUE. Well, sir, you have just put your finger on why this is a very difficult matter to challenge, either here in the Congress or in the courts, because most companies that have been painted into this box are not going to come forward and give you an example. I know many examples. I would suggest it is probably in our mutual best interests not to lay out the names of a bunch of companies.

I could tell you a couple of interesting points. In one matter that I am aware of, the prosecutor in a jurisdiction gave a public speech and said, in our jurisdiction, anybody failing to waive the privilege will be considered guilty. I passed that material on to the Justice Department; I don't know how it was used.

But if you were to go--and by the way, it is very, very important to understand that the SEC and the Justice Department have hundreds and thousands of investigations going on. And the great amount of these have nothing to do with fraud. They have arguments about proper accounting and all kinds of other issues.

Where there is fraud, there should be a vigorous investigation. But, you know, I was trying to think of a good example that I might use. You know, the Inquisition supposedly had the blessing of the Church, but their means weren't very appropriate. And when Mr. McCallum began today, he laid out a rationale of why they should be able to do these things because of the assignment they were given to respond to Sarbanes-Oxley.

My understanding is that the privilege is a constitutional protection, and that the end does not justify the means, and that the serious nature of this--and I think the point made about resources did not--should not put the companies in the position of conducting investigations, which I am aware of many, to supplement the work and actually do to the work of the prosecutors.

And I ended my statement by saying if people maliciously, directly, and intentionally go out and violate the law and they are in the American business community, lock them up. But you try and go out, as Mr. Sullivan indicated, and deal with these prosecutors--and you have got two sets of them; you got the SEC and you got the Justice Department, and they are playing off each other, and they are sitting in the same rooms, you know, when you have a civil issue and you have a criminal issue. And I would just say, you know, if you and I want to walk down a hall one day, I will give you

four or five examples. But with the Chairman's permission and protection, I am not going to do that here.

[Laughter.]

Mr. CHABOT. Thank you very much.

Mr. Sullivan, if I could ask you the next question. What alternative techniques are available to prosecutors to obtain the needed information from a corporation without requiring a waiver of the attorney-client privilege?

Mr. SULLIVAN. Mr. Delahunt alluded to many, drawing upon his hears as a prosecutor. There are all types of investigative techniques. There is cooperation undertaken by individuals within the corporation. There is the grand jury process, with subpoenas. There are wires.

What also is available, and which I suggested, for purposes of a corporation who is--which is interested in cooperating is the factual recitation, which is actually quite common: a factual review of what the outside counsel's investigation has yielded, with a view toward working in concert with the Government, ferreting out the criminal activity as it is perhaps determined to be a rogue element or an independent group working without knowledge of management. We see that in export control cases, for example, where shipments are made abroad by individuals who have an incentive for sales commissions without the knowledge of management or at least without management understanding that

ineffective internal controls were in place.

All of this suggests that the corporate entity itself and outside counsel, certainly responsible management, as Mr. Donohue has mentioned, has an interest in abiding by the law. And to the extent that it becomes aware of problems with the law, either through its own inquiry or through an external source, a subpoena or whatnot, outside counsel working with in-house counsel wants to ferret that out and find it out.

And we will assist the Government to the extent that it is in our best interests to provide them with the roadmap, with the factual outline, who you should talk to, what this document means. But we shouldn't have to and we don't want to provide them with our mental impressions, our specific interview notes, our opinion work product, and our sensitive discussions with employees because we want to preserve the ability to talk to them again about another problem so that we can continue to observe the law.

And the factual recitation is not something that is ultimately going to be a problem. Factual recitations are found in indictments every day in every public context. If you want to learn what happened in a particular case, what went wrong, read the Government's indictment. And we will help you with that factual outline to preserve our ability to interact with you and to get credit for cooperation. But you should be encouraged, Mr. Prosecutor, and you should insist

on doing your own legal analysis.

Mr. CHABOT. Thank you.

Mr. COBLE. The gentleman's time is expired. I thank the gentleman.

Gentlemen, as I said earlier, I think this issue warrants a second round, so we will commence that now.

Mr. Donohue, I may be repetitive, but I want to be sure this is in the record. In your testimony, you mentioned that erosion of the attorney-client privilege will frustrate corporate efforts to comply with regulations and statutes. Elaborate a little bit more in detail about that.

Mr. DONOHUE. Mr. Chairman, what happens in a company is when issues of significance--it happens with me every day--come up that we are dealing with some Federal regulation, some political regulation, whatever it is, the first thing we do is call the general counsel. When we are sued, as people are on a regular basis, the first thing we do is call the general counsel. And these are all civil matters.

But I want to have a feeling that when I sit down and talk to Steve Bokat, who is the general counsel of the United States Chamber of Commerce, that what I am talking about is going to stay there. And if I had a feeling that in matters where there may be differences with the Government, there may be differences with regulars, if I talk to him, if anybody

wanted to bring an action against us, he is going to be up sitting--talking about what we discussed, I am not too sure I am going to talk to him. Nor am I going to go and get my regulatory counsel, nor am I going to go down and get my outside counsel.

At least--you know, the term ''counsel'' is used up here a great deal. And if you look to your right, you have your counsel, and you sure want to make sure that what you are talking to him about is not blabbed all over this place.

Mr. COBLE. Yes. Well, that is what I thought you--

Mr. DONOHUE. And I think we have a constitutional right to do that.

Mr. COBLE. Thank you, Mr. Donohue.

Mr. Sullivan, in your testimony, you noted that you represented a client before a regulator who requested a waiver prior to your client's declining to cooperate or deciding to cooperate.

What impact would such a waiver have on your ability to represent a client corporation, given--under those facts?

Mr. SULLIVAN. Thank you, Mr. Chairman. Of course, I declined that request immediately. And in fact, as Mr. Donohue so perceptively referenced only upon hearing my anecdote, there were more than one law enforcement agency representative in there. There was the tag team, as he referenced a few moments ago.

As I said before, this was a very early meeting, a meet and greet, if you will, where I was attempting to outline to them what my preliminary view of the evidence I had gathered after only a couple weeks would suggest as a function of how to address their concerns.

I had not made up my mind as to what I would do in terms of seeking cooperation or defending. As I said before, we should never forget about the presumption of innocence as a corporate representative, as a corporate lawyer, and we should always ferret out the facts and then have a good understanding of the law on those facts to understand whether or not there was a crime committed and whether or not there was a credible defense.

But to go directly to answer your question, if I had undertaken to waive the privilege, how would I walk into that company's office the following day? We had not determined that a crime had been committed or that there were regulatory problems. I needed to find out what went on, and in the best way possible, so that I could represent that client in an informed way.

Who would speak to me, Mr. Chairman? What type of evidence would I be able to gain? I would be nothing more than an arm of the Government. I would in fact have been deputized. My role would be completely eliminated. It makes no sense, particularly when, if I found there was wrongdoing

and I needed to work with the Government, I would be most pleased to do so by rendering factual, non-opinion work product.

Mr. COBLE. I thank the gentleman.

The gentleman from Virginia. The distinguished gentleman from Virginia.

[Laughter.]

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Sullivan, why would a corporation do an in-depth investigation of suspected employee misconduct if the report of that investigation has to be turned over to the prosecutors?

Mr. SULLIVAN. Well, frequently reports are turned over to prosecutors. In fact, we see public reports very frequently. We just saw a very public Fannie Mae report. Shell has got a report. Baker Botts has got Freddie Mac's report on its website.

The difference is, again, reports outlining factual undertakings and understandings as opposed to attorney work product and attorney-client communications. And--

Mr. SCOTT. Well, let me ask it another way. If you are writing such a report, would you be writing it to be read by the president of the corporation or by the prosecutor? I mean, you know, you would say things differently depending on who the audience is.

Mr. SULLIVAN. Sure. And it depends who I represent and what my charge might be. The individuals who, for example, are writing the Fannie Mae report may have been reporting to an independent board, an independent accounting board or an independent board of directors, coming in after the fact to outline what facts happened. I think they would be very cautious in outlining any opinion work product in that report.

And to be fair to the Justice Department, I have not seen requests for waiver of attorney-client communications. It is all work product. And I am not saying that in any way to suggest that it is any less nefarious. It is the opinion attorney work product, which is perhaps the most dangerous.

But to the extent that I would undertake to write a report, a report for the general counsel or for the board of directors, I would insist that it be a privileged document, that it would include my mental impressions and opinions, thereby covering it as work product, perhaps made in anticipation of litigation as well. It would certainly be an attorney-client communication because I would be proffering it to the general counsel. But I would never want that to go elsewhere. A parsed, very narrowly drawn factual recitation I might be persuaded to part company with.

One thing I would like to also mention, Ranking Member Scott. You earlier in the hearing talked about public

policies regarding inadmissible information and material. I think that was a very important point. I would like to bring out that I have represented Federal prosecutors in internal DOJ investigations, OPR investigations, Office of Professional Responsibility.

There is no compelled waiver of the Fifth Amendment. There is no compelled self-incrimination under pain of losing your job in the Justice Department. There is a Supreme Court case on that, Garrity. Nevertheless, I am literally asked by Justice Department officials to bring my employees in and to tell them they either tell me everything or they walk.

And I have no problem doing that because there is no specific type of due process in a corporation. But the next step is, and by the way, once you get something from that employee and if it is an incriminatory Fifth Amendment waiver, I did it, I want it, Mr. Sullivan. And that is where I draw the line.

They don't extract from their own employees. Why should they ask that kind of duress of mine, or of my clients?

Mr. SCOTT. Thank you. Exactly who can waive the privilege?

Mr. SULLIVAN. The corporation, to the extent that the corporation has the privilege when we are dealing with corporations and employees.

Mr. SCOTT. Who? Who? The CEO?

Mr. SULLIVAN. We would have to get that consent of representative management, whoever is running the program, the board, in consultation with counsel.

Mr. SCOTT. Can the CEO waive the privilege?

Mr. SULLIVAN. Not as an individual. He has got to only do it on behalf of the corporation as a function of his role as a corporate representative.

Mr. SCOTT. Is that right, Mr. Donohue?

Mr. DONOHUE. I believe procedurally the CEO could move, with probably advice of his lawyer, to waive the privilege. But in these kinds of instances, this would be so sensitive that it would already be up to the board, and the board would be informed of that change in circumstance.

Mr. SULLIVAN. and that is what I meant by--

Mr. DONOHUE. That probably wouldn't have been done four or five years ago, but it would sure be done today.

Mr. SCOTT. Are you aware of--the Department indicated that they don't--you can get full cooperation without a waiver. Are you aware of cases where full cooperation credit on sentencing was given without a waiver of attorney-client privilege?

Mr. DONOHUE. Mr. Scott, I am sure it has. I cannot give you a definitive case. The more difficult the case, the more visible the Justice Department and the SEC has been in announcing the case and how they are going to be successful

and all these terrible things that have happened before they have had their full investigation, the more aggressive the SEC and Justice Department lawyers are going to be to try and make sure that they are successful.

And when they are having problems in finding what they thought they were going to find, then they want the company to investigate it for them, and they want people to break the privilege. We are not trying to protect criminals. We are trying to protect a constitutional protection that is given to individuals and corporate individuals, and we believe it is being eroded.

Mr. SCOTT. Mr. Chairman, could I ask one other question?

In terms of corporate organization, which attorney--do all attorneys in the corporation have the privilege, or is it just corporate counsel we are talking about? And let me follow up on that by saying, I mean, there is some--if you are trying to discuss certain activities, trying to come up with a process that may be kind of borderline legal, would you help yourself by having the person in that position you are talking to be an attorney where you wouldn't get that privilege if it was not an attorney? And do you find people hiring lawyers in kind of non-lawyer positions to try to get a privilege?

Mr. DONOHUE. Mr. Scott, I am going to respond and then

ask Mr. Sullivan if he would make sure I am correct. But I am not sending him a fee.

[Laughter.]

Mr. DONOHUE. You know, generally, when one is dealing with broad corporate matters, the general counsel of the corporation, who is an officer of the court by his own professional standing, would be the person that would have this role with the CEO or other executives.

There are, however, issues, for example, on SEC questions or environmental questions or other matters where there are senior lawyers within the institution, probably but not necessarily working for the general counsel, who on those matters would be seen as the more senior person with whom discussions and therefore protected discussions could have been held.

Mr. Sullivan, you have had a minute to think about that.

Mr. SULLIVAN. You are absolutely right. My experience has been working with the general counsel and other lawyers in the company who hold particular expertise in various areas as questions may arise. But no privilege determinations are made without the assent and consent of the board or a special committee who is operating in a joint way--a special committee on accounting, a special litigation committee--so that there is usually a board approval at the highest levels for such--

Mr. SCOTT. Board approval to determine who has a privilege and who doesn't?

Mr. SULLIVAN. Well, board approval relating to waiver of the privilege.

Mr. SCOTT. Well, I mean, if you have in a certain department--for example, sometimes a person may be hired as a lawyer; sometimes they may have expertise and are not a lawyer. Would the lawyer have--would there be a privilege when the person happens to be a lawyer and a privilege when the person does not happen to be a lawyer, and would there be an advantage in hiring somebody for that position who is a lawyer?

Mr. SULLIVAN. The privilege is held by the corporation. And to the extent that, for example, outside counsel is acting at the behest of the corporation for purposes of pursing an internal investigation, individual employees who are interviewed by that counsel does not hold a privilege relationship with that investigating counsel. The privilege is held by the corporate entity, and it can be waived only through the exercise of a determination by management in consultation with the board.

Mr. DONOHUE. But Mr. Scott--

Mr. SCOTT. That is if you have a lawyer. If you have a non-lawyer in that position, he wouldn't have a privilege. Is that right?

Mr. DONOHUE. Yes. But even the lawyer--for example, as you can imagine in this town, the Chamber is full of lawyers. So if we looked at it as if it were a public company and I walked in the door and talked to any of the lot of lawyers, there is no implied privilege there.

The privilege is when you seek legal guidance from those people who are in a corporate position to give it and protect it. And so walking down to the cafeteria with any number of the lawyers that work for us in some other--and I think Mr. Sullivan--again, I am not paying him a fee--I think he would suggest that there would be no implied privilege there.

Mr. SULLIVAN. I would agree.

Mr. COBLE. The gentleman's time is expired.

The distinguished gentleman from Florida.

Mr. FEENEY. Thank you.

General Thornburgh, you said you don't recall using this required waiver in prosecutions during your tenure as AG. You can think of, you know, briefly a hypothetical where it would be appropriate in order for a corporation to have considered to have cooperated where the attorney-client privilege would be waived, can you not?

Mr. THORNBURGH. I think there are certainly going to be situations where the corporation itself may take the initiative to waive the privilege in order to make available to the Government--

Mr. FEENEY. But off the top of your head, you can't think of where it would be appropriate for the Justice Department to waive--to require a waiver in order for the corporation to have considered cooperating?

Mr. THORNBURGH. I can't, but I wouldn't want to rule it out. I mean, there might be--

Mr. FEENEY. Okay. I think that is very telling.

And with that, you know, Mr. McCallum, I have to tell you, I am, you know, typically a huge supporter of giving the Justice Department the tools that it needs because these are very dangerous times, and we want to clean up Wall Street, Enron, and WorldCom. We're a disaster for investors.

But I would ask you: Have there been any successful prosecutions that you know of of major Wall Street fraud that would not have been successful in the absence of a required waiver?

Mr. MCCALLUM. I can't speak to that because I was not personally involved to a degree to be able to assess the strength or weaknesses of any of those cases.

I would, in response to the previous question, indicate to you, Mr. Feeney, that with respect to circumstances in which it would be clear that a waiver of attorney-client privilege might be necessary would be when the investigation implicates or creates suspicion regarding the general counsel's activity and whether that person is complicit

within the fraud. That would be one, you know, prime example that is obvious.

But I can't talk to you with regard to the second question. I can't address the issue of would the prosecution of X have succeeded without a--

Mr. FEENEY. If you would be willing to give us a list, I think I would like to know that, Mr. Chairman, with unanimous consent of the committee, if you would be willing to go back and get us that information.

General Thornburgh?

Mr. THORNBURGH. Yeah. I want to amplify a bit my response. Under the crime-fraud exception, there is no privilege. So it's not a waiver of a privilege; it is that the privilege doesn't arise in the first place.

I want to say one thing, if I might. Having been one of those young, zealous prosecutors that Tom Donohue so eloquently described earlier on, I want to come to their defense. We want our prosecutors to use every single tool that is legally available to them. On the other hand, I don't want to castigate those prosecutors for the faults that we are speaking about today.

This, unfortunately, is a matter of Department policy. And they are empowered to pursue these waivers by the policy of the Department of Justice. And it is that level upon which this requires some redress.

Mr. FEENEY. I thank you, General Thornburgh. And on that one, I wanted to go back to Mr. McCallum.

Mr. McCallum, as I said, I tend to be a huge supporter of the tools the Justice Department needs. But I am not persuaded by the position of the Justice Department in this case--in this case yet. I mean, you start out your remarks by talking about the number of prosecutions.

My goal would be investor confidence and investor security. Prosecuting successfully lots of directors, CFOs, CEOs, and COOs is not necessarily the type of successful, clean Wall Street that I want to see.

And towards that end, you know, Mr. Donohue suggested that a lot of directors nowadays and top level management are spending a good portion, if not the majority of their time, not only building a better, cheaper, quality mousetrap, but on compliance with regulatory burdens and legal burdens. It doesn't seem like that helps investors, and it doesn't seem like that helps a solid corporate governance strategy.

You know, one of the concerns that I have is that if I am a director--let's assume hypothetically I am a director trying to do the right thing, which is to make profits for the shareholders and succeed in business. And let's assume for purposes of my hypothetical that even though I am a Congressman, I am an ethical guy. And let's assume, since it is my hypothetical, that I am trying to do the right thing.

If I have an accounting question, I want to go to my independent auditor. I am not allowed to do that under Sarbanes-Oxley. If there is a close call on a legal or ethical issue, I want to go to the corporation's general counsel. I am terrified to do that for the same reason that if I were a Catholic and there was no protection for things I said to my priest, I would be afraid to confess some of my sins and I would not be able to get the absolution that I were seeking.

So can you see that some of the things that we want to accomplish with solid corporate governance, with people focused on doing the right thing but making a profit for their shareholders, providing a better widget for the marketplace, can you see how some of these concerns--I am not worried about the Enron fraud case. I am worried about the guy trying to do the right thing and how he is afraid to talk to, in the one case, his accountants, and in this case, his lawyers.

Mr. MCCALLUM. Mr. Feeney, we certainly hear the arguments that are made by the business community on that side relating to the chilling effect. I would submit to you that our view of the compliance environment is indeed that corporations are spending more time on compliance. There is more regulatory supervision and oversight that has been imposed as a result of the corporate frauds. And I think

that corporate governance is better off for it.

Rather than being deterred from seeking counsel from the general counsel, we believe that management is--in fact has been encouraged to seek advice and counsel, and there are any number of institutional investors who assess the legal risks and who try to determine whether there are compliance programs in place that are vigorously followed and that are effective. That has become part of the investment decision, that institutional investors make these days because of the frauds that--corporate frauds that have been experienced in the financial community over the--over the past 6, 7, 8 years.

Mr. FEENEY. Well, just one brief follow-up. If that is part of the investor decision-making process, does that account for the enormous flight into international investments and the fact that since Sarbanes-Oxley, for example, at that time 90 percent of foreign firms that went public raised 90 percent of their capital in the U.S. Today it's the reverse. Foreign corporations, not just because of Sarbanes-Oxley but because of the legal burden, are fleeing, and capital markets are moving overseas where there is no requirement for some of these things and these burdens.

Mr. MCCALLUM. Well, I think that doesn't speak to the issue of the improvements in corporate governance, corporate standards, and corporate citizenship within the United

States. And there has been, I would submit, a restoration of confidence in the American corporate culture and in the American financial markets as a result of many of the regulatory oversight matters that have been instituted by the Congress and enforced by the Department of Justice.

Mr. COBLE. The gentleman's time is expired.

The distinguished gentleman from Massachusetts.

Mr. DELAHUNT. Mr. McCallum, let me give you a chance to respond to part A. You know, what happened in the past decade since I left, you know, my previous career as a prosecutor? You know, what information do you receive now from waiver of the attorney-client privilege that absolutely cannot be developed from other mechanisms, other tools that have existed, you know, for the past 30, 40 years?

Mr. MCCALLUM. Well, Mr. Delahunt, there are three standards that are articulated in the Thompson Memorandum.

Mr. DELAHUNT. I am not interested in the standards. What I am interested in, you know, is in the course of an investigation, there are--there is a litany of investigative methods, mechanisms, and tools--we could repeat them--that are insufficient that have increased the reliance on the waiver.

Mr. MCCALLUM. All right. There are issues regarding the timeliness of the information and whether or not a particular criminal activity and the consequences of it can

be addressed regardless of the investment of significant resources in an adequately--in a timely manner to respond to both the public need, the financial market needs.

Number two, the completeness of the information. I would submit to you that even in the investigations that you diligently pursued, you were not always confident that despite all of the efforts that you had used and all of the tools that you had used, that the information that you found was, in fact, complete. the whole story, all the facts, with all of the documents. And then--

Mr. DELAHUNT. I--go ahead. I am.

Mr. MCCALLUM. Excuse me. And then thirdly is the accuracy of that information. That is, there are subjective judgments that are necessarily made regarding the credibility of witnesses, the credibility of documentation, and all of that is--

Mr. DELAHUNT. Right. But documentation and witness credibility, they can all be tested via grand jury testimony. I mean, everything that you say I can envision occurring without the need to secure the waiver.

What I am concerned about, even--I think that, you know, there has been a restoration of confidence. I think that that in fact has happened as a result of legislative policy. I think it has happened probably because of aggressive enforcement. And I think that is good for our financial

markets, and over time, I think it would attract capital as opposed to encourage its flight.

But I am concerned about the attorney-client privilege because I can see slippage in that privilege. You know, today it's, you know, the corporation. You know, tomorrow it's that priest, you know, that I might have gone to confession to. All right? I mean, it makes me very, very uncomfortable, and I really do think that this is a shortcut method to secure evidence that can be developed by alternative means.

You know, I thought Mr. Thornburgh made a good suggestion in terms of the review that alluded to. I would like to see you, the Department on its own, conduct a review. Get us some information. You know, get us some data. I mean, who is doing this and who is initiating it? Because it is a concern.

And, you know, I think that you can probably sense by the questions that have been posed, as well as observations by individual members, that there is a real concern here. And you don't want someone like Lungren from California, you know a far right conservative Republican, and Delahunt, this Northeast liberal, filing legislation on this because I think that is the order of magnitude that is being expressed here.

So respectfully, that is a message that I think you can bring back to Justice, is that there is concern about the

Thompson/McCallum Memorandum. Okay?

Mr. MCCALLUM. I will certainly take that message back, Mr. Delahunt.

Mr. COBLE. And for the record, let me say that far left-winger and that far right-winger are both pretty good guys.

Gentlemen, before I forget it, I want to introduce into the record, without objection, coalition letters to preserve the attorney-client privilege.

[The coalition letters follow:]

********** INSERT **********

Mr. COBLE. Gentleman, we thank you all very much for being here. In order to ensure a full record and adequate consideration of this issue, the record will be left open for additional submissions for 7 days. Any written questions that a member of the subcommittee wants to submit should also be submitted within the same 7-day period.

This concludes the oversight hearing on white collar enforcement, part 1, attorney-client privilege and corporate waivers. Thank you again, gentlemen. And the subcommittee stands adjourned.

[Whereupon, at 1:50 p.m., the subcommittee was adjourned.]

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SPEAKER LISTING
****

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CONTENTS

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INDEX OF INSERTS

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VISIT OF THE ATTORNEY GENERAL

TO

NEW YORK, NEW YORK

THURSDAY, DECEMBER 1, 2005

EVENT SUMMARY OF THE ATTORNEY GENERAL

FOR

THURSDAY, DECEMBER 1, 2005

5:30-6:00 pm **EVENT: Council on Foreign Relations - Reception**

Location:
Greenberg Room
Harold Pratt House
New York, New York

6:00-7:00 pm **EVENT: Council on Foreign Relations – Remarks and Q&A**

Location:
Peter G. Peterson Hall
Harold Pratt House
New York, New York

DOJ_NMG_0143555

THE SCHEDULE OF THE ATTORNEY GENERAL TO

NEW YORK, NEW YORK

THURSDAY, DECEMBER 1, 2005

3:05 PM THE ATTORNEY GENERAL boards vehicle and departs DOJ en route Washington Reagan National Airport.

VEHICLE ASSIGNMENTS:

LIMO:
Attorney General
[redacted]

STAFF VEHICLE:
[redacted]

3:20 PM THE ATTORNEY GENERAL arrives Signature Flight Support and boards Aircraft.

3:30 PM THE ATTORNEY GENERAL departs [redacted] en route Teterboro Airport in Teterboro, New Jersey.

[redacted]

4:35 PM THE ATTORNEY GENERAL arrives Teterboro Airport Signature Flight Support and proceeds to helicopter.

4:45 PM THE ATTORNEY GENERAL boards helicopter and departs Teterboro Signature Flight Support en route Wall Street Landing Zone (LZ).

HELICOPTER MANIFESTS:

HELO ONE:
THE ATTORNEY GENERAL
[redacted]

HELO TWO:
[redacted]

NOTE: [redacted]

[redacted]

4:55 PM THE ATTORNEY GENERAL arrives Wall Street LZ and proceeds to Hold area.

Note: The AG and Staff will hold until remainder of staff arrive on follow helicopter.

5:15 PM THE ATTORNEY GENERAL departs Wall Street LZ en route Harold Pratt House.

VEHICLE ASSIGNMENTS:

LIMO:
THE ATTORNEY GENERAL
[redacted]

STAFF VEHICLE:
[redacted]

Drive Time: 20 minutes

5:35 PM THE ATTORNEY GENERAL arrives at the Harold Pratt House and proceeds to Greenberg Room.

EVENT: THE COUNCIL ON FOREIGN RELATIONS - RECEPTION
GREENBERG ROOM
NO AG REMARKS
PRESS MINGLING IN ROOM (NO CAMERAS)
200 ATTENDEES
ATTIRE: BUSINESS

5:37 PM THE ATTORNEY GENERAL begins participation in event.

6:00 PM THE ATTORNEY GENERAL concludes participation in event and proceeds to Peter G. Peterson Hall.

Note: Several front-row seats have been reserved for staff. Remaining staff are welcome to stand around periphery of room.

EVENT: REMARKS TO THE COUNCIL ON FOREIGN RELATIONS
PETER G. PETERSON HALL
20 MINUTES REMARKS
OPEN PRESS
200 ATTENDEES
ATTIRE: BUSINESS

6:02 PM THE ATTORNEY GENERAL begins participation in event.

Sequence of Events:

- THE ATTORNEY GENERAL proceeds to stage with Peter Peterson and stands to side of podium
- Peter Peterson introduces THE ATTORNEY GENERAL
- AG remarks
- AG concludes remarks and proceeds to seat on stage
- Peter Peterson moderates Q&A Session

7:00 PM THE ATTORNEY GENERAL concludes participation in event.

7:05 PM THE ATTORNEY GENERAL boards vehicle and departs Harold Pratt House en route Wall Street LZ.

VEHICLE ASSIGNMENTS:

LIMO:
THE ATTORNEY GENERAL
[redacted]

STAFF VEHICLE:
[redacted]

Drive Time: 20 Minutes

7:25 PM THE ATTORNEY GENERAL arrives Wall Street Landing Zone and boards helicopter.

HELICOPTER MANIFESTS:

HELO ONE:
THE ATTORNEY GENERAL
[redacted]

HELO TWO:
[redacted]

NOTE: [redacted]

Flight Time: 10 Minutes

7:35 PM THE ATTORNEY GENERAL arrives Teterboro Airport and proceeds to Aircraft.

Note: AG and staff will hold on aircraft until remainder of staff arrive on follow helicopter.

8:00 PM THE ATTORNEY GENERAL departs Teterboro, New Jersey, en route Washington, DC.

[redacted]

9:00 PM THE ATTORNEY GENERAL arrives at [redacted]

9:05 PM THE ATTORNEY GENERAL boards vehicle and departs [redacted] en route personal residence.

CONTACT SHEET

Thursday, December 1, 2005

WEATHER:

New York, New York:

Sunny

High 48/ Low 36

ATTIRE:

Business

CONTACTS:

[redacted]

ADVANCE:

[redacted]

FBI DETAIL

[redacted]

DOJ_NMG_0143562

[redacted]

[redacted]

OTHER:

[redacted]

PILOT/AIRCRAFT INFORMATION

[redacted]

DOJ_NMG_0143564

Gorsuch, Neil M

From: Beach, Andrew
Sent: Wednesday, November 30, 2005 11:43 AM
To: Sampson, Kyle; Scolinos, Tasia; Gorsuch, Neil M; Nichols, Grant W; Wainstein, Kenneth; Rowan, Patrick (ODAG); Oldham, Jeffrey L
Cc: Washington, Tracy T; Shaw, Aloma A; Sours, Raquel; Nelson, Carrie; Sellers, Kiahna (OAG); Jenkins, Linda A; Smith, Jeanette
Subject: Dec 1 travel to New York w/ AG

TO EVERYONE ON THE "TO" LINE:

You will be traveling with the Attorney General on THURSDAY, DECEMBER 1 to New York City for his Council on Foreign Relations speech. The AG will depart DOJ around 2:30 PM on Thursday afternoon and he is scheduled to return to [redacted] at approximately 9:15 PM. A DRAFT copy of the Attorney General's schedule will be sent to you later tonight or early tomorrow morning.

You will be departing from [redacted]. The phone number at [redacted].

QUESTION: Due to the late return hour tomorrow evening, please let me and Carrie Nelson know ASAP if you will drive yourself to [redacted] so that you have your car there when your return ... or if you will ride in the AG's motorcade out to the airport and take a cab from [redacted] on your return tomorrow evening.

For those wishing to ride in the AG's motorcade, we will arrange for a DOJ motorpool vehicle to follow the AG's vehicle out to the airport. The DOJ motorpool vehicle will depart from DOJ Main Justice's E Court. To get to E Court, use the elevator bank at the corner of 10th and Constitution Ave. N.W. Go down to basement ("B") level. As you exit the elevator, turn to the right and go through the door into E Court (outside). The AG's motorcade will be staged right there. Staff should board vehicles in advance of the AG's scheduled departure time.

If you drive yourself you may park in the parking lot in front of [redacted]. See weblink for map of the airport [redacted].

If you are driving yourself: please arrive at [redacted] no later than 2:25 PM on Thursday (unless otherwise instructed in a subsequent email). Although [redacted] is officially closed, the doors will be opened for the AG's trip. A member of the AG's FBI security detail will be in the lounge area at [redacted] to meet you, and direct you to the plane at the appropriate time. The lobby area at [redacted] is small enough that you will easily be able to find the FBI detail. If you are driving yourself, you are being asked to arrive early enough to depart as soon as the AG arrives.

You will be flying on an FBI leased aircraft to the airport in Teterboro, New Jersey, and back to Washington. There will be juice, soda and water on the plane. Flight time to Teterboro is about 1 hour. There will be a catered light dinner (a turkey wrap, chips, fruit, cookie, soda) provided on the return flight. Please let us know now if you do not wish to have us order that for you. There will be light refreshments available at a reception prior to the Council on Foreign Relations speech, but it is not a dinner event.

You or your secretary are responsible to complete your travel authorization form.

If you have any questions or need additional information, please feel free to contact the scheduling office.

Andrew Beach
Assistant to the Attorney General
& Director of Scheduling
US Department of Justice
951 Constitution Ave., NW
Washington, DC 20530
Tel: (202) 514-4195; FAX: (202) 307-2825
E-mail: andrew.beach@usdoj.gov

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APPLICANT/AUTHOR: Neil M. Gorsuch

ADDRESS: [redacted]

PHONE: [redacted] E-MAIL: [redacted]

DATE OF ADMISSION TO NEW YORK BAR: 5/19/92

PRIOR PUBLICATION CREDIT? NO [X] YES [ ] If "yes," please complete items A, B and C, below.

A- DATE OF PUBLICATION:

B- CLE CREDIT AWARDED:

C- DATE OF LAST NEW YORK ATTORNEY REGISTRATION:

TITLE OF SUBMISSION: Settlements in Securities Fraud Class Actions: Improving Investor Relations

WHERE PUBLISHED: Washington Legal Foundation Critical Legal Issues Working Paper Series No. 128

DATE OF PUBLICATION OR ACCEPTANCE FOR PUBLICATION: April 2005

HOURS SPENT WRITING/RESEARCH: 80 TOTAL CLE CREDIT HOURS REQUESTED:* 12

ETHICS AND PROFESSIONALISM: 2 GENERAL: 10

LISTED AS AUTHOR OR JOINT AUTHOR? YES [X] NO [ ]
If "no," please attach a letter from a listed author attesting to your contribution, including a description of the character of your contribution and the hours spent on research or writing.

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Honorable Barry A. Cozier
Chair

Elise Anne Geltzer
Counsel

September 27, 2005

Pub#: 2289

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Dear Applicant:

The review of your application for CLE publication credit cannot be completed due to an unanswered request for additional information. Enclosed, therefore, please find the materials that you submitted in connection with your request for CLE publication credit. Should you wish to resubmit your application, please return all materials, as well as the additional information that was previously requested.

Please contact CLE staff member Esther Altaras Meyers at (212) 428-2122 if you should have any questions. You may also visit the CLE website at www.nycourts.gov/attorneys/cle for additional information on New York's CLE program.

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PHONE: [redacted] E-MAIL: [redacted]

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WHERE PUBLISHED: Wisconsin Law Review

DATE OF PUBLICATION OR ACCEPTANCE FOR PUBLICATION: 2004

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ETHICS AND PROFESSIONALISM: 3 GENERAL: 9

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SETTLEMENTS IN SECURITIES FRAUD CLASS ACTIONS: IMPROVING INVESTOR PROTECTION

by
Neil M. Gorsuch and Paul B. Matey
Kellogg, Huber, Hansen,
Todd, Evans & Figel, P.L.L.C.

APPLICATION FOR PUBLICATION CREDIT

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APPLICANT/AUTHOR: Neil M. Gorsuch

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A- DATE OF PUBLICATION:

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C- DATE OF LAST NEW YORK ATTORNEY REGISTRATION:

TITLE OF SUBMISSION: The Legalization of Assisted Suicide and the Law of Unintended Consequences: A Review of the Dutch and Oregon Experiments and Leading Utilitarian Arguments for Legal Change.

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If "no," please attach a letter from a listed author attesting to your contribution, including a description of the character of your contribution and the hours spent on research or writing.

You MUST enclose with your application: a copy of the actual legal research-based writing including proof of publication (or letter of acceptance for publication if not yet published).

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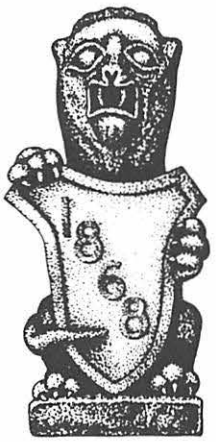
WISCONSIN LAW REVIEW

THE LEGALIZATION OF ASSISTED SUICIDE AND THE LAW OF UNINTENDED CONSEQUENCES: A REVIEW OF THE DUTCH AND OREGON EXPERIMENTS AND LEADING UTILITARIAN ARGUMENTS FOR LEGAL CHANGE

Neil M. Gorsuch



Volume 2004
Number 5

COMMON GOOD
RESTORING COMMON SENSE TO AMERICAN LAW
WWW.CGOOD.ORG

DATE: Thursday, June 23, 2005

TO: "Lawsuits and Liberty" Participants

FROM: Philip K. Howard

RE: Conference Papers

Enclosed are the following papers that will be presented at the upcoming "Lawsuits and Liberty" conference at the National Constitution Center:

The Modern Transformation of Civil Law
George L. Priest, Professor, Yale Law School

How Did We Get Here? What Litigation Was, What It Is Now, What It Might Be
Stephen B. Presser, Professor, Northwestern University School of Law and
Kellogg School of Management

The Administrative Advantage in Civil Procedure: Tort Reform through Consistent and Intelligent Policies Applied by Administrative Tribunals
E. Donald Elliott, Professor, Yale Law School;
Partner, Willkie Farr & Gallagher LLP

The Forgotten Goal of Civil Justice: A Foundation for Common Sense in Daily Life
Philip K. Howard, Chair, Common Good

The papers will be provided at the conference itself as well. Enclosed below is an update to the agenda that was sent to most of you, via memorandum, last week – as well as some logistical information, which has not changed. As always, should you have any questions or concerns, please do not hesitate to contact either me (phoward@cov.com; 212.841.1068) or Andy, Eric, or Sara via the following contact information:

Andrew T. Park
Office Phone: 202.483.3760 x 13
Cell Phone: [redacted]
E-Mail: [redacted]

Eric Hauser
Office Phone: 212.681.8199 x 15
Cell Phone: [redacted]
E-Mail: [redacted]

Sara A. Berg
Office Phone: 212.681.8199 x 12
Cell Phone: [redacted]
E-Mail: [redacted]

Thank you again, and I look forward to seeing all of you at the National Constitution Center.

Enclosures

TENTATIVE AGENDA

Monday, June 27

6:00	Cocktail Reception at the National Constitution Center.
7:00 – 7:20	Overview of Conference and Introduction of Lord Hoffmann.
7:20	*The Social Cost of Tort Liability*, Keynote Address by Lord Hoffmann, Member of the Appellate Committee of the House of Lords.
8:00	Dinner at the National Constitution Center.

Tuesday, June 28

8:00 – 8:45	Informal Breakfast at the National Constitution Center.
8:45 – 10:15	**Panel 1: The Historical Role of the Civil Justice System in American Society**
	Moderator: John M. Walker, Jr., Chief Judge, U.S. Court of Appeals for the Second Circuit
	Presentations: *The Modern Transformation of Civil Law* George L. Priest, Professor, Yale Law School
	How Did We Get Here? What Litigation Was, What It Is Now, What It Might Be Stephen B. Presser, Professor, Northwestern University School of Law and Kellogg School of Management
	Panelists: Geoffrey C. Hazard, Jr., Professor, University of Pennsylvania Law School
	Edward L. Rubin, Professor, University of Pennsylvania Law School; Dean-Elect, Vanderbilt University Law School
10:30 – 12:00	**Panel 2: Has Distrust of the Civil Justice System Affected Daily Choices in Modern Society?**
	Moderator: Robert E. Litan, Vice President for Research and Policy, Kauffman Foundation; Senior Fellow, The Brookings Institution
	Presentations: *How Adversarial Legalism Affects Behavior* Robert A. Kagan, Professor, University of California, Berkeley
	Effects of Law on Healthcare Troyen A. Brennan, M.D., Professor, Harvard Medical School and Harvard School of Public Health

		The Public's Perceptions: Presentation of Harris Poll Results and Other Polling Results Judyth W. Pendell, Senior Fellow, AEI-Brookings Joint Center for Regulatory Studies
	Panelists:	Neil M. Gorsuch, Principal Deputy Associate Attorney General
		Stephanie L. Franklin-Suber, Partner, Ballard Spahr Andrews & Ingersoll, LLP; Former Chief of Staff to Mayor John F. Street and City Solicitor for the City of Philadelphia
12:00 – 1:00	Lunch – Informal Discussion.	
1:00 – 2:30	**Panel 3: Law and Fact: The Role of Policy in Civil Justice**	
	Moderator:	Walter E. Dellinger III, Professor, Duke University School of Law; Partner, O'Melveny & Myers LLP; Former Acting Solicitor General
	Presentation:	*The Administrative Advantage in Civil Procedure: Tort Reform through Consistent and Intelligent Policies Applied by Administrative Tribunals* E. Donald Elliott, Professor, Yale Law School; Partner, Willkie Farr & Gallagher LLP
	Panelists:	Lord Hoffmann, Member of the Appellate Committee of the House of Lords
		George L. Priest, Professor, Yale Law School
2:45 – 4:15	**Panel 4: The Responsibility of Judges Versus Juries**	
	Moderator:	Edith H. Jones, Judge, U.S. Court of Appeals for the Fifth Circuit
	Presentation:	*The Forgotten Goal of Civil Justice: A Foundation for Common Sense in Daily Life* Philip K. Howard, Chair, Common Good
	Panelists:	Larry D. Thompson, Senior Vice President for Government Affairs and General Counsel, PepsiCo, Inc.; Former U.S. Deputy Attorney General
		Walter E. Dellinger III, Professor, Duke University School of Law; Partner, O'Melveny & Myers LLP; Former Acting Solicitor General

Geoffrey C. Hazard, Jr., Professor, University of Pennsylvania Law School

Dolores K. Sloviter, Judge, U.S. Court of Appeals for the Third Circuit

Robert A. Kagan, Professor, University of California, Berkeley

LOGISTICAL INFORMATION

Event Information

All conference events will be at the National Constitution Center. The first event is a cocktail reception beginning at 6:00 PM on Monday evening and will take place on the second floor of the Constitution Center. Common Good staff will be on hand to direct you to all events. Also, for your convenience, you will have access to a green room adjacent to the auditorium on Tuesday to store your belongings or to take a break from the proceedings. The address for the National Constitution Center, and information regarding parking is as follows:

Address and Telephone

National Constitution Center
525 Arch Street, Independence Mall, Philadelphia, PA 19106
Toll Free: 866.917.1787

Parking

Convenient parking for cars is available at the underground lots below the National Constitution Center (enter from Race Street) and at the Independence Visitor Center (enter from 5th or 6th Streets, between Arch and Market Streets).

Map of the National Constitution Center Area

Hotel Information

For those coming in from out of town, we have arranged for a hotel room in your name for the night of Monday, June 27th at The Omni Hotel at Independence Park. Check-in time is 4:00 PM, but rooms are guaranteed for later arrivals. The Omni is just three blocks south of the National Constitution Center. The address for The Omni and information regarding arrival by taxi is as follows:

Address and Telephone

The Omni Hotel at Independence Park, 401 Chestnut Street, Philadelphia, PA 19106
215.925.0000

Taxi Information

It is a flat fee of $25.00 for cab fare from the Philadelphia International Airport. Cab fare from 30th Street Station (Philadelphia's train station) is roughly $10.00.

Map of The Omni Hotel Area

Reimbursement of Expenses

Upon the conference's completion, we will send you reimbursement forms for expenses you incur in attending the conference, as well as forms for your respective honorariums.

Common Good Staff Contact Information

If you have any questions or concerns at any time, please do not hesitate to bring them to our attention – particularly to Andrew Park, Sara Berg, or Eric Hauser, whose contact information is as follows:

Andrew T. Park
Office Phone: 202.483.3760 x 13
Cell Phone: [redacted]
E-Mail: [redacted]

Sara A. Berg
Office Phone: 212.681.8199 x 12
Cell Phone: [redacted]
E-Mail: [redacted]

Eric Hauser
Office Phone: 212.681.8199 x 15
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Stephanie L. Franklin-Suber | *Partner*

Practice Area Focus
Business & Finance

Additional Practice Areas
Bankruptcy, Reorganization and Capital Recovery
Biotechnology/Life Sciences
Construction
Energy and Project Finance
Mergers and Acquisitions
Securities
Technology and Emerging Companies

Licensed To Practice In
Pennsylvania 1982

Education
University of Pennsylvania Law School J.D. 1982
Vassar College B.A. 1979

Stephanie L. Franklin-Suber is a partner in the Business & Finance Department of Ballard Spahr Andrews & Ingersoll, LLP. She has extensive experience in commercial transactions, corporate governance, mergers, acquisitions and divestitures, joint venture, partnership and development agreements, and securities, investment company and investment adviser regulatory matters. She is a member of several special practice groups, including the Securities Group and the Mergers and Acquisitions Group, as well as the Biotechnology/Life Sciences Group, Energy and Project Finance Group and Technology and Emerging Companies Group. She also has extensive government experience, and specializes in public commercial transactions and contracting, economic and community development projects, public finance, and legislative, regulatory and government relations matters.

Ms. Franklin-Suber has developed, moderated and presented numerous continuing legal education programs on compliance with the Sarbanes-Oxley Act of 2002, including the new corporate governance and attorney conduct requirements, and "Due Diligence Considerations in Business Transactions After Enron and Sarbanes-Oxley" for the American Bar Association, the National Bar Association, the Pennsylvania Bar Institute and Half Moon Seminars.

Prior to joining Ballard Spahr, Ms. Franklin-Suber was one of the highest-ranking women ever to serve in a Philadelphia mayoral administration when she was appointed Chief of Staff in January 2000 by Mayor John F. Street. As Chief of Staff, she served as a member of the Cabinet and was responsible for the overall administration of the Mayor's Office and the more than 30 City departments, commissions, and agencies in City government.

From 1996 to 1999, Ms. Franklin-Suber served as the City Solicitor for the City of Philadelphia. She was appointed Acting City Solicitor by Mayor Edward G. Rendell in November of 1996, confirmed as City Solicitor by unanimous vote of the City Council in December of 1996, and officially sworn in to office by Mayor Rendell in January of 1997.

As the chief legal officer for the City, she represented the Mayor, the Administration, the City Council, the City Controller, and more than 30 City departments, commissions, and agencies. She was the only woman and the youngest member of Mayor Rendell's Cabinet. As an Executive Department Head, she also managed the Law Department, which had a total workforce of approximately 340 lawyers, legal assistants, analysts, and support staff. Prior to her elevation to the position of City Solicitor in 1996, she served as Chair of the Corporate Group for the Law Department and a member of the Law Department Executive Committee from 1994 to 1996.

In both her capacity as Corporate Chair and City Solicitor, she served as lead counsel to the City on various significant transactions and litigation matters, including the 2000 Republican National Convention Service Agreements, the USAIRWAYS International and Commuter Terminals Project, the Gateway Visitors Center and Liberty Bell Project, the Delinquent Real Estate Tax Lien Sale and Securitization, the HealthChoices Behavioral Health System Agreements, the Curram-Frohmhold Prison Facilities Agreements, and the MarketPlace/Redwood International Airport Concession Agreement.

Prior to joining the City of Philadelphia Law Department in March of 1994, Ms. Franklin-Suber was a partner in the Business Department of Schnader Harrison Segal & Lewis, LLP. She joined the firm as an Associate in September 1986. In 1992, she became the first woman partner in the Business Department of this firm. She was the first African-American woman partner in the history of the firm.

From 1985 to 1986 she served as a Law Clerk to the Honorable Clifford Scott Green of the U.S. District Court for the Eastern District of Pennsylvania.. From 1983 to 1985, Ms. Franklin-Suber served as a Law Clerk to the Honorable A. Leon Higginbotham, Jr. of the United States Court of Appeals for the Third Circuit. She also served as Judge Higginbotham's research associate, teaching assistant, and lecturer at the University of Pennsylvania from 1982 to 1983. In addition, Ms. Franklin-Suber was an Adjunct Professor at the University of Pennsylvania Law School and taught Appellate Advocacy I in both the Fall of 1998 and 1999.

Ms. Franklin-Suber's professional associations and activities include membership in the American Bar Association, the National Bar Association, the Federal Bar Association, the Pennsylvania Bar Association, the Philadelphia Bar Association, the Barristers' Association of Philadelphia, Inc., and the National Bar Association Women Lawyers Division, Philadelphia Chapter. She is Co-Chair of the American Bar Association Minority Counsel Program and serves on the ABA Business Law Section Negotiated Acquisitions Committee and the ABA Graham-Leach-Bliley Act Task Force.

In addition, Ms. Franklin-Suber is a member of the ABA Minority Partners Conference and ABA Women Rainmakers as well as the DuPont Women Lawyers Network Business Development Committee. She recently served on the Philadelphia Bar Association's 2002 Hall of Fame Committee and is former Vice Chair of the Pennsylvania Bar Association Government Lawyers Committee. She has served as a member of the Advisory Board and as a past President of the Barristers' Association of Philadelphia, Inc. She served on the Host Committee for the 1999 National Bar Association Annual Convention and is a former member of the Board of Governors of the National Bar Association. She is a former member of the Board of Governors of the Philadelphia Bar Association and the Board of Trustees of the Philadelphia Bar Foundation.

In 2003, Ms. Franklin-Suber was appointed by Pennsylvania Governor Edward G. Rendell to the Governor's Standing Committee on Minority and Women Business Opportunities which advises the Department of General Services on minority and women-owned business certification and contracting matters. In 2002, she was appointed by Mayor John F. Street to the Philadelphia Gas Commission which oversees the management, operations and budget of the Philadelphia Gas Works. She was also appointed by former Pennsylvania Governor Robert P. Casey to the Governor's Advisory Commission on African-American Affair and by the Chief Judge of the United States District Court for the Eastern District of Pennsylvania to the Federal Magistrates' Merit Selection Panel for the appointment and reappointment of federal magistrates. In 2004, she was appointed by Philadelphia Managing Director Phillip R. Goldsmith to the Behavioral Health Search Committee for the Cabinet-level position of Director of a newly-created Office of Behavioral Health and Mental Retardation Services.

Ms. Franklin-Suber's publications include "Keeping Thurgood Marshall's Promise-A Venerable Voice for Equal Justice," 16 *Harvard Black Letter Law Journal*, 27 (Spring 2000); "Remarks Made at Judge A. Leon Higginbotham's Funeral," IX *Vital Issues: The Journal of African American Speeches 3* (1999); "Developing a Successful In-house Continuing Legal Education Program," *Municipal Lawyer*, Nov./Dec 1997; "The Unique Path of A. Leon Higginbotham, Jr. A Voice for Equal Justice Through Law", *Law & Inequality: A Journal of Theory and Practice*, Aug. 1991; "Trash Collection: Judicial Decision on Pricing Threatens Municipalities' Ability to Provide Basic Service", *The Authority*, August, September 1987; "United States v. City of Philadelphia: A Continued Quest for and Effective Remedy for Police Misconduct", 7 *Black L.J.* 18 (1981).

Ms. Franklin-Suber was profiled by the Pennsylvania Bar Association Government Lawyers Committee in "Serving the City of Brotherly Love," *News & Views*, Winter 1999. Among her many speaking engagements, she was a featured speaker at the Temple University Beasley School of Law Judge Clifford Scott Green Lectureship Dinner in February 2003. She was the Luncheon Keynote Speaker at KYW-TV's Eleanor Jean Hendley Teenshop Awards Luncheon in June 2000. She was honored for her community service by the Associated Alumni of Central High School at its Annual Banquet in June 1999. She was the Featured Speaker of Phi Alpha Delta Pre-Law Fraternity International at Temple University Fox School of Business & Management in March 1999. She was the Luncheon Keynote Speaker at the University of Pennsylvania Black Law Student Association's Sadie T. M. Alexander Conference in March 1999. She was the Keynote Speaker at the American Bar Association's Young Lawyer's Conference on Public Service in October 1998. She was the Commencement Speaker at The Springside School Graduation in May 1997 and the Keynote Speaker at the "All for One" Conference for Independent Schools, hosted by The Springside School in November 1999.

Ms. Franklin-Suber is active in numerous civic and community associations. She is a member of the 2004 Board of Directors of the Philadelphia Convention & Visitors Bureau and serves on the Executive Committee, the Steering Committee, the International Committee and as Chairman of the Human Relations/Nominating Committee. She is also a member of the National Alumnae Council for The Springside School.

Ms. Franklin-Suber has received numerous awards and citations for

outstanding and dedicated service, including: The Barristers' Association of Philadelphia, Inc. A. Leon Higginbotham, Jr. Award for Professional Excellence (2003); The Champions for Social Justice and Equality Award, Black Law Students Association of Rutgers University School of Law (2002); The Shirley Chisholm Award, Philadelphia Congress of the National Political Congress of Black Women (1999); The Outstanding Achievement Award, Alpha Kappa Alpha Sorority, Inc. (1997); The Community Service Award, Schnader, Harrison Segal & Lewis (1997); and The Outstanding Young Leader of the Year Award Finalist, The Philadelphia Jaycees (1995, 1996). She serves on the American Red Cross, Philadelphia Chapter, Spectrum Committee and recently served on the Advisory Board of the African-American Historical and Cultural Museum's Exhibit, "Call to Order: African Americans and the Law."

Ms. Franklin-Suber is also active politically and recently served in a variety of different capacities during the Rendell for Governor Campaign and Transition,including Co-Chair of the Legal Issues Group and a member of the Campaign Leadership Group, the Women's Leadership Group, Lawyers for Rendell and the Finance Committee which raised over $42 million dollars. She subsequently served as Co-Chair of the Rendell State Department Transition Team and a member of the Rendell Inaugural Committee. Ms. Franklin-Suber continues to serve on the Rendell for Governor Finance Committee as well on the Friends of John F. Street Finance Committee and the Fattah for Congress Finance Committee.

Ms. Franklin-Suber was appointed in 2003 by Democratic National Committee Chairman Terry McAuliffe to the DNC African-American Leadership Council (AALC) and serves as one of the Pennsylvania DNC Vice Chairs.

Ms. Franklin-Suber is a graduate of The Springside School (1975), Vassar College (B.A. 1979), and the University of Pennsylvania (J.D. 1982). She is married to retired [redacted] and they have a [redacted]

Institute for Corean-American Studies

Stephanie L. Franklin-Suber
Biographic Sketch

Stephanie L. Franklin-Suber is a partner in the Business & Finance Department and a member of the Energy and Project Finance Group, Mergers and Acquisitions Group, Securities Group, and Technology and Emerging Companies Group. She also practices in the areas of public finance and securitization. Prior to joining Ballard Spahr, Ms. Franklin-Suber was one of the highest-ranking women ever to serve in a Philadelphia mayoral administration when she was appointed in January 2000 to the position of Chief of Staff by Mayor John F. Street. As Chief of Staff, Ms. Franklin-Suber served as a member of Mayor Street's Cabinet and was responsible for the overall administration of the Mayor's Office and the more than 30 City departments, commissions, and agencies in City government. From 1996 to 1999, Ms. Franklin- Suber served as the City Solicitor for the City of Philadelphia. She was appointed Acting City Solicitor by Mayor Edward G. Rendell in November of 1996, confirmed as City Solicitor by unanimous vote of the City Council in December of 1996, and officially sworn in to office by Mayor Rendell in January of 1997. Under the Philadelphia Home Rule Charter, she served as the chief legal officer for the City, representing the Mayor, the Administration, the City Council, the City Controller, and more than 30 City departments, commissions, and agencies. She was the only woman and the youngest member of Mayor Rendell's Cabinet. As an Executive Department Head, she also directed the activities of the City of Philadelphia Law Department, which had a total workforce of approximately 340 lawyers, legal assistants, analysts, and support staff.

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Inequality: A Journal of Theory and Practice, Aug. 1991; "Trash Collection: Judicial Decision on Pricing Threatens Municipalities' Ability to Provide Basic Service", The Authority, August, September 1987; "United States v. City of Philadelphia: A Continued Quest for and Effective Remedy for Police Misconduct", 7 Black L.J. 18 (1981). Ms. Franklin-Suber was recently profiled by the Pennsylvania Bar Association Government Lawyers Committee in "Serving the City of Brotherly Love," News & Views, Winter 1999. Among her many speaking engagements, she was the Luncheon Keynote Speaker at Eleanor Jean Hendley's Teenshop Awards Luncheon in June 2000. She was honored for her community service by the Associated Alumni of Central High School at its Annual Banquet in June 1999. She was the Featured Speaker of Phi Alpha Delta Pre-Law Fraternity International at Temple University Fox School of Business & Management in March 1999. She was the Luncheon Keynote Speaker at the University of Pennsylvania Black Law Student Association's Sadie T. M. Alexander Conference in March 1999. She was the Keynote Speaker at the American Bar Association's Young Lawyer's Conference on Public Service in October 1998. She was the Commencement Speaker at The Springside School Graduation in May 1997 and the Keynote Speaker at the "All for One" Conference for Independent Schools, hosted by The Springside School in November 1999.

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***ICAS* Web Site Links for Stephanie L. Franklin-Suber:**

Bulletin 7/18/01

Summer 2001 Symposium

Reyes
Gorsuch

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT:	11/03/2005	**WORKFLOW ID:**	902363
DATE RECEIVED:	11/07/2005	**DUE DATE:**	11/22/2005

FROM: The Honorable Richard J. Durbin
United States Senate

Washington, DC 20510

TO: AG

MAIL TYPE: Congressional Priority

SUBJECT: Ltr (copy rec'd from OLA) requesting an update on DOJ's handling of detainee abuse allegations since the beginning of the conflict in Afghanistan. See related corres in ES.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
11/07/2005	Criminal Division Prepare response for AAG/OLA signature.

INFO COMPONENT: OAG, ODAG, OASG, CRT, EOUSA, FBI, OIG, BOP, OLA

COMMENTS: Per OLA (Scott-Finan), CRM is coordinating a response.

FILE CODE:

EXECSEC POC: Marcia Hines: 202-514-5984

902363

RICHARD J. DURBIN
ILLINOIS

COMMITTEE ON APPROPRIATIONS

COMMITTEE ON THE JUDICIARY

COMMITTEE ON RULES
AND ADMINISTRATION

ASSISTANT DEMOCRATIC
LEADER

United States Senate
Washington, DC 20510–1304

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525 SOUTH EIGHTH STREET
SPRINGFIELD, IL 62703
(217) 492–4062

701 NORTH COURT STREET
MARION, IL 62959
(618) 998–8812

durbin.senate.gov

November 3, 2005

The Honorable Alberto R. Gonzales
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Gonzales:

I write to request an update on the Justice Department's handling of detainee abuse allegations.

On June 17, 2004, then-Attorney General John Ashcroft announced the indictment of a Central Intelligence Agency contractor for abusing an Afghan detainee. He stated that the Justice Department had also received one abuse referral from the Defense Department and "additional" abuse referrals from the CIA. He said, "These are ongoing investigations; I cannot offer further details at this time." Mr. Ashcroft announced that he was assigning all ongoing prisoner abuse cases to the U.S. Attorney's Office for the Eastern District of Virginia.

It has been sixteen months since this announcement. I would appreciate your responses to the questions below.

Since the beginning of the conflict in Afghanistan, how many detainee abuse referrals has the Justice Department received from the Defense Department? For how many of these referrals were investigations opened? How many of these investigations have resulted in indictments? How many of these investigations are still ongoing? How many have been closed? What were the bases for closing these investigations?

Since the beginning of the conflict in Afghanistan, how many detainee abuse referrals has the Justice Department received from the CIA? For how many of these referrals were investigations opened? How many of these investigations have resulted in indictments? How many of these investigations are still ongoing? How many have been closed? What were the bases for closing these investigations?

In addition to investigations of detainee abuse resulting from Defense Department or CIA referrals, how many abuse investigations have been opened since the beginning of the conflict in Afghanistan? How many of these investigations have resulted in

indictments? How many of these investigations are still ongoing? How many have been closed? What were the bases for closing these investigations?

Has the U.S. Attorney's Office for the Eastern District of Virginia handled all detainee abuse cases? What have been the roles of the Criminal Division and the Civil Rights Division, if any, in these cases?

Thank you for your time and consideration.

Sincerely,

Richard J. Durbin

Barnes, Michelle D
From: Callier, Saundra M
Sent: Monday, November 07, 2005 9:27 AM
To: Rainey, Obern; Hines, Marcia L; Barnes, Michelle D
Subject: FW:another letter -


tmp.htm


AG Gonzales letter 110305.pdf

see below from OLA/n.scott-finan.

thx,
smc
-----Original Message-----
From: Scott-Finan, Nancy
Sent: Friday, November 04, 2005 2:52 PM
To: Callier, Saundra M
Subject: FW: letter

Pls.get this letter into Ex. Sec. I have asked Crim to coordinate the response.

-----Original Message-----
From: [redacted]
Sent: Friday, November 04, 2005 12:21 PM
To: Scott-Finan, Nancy
Subject: letter

Hi Nancy,

Hope all's well. Sen. Durbin sent the attached letter to the Attorney General yesterday.

Thanks,

Joe

U.S. Department of Justice

Washington, D.C. 20530

CUSTOMER CONSENT AND AUTHORIZATION FOR ACCESS TO FINANCIAL RECORDS

I, NEIL GORSUCH, having read the
(Name of Customer)

explanation of my rights which is attached to this form, hereby authorize the _____
(Name and Address of Financial Institution)

to disclose these financial records:

to _____, _____,
(Names of Government Authorities Allowed Access)

_____, for the following purpose(s):

_____

_____

I understand that this authorization may be revoked by me in writing at any time before my records, as described above, are disclosed, and that this authorization is valid for no more than three months from the date of my signature.

9/8, 05
(Date)

(Signature of Customer)

[redacted]
(Address of Customer)

§1104(a) of the Right To Financial

FORM DOJ-462

UNITES STATES DEPARTMENT OF JUSTICE

FAX COVER SHEET

PERSONNEL SECURITY GROUP
SECURITY & EMERGENCY PLANNING STAFF

Date: 9/8/05

To: ALOMA SHAW

Organization:

Tel Phone No:

Fax Phone No:

Subject: NEIL GORSUCH

From: KATHY BYRNES

Pages: 2 **(Including cover sheet)**

COMMENTS:
PLEASE MAIL BACK TO ME. He SHOULD ONLY fill out bottom portion - sign, date, & put address.

Personnel Security Group
Security & Emergency Planning Staff
20 Massachusetts Ave., N.W. Rm. 6200
Washington, D.C. 20530
Telephone: (202) 514-2351
Fax: (202) 514-4555

WARNING!!!

Shaw, Aloma A

From: Byrnes, Kathleen T
Sent: Thursday, September 08, 2005 4:33 PM
To: Shaw, Aloma A
Subject: RE: Neil Gorsuch

We're at the mercy of the FBI. I did ask them to expedite it and they said it should be done in a few weeks. They tell me this is a release for the state of Virginia that needs to be filled out. It takes the FBI approx 4-5 months on average to complete an initial background.

-----Original Message-----
From: Shaw, Aloma A
Sent: Thursday, September 08, 2005 4:30 PM
To: Byrnes, Kathleen T
Subject: FW: Neil Gorsuch

-----Original Message-----
From: Gorsuch, Neil M
Sent: Thursday, September 08, 2005 4:23 PM
To: Shaw, Aloma A
Subject: RE: Neil Gorsuch

Is there any way we can speed this up? I find it hard to believe they have so many leads to complete given how long it has been since my initial interview, and I know I already signed a copy of the financial release form months ago.

-----Original Message-----
From: Shaw, Aloma A
Sent: Thursday, September 08, 2005 9:30 AM
To: Byrnes, Kathleen T
Cc: Gorsuch, Neil M
Subject: RE: Neil Gorsuch

Thanks so much Kathleen for your attention to this matter. As soon as I get the form and Neil has signed it, I'll send it over to you today by special messenger.

Aloma

-----Original Message-----
From: Byrnes, Kathleen T
Sent: Thursday, September 08, 2005 8:59 AM
To: Shaw, Aloma A
Subject: RE: Neil Gorsuch

Aloma,

Heard from the FBI and they [redacted]. In order to possibly speed things up I'm going to fax you a financial form that Neil needs to sign. This way, the FBI doesn't have to send an investigator to see him. This form is needed to verify state tax records. Please ask him to only sign, date, and put his address. The FBI fills out the rest. I will need you to mail this to me via Intraoffice mail as an original signature is needed. Please let me know when you mail it so I can be on the lookout for it and send it to the FBI. We are at 20 Massachusetts Ave, Room 6221 and put to my attention.

Please let me know your fax# so I can fax the form to you.

Thks,

-----Original Message-----
From: Shaw, Aloma A
Sent: Wednesday, September 07, 2005 3:23 PM

To: Byrnes, Kathleen T
Cc: Gorsuch, Neil M
Subject: RE: Neil Gorsuch

Great. Thank you for your update.

-----Original Message-----
From: Byrnes, Kathleen T
Sent: Wednesday, September 07, 2005 3:01 PM
To: Shaw, Aloma A
Subject: RE: Neil Gorsuch

Aloma,

I've called the FBI supervisor twice today and am still waiting for her to advise us of the status of his background. Will let you know as soon as I hear from them. We cannot upgrade his clearance to final until they finish the background.

-----Original Message-----
From: Rice, Dorianna C
Sent: Wednesday, September 07, 2005 9:26 AM
To: Kathleen Byrnes
Subject: FW: Neil Gorsuch

Hi Kathy - would you please research and get back to Aloma. Thanks

-----Original Message-----
From: Shaw, Aloma A
Sent: Wednesday, September 07, 2005 9:20 AM
To: Rice, Dorianna C
Subject: Neil Gorsuch

Dorianna:
Neil Gorsuch, Principal Deputy Associate Attorney General, was employed by the Associate AG's office June 13, 2005. Presently he has an interim top secret security clearance. He'd like to know when his clearance will be final?

Thank you,
Aloma Shaw
Staff Assistant
Office of the Associate Attorney General

PRESIDENT'S Economic Adjustment Committee

DOJ_NMG_0143594

THE PRESIDENT'S
ECONOMIC ADJUSTMENT COMMITTEE

ADVISORY &
WORKING GROUP MEETING

OCTOBER 17, 2005
1:00pm – 3:00pm

HORIZON ROOM
Ronald Reagan Building / International Trade Center
1300 Pennsylvania Avenue
Washington, D.C. 20004

AGENDA

- **Welcome and Introductions – DoD, DoC, DoL & WH-IGA**
- **BRAC 05 Overview – DoD**
- **Defense Economic Adjustment Program – (DoD-OEA)**
  - **Overview & Mission of the Economic Adjustment Committee**
  - **Executing the BRAC 05 Defense Economic Adjustment Program**
- **BRAC Response Activities**
  - **Department of Labor**
  - **Department of Commerce**
  - **Department of Housing and Urban Development**
  - **Small Business Administration**
- **Federal Agency Roundtable Discussion**
- **Next Steps**
- **Adjourn**

President's Economic Adjustment Committee

October 2005

FEDERAL AGENCY	EAC MEMBER	ADVISORY GROUP MEMBER	WORKING GROUP MEMBER(S)	OEA LIAISON
Agriculture	Michael Johanns Secretary of Agriculture	Thomas Dorr Under Secretary [redacted]	David Rouzer Assoc Administrator Rural Bus. Coop Program [redacted]	Joan Sigler [redacted]
Justice	Alberto Gonzales Attorney General	Neil Gorsuch Principal Deputy Associate [redacted]	David M. Orr Director [redacted]	Mike Davis [redacted]
Commerce *Co-Vice Chair*	Carlos Gutierrez Secretary of Commerce	James Yeager Senior Advisor [redacted]	Dennis Alvord Deputy Director, Intergov't Affairs [redacted]	David F. Witschi [redacted]
Defense *Chair*	Donald Rumsfeld Secretary	Philip Grone DUSD (I&E) [redacted]	Patrick O'Brien OEA Director [redacted]	David F. Witschi [redacted]
Education	Margaret Spellings Secretary	Michell Clark Deputy Asst Secretary [redacted]	Peter Wieczorek Director Fed Real Property Asst [redacted] Catherine Schagh Director [redacted]	Gary Willis [redacted]

Energy	Samuel W. Bodman Secretary	Michael Owen Director, Legacy Mgmt [redacted]	Cory Flowers Industrial Specialist [redacted]	Frank Barton [redacted]
Health and Human Services	Michael O. Leavitt Secretary	Joe W. Ellis Asst Secretary, Admin/Mgmt [redacted]	Marc Weisman Director, Acq Mgmt & Policy [redacted]	Bryant Monroe [redacted]
Housing and Urban Development	Alphonso Jackson Secretary	Patricia Carlile Deputy Asst Secretary Special Needs [redacted]	Linda Charest Coordinator Base Redevelopment Team [redacted]	Bryant Monroe [redacted]
Interior	Gale Norton Secretary	Chris Kearney Deputy Asst Secretary Policy & Intl Affairs [redacted]	Dr. Willie Taylor Director Ofc of Environmental Policy [redacted]	David F. Witschi [redacted]
Labor *Co-Vice Chair*	Elaine Chao Secretary	Emily Stover-DeRocco Assistant Secretary, ETA [redacted]	Mason Bishop Deputy Asst Secretary, ETA [redacted]	Gary Willis [redacted]
State	Condoleezza Rice Secretary	Steven J. Rodriguez Acting Deputy Asst Sec Operations [redacted]	William Kohlenbush Director [redacted]	David MacKinnon [redacted]

Transportation	Norman Mineta Secretary	George Schoener Deputy Asst Secretary [redacted] Mary Edmondson [redacted]	Sherri Alston Director [redacted] Dennis Roberts Director Airport Planning & Prog [redacted] Sherry Riklin Policy Analyst, DOT [redacted] Robert Tuccillo Assoc Administrator [redacted] Bruce Carlton Assoc Administrator, MARAD Policy & Intl Trade [redacted]	Cyrena Eitler [redacted] Rich Tenga [redacted] David MacKinnon [redacted] Cyrena Eitler [redacted] David MacKinnon [redacted]
Treasury	John Snow Secretary	Arthur Garcia Director, CDFI [redacted]	Matt Josephs Program Manager, NMTC [redacted]	Jay Sweat [redacted]
Veterans Affairs	Jim Nicholson Secretary	Tim McCain CBO & GC [redacted]	Lisa Thomas Director Capital Ops & Programs [redacted]	Bryant Monroe [redacted]

Homeland Security	Michael Chertoff Secretary	Al Martinez Fonts Special Assistant to the Sec Private Sector Coordination [redacted]	Jan Mares Coordinator Private Sector Office [redacted]	David F. Witschi [redacted]
Council of Economic Advisors	Ben Bernanke Chair	Gary Blank Chief of Staff [redacted]	Dino Falaschetti Senior Economist [redacted]	Joe Cartwright [redacted]
Office of Management and Budget	Joshua Bolton Director		Terrence Blackburne Examiner [redacted]	Gary Willis [redacted]
Office of Personnel Management	Linda M. Springer Director	Nancy H. Kichak Acting Assoc Director HR Policy [redacted]	Kevin Mahoney Deputy Asst Director Center for General Gov't [redacted]	Gary Willis [redacted]
Environmental Protection Agency	Stephen Johnson Administrator	Barry Breen Principal Dep Asst Admin OSWER [redacted]	James Woolford Director, Fed Facilities & Restoration & Reuse Ofc [redacted]	Frank Barton [redacted]
General Services Administration	Stephen Perry Administrator	James Ferracci Acting Dep Asst Comm Real Property Disposal [redacted]	Ralph Conner Director Real Property Utilization Div [redacted]	Frank Barton [redacted]

Small Business Administration	Hector V. Barreto Administrator	Porter Montgomery Associate Administrator Policy & Planning [redacted]	James Parker, Ph.D Senior Policy Advisor Policy & Planning [redacted]	Frank Barton [redacted]
U.S. Postal Service	John E. Potter Postmaster General	Dallan C. Wordekemper Real Estate Specialist [redacted]	Stephen Landi Operations Specialist [redacted]	Frank Barton [redacted]

EAC Executive Director	Patrick J. O'Brien Director, OEA [redacted]	David F. Witschi [redacted]

Coordinated Federal Resources for BRAC Communities under the President's Economic Adjustment Committee and Defense Economic Adjustment Program

The following presents **some** of the Federal resources available to assist communities in alleviating the socioeconomic effects that may result from military base closures and realignments. Under Executive Order 12788, as amended, assistance for BRAC-impacted communities is coordinated across the Federal Government through the President's Economic Adjustment Committee (EAC). The Department of Defense's Office of Economic Adjustment (OEA) staffs the EAC and its Director is the EAC's Executive Director. Communities are encouraged to familiarize themselves with the following resources, including accessing program information through the provided internet links. OEA staff is available at (703) 604-6020 to address any questions you may have concerning the EAC, Federal assistance available to affected communities, or specific local needs that may exist. This listing will continually be updated and available at www.oea.gov.

Department of Defense

- **The Office of Economic Adjustment (OEA)** (www.oea.gov)

  OEA is the Department of Defense's primary source for assisting communities that are adversely impacted by Defense program changes, including base closures or realignments, base expansions, and contract or program cancellations. To assist affected communities, OEA manages and directs the Defense Economic Adjustment Program, and coordinates the involvement of other Federal Agencies.

  Economic adjustment assistance provides a community-based context for assessing economic hardships caused by DoD program changes by identifying and evaluating alternative courses of action, identifying resource requirements, and assisting in the preparation of an adjustment strategy or action plan to help communities help themselves.

  OEA staff has a range of experience in economic and community development, land use planning, real estate redevelopment, Federal real property programs, military programs, and worker adjustment. Project managers also bring a working knowledge of other Federal agencies and their respective programs to help communities put together an adjustment program combining Federal, State, local and private resources.

  Communities that are on the Secretary of Defense's BRAC 05 recommendations and desire additional resource information can visit http://www.oea.gov/oeaweb.nsf/BRAC?readform or call OEA at (703)-604-6020.

- **Civilian Personnel Management Services (CPMS)**
  http://www.cpms.osd.mil
  CPMS supports the Under Secretary of Defense (Personnel and Readiness) in planning and formulating civilian personnel programs, providing policy support, functional information management and Department-wide human resources advisory services for the Military Departments and Defense agencies. Through CPMS, DoD administers the Civilian Assistance and Re-Employment (CARE) Program, which oversees the management of draw-downs and transition assistance programs and tools. The CARE Program consists of job placement programs such as the DoD Priority Placement Program (PPP), separation incentives such as Voluntary Separation Incentive Pay, and other benefits and services for civilian employees in career transition. CARE also provides direct program assistance to DoD activities affected by downsizing or reorganization.

  CPMS also hosts a BRAC transition assistance website (http://www.cpms.osd.mil/bractransition) designed to provide employees, managers, supervisors, and human resources specialists the latest information on BRAC, and the variety of transition assistance programs offered by the Department and other Federal agencies. In addition, the website answers questions concerning BRAC and transition programs, and links to websites that will help users learn more about BRAC, transition assistance, and employment opportunities.

  DoD uses a variety of tools to reduce staff while avoiding involuntary separations and meeting mission requirements, including:

  Job Placement

  - ***Priority Placement Program (PPP)***
    The Priority Placement Program is the Department's principal mechanism for retaining employees who are adversely affected by reduction in force, transfer of function, base realignment and closure, and other downsizing and restructuring actions. Through its Automated Stopper and Referral System (ASARS), the skills of displaced employees are matched with vacant positions at DoD activities in the employees' selected geographic area of availability. If the new job involves a move to another location, the costs of moving the employee and his/her household are borne by the government in accordance with the Joint Travel Regulations. If the new job is at a lower grade level, the employee's grade or pay is saved to the maximum extent permitted by law.

  - ***Re-Employment Priority List (RPL)***
    The RPL provides priority reemployment consideration for current and former DoD career and career-conditional competitive service employees, who are separated by reduction in force (RIF) or have received a RIF separation notice or Certificate of Expected Separation (CES). The RPL is also available to employees who are separated (or who accept a lower graded position instead of separation) due to compensable injury or disability and who fully recover more than one year from the date compensation is payable as described in 5 CFR Parts 330 and 353.

Separation Programs

- ***Voluntary Separation Incentive Pay (VSIP)***
  VSIP allows activities to offer incentive payments, or "buyouts," of up to $25,000 to encourage DoD employees to resign or retire. Buyouts are targeted to employees in specific grades, series, or locations, and are used to restructure the workforce or to help avoid RIF and minimize involuntary separations. Generally, activities must offer buyouts to their employees at least 30 days prior to the issuance of RIF notices. Buyouts are also referred to as "incentives," or "separation pay."

- ***Voluntary Early Retirement Authority (VERA)***
  VERA is a management tool used to mitigate the affects of substantial delayering, RIF, reorganization, or transfer of function. Using the VERA, which is also referred to as "early retirement" or "early out," DoD activities may downsize or restructure the workforce by allowing employees to retire under reduced age and service requirements (age 50 with 20 years of service, or any age with 25 years of service). Under CSRS, the retirement annuity is reduced by 2 percent per year for each year the employee is under age 55. There is no reduction to a FERS annuity. VERA may be targeted to a specific segment of the workforce based on occupational series or grade; skills, knowledge, or other factors related to a position; organizational, geographical, non-personal and objective factors; or a combination of these factors. The Secretary of Defense redelegated the authority to use VERA to the Heads of the DoD Components for positions up to the GS-15 level (and equivalent) and authorizes further delegation to the lowest practicable level, but not lower than the local installation commander or activity head.

➢ **Homeowner Assistance Program (HAP)**
The Department of Defense Homeowner's Assistance Program provides assistance to eligible federal personnel (military and civilian), who are stationed at or near an installation scheduled for closure or realignment and who, through no fault of their own, are unable to sell their homes under reasonable terms and conditions. The program provides assistance to eligible applicants in three ways: the Government may purchase the applicant's home by paying off the balance of any mortgage existing at the time of the closure or realignment announcement, or for 75% of the fair market value prior to the announcement, whichever is higher; applicants who are able to sell their homes may be reimbursed for part of their losses or, in some cases, paid at the time of closing; and, applicants who defaulted on their mortgage through foreclosure may receive financial assistance. The U.S. Army Corps of Engineers is the executive agent with overall responsibility for administering the program. Information concerning HAP is available at
http://www.sas.usace.army.mil/hapinv/hapinfo.htm

Department of Labor

- **New Resources for States and Communities**
  - ***Workforce Investment Act (WIA) National Emergency BRAC Planning Grants -***
    The Secretary of Labor is issuing guidance to States regarding the availability of National Emergency Grant (NEG) funds to begin planning for layoffs that will occur as a result of BRAC 05. Priority will be given to States that are likely to face the largest impact. The first round of funds will be issued to impacted States by June 30, 2005.

  - ***Coordination Between Rapid Response Officials and DOD Human Resource Officers***
    The U.S. Department of Labor has advised State Rapid-Response coordinators (individuals who coordinate the State-level response to mass-layoffs) of the opportunity to participate in DoD's 2005 Worldwide Human Resources Conference in Southbridge, MA July 18-21. This conference will help State Rapid-Response coordinators and DoD Human Resource officers from across the country make connections and coordinate strategies.

- **Resources for Workers and Businesses**
  - ***BRAC-Coach Web-Site***
    www.Brac-Coach.org
    To further aid communities impacted by BRAC actions, DOL has created this online tool to assist workers, businesses, and workforce professionals who may be affected by a local base realignment or closure.

  - ***Toll-Free Hotline***
    1-877-US2-JOBS
    Operators will have BRAC-specific talking points to refer callers to local programs, including One-Stop Career Centers for assistance.

  - ***One-Stop Career Center One Stop Services***
    www.servicelocator.org; 1-877-US2-JOBS
    One-Stop Career Centers are the focal point of the workforce investment system, supporting the employment needs of job seekers and the human resource needs of businesses. Transitioning workers (BRAC impacted workers, veterans, military spouses, and others) can access career guidance, information on available jobs, job search assistance, information on training availability, training and educational opportunities, and job placement services. Laid-off workers may also access temporary income support and more intensive services to assist with child-care and transportation needs.

Housing & Urban Development

- **Community Development Block Grants (CDBG)**
  http://www.hud.gov/offices/cpd/communitydevelopment/programs/index.cfm.
  Begun in 1974, the Community Development Block Grant (CDBG) is one of the oldest programs in HUD. This program provides Federal funds for community and economic development projects. The program supports job creation and retention efforts, local government efforts to provide affordable infrastructure systems and community efforts to improve the quality of life for low- to moderate-income citizens. The CDBG program provides annual grants on a formula basis (hence the term entitlement communities) based on the population of the community.

- **Small Cities Block Grant (SCBG)**
  http://www.hud.gov/offices/cpd/communitydevelopment/programs/index.cfm
  The Small Cities Block Grant program (SCBG) provides Federal funds for community and economic development projects to cities not in the CDBG "entitlement" program. The program supports job creation and retention efforts, local government efforts to provide affordable infrastructure systems and community efforts to improve the quality of life for low- to moderate-income citizens. These funds are first provided to States, which in turn make them available to smaller communities.

- **Homeless Assistance (Technical & Financial)**
  http://www.hud.gov/offices/cpd/homeless/library/milbase/index.cfm
  For over three decades the Department of Defense has been closing or consolidating domestic military installations to reduce overhead. Communities where these bases were located are charged with the responsibility of finding alternative uses for them once they have been closed.

  In 1987, Congress passed the McKinney Homeless Assistance Act, which made serving the homeless the first priority for use of all surplus Federal properties, including military facilities. In 1994 the Base Closure Community Redevelopment and Homeless Assistance Act (the Redevelopment Act) was passed, superseding the McKinney Act for most base closure buildings and properties.

  The Act itself was the end result of recommendations made by HUD, the Department of Defense, Veterans Affairs, the General Services Administration, and the Department of Health and Human Services. The Redevelopment Act accommodates the impacted communities' multiple interests in base reuse as well as to meet national priorities for homeless assistance. To help communities gain a greater understanding of the provisions of the Act, and to assist them in implementing the law in a fair and consistent manner, HUD published the Guidebook on Military Base Reuse and Homeless Assistance.

  The Guidebook includes an overview of the base redevelopment process, reviews consolidated and redevelopment plans, offers model base reuse plans, and provides guidance for communities seeking additional sources of assistance with HUD Homeless Assistance Programs. For further information, please contact Linda Charest, Coordinator of HUD's Base Redevelopment Team, by phone at (202) 708-1234, ext. 2595 or by e-mail.

  The Guidebook is also available on HUD's Web site in two electronic versions. One is an interactive version that can be read online. The other is an Adobe .PDF document and can be downloaded directly to your computer. Please note that in order to view the .PDF version a downloadable viewer must be installed on your computer.

- **Self Help Homeownership Opportunity Program (SHOP)**
  http://www.hud.gov/offices/cpd/affordablehousing/programs/shop/index.cfm
  SHOP provides funds for eligible non-profit organizations to purchase home sites and develop or improve the infrastructure needed to set the stage for sweat equity and volunteer-based homeownership programs for low-income persons and families. SHOP is authorized by the Housing Opportunity Program Extension Act of 1996, Section 11, and is subject to other Federal crosscutting requirements.

- **Native American Assistance**
  http://www.hud.gov/groups/nativeamericans.cfm
  HUD offers a range of programs, assistance, and loan programs specifically for Native American tribes, organizations, and sometimes individuals. See website for details.

Department of Commerce

- **Economic Development Programs**
  http://www.eda.gov/AboutEDA/Programs.xml
  The Economic Development Administration (EDA) has provided grants that have leveraged private sector and local public sector dollars for targeted investments to alleviate the sudden economic dislocation caused by base closures. Total EDA grants from additional appropriations made for bases closed in 1988, 1991, 1993 and 1995 exceeded $640 million. Additionally, EDA received approximately $274 million from the Department of Defense and $8 million from the Department of Energy in appropriations for specially targeted defense adjustment projects. These grants provided substantial funds for a range of services including: infrastructure development, technology initiatives, revolving loan funds and other economic development strategies. EDA's Economic Adjustment Program predominantly supported three types of grant activities: strategic planning, project implementation, and Revolving Loan Funds (RLF's). Implementation grants supported one or more activities identified in an EDA approved Comprehensive Economic Development Strategy (CEDS).

- Communities economically impacted by major base closures or realignments may be eligible for funding under EDA's Planning, Technical Assistance and Public Works programs.

Department of Transportation

- **Airport Improvement Program (AIP)**
  http://www.faa.gov/arp/financial/aip/overview.cfm?ARPnav=aip
  The AIP provides grants to public agencies for the planning and development of public use airports that are in the National Plan for Integrated Airports System (NPIAS). The Federal share of eligible costs for large and medium primary hub airports is 75%, with the exception of the noise program which is 80%. For remaining airports (small hub, non-hub, primary relievers, and general aviation airports) the participation is 95%. The AIP was funded at about $3.4 billion in FY 2003 from the Aviation Trust Fund.

- **Military Airport Program (MAP)**
  http://www.faa.gov/arp/planning/map/index.cfm?nav=map
  The MAP was established in Federal law (49USC 47118) to place special emphasis on the development of appropriate former military (closed under BRAC) and existing joint use military airports. This is a set-aside in the Aviation Trust Fund, representing $35 million in FY 2005, or about 4% (49USC47117) of the discretionary part of the full AIP appropriation. Competition for the limited number of slots in this program is keen because regulations allow funding of certain capital improvements that are not allowed under the main AIP. MAP grants can be used for projects not generally funded by the AIP, such as: surface parking lots, fuel farms, hangars, terminals, utility systems (on and off the airport), access roads and cargo buildings

Department of Agriculture

- **Rural Development Programs**
  http://www.rurdev.usda.gov/
  USDA's Rural Development programs provide loans, loan guarantees, and grants. Rural Development achieves its mission by helping rural individuals, communities and businesses obtain the financial and technical assistance needed to address their diverse and unique needs. Rural Development works to make sure that rural citizens can participate fully in the global economy.

Department of Interior

- **Parks and Preservation Program**
  The Native American Graves Protection and Repatriation Act (http://www.cr.nps.gov/nagpra/grants/
  Maritime (http://www.cr.nps.gov/maritime/grants.htm)
  Save America's Treasures (http://www.cr.nps.gov/hps/treasures/)

- **Historic Preservation Tax Credits**
  http://www.cr.nps.gov/hps/tps/tax/incentives/index.htm
  Incentives offers a guide to the Federal historical preservation tax credit program for income-producing properties regarding the process to receiving historic designation and obtaining financial assistance. Other grant programs can be found on this site: http://www.cr.nps.gov/hps/grants.htm

Health & Human Services

- The Department of Health and Human Services administers public benefit transfer programs which enable communities and other eligible applicants to acquire former military property, infrastructure and improvements at a discount or at no cost.

  - ***Health Sponsored Conveyance Programs***
    http://propertydisposal.gsa.gov/Property/library/law/law_main1.asp

  - ***Water & Sewer System Conveyance Programs***
    http://www.epa.gov/owm/mab/smcomm/eparev.htm

Office of Personnel Management

- **Interagency Career Transition Assistance Plan (ICTAP)**
  http://www.opm.gov/ctap/
  The reemployment priority list (RPL) is the mechanism agencies use to give reemployment consideration to their former competitive service employees separated by reduction in force (RIF) or fully recovered from a compensable injury after more than 1 year.

Small Business Administration

- **Small Business Loans**
  http://www.sba.gov/financing/
  SBA offers numerous financing programs to assist small businesses. SBA has been assisting businesses with their financing needs since 1953.

- **Office of Entrepreneurial Development Programs**
  - **Small Business Development Centers**
    http://www.sba.gov/sbdc/
    SBDCs offer one-stop assistance to individuals and small businesses by providing a wide variety of information and guidance in central and easily accessible branch locations. The program is a cooperative effort of the private sector, the educational community and Federal, State and local governments.

  - **Small Business Training Network**
    http://www.sba.gov/training/
    The Small Business Training Network, sponsored by the Office of Entrepreneurial Development, is a virtual campus housing free training courses, workshops and knowledge resources designed to assist entrepreneurs and other students of enterprise.

  - **Business & Community Initiatives**
    http://www.sba.gov/bi/
    The Office engages in co-sponsorships with private sector partners who are designed to provide small business owners with information, education and training that is cost-effective, of high quality and reflective of trends in small business development. As a result of these co-sponsorships, small businesses receive a broad variety of education and training opportunities, written materials, and other forms of assistance that are provided free of charge or at extremely low cost.

  - **Women's Business Ownership**
    http://www.sba.gov/ed/wbo/index.html
    SBA's Office of Women's Business Ownership (OWBO) is leading the way.
    OWBO promotes the growth of women-owned businesses through programs that address business training and technical assistance, and provide access to credit and capital, Federal contracts, and international trade opportunities.

- **Historically Underutilized Business Zone Programs (HUBZones)**
  https://eweb1.sba.gov/hubzone/internet/
  The HUBZone Empowerment Contracting Program stimulates economic development and creates jobs in urban and rural communities by providing Federal contracting preferences to small businesses. These preferences go to small businesses that obtain HUBZone (Historically Underutilized Business Zone) certification in part by employing staff who live in a HUBZone.

Department of Education

- **Impact Aid Program**
  http://www.ed.gov/about/offices/list/oese/impactaid/index.html
  The mission of the Impact Aid Program is to disburse Impact Aid payments to local educational agencies that are financially burdened by Federal activities and to provide technical assistance and support services to staff and other interested parties.

- **Educational Conveyance**
  The Secretary of Education has the legislative authority to sell and convey Federal real property to States, their political subdivisions, colleges, universities, public and private non-profit school systems and other education organizations at public benefit allowance discounts up to 100% off the current fair market value of the available property.

Department of Treasury

- **New Markets Tax Credits (NMTC)**
  http://www.cdfifund.gov/programs/programs.asp?programID=5
  The NMTC Program attracts private-sector capital investment into the nation's urban and rural low-income areas to help finance community development projects, stimulate economic growth and create jobs. The NMTC program, established by Congress in December of 2000, permits individual and corporate taxpayers to receive a credit against Federal income taxes for making qualified equity investments in investment vehicles known as Community Development Entities (CDEs). Substantially all of the investor dollars must in turn be used by the CDE to provide investments in low-income communities. NMTCs are allocated annually by the Fund to CDEs under a competitive application process. Throughout the life of the NMTC Program, the Fund is authorized to allocate to CDEs the authority to issue to their investors up to the aggregate amount of $15 billion in equity as to which NMTCs can be claimed.

- **Community Development Finance Institutions (CDFI) Program**
  http://www.cdfifund.gov/programs/programs.asp?programID=7
  Through the CDFI Program, the Fund provides financial assistance to certified CDFIs that demonstrate the ability to leverage non-Federal dollars to support comprehensive business plans of providing services to create community development impact in underserved markets. The CDFI Program also provides technical assistance to existing and emerging CDFIs to build their capacity to serve their communities.

Department of Homeland Security

- **First Responder Assistance Programs**
  http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0355.xml
  The objective is to enhance the capacity of State and local first responders in response to a "weapons of mass destruction" (WMD) incident involving chemical, biological, radiological, nuclear, and explosive devices. Funds will be used to provide support for planning and conducting exercises at the National, State, and local levels.

Department of Veteran Affairs

- **Various Programs Available**
  http://www.va.gov
  The Department of Veterans Affairs administers a wide range of programs to assist veterans. These programs provide critical resources that veterans may access when services provided at military bases (particularly medical care) are no longer available as a result of base realignment or closure.

Environmental Protection Agency

- **Technical Outreach Services for Communities (TOSC)**
  http://www.toscprogram.org
  The Technical Outreach Services for Communities (TOSC) program helps citizens better understand the hazardous contamination issues in or near their communities by providing free, independent, non-advocate, technical assistance about contaminated sites. TOSC taps into the technical expertise of the university environmental researchers that will best meet community's needs.

- **Technical Outreach Services for Native American Communities (TOSNAC)**
  http://bridge.ecn.purdue.edu/~tosnac/
  The Technical Outreach Services for Native American Communities (TOSNAC) program provides technical assistance to Native Americans dealing with hazardous substance issues. It provides first contact, needs assessment, initial support, and long-term technical support arrangements by regional TOSC programs and other resources, as necessary.

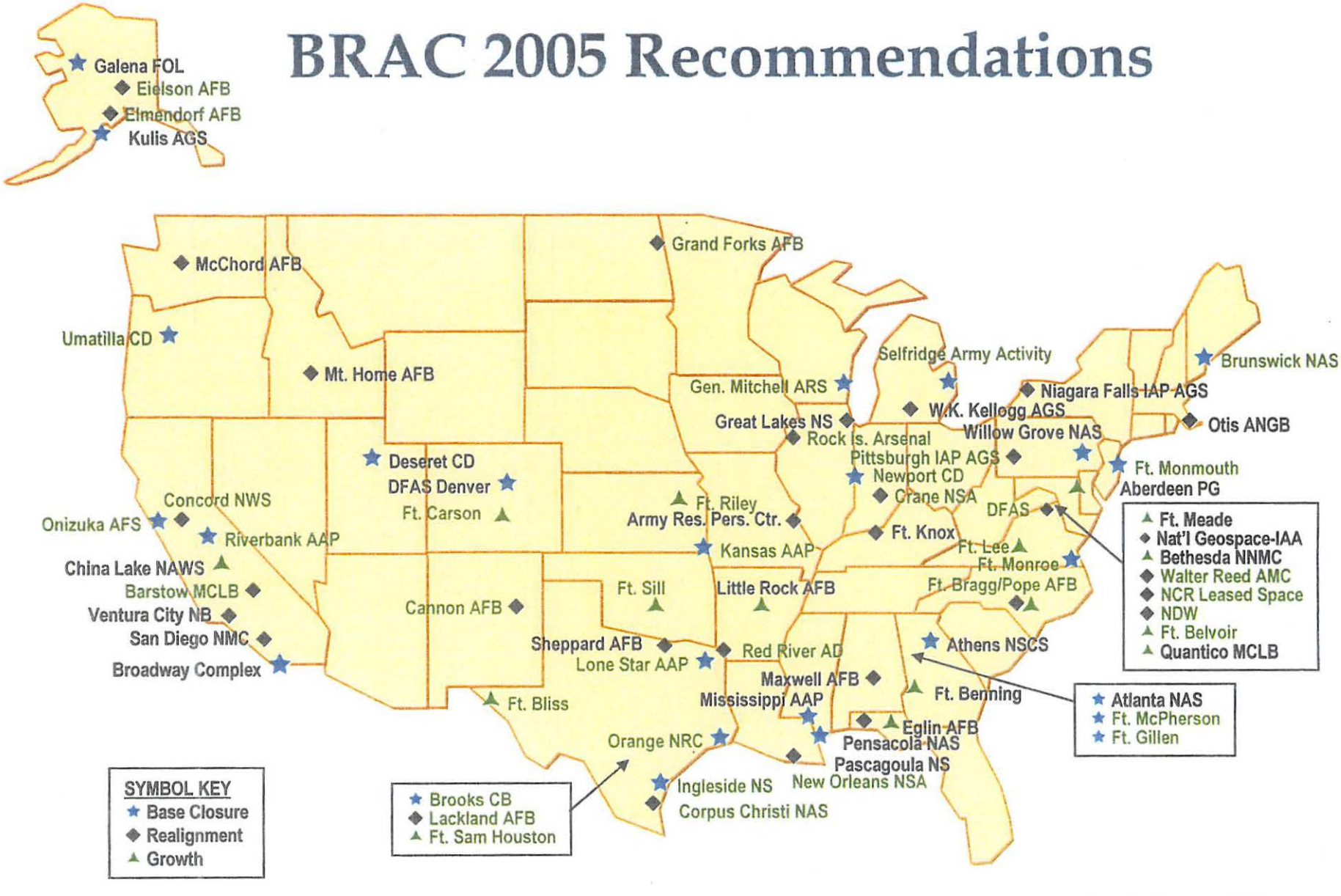
- **Technical Assistance Grants (TAG)**
  http://www.epa.gov/superfund/tools/tag/
  BRAC installations that are on the EPA's National Priorities List (NPL), or proposed to be listed, may be eligible for Technical Assistance Grants (TAGs). An initial grant up to $50,000 is available to qualified community groups so they can contract with independent technical advisors to interpret and help the community understand technical information about their site.

- **Regional Public Liaison (Regional Ombudsman)**
  http://www.epa.gov/superfund/programs/reforms/reforms/3-19.htm#res
  The Regional Public Liaison serves an ombudsman function for Superfund cleanups. The Regional Public Liaison is responsible for resolving concerns and for providing guidance to regional personnel and to stakeholders, including the community. Communities with concerns about Superfund BRAC site cleanup activities may contact the established Regional Public Liaison if the community feels their concerns are not adequately addressed through normal channels. The Regional Public Liaison serves as a direct point of contact for the public on Superfund concerns; he/she has the ability to look independently into problems and facilitate the communication that can lead to a solution.

BRAC Websites

- **Department of Defense:**
  - http://www.defenselink.mil/brac/
- **Office of Economic Adjustment:**
  - http://www.oea.gov/
- **BRAC Commission:**
  - http://www.brac.gov/
- **Department of the Army:**
  - http://www.hqda.army.mil/acsim/brac/braco.htm
- **Department of the Navy:**
  - http://www.navybracpmo.org/
- **Department of the Air Force:**
  - http://www.af.mil/brac/

BRAC 2005 Recommendations



OEA10/05

*Installation names in green font indicates OEA community contact

THE PRESIDENT

EXECUTIVE ORDER 12788 **As AMENDED**

Defense Economic Adjustment Program

By the authority vested in me as President by the Constitution and the laws of the United States of America, including 10 U.S.C. 2391 and the Defense Economic Adjustment, Diversification, Conversion, and Stabilization Act of 1990, enacted as Division D, section 4001 *et seq.*, of the National Defense Authorization Act for Fiscal Year 1991, Public Law 101-510, and to provide coordinated Federal economic adjustment assistance necessitated by changes in Department of Defense activities, it is hereby ordered as follows:

Section 1. *Function of the Secretary of Defense.* The Secretary of Defense shall, through the Economic Adjustment Committee, design and establish a Defense Economic Adjustment Program.

Sec. 2. The Defense Economic Adjustment Program shall (1) assist substantially and seriously affected communities, businesses, and workers from the effects of major Defense base closures, realignments, and Defense contract-related adjustments, and (2) assist State and local governments in preventing the encroachment of civilian communities from impairing the operational utility of military installations.

Sec. 3 *Functions of the Defense Economic Adjustment Program.* The Defense Adjustment Program shall:

(a) Identify problems of States, regions, metropolitan areas, or communities that result from major Defense base closures, realignments, and Defense contract-related adjustments, and the encroachment of the civilian community on the mission of military installations and that require Federal assistance;

(b) Use and maintain a uniform socioeconomic impact analysis to justify the use of Federal economic adjustment resources prior to particular realignments;

(c) Apply consistent policies, practices, and procedures in the administration of Federal programs that are used to assist Defense-affected States, regions, metropolitan areas, communities, and businesses;

(d) Identify and strengthen existing agency mechanisms to coordinate employment opportunities for displaced agency personnel;

(e) Identify and strengthen existing agency mechanisms to improve reemployment opportunities for dislocated Defense industry personnel;

(f) Assure timely consultation and cooperation with Federal, State, regional, metropolitan, and community officials concerning Defense-related impacts on Defense-affected communities' problems;

(g) Assure coordinated interagency and intergovernmental adjustment assistance concerning Defense impact problems;

(h) Prepare, facilitate, and implement cost-effective strategies and action plans to coordinate interagency and intergovernmental economic adjustment efforts;

(i) Encourage effective Federal, State, regional, metropolitan, and community cooperation and concerted involvement of public interest groups and private sector organizations in Defense economic adjustment activities;

(j) Serve as a clearinghouse to exchange information among Federal, State, regional, metropolitan, and community officials involved in the resolution of community economic adjustment problems. Such information may include, for example, previous studies, technical information, and sources of public and private financing;

(k) Assist in the diversification of local economies to lessen dependence on Defense activities;

(l) Encourage and facilitate private sector interim use of lands and buildings to generate jobs as military activities diminish;

(m) Develop ways to streamline property disposal procedures to enable Defense-impacted communities to acquire base property to generate jobs as military activities diminish; and

(n) Encourage resolution of regulatory issues that impede encroachment prevention and local economic adjustment efforts.

Sec. 4. *Economic Adjustment Committee.*

(a) *Membership.* The Economic Adjustment Committee ("Committee") shall be composed of the following individuals or a designated principal deputy of these individuals, and such other individuals from the executive branch as the President may designate. Such individuals shall include the:

(1) Secretary of Agriculture;
(2) Attorney General;
(3) Secretary of Commerce;

(4) Secretary of Defense;
(5) Secretary of Education;
(6) Secretary of Energy;
(7) Secretary of Health and Human Services;
(8) Secretary of Housing and Urban Development;
(9) Secretary of Interior;
(10) Secretary of Labor;
(11) Secretary of State;
(12) Secretary of Transportation;
(13) Secretary of Treasury;
(14) Secretary of Veterans Affairs;
(15) Secretary of Homeland Security;
(16) Chairman, Council of Economic Advisers;
(17) Director of the Office of Management and Budget;
(18) Director of the Office of Personnel Management;
(19) Administrator of the Environmental Protection Agency;
(20) Administrator of General Services;
(21) Administrator of the Small Business Administration; and
(22) Postmaster General.

(b) The Secretary of Defense, or the Secretary's designee, shall chair the Committee.

(c) The Secretaries of Labor and Commerce shall serve as Vice Chairmen of the Committee. The Vice Chairmen shall co-chair the Committee in the absence of both the Chairman and the Chairman's designee and may also preside over meetings of designated representatives of the concerned executive agencies.

(d) *Executive Director.* The head of the Department of Defense's Office of Economic Adjustment shall provide all necessary policy and administrative support for the Committee and shall be responsible for coordinating the application of the Defense Economic Adjustment Program to Department of Defense activities.

(e) *Duties.* The Committee shall:
(1) Advise, assist, and support the Defense Economic Adjustment Programs;
(2) Develop procedures for ensuring that State, regional, and community officials, and representatives of organized labor in those States, municipalities, localities, or labor organizations that are substantially and seriously affected by changes in Defense expenditures, realignments or closures, or cancellation or curtailment of major Defense contracts, are notified of available Federal economic adjustment programs; and
(3) Report annually to the President and then to the Congress on the work of the Economic Adjustment Committee during the preceding fiscal year.

Sec. 5. Responsibilities of Executive Agencies.

(a) The head of each agency represented on the Committee shall designate an agency representative to:
(1) Serve as a liaison with the Secretary of Defense's economic adjustment staff;
(2) Coordinate agency support and participation in economic adjustment assistance projects; and
(3) Assist in resolving Defense-related impacts on Defense-affected communities.

(b) All executive agencies shall:
(1) Support, to the extent permitted by law, the economic adjustment assistance activities of the Secretary of Defense. Such support may include the use and application of personnel, technical expertise, legal authorities, and available financial resources. This support may be used, to the extent permitted by law, to provide a coordinated Federal response to the needs of individual States, regions, municipalities, and communities adversely affected by necessary Defense changes; and
(2) Afford priority consideration to requests from Defense-affected communities for Federal technical assistance, financial resources, excess or surplus property, or other requirements, that are part of a comprehensive plan used by the Committee.

Sec. 6. Judicial Review. This order shall not be interpreted to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, its agents, or any person.

Sec. 7. Construction. (a) Nothing in this order shall be construed as subjecting any function vested by law in, or assigned pursuant to law to, any agency or head thereof to the authority of any other agency or officer or as abrogating or restricting any such function in any manner.

(b) This order shall be effective immediately and shall supersede Executive Order No 12049.

GEORGE BUSH
THE WHITE HOUSE
January 15, 1992.

[Amended 2/28/03 by President George W. Bush, E.O. 13286]
[Amended 5/12/05 by President George W. Bush, E.O. 13378]

U.S. DEPARTMENT OF COMMERCE

Economic Development Administration

THE Defense Adjustment PROGRAM

A Coordinated Approach for Addressing the Economic Challenges Resulting from Base Realignment and Closures (BRAC)

EDA Regional Contacts

Atlanta Regional Office
404-730-3002
(AL, FL, GA, KY, MS, NC, SC, TN)

Austin Regional Office
512-381-8144
(AR, LA, NM, OK, TX)

Chicago Regional Office
312-353-7706
(IL, IN, MI, MN, OH, WI)

Denver Regional Office
303-844-4715
(CO, IA, KS, MO, MT, NE, ND, SD, UT, WY)

Philadelphia Regional Office
215-597-4603
(CT, DE, DC, ME, MD, MA, NH, NJ, NY, PA, PR, RI, VT, VA, VI, WV)

Seattle Regional Office
206-220-7660
(AK, AZ, CA, HI, ID, NV, OR, WA, American Samoa, N. Marina Islands, Guam, Fed. States of Micronesia, Rep. of Marshall Islands, Rep. of Palau)

U.S. Department of Commerce
1401 Constitution Ave., N.W.
Washington, D.C. 20230
www.doc.gov

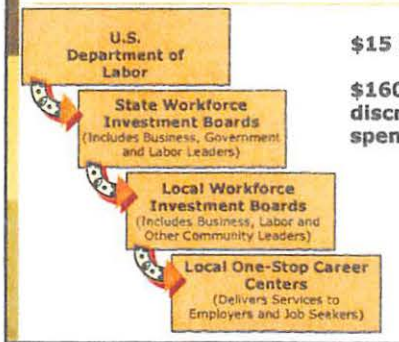
Workforce Development Services and Solutions

Emily Stover DeRocco
Assistant Secretary
Department of Labor/
Employment and Training
Administration

Department of Labor Principles for BRAC 2005 Response

- Tailored to needs of affected communities
- Workers are assets with transferable skills
- Economic analysis as foundation for strategies and career guidance
- Demand-driven strategies linked to economic development
- Strategic partnerships for solutions-based approach

The Public Workforce System



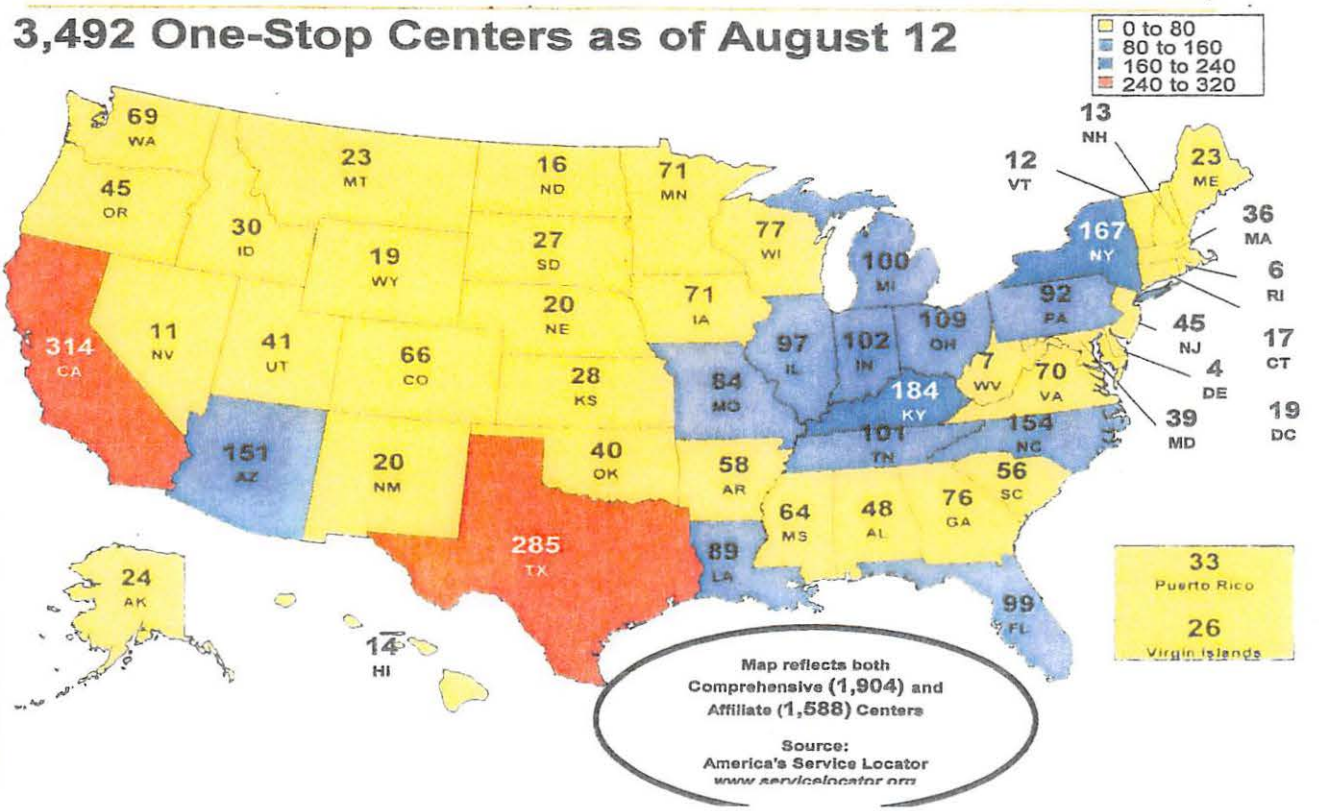
$15 billion

$160 million in discretionary spending

Services

- **Rapid Response services**: vital on-site services, information, and access to resources for workers and employers, prior to layoffs
- **One-Stop Career Center**: Local workforce development hubs; training and other services, connections to hiring employers, other necessary services

One-Stop Career Centers (August 2005)



Business Connections to Support Transition Efforts

- Demand-driven workforce system with extensive business engagement
- Access to a network of employers in high growth, high demand industries
- Large, multi-state employers as national business partners

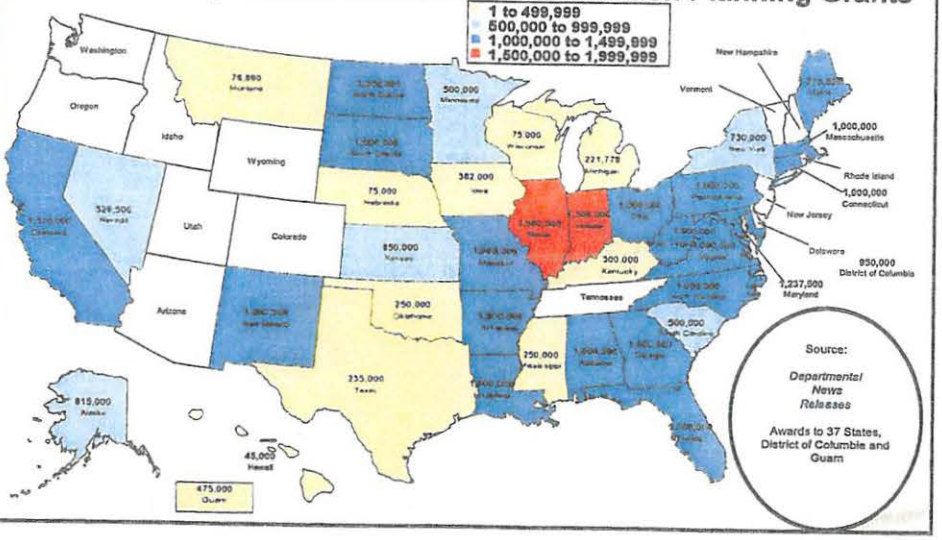
ETA's BRAC Responses to Date

Discretionary Spending

- BRAC planning grants to be used for planning purposes in states/local areas expecting to be impacted by BRAC (37 states, DC & Guam/$30 million)
- Establishing transition committees of key stakeholders
- Establishing infrastructure (including staffing) for planning efforts
- Long-range planning for education and training needs
- Leveraging additional resources to move from planning to implementation
- Undertaking layoff aversion activities

States with Planning Grants

BRAC 2005: Department of Labor NEG Transition Planning Grants



BRAC Responses cont.

Other Activities

- BRAC Coach: online tool designed to access electronic resources by audience (www.brac-coach.org)
- Toll-Free Helpline: Specially designed scripts for BRAC-related calls (877-US-2JOBS)
- Conference presentations: Joint DOD-ETA information sessions at both workforce and defense department events; and NAID community sessions

EDA's Defense Economic Adjustment Program

Base Realignment and Closure 2005

October 2005

EDA's Role in BRAC 2005

- EDA's role in Base Realignments and Closure (BRAC) 2005 is governed by Executive Order 12788.
- Signed in January 1992, and updated in May of 2005, Executive Order 12788 serves as the coordinating mechanism for the federal government's response to communities impacted by BRAC.
- Pursuant to this Executive Order the Secretary of Commerce serves as Co-Vice Chair (with the Secretary of Labor) of the President's Economic Adjustment Committee.

EDA's Mission and Role in Defense Economic Adjustment

Mission Statement

EDA's mission is to lead the federal economic development agenda by promoting innovation and competitiveness, preparing American regions for growth and success in the worldwide economy.

Defense Economic Adjustment

EDA operates the federal government's largest program for defense economic adjustment at the community level.

What EDA Brings to the Table

- **Flexibility** - EDA develops projects at the local level. Priorities are community specific.
- **Leadership** - EDA's portfolio includes significant contributions to hundreds of communities across the country.

EDA targets its investment assistance to attract private capital investment and create higher-skill, higher-wage jobs in those communities and regions that are suffering from high level of economic distress. EDA investments are focused on locally-developed, regionally-based economic development initiatives that achieve the highest return on the taxpayers' investment and that directly contribute to regional and national economic growth.

EDA Program Tools – Economic Adjustment

Economic Adjustment Program

EDA's Economic Adjustment Program assists state and local interests to design and implement strategies to adjust or bring about change to an economy. The program focuses on areas that have experienced or are under threat of serious structural damage to the underlying economic base.

EDA Program Tools - Economic Adjustment

The **Economic Adjustment Program** predominantly supports two types of investment activities:

- **Strategic Planning** - Strategy investments help organize and carry out a planning process resulting in a Comprehensive Economic Development Strategy (CEDS) tailored to the community's specific economic problems and opportunities.
- **Project Implementation** - Implementation investments support one or more activities identified in an EDA-approved CEDS. Activities may include, but are not limited to, the creation/expansion of strategically targeted business development and financing programs such as, construction of infrastructure improvements, organizational development and market or industry research and analysis.

BRAC 2005: "Simplified" Redevelopment Process

A step-by-step approach:

- Step 1: Organize the Planning Group
- Step 2: Create the Reuse Strategy/Plan*
- Step 3: Begin Plan Implementation
- Step 4: Property Disposal & Environmental Cleanup
- Step 5: Redevelopment Project Implementation

EDA supports BRAC reuse efforts at two stages: **economic recovery strategy development*** and **redevelopment project implementation**.

* In coordination with OEA.

EDA's Role – Our Legacy

- Since 1992, EDA has awarded $646 million in 385 investments in approximately 113 counties across 38 states affected by 103 base closures.
- EDA received roughly $274 million from the Department of Defense (DOD) and $8 million from Department of Energy (DOE) appropriations for specially targeted defense adjustment projects.
- Of the previous BRAC Rounds, 21 communities have enjoyed over 150% civilian jobs recovery rate; 20 of these did it with assistance from the Economic Development Administration.

Nuts and Bolts: Working with EDA

- Interested applicants are encouraged to contact the appropriate EDA Regional Office to discuss their proposal and obtain specific EDA program information, application instructions and forms. EDA regulations and other information are available on the EDA website: http://www.eda.gov.

EDA BRAC 2005 Staff Contacts (by Regional Office)

EDA HQ
Dennis Alvord
202-482-2900

Philadelphia Regional Office	Denver Regional Office	Austin Regional Office	Seattle Regional Office	Atlanta Regional Office	Chicago Regional Office
Paul Matyskiela 215-597-8733	Robert Olson 303-844-4715	Pedro Garza 512-381-8144	Leonard Smith 206-220-7660	Lois Smith 404-730-3013	Kathryn Huth 312-353-8143 x137
[CT, DE, DC, ME, MD, MA, NH, NJ, NY, PA, PR, RI, VT, VA, VI, WV]	[CO, IA, KS, MO, MT, NE, ND, SD, UT, WY]	[AR, LA, NM, OK, TX]	[AK, AZ, CA, HI, ID, NV, OR, WA, American Samoa, N. Marina Islands, Guam, Fed. States of Micronesia, Rep. of Marshall Islands, Rep. of Palau]	[AL, FL, GA, KY, MS, NC, SC, TN]	[IL, IN, MI, MN, OH, WI]

DOC Economic Adjustment Committee Contact Person

Contact information:

Jim Yeager
Senior Advisor to the Assistant Secretary
U.S. Department of Commerce
Economic Development Administration
14th St. & Constitution Ave., NW
HCHB 7800
Washington, D.C. 20230
(202) 482-5081
JYeager@eda.doc.gov

The Defense Economic Adjustment Program

Responding to BRAC:
The President's Economic Adjustment Committee

Patrick J. O'Brien
Office of Economic Adjustment

The Defense Economic Adjustment Program

- Purpose is to assist substantially and seriously affected communities, businesses, and workers
- Created by Executive Order 12788, amended in May 2005
- Functions through the advise, assistance, and support of the President's Economic Adjustment Committee (EAC)
- Staffed by the Office of Economic Adjustment

The Defense Economic Adjustment Program – Through the EAC

- Identifies problems of state and local government that result from Defense actions
- Identifies and strengthens existing agency mechanisms to improve reemployment opportunities for displaced agency personnel
- Assures timely consultation and cooperation with Federal, State, regional, and local officials concerning Defense-related impacts on Defense-affected communities' problems
- Assures coordinated interagency and intergovernmental adjustment assistance concerning Defense impact problems
- Serves as a clearinghouse to exchange information across government and community officials involved in the resolution of community economic adjustment problems

The President's Economic Adjustment Committee – Responsibilities

- **Members designate staff to**
  1. Serve as a liaison with OEA staff
  2. Coordinate agency support and participation in economic adjustment assistance projects
  3. Assist in resolving Defense-related impacts on Defense-affected communities
- **Member agencies are to**
  1. Support, to the extent permitted by law, the economic adjustment assistance activities of the Secretary of Defense
  2. Afford priority consideration to requests from Defense-affected communities for Federal technical assistance, financial resources, excess or surplus property, or other requirements, that are part of a comprehensive plan use by the Committee
  3. Track BRAC related activities
- **EAC reports annually to the President and to Congress**

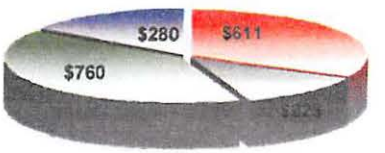
Federally-Coordinated BRAC Property Disposal 1989-Present

Fed-to-Fed Transfers and Federally Sponsored Conveyances

- **Federal Aviation Administration** *(airports)*
  - *23 installations*
- **Interior** *(parks, historic monuments, conservation)*
  - *39 installations*
- **Education** *(primary, secondary, graduate)*
  - *27 installations*
- **Justice** *(prisons, law enforcement facilities)*
  - *15 installations*
- **Health and Human Services**
  - *16 installations*
- **Transportation** *(highways, intermodal)*
  - *22 installations*
- **Maritime Administration** *(seaports)*
  - *4 installations*

Federally-Coordinated BRAC Community Adjustment Assistance

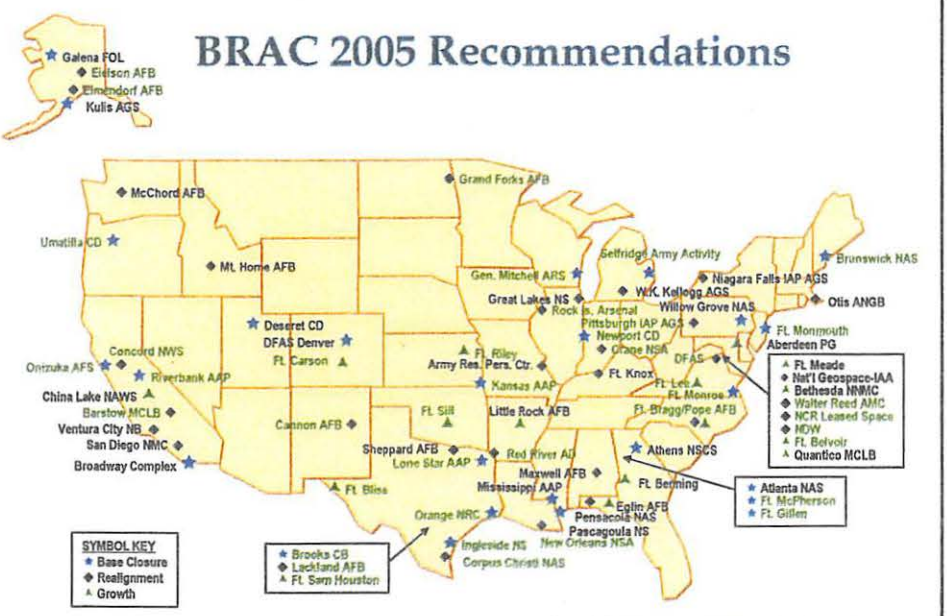
Federal Grants 1988-2004* (mil)



- Economic Development Administration
- Department of Labor
- Federal Aviation Administration
- Office of Economic Adjustment

* Source. GAO 2004

BRAC 2005 Recommendations



*Installation names in green font indicates OEA community contact

EAC Implementation Activities

- Coordinated site visits
- Agency Publications/websites
- Issue roundtables/task forces
- Conference participation

Anticipated Activity in Response to Downsizing Closures and Realignments

- Worker adjustment/retraining
- Infrastructure improvements
- Demolition
- Economic development activities
- School Impact Aid drawdown
- Environmental regulatory approvals
- Historic resource agreements
- Fed-to-Fed property transfers
- Federal sponsorship of public benefit conveyances
- Small business assistance
- Homeless outreach and review support

Anticipated Activity in Response to Realignments with Growth

- Growth management planning
- Housing construction
- Gap financing for residential construction/home ownership
- Transportation systems
- Infrastructure expansion
- Impact aid growth
- School expansion and construction
- Additional community services (police, fire, solid waste, recreation, social services)
- Economic development - jobs for spouses

Base Realignment and Closure

Mr. Philip W. Grone
Deputy Under Secretary of Defense
(Installations and Environment)

Economic Adjustment Committee
October 17, 2005

Status of Recommendations

- 8 Sep 05 - Commission forwarded its report and recommendations to the President.
- 15 Sep 05 - President approved and forwarded Commission's recommendations to Congress.
- Congressional Action
  - House
    - 2 Joint Resolutions of Disapproval introduced and referred to HASC.
    - HASC reported adversely on one (43-14); no action on other.
  - Senate – No action.
- 9 Nov 05 – estimated expiration of congressional review period.

Comparing BRAC Rounds

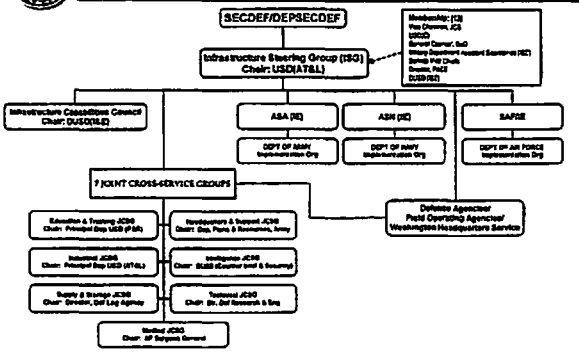
(TY $B)	Major Base Closures	Major Base Realignments	Minor Closures and Realignments	Costs[1] ($B)	Annual Recurring Savings[2] ($B)
BRAC 88	16	4	23	2.7	0.9
BRAC 91	26	17	32	5.2	2.0
BRAC 93	28	12	123	7.6	2.6
BRAC 95	27	22	57	6.5	1.7
Total	97	55	235	22.0	7.3[3]
BRAC 05 (Commission Rec's)	25	26	757	22.8	4.4

Note 1: As of the FY 2006 President's Budget (February 2005) through FY 2001.
Note 2: Annual recurring savings (ARS) begin in the year following each round's 6-year implementation period: FY96 for BRAC 88; FY98 for BRAC 91; FY00 for BRAC 93; and FY02 for BRAC 95. These numbers reflect the ARS for each round starting in 2002 and are expressed in FY 05 dollars.
Note 3: Does not add due to rounding.

DoD BRAC Implementation

- Military Departments and affected Defense Agencies will:
  - Prepare "Business Plans" that delineate required actions, their timing, and necessary resources
    - Plans will serve as the foundation for the complex program management required, and support initial operational/budgetary estimates and allocation of BRAC resources
  - Consult/coordinate with other affected organizations (losing/gaining installations), operating entities, and Joint Cross-Service Groups to ensure effective implementation
- Established Infrastructure Steering Group (ISG) and Installation Capabilities Council (ICC) review responsibility

BRAC Implementation - Organization



BRAC Implementation – DoD

- Involves
  - Designing and building facilities at gaining installations
  - Moving personnel and equipment
  - Examining the environmental conditions at both gaining and losing installations
  - Environmental cleanup
  - Disposing of excess property

Environmental Strategy

- Follow the law and streamline the process
- Cleanups/ site characterizations well advanced and publicly available
- Good site characterization vital
- Environmental Condition of Property (ECP) key
  - Maximizes use of existing data and studies
  - Information updated and gaps filled
  - Developed ASAP after BRAC list to aid reuse planning
  - End result similar to Environmental Baseline Survey

Guiding Principles - Implementation

1. Act expeditiously whether closing or realigning
2. Fully utilize all appropriate means to transfer property
3. Rely on and leverage market forces
4. Collaborate effectively
5. Speak with one voice

Rulemaking

- Published in Federal Register August 9, 2005
- Comment Period Closed October 11, 2005
- 24 Commenters as of close date (may still be some in the mail)
- Highlights:
  - Conforms the regulation to statutory changes since the last BRAC round
  - More closely tracks the statutory requirements than current regulation
  - Reflects updated DoD policy

BRAC Implementation - DEAP

Defense Economic Adjustment Program (DEAP)

Purpose: To assist communities, businesses and individuals adversely impacted by changes in Defense activities, such as BRAC, by providing coordinated Federal economic adjustment assistance.

Examples:

- School impact aid
- Worker adjustment assistance
- Federal sponsored public benefit conveyance
- Infrastructure improvements
- Economic development assistance

Roles of EAC Members

- Identify & involve key Agency decision-makers
- Engage their Agency in support of the Defense Economic Adjustment Program
- Respond to requests from the EAC Executive Director on behalf of the Chair
- Track participation in BRAC issues
- Afford priority consideration to requests from Defense-affected communities for technical assistance, financial resources, excess or surplus property or other requirements

Key Milestones – Program Implementation

Oct. 11, 2005	Public comments due on DoD proposed rule
Oct. 17, 2005	Initial meeting of the President's Economic Adjustment Committee
Nov. 9, 2005	Earliest possible BRAC recommendation approval date
In process	Environmental Condition of Property assessments
Oct.- Nov. 2005	Issuance of DoD's final rule (32 CFR part 174)
Oct.- Nov. 2005	Issuance of Base Reuse and Redevelopment Manual (BRRM)
Nov. 29-Dec. 1, 2005	OSD/Military Service/Community Conference
Nov.-Dec. 2005	Excess property determination
Dec.-Feb. 2006	Federal screening of property
May 2006	Surplus property determination


DEPARTMENT OF DEFENSE
UNITED STATES OF AMERICA

8 17508

Congress of the United States
Washington, DC 20515

September 1, 2005

Attorney General Alberto Gonzales
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Gonzales:

The sequence of events culminating in the dismissal of [redacted] is very troubling. At best, your Department took far too long to act on accusations against the [redacted] that were sufficiently serious as to lead you ultimately to decide to dismiss him, and that is the most favorable possible interpretation that can be put on your actions. A more persuasive explanation is that having been forced by the information in the Boston Globe to look into this situation, and having received from the Inspector General a very damning report about [redacted] work habits, the Justice Department planned to take no action until its hand was forced by the Globe's publicizing the report through a Freedom of Information Request.

No one is arguing that dismissal of [redacted] should have followed immediately upon publication of the Globe series in October. It was reasonable to ask the Inspector General to look into this, then to give [redacted] a chance to respond to their findings, and finally to decide what should be done based on the Inspector General's findings and [redacted] response. But every step of this process appears to have taken far longer than was reasonable, and in particular, the lapse in time between the Inspector General's report in March and the ultimate decision to dismiss [redacted] in August means that for months this important position in Massachusetts was filled by someone who your Department believed had faltered in his right to hold it, and who was not administering its important duties in a proper fashion. Several questions must be answered. First, why was there a delay – as the Globe has reported – between the Inspector General's report being completed in March, and [redacted] being asked for his response in May? Second, why did that response take so long - again according to the Globe, it was not submitted until July. Since [redacted] is being asked to account for his own work habits, it is very difficult to understand why this took two or more months.

The next question is why there was a delay until late August in your Department's decision to act on the matter? The fact that your Department refused to make the report public until the Globe filed the Freedom of Information Act request adds weight to the suspicion that you had hoped to be able to take either no action on the report, or action of the most minimal sort, and it stretches belief in coincidence beyond the breaking point to

suggest that your decision to fire [redacted] so many months after the Inspector General's report was independently arrived at shortly after the Globe published its article based on the findings in that report.

The inference that your Department's actions in this matter were motivated by a desire to avoid acknowledging a political embarrassment is strengthened by the contrast between the long delay in acting against [redacted] and what appears to have been the more prompt decision by your Department to penalize a Justice Department appointee who resisted efforts to minimize the significance of statistics documenting unfair treatment of racial minorities in some law enforcement situations.

It is important for people to know that political considerations are not unduly affecting law enforcement administration, and that makes your answers to these questions and your explanation of the sequence of events of the utmost importance.

Rep. Edward Markey

Rep. Barney Frank

Rep. John Olver

Rep. Martin Meehan

Rep. James McGovern

Rep. John Tierney

819508

BARNEY FRANK
4TH DISTRICT, MASSACHUSETTS

2252 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-2104
(202) 225-5931

29 CRAFTS STREET
SUITE 375
NEWTON, MA 02458
(617) 332-3920

558 PLEASANT STREET
ROOM 309
NEW BEDFORD, MA 02740
(508) 999-6462

THE JONES BUILDING
29 BROADWAY
SUITE 310
TAUNTON, MA 02780
(508) 822-4796

Congress of the United States
House of Representatives
Washington, DC

FAX FROM THE WASHINGTON OFFICE OF CONGRESSMAN BARNEY FRANK

TODAY'S DATE: 9/1/05

TO: Attorney General Gonzales

FROM: Congressman Barney Frank

FAX NUMBER: 202.307.6777

NUMBER OF PAGES (INCLUDING THIS ONE): 3

If this fax does not transmit properly, please call 202-225-5931.

COMMENTS:

IMMIGRATION ADDENDUM TO THE SF-86 (TO BE USED WHEN APPOINTEE, COTENANTS AND/OR RELATIVES ARE BORN OUTSIDE THE U.S. BUT RESIDE IN THE U.S. OR ARE NATURALIZED U.S. CITIZENS)

NAME Neil M. Gorsuch
DOB 8/29/67 SSAN [redacted]

YOUR CITIZENSHIP DATA (FILL IN ONLY IF YOU WERE BORN OUTSIDE U.S.):

ARE YOU A U.S. CITIZEN? YES NO IF NO, LIST THE COUNTRY IN WHICH YOU ARE A CITIZEN _____

WAS YOUR U.S. CITIZENSHIP DERIVED FROM YOUR PARENTS? YES NO
(IF YES, YOU MUST FILL IN SPACES ON THE REVERSE SIDE WITH INFORMATION ON YOUR PARENTS' CITIZENSHIP)

NATURALIZATION NUMBER (A#) _____
PROVIDE YOUR CERTIFICATE NUMBER (C#) ONLY IF YOU CAN NOT PROVIDE YOUR A#.

DATE/PLACE OF ENTRY INTO THE U.S. _____
COURT/CITY WHERE NATURALIZED _____

DATE NATURALIZED _____

NAME/SPELLING YOU USED WHEN YOU ENTERED/WERE NATURALIZED _____

ALIEN REGISTRATION (A#) OR VISA # (IF YOU ARE NOT A U.S. CITIZEN) _____

ON THE REVERSE SIDE, SPACES ARE PROVIDED FOR INFORMATION ON YOUR RELATIVES AND COTENANTS. FILL IN AS MANY AS NECESSARY FOR ALL RELATIVES AND COTENANTS BORN OUTSIDE THE U.S. AND WHO NOW LIVE IN THE U.S. OR ARE U.S. CITIZENS. "RELATIVES" INCLUDES YOUR PARENTS, YOUR STEPPARENTS, YOUR SPOUSE AND ANY OF YOUR BROTHERS, SISTERS, STEPBROTHERS, STEPSISTERS, HALF BROTHERS OR HALF SISTERS WHO ARE EIGHTEEN YEARS OF AGE OR OLDER. "COTENANTS" INCLUDES ANYONE WHO LIVES WITH YOU OVER THE AGE OF EIGHTEEN, TO INCLUDE EMPLOYEES. DO NOT INCLUDE DATA FOR PEOPLE UNDER AGE EIGHTEEN IN-LAWS OR PEOPLE BORN ABROAD TO AMERICAN PARENTS. THE REVERSE SIDE SHOULD BE COPIED IF NECESSARY FOR ADDITIONAL RELATIVES AND COTENANTS.

Neil Gorsuch 3.23.06
SIGNATURE DATE

(OVER)

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

August 12, 1996

BY COURIER

To: Mrs. Sheila C. Joy
United States Department of Justice
Office of Legal Policy

From: James A. Bourke
Chief
Special Inquiry and General
Background Investigations Unit
Federal Bureau of Investigation

Subject: Immigration Addendum to the SF-86

When conducting background investigations for the Office of Policy Development, one of the steps taken is to verify the naturalized citizenship or legal alien status of the candidate, and, depending upon the type of background investigation requested, all foreign-born close relatives, cotenants, and domestic help that reside with the candidate. In order for this verification to be conducted in a timely, effective and efficient manner, it is necessary for certain information to be provided to the FBI at the same time as the request for investigation.

Currently, the prospective candidate utilizes the SF-86 (revised September 1995) to provide the FBI with information concerning his or her citizenship or alien status and that of their relatives and cotenants. Recently, the Immigration and Naturalization Service (INS) has informed my office that having other information in addition to that requested on the SF-86, which includes exact name of an individual at the time of their entry, will allow the naturalization or alien status of that individual to be verified more quickly in a timely manner as the majority of INS files are maintained and retrieved by the individual's entry name. The INS utilizes the alien registriation numbers and the certification numbers, along with the entry name, to locate the correct file of an individual for review. Although the SF-86 requires the candidate to provide certificate numbers, it does not ask for the person's exact name at the time of entry, an alien registration number, place or date of entry or place or date of naturalization.

The FBI has developed the enclosed document entitled "Immigration Addendum to the SF-86." (copy attached) This form allows the candidate to provide to the FBI all the information necessary to verify an individual's naturalization or legal alien status. It is requested that you use this form whenever the candidate, his or her close relatives or his or her cotenants were not U.S. citizens at birth. The use of this addendum to obtain the needed information would be of great benefit to the candidate, the FBI, the INS, and ultimately your office, to facilitate an efficient background investigation process. The attached addendum copy may be duplicated as necessary.

It is suggested that any supplemental instructions you provide along with the SF-86 be amended to address the use of the enclosed addendum.

If you have any questions concerning this matter, please contact me or Supervisory Personnel Security Specialists [redacted]

Enclosure

CONFIRMATION OF ATTENDANCE

UNITED STATES INTERAGENCY COUNCIL ON HOMELESSNESS
FULL COUNCIL MEETING

TUESDAY, SEPTEMBER 13, 2005
11:00 A.M. – 12:30 P.M.

Eisenhower Executive Office Building, Room 350

Secretary [Administrator, etc.] _____
will attend.
is unable to attend.

The following Deputy Secretary from my agency will attend: (Please print)

Full Name: Neil M. Gorsuch
Title: Principal Deputy Associate Attorney General
Agency: U.S. Department of Justice
DOB: [redacted] SSN: [redacted]
Telephone: (202) 514-9500
Fax: (20) 514-0238
E-Mail: Neil.Gorsuch@usdoj.gov

Also attending will be:

(2) Full Name: _____
Title: _____
Agency: _____
DOB: _____ SSN: _____
Telephone: _____
Fax: _____
E-Mail: _____

Please return this form by FAX to the U.S. Interagency Council on Homelessness at (202) 708-1216 by THURSDAY, SEPTEMBER 8, 2005.

United States Interagency Council on Homelessness

451 7th Street SW, Washington, DC 20410
Philip F. Mangano, Executive Director
202-708-4663 phone • 202-708-1216 fax

Fax

To:	The Honorable Alberto Gonzales	**From:**	USICH
Fax:	202-307-2825	**Pages:**	2 (including cover)
RE:	FULL COUNCIL MEETING – SEPTEMBER 13	**Date:**	August 26, 2005

FULL COUNCIL MEETING:

REMINDER AND RSVP NOTICE

The full Council meeting previously scheduled for July 26 is re-scheduled for Tuesday, September 13 at 11am at EEOB #350.

Official Letters of Invitation will follow to Schedulers.

Please reply using the attached Confirmation of Attendance Form and be sure to include your clearance information as indicated.

Questions: Please call USICH Deputy Director Mary Ellen Hombs at 202/708-4663.

9/13 - 11:00

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 08/09/2005
DATE RECEIVED: 08/10/2005
WORKFLOW ID: 849745
DUE DATE:

FROM:

United States Interagency Council on Homelessness
451 7th Street, SW
Washington, DC 20410

TO: AG

MAIL TYPE: Invitations (non DOJ)

SUBJECT: (Fax) Advising that the Full Council Meeting of the U.S. Interagency Council on Homelessness originally scheduled for 7/26/2005, has been rescheduled to 9/13/2005 at 11 a.m. A formal invitation will be forthcoming. See WFs 836440 & 827167.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
09/02/2005	For appropriate action. Office of the Associate Attorney General

INFO COMPONENT: ODAG, OASG, OLP, OJP, CRT

COMMENTS: 9/2/2005: Per OAG (Beach), reassign to ASG (Gorsuch).
8/31/2005: Fax dtd 8/26/05 reminding the AG of the Full Council meeting on 9/13/2005 and enclosing a copy of confirmation and attendance form. Forwarded to OAG (Beach).

FILE CODE:

EXECSEC POC: Debbie Alexander: 202-616-007

faxed confirmation
9/2/05

CONFIRMATION OF ATTENDANCE

UNITED STATES INTERAGENCY COUNCIL ON HOMELESSNESS
FULL COUNCIL MEETING

TUESDAY, SEPTEMBER 13, 2005
11:00 A.M. – 12:30 P.M.

Eisenhower Executive Office Building, Room 350

Secretary [Administrator, etc.] _____
will attend.
is unable to attend.

The following Deputy Secretary from my agency will attend: (Please print)

Full Name: Neil M. Gorsuch
Title: Principal Deputy Associate Attorney General
Agency: U.S. Department of Justice
DOB: [redacted] SSN: [redacted]
Telephone: (202) 514-9500
Fax: (20) 514-0238
E-Mail: Neil.Gorsuch@usdoj.gov

Also attending will be:

(2) Full Name: _____
Title: _____
Agency: _____
DOB: _____ SSN: _____
Telephone: _____
Fax: _____
E-Mail: _____

Please return this form by FAX to the U.S. Interagency Council on Homelessness at (202) 708-1216 by THURSDAY, SEPTEMBER 8, 2005.

TRANSMISSION VERIFICATION REPORT

TIME : 09/02/2005 16:32
NAME :
FAX :
TEL :
SER.# : BROF3J497892

DATE,TIME	09/02 16:32
FAX NO./NAME	97081216
DURATION	00:00:18
PAGE(S)	02
RESULT	OK
MODE	STANDARD ECM

U.S. Department of Justice

Office of the Associate Attorney General

FACSIMILE TRANSMITTAL COVER SHEET

Date: 9/2/05

To: Mary Ellen Hombo

Organization: U.S. Interagency Council on Homelessness

Fax #: (202) 708-1216

Number of pages 1 **+ cover sheet**

From: _____

Office of the Associate Attorney General

DOJ_NMG_0143644

U.S. Department of Justice
Office of the Associate Attorney General

FACSIMILE TRANSMITTAL COVER SHEET

Date: 9/2/05

To: Mary Ellen Hombo

Organization: U.S. Interagency Council on Homelessness

Fax #: (202) 708-1216

Number of pages 1 **+ cover sheet**

From: _____

Office of the Associate Attorney General
950 Pennsylvania Avenue NW, Room 5706
Washington, D.C. 20530-0001
Telephone: (202) 514-9500
Fax: (202) 514-0238

Comments: _____

COMSEC ACCESS BRIEFING

You have been selected to perform duties requiring access to sensitive COMSEC information. It is, therefore, essential that you are made fully aware of certain facts relative to the protection of this information before access is granted. This briefing will provide you with a description of the types of COMSEC information you may have access to, the reasons why special safeguards are necessary for protecting this information, the directives and rules, which prescribe those safeguards, and the penalties that you will incur for willful disclosure of this information to unauthorized persons.

COMSEC equipment and keying material are especially sensitive because they are used to protect other sensitive information against unauthorized access during the process of communicating that information from one point to another. Any particular piece of COMSEC equipment, keying material, or other cryptographic material may be the critical element, which protects large amounts of sensitive information from interception, analysis, and exploitation. If the integrity of the COMSEC system is weakened at any point, all the sensitive information protected by that system might be compromised; even more damaging, this loss of sensitive information may never be detected. The procedural safeguards placed on physical security, covering every phase of their existence from creation through disposition, are designed to reduce or eliminate the possibility of such compromise.

Communications Security (COMSEC) is the general term used for all steps taken to protect information of value when it is being communicated. COMSEC is usually considered to have four main components: Transmission security, physical security, emission security, and cryptographic security. Transmission security is that component of COMSEC which is designed to protect transmissions from unauthorized intercept, traffic analysis, imitative deception and disruption. Physical security is that component of COMSEC, which results from all physical measures to safeguard cryptographic materials, information, documents, and equipment from access by unauthorized persons. Emission security is that component of COMSEC which results from all measures taken to prevent compromising emanations from cryptographic equipment or telecommunications systems. Finally, cryptographic security is that component of COMSEC which results from the use of technically sound cryptosystems, and from their proper use. To ensure that telecommunications are secure, all four of these components must be considered.

Part of the physical security protection given to COMSEC equipment and materials is afforded by the special handling it receives from distribution and accounting. There are two separate channels used for handling of such equipment and materials: "COMSEC channels" and "administrative channels". The COMSEC channel, called the COMSEC Material Control System (CMCS) is used to distribute accountable COMSEC items such as keying material, maintenance manuals, and classified and CCI equipment. (EXCEPTION: Some military departments have been authorized to distribute CCI equipment through their standard logistics system.) The CMCS channel is comprised of a series of COMSEC accounts, each of which has an appointed COMSEC Custodian who is personally responsible and accountable for all COMSEC material charged to the account. The COMSEC Custodian assumes responsibility for the material upon receipt, and then controls its dissemination to authorized individuals on a need-to-know basis. The administrative channel is used to distribute COMSEC information and material other than that which is accountable in the CMCS.

COMSEC ACCESS BRIEFING (cont'd)

Particularly important to the protection of COMSEC equipment and material are an understanding of all security regulations and the timely reporting of any compromise, suspected compromise, or other security problem involving these materials. If a COMSEC system is compromised but the compromise is not reported, the continued use of the system, under the incorrect assumption that it is secure, can result in the loss of all information that was ever protected by that system. If the compromise is reported, steps can be taken to change the system, replace the keying material, etc. to reduce the damage done. In short, it is your individual responsibility to know and to put into practice all the provisions of the appropriate publications, which relate to the protection of the COMSEC equipment and material to which you will have access.

Public disclosure of any COMSEC information is not permitted without the specific approval of your Government contracting office representative or the National Security Agency (NSA). This applies to both classified and unclassified COMSEC information, and means that you may not prepare newspaper articles, speeches, technical papers, or make any other "release" of COMSEC information without the specific Government approval. The best personal policy is to avoid any discussions, which reveal your knowledge of, or access to COMSEC information and thus avoid making yourself of interest to those who would seek the information you possess.

Finally, you must know that should you willfully disclose or give to any unauthorized persons any of the classified or CCI COMSEC equipment, associated keying material, or other classified COMSEC information to which you have access, you will be subjected to prosecution under the criminal laws of the United States. The laws, which apply, are contained in Title 18, United States Code, and sections 641, 793, 794, 798, and 952.

If your duties include access to classified COMSEC information, in addition to the above, you should avoid travel to any countries which are adversaries of the United States, or to their establishments/facilities within the U.S. Should such travel become necessary, however, your security office must be notified sufficiently in advance so that you may receive a defense security briefing. Any attempt to elicit the classified COMSEC information you have, either through friendship, favors, or coercion must be reported immediately to your security office.

JCON - S Network User Agreement Form

COMSEC ACCESS CERTIFICATION

I understand that as result of performing my duties as Primary/Alternate COMSEC Representative, I am being granted access to United States cryptographic information. I understand that my being granted access to this information involves me in this position of special trust and confidence concerning matters of national security. I hereby acknowledge that I have been briefed concerning my obligations with respect to such access.

I understand that safeguarding United States Cryptographic information is of the utmost importance and that the loss or compromise could cause serious or exceptionally grave damage to the national security of the United States. I understand that I am obligated to protect U. S. cryptographic information and I have been instructed in the special nature of this information and the reasons for the protection of such information. I agree to comply with any special instructions issued by my department or office regarding unofficial foreign travel or contracts with foreign nationals.

I understand fully the information presented in the written briefing I have received. I have read this certificate and my questions if any, have been satisfactorily answered. I understand that, if I willfully disclose to any unauthorized person any of the U. S. cryptographic information to which I might have access, I may be subject to prosecution under the criminal laws of the United States, as appropriate. I understand and accept that unless I am released in writing by an authorized representative of my department or office, the terms of this certificate and my obligation to protect U. S. cryptographic information to which I have access, apply during the time of my access and at all time thereafter.

Signature

January 9, 2006

Date

Neil M. Gorsuch

Print Name

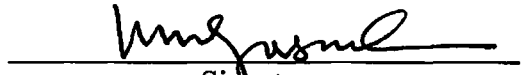
JCON - S Network User Agreement Form

Computer Security Awareness Certification

I understand that as result of performing my duties, I am being granted access to United States SECRET level information. I understand that my being granted access to this information involves me in this position of special trust and confidence concerning matters of national security. I hereby acknowledge that I have been briefed concerning my obligations with respect to such access.

I understand that safeguarding SECRET Level information is of the utmost importance and that the loss or compromise could cause serious or exceptionally grave damage to the national security of the United States. I understand that I am obligated to protect the SECRET Level information and I have been instructed in the special nature of this information and the reasons for the protection of such information. I agree to comply with any special instructions issued by my department or office regarding unofficial foreign travel or contracts with foreign nationals.

I understand fully the information presented in the DVD, oral and/or written briefing I have received. I have read this certificate and my questions if any, have been satisfactorily answered. I understand that, if I willfully disclose to any unauthorized person any of SECRET Level information to which I might have access, I may be subject to prosecution under the criminal laws of the United States, as appropriate. I understand and accept that unless I am released in writing by an authorized representative of my department or office, the terms of this certificate and my obligation to protect SECRET Level information to which I have access, apply during the time of my access and at all time thereafter.



Signature

January 9, 2006

Date

Neil M. Gorsuch

Print Name

JCON-S User Account Application

The User Account Application consists of two forms: 1) JCON-S Network User Agreement Form and 2) The COMSEC Access Certification Form. Each form consists of pertinent information and a signature block. Please be sure to fully complete, sign, and obtain approval (if necessary). All forms must be completely filled out, **originally signed** and returned to your component point of contact (POC) before system access will be granted.

**Please note that if sections of the forms are not completed they will be returned to the component POC.

JCON - S Network User Agreement Form

This check-in brief outlines basic computer or automated information system (AIS) security practices that shall be followed while utilizing JCON - S System workstations processing Collateral Secret Information. Users requesting access to the AIS, shall:

1. Read pages 7-11 of this package. **Initial the bottom of each page**.
2. Fill out, sign, and date the JCON - S User Agreement Form, COMSEC Form and CSAT Form.
3. Have your Supervisor fill out, sign and date his/her section of the JCON - S User Agreement Form. Please be sure to fill in the reason you need system access.
4. Keep pages 1-5 for your reference.
5. Send the **originally signed** package to your Component Point of Contact for processing.

Basic User Responsibilities are discussed below. More detailed information is available in the Department of Justice SPOM and individual JCON-S SOPs.

USER RESPONSIBILITIES

AIS Security Officials	The Information System Security Manager **(ISSO)** is responsible for establishing and enforcing AIS security policy for the JCON-S system. The system **ISSO** implements AIS security policy and procedures on individual workstations. Each user shall know how to contact the security officials for the information system that he/she is authorized to access.
User Access	Each user will protect the confidentiality, integrity and availability of the JCON-S system and the information it contains. Users will not employ JCON-S assets for private or personal use. JCON-S users will not attempt to have multiple concurrent active sessions.
Physical Security	Physical security and environmental controls will be used to provide an acceptable level of security to all information systems. Physical security can be achieved through basic measures such as challenging strangers/unknown personnel in your workplace or computer area and by never leaving an active terminal unattended. In temporary classified workspaces the cubicle or office should be prepared for classified processing. Preparation activities include ensuring that the computer monitor is not facing the entrance ways or windows or that the monitor has a privacy filter covering the screen, glass doors are covered with paper, and a notification sign is posted on the outside of the door. The removable hard drive and Crypto Ignition Key (CIK) may be retrieved from the safe. The safe must then be closed and secured. The cubicle or office door has been locked the session may begin. At the end of a session the printer and computer must be shut down and powered off for at least 10 seconds. Secure everything (hard drive, CIK key and all classified materials) in the GSA-approved safe except the key to the hard drive. As an added precaution (layered defense) the key to the hard drive should not be stored in the same location as the hard drive. These are important practices that safeguard against unauthorized use. Individuals providing escort duty are responsible for ensuring the person being escorted does not gain unauthorized access to a JCON - S automated information system. Failure to do so may result in a security incident and adverse action
System Monitoring	Users activities on the JCON-S system may be monitored by the Department of Justice and by DISA. **JCON-S users have no expectation of privacy while using the system.**

Passwords	Every user of a JCON - S system will use a "strong" password of twelve ALPHANUMERIC CHARACTERS (combination of numbers and letters). A "strong" password must contain **all four** types of characters: upper case letter, lower case letter, western Arabic numeric and non-alphanumeric. To prevent passwords from being easily guessed, they shall not be names/numbers that can easily be associated with your person (i.e. well known nicknames, spouse's or close relatives (son, daughter, mother, etc.) name, favorite sports teams, type of car you drive, etc.) nor should they be dictionary words (e.g. "SPIDER" or "OFFICE"). Choose a password that is easy for you to remember but is not easily guessed. Passwords are for individual use only. The sharing of passwords is prohibited as is writing it down in easily accessible places (such as "post-it" notes on your desk or in your organizer file under "P", etc.). Your password is used to authenticate you and only you as a valid user of the system. Protect passwords, when combined with user account names, at the highest classification level of the system to which the passwords allow access. If you feel your password has been compromised or that unauthorized personnel are accessing your files, report it immediately to the system **ISSO**.
Individual Account Protection	To ensure individual account and system protection log-off the system each time you leave the workstation. **Ensure this is always done!** Failure to secure the workstation by logging off is a practice dangerous to security and may result in adverse administrative action.
Processing Restrictions	Information systems connected to the JCON - S LAN can process, store, and transmit information up to a classification level of **SECRET**. If higher classification is inadvertently processed on the JCON - S LAN, report the incident immediately to the **ISSO and his/her Security Program Manager (SPM).** The contaminated workstation(s) and servers will be disconnected from the network and sanitized. Users will not forward E-mails automatically outside the JCON-S system. The JCON-S network is a closed network, except for the SIPRNet connection. Users will not attempt to connect any JCON-S assets or resources to any other system.
Hardware	JCON-S users will not introduce new hardware to the JCON-S workstation or workstation suite. The use of modems, wireless adapters, or USB devices on JCON-S. is strictly prohibited.
Software	Requests to use non-standard JCON - S software, including free and unsolicited demonstration software, shall be submitted to the **JCON - S ISSO**. Personally owned software, regardless of source, may not be introduced into JCON - S computers.
Removable Media	All removable magnetic media must bear a label indicating the classification level of information to which the media contains. A color-coded security classification label must be affixed to media. Place the labels in a conspicuous place where they will not adversely affect operation of the equipment. Media may not be moved from the JCON-S workstation suite to an unclassified system.

	JCON-S users will protect media that has been used on JCON-S at the SECRET Level, even if they believe the media contains only unclassified information. Users will dispose of medial when it is no longer required for mission completion.
Output	Users will ensure that all output contains proper classification and control markings and is adequately protected, including classified information cover sheets. This includes all messages and correspondence generated on electronic mail systems. Printed Secret information that does not leave the restricted area is normally exempt from accountability. See the **ISSO** with questions regarding printed collateral Secret material.
Electronic Mail	E-mail is a DOJ owned communications system used to supplement the record message system. It is subject to the same for official use only constraints as government mail or telephones, and shall be used to conduct Government business only. Users should be aware that administrators and technicians have the ability to review e-mail and disseminate it as necessary. **There is no expectation of privacy while using DOJ information systems!**
Electronic Equipment	Items generally prohibited in restricted areas include personally owned: photographic, video, audio recording equipment, computers & associated media, and **cell phones**. Personally owned electronic calculators, electronic spell-checkers, wristwatches, receive only pagers and radios are allowed in a Restricted Area.
Virus/Malicious Programs	Users shall make every effort to prevent the transmission of computer viruses and Trojan horses. Anti-virus software is installed on all JCON - S workstations. Users will use the installed anti-viral software to scan any removable media introduced to the JCON-S system prior to its being accessed by other JCON-S resources.
Disposal and Output media.	JCON S users will dispose of classified material properly. Disposal methods may in clued burning, shredding, pulping, melting, mutilating, using chemical decomposition, pulverizing, or degaussing. Users will properly dispose of toner cartridges.

To begin using the classified system:

1. Make sure the hard drive key is accessible.

Note: Some workstations may not have removable hard drives. If working on a machine without a hard drive please disregard the steps referring to the removable hard drives.

2. Clear work area of all unauthorized personnel.

3. Review System Security Plan.

4. Do not leave classified material unattended or unsecured during processing.

5. Retrieve removable hard drive and Crypto Ignition Key (CIK) from GSA-approved container.

6. Insert and lock the hard drive.

7. Turn the computer on.

8. Insert the CIK into the TACLANE and turn the key $1/8^{th}$ of a turn in the clockwise direction.

9. Turn the TACLANE on and use the following procedure to establish a secure connection.
   - After the start up process runs the "-----Offline Main Menu-----" should appear.
   - Use the arrows on the key pad to move the selection cursor '>' to the "Operation" option and press the select button.
   - Use the arrows to select the "Select Lvl" option and press the **Select** button.
   - Use the arrows to select "Secret" as the level and press the **Select** button.
   - Select "Operation" and press the **Select** button.
   - Select "Secure Comm" and press the **Select** button. ***Note:*** *The Green Run light blinks when Secure Comm mode is functioning properly.*

10. Upon completion of the computer boot-up, Log on, and initiate desired program.

11. If storage media is needed ensure that it is properly labeled and insert it into its drive.

12. If system malfunctions, immediately notify the TSVC Help Desk at 202-307-5368.

13. If you need to print, use **only** the locally associated printer. (Network printing is not allowed.)

14. Ensure all printer material is properly labeled with highest level of classification contained therein.

15. Do not load any unauthorized software on system.

To shut down the system:

Note: Some workstations may not have removable hard drives. If working on a machine without a hard drive please disregard the steps referring to the removable hard drives.

1. Save any material to the A: drive or the removable hard drive.

2. Remove any diskettes in the A: drive or CDs, label them with appropriate classification and set aside for storage in the GSA-approved container.

3. Shut down the computer. ***Note:*** *A logoff script will run when the computer is shutting down. Depending upon the type of printer (inkjet or laser) the printer may print 3 sheets of paper to clear the memory and clean the drum.*

4. Turn off the printer.

5. Shut down the TACLANE using the following procedures.
   - Select "Operations" and press the **Select** button.
   - Select the "Shutdown" and press the **Select** button.
   - The prompt "Perform Shutdown?" will appear.
   - Select "Yes". – Wait a moment until the TACLANE states you may shut the TACLANE off.
   - Turn off the TACLANE.
   - Turn the CIK key 1/8th of a turn in the counter clockwise direction and remove the CIK.

6. Remove the hard drive from the workstation.

7. Ensure all products/media are properly marked.

8. Place all classified media (hard drive and the CIK key) into the GSA-approved security container.

9. Store the hard drive key.

JCON - S Network User Agreement Form

Part 1	USER INFORMATION				
Last Name	**First Name, MI**	**SSN**	**Grade**	**Phone**	**Dept/Compont/Sec.**
Gorsuch	Neil M.	[redacted]	SES	305-1434	DOJ/OASG

Access requested to system: *(Check one. Submit separate form for each system requested)*

☒ **JCON - S Network**

Are you a Cadre Member?

Yes_____ **No**_____

Contractor? No_____ ***Yes***_____ ***Company***_____ United States Citizen? ___Yes ___No

If yes Govt. COTAR_____ ***Phone#***_____ If Yes place of birth_____

Reason for access: **:** This person requires access and is authorized to a SECRET workstation to perform his/her duties.

Supervisor Certification

Signature *Date* 1-9-06

Robert D. McCallum, Jr. (202) 514-9500

Government Supervisor's Name (print) ***Supervisor's Phone Number***

Part 2 USER AUTHORIZATION & ACKNOWLEDGEMENT

Scope of Authorization

Subject to the limitations detailed in the User Responsibilities of this brief and the respective system Standard Operating Procedures (SOP), the user is authorized access to JCON - S information systems classified Secret as required. This authorization contains no implied authorization to access any computer system of the United States Government not specifically identified herein. This authorization shall be revoked upon separation, retirement, reassignment of duties, change of organization or when determined by the Information Systems Security Officer **(ISSO)** to be in the best interest of the Government.

WARNING: Only Authorized Users May Use These Systems. Individuals using DOJ computer systems without authority, or in excess of their authority, are subject to having all of their activities on these systems monitored and recorded by system personnel. In the course of monitoring individuals improperly using these systems, or in the course of system maintenance, the activities of authorized users may be monitored. Anyone using these systems expressly consents to such monitoring and is advised that if such monitoring reveals possible evidence of criminal activity, management may authorize system personnel to provide the evidence of such monitoring to law enforcement officials.

JCON - S ISSO Review:

User is authorized/not authorized access to: _____ _____ _____

System Signature Date

User Acknowledgement

I understand that I am authorized to access to Department of Justice computer systems as necessary. Access for purposes beyond the Scope of Authorization is a violation of Federal law (18 U.S.C. 1030 et al.). I acknowledge the above briefing along with my responsibility to protect information processed by the Department of Justice owned and operated computer systems, directly or via remote access. I understand that only official Department of Justice business may be conducted on the system. Any records produced are government records and must be handled in accordance with the Paperwork Management and Information Security Manuals.

I understand THERE IS NO EXPECTATION OF PRIVACY WHILE USING THIS CLASSIFIED DEPARTMENT OF JUSTICE SYSTEM and that ALL DEPARTMENT OF JUSTICE SYSTEMS ARE SUBJECT TO MONITORING BY AUTHORIZED PERSONNEL. I further understand that if security monitoring reveals evidence of possible improper or criminal activity, such evidence will be provided to appropriate management and/or law enforcement personnel and may result in prosecution and/or removal of my account.

I have read and initialed the user responsibilities pages attached to this form and retained a copy for my reference. I agree to abide by the applicable system SOP.

User Signature: _____ Date: January 9, 2006

If users need access to shared directories, please indicate the directory name and check the appropriate type of access below:

Shared Directory	Read	Write	Delete

PRIVACY ACT STATEMENT: SSN info will be used to verify personal identification and security clearance levels to allow individuals access to classified computer systems.

JCON - S Network User Agreement Form

This check-in brief outlines basic computer or automated information system (AIS) security practices that shall be followed while utilizing JCON - S System workstations processing Collateral Secret Information. Users requesting access to the AIS, shall:

1. Read pages 7-11 of this package. **Initial the bottom of each page**.
2. Fill out, sign, and date the JCON - S User Agreement Form.
3. Have your Supervisor fill out, sign and date his/her section of the JCON - S User Agreement Form. Please be sure to fill in the reason you need system access.
4. Keep pages 1-5 for your reference.
5. Send the **originally signed** package to your Component Point of Contact for processing.

Basic User Responsibilities are discussed below. More detailed information is available in the Department of Justice SPOM and individual JCON-S SOPs.

USER RESPONSIBILITIES

AIS Security Officials	The Information System Security Manager **(ISSO)** is responsible for establishing and enforcing AIS security policy for the JCON - S system. The system **ISSO** implements AIS security policy and procedures on individual workstations. Each user shall know how to contact the security officials for the information system that he/she is authorized to access.
User Access	Each user will protect the confidentiality, integrity and availability of the JCON-S system and the information it contains. Users will not employ JCON-S assets for private or personal use. JCON-S users will not attempt to have multiple concurrent active sessions.
Physical Security	Physical security and environmental controls will be used to provide an acceptable level of security to all information systems. Physical security can be achieved through basic measures such as challenging strangers/unknown personnel in your workplace or computer area and by never leaving an active terminal unattended. In temporary classified workspaces the cubicle or office should be prepared for classified processing. Preparation activities include ensuring that the computer monitor is not facing the entrance ways or windows or that the monitor has a privacy filter covering the screen, glass doors are covered with paper, and a notification sign is posted on the outside of the door. The removable hard drive and Crypto Ignition Key (CIK) may be retrieved from the safe. The safe must then be closed and secured. The cubicle or office door has been locked the session may begin. At the end of a session the printer and computer must be shut down and powered off for at least 10 seconds. Secure everything (hard drive, CIK key and all classified materials) in the GSA-approved safe except the key to the hard drive. As an added precaution (layered defense) the key to the hard drive should not be stored in the same location as the hard drive. These are important practices that safeguard against unauthorized use. Individuals providing escort duty are responsible for ensuring the person being escorted does not gain unauthorized access to a JCON - S automated information system. Failure to do so may result in a security incident and adverse action
System Monitoring	Users activities on the JCON-S system may be monitored by the Department of Justice and by DISA. **JCON-S users have no expectation of privacy while using the system.**

Passwords	Every user of a JCON - S system will use a "strong" password of twelve ALPHANUMERIC CHARACTERS (combination of numbers and letters). A "strong" password must contain **all four** types of characters: upper case letter, lower case letter, western Arabic numeric and non-alphanumeric. To prevent passwords from being easily guessed, they shall not be names/numbers that can easily be associated with your person (i.e. well known nicknames, spouse's or close relatives (son, daughter, mother, etc.) name, favorite sports teams, type of car you drive, etc.) nor should they be dictionary words (e.g. "SPIDER" or "OFFICE"). Choose a password that is easy for you to remember but is not easily guessed. Passwords are for individual use only. The sharing of passwords is prohibited as is writing it down in easily accessible places (such as "post-it" notes on your desk or in your organizer file under "P", etc.). Your password is used to authenticate you and only you as a valid user of the system. Protect passwords, when combined with user account names, at the highest classification level of the system to which the passwords allow access. If you feel your password has been compromised or that unauthorized personnel are accessing your files, report it immediately to the system **ISSO**.
Individual Account Protection	To ensure individual account and system protection log-off the system each time you leave the workstation. **Ensure this is always done!** Failure to secure the workstation by logging off is a practice dangerous to security and may result in adverse administrative action.
Processing Restrictions	Information systems connected to the JCON - S LAN can process, store, and transmit information up to a classification level of **SECRET**. If higher classification is inadvertently processed on the JCON - S LAN, report the incident immediately to the **ISSO and his/her Security Program Manager (SPM).** The contaminated workstation(s) and servers will be disconnected from the network and sanitized. Users will not forward E-mails automatically outside the JCON-S system. The JCON-S network is a closed network, except for the SIPRNet connection. Users will not attempt to connect any JCON-S assets or resources to any other system.
Hardware	JCON-S users will not introduce new hardware to the JCON-S workstation or workstation suite. The use of modems, wireless adapters, or USB devices on JCON-S. is strictly prohibited.
Software	Requests to use non-standard JCON - S software, including free and unsolicited demonstration software, shall be submitted to the **JCON - S ISSO**. Personally owned software, regardless of source, may not be introduced into JCON - S computers.
Removable Media	All removable magnetic media must bear a label indicating the classification level of information to which the media contains. A color-coded security classification label must be affixed to media. Place the labels in a conspicuous place where they will not adversely affect operation of the equipment. Media may not be moved from the JCON-S workstation suite to an unclassified system. JCON-S users will protect media that has been used on JCON-S at the SECRET

	Level, even if they believe the media contains only unclassified information. Users will dispose of medial when it is no longer required for mission completion.
Output	Users will ensure that all output contains proper classification and control markings and is adequately protected, including classified information cover sheets. This includes all messages and correspondence generated on electronic mail systems. Printed Secret information that does not leave the restricted area is normally exempt from accountability. See the **ISSO** with questions regarding printed collateral Secret material.
Electronic Mail	E-mail is a DOJ owned communications system used to supplement the record message system. It is subject to the same for official use only constraints as government mail or telephones, and shall be used to conduct Government business only. Users should be aware that administrators and technicians have the ability to review e-mail and disseminate it as necessary. **There is no expectation of privacy while using DOJ information systems!**
Electronic Equipment	Items generally prohibited in restricted areas include personally owned: photographic, video, audio recording equipment, computers & associated media, and **cell phones**. Personally owned electronic calculators, electronic spell-checkers, wristwatches, receive only pagers and radios are allowed in a Restricted Area.
Virus/Malicious Programs	Users shall make every effort to prevent the transmission of computer viruses and Trojan horses. Anti-virus software is installed on all JCON - S workstations. Users wil use the installed anti-viral software to scan any removable media introduced to the JCON-S system prior to its being accessed by other JCON-S resources.
Disposal and Output media.	JCON S users will dispose of classified material properly. Disposal methods may in clued burning, shredding, pulping, melting, mutilating, using chemical decomposition, pulverizing, or degaussing. Users will properly dispose of toner cartridges.

To begin using the classified system:

1. Make sure the hard drive key is accessible.

Note: Some workstations may not have removable hard drives. If working on a machine without a hard drive please disregard the steps referring to the removable hard drives.

2. Clear work area of all unauthorized personnel.

3. Review System Security Plan.

4. Do not leave classified material unattended or unsecured during processing.

5. Retrieve removable hard drive and Crypto Ignition Key (CIK) from GSA-approved container.

6. Insert and lock the hard drive.

7. Turn the computer on.

8. Insert the CIK key into the TACLANE and turn the key 1/8th of a turn in the clockwise direction.

9. Turn the TACLANE on and use the following procedure to establish a secure connection.
   - After the start up process runs the "-----Offline Main Menu-----" should appear.
   - Use the arrows on the key pad to move the selection cursor '>' to the "Operation" option and press the select button.
   - Use the arrows to select the "Select Lvl" option and press the **Select** button.
   - Use the arrows to select "Secret" as the level and press the **Select** button.
   - Select "Operation" and press the **Select** button.
   - Select "Secure Comm" and press the **Select** button. ***Note:*** *The Green Run light blinks when Secure Comm mode is functioning properly.*

10. Upon completion of the computer boot-up, Log on, and initiate desired program.

11. If storage media is needed ensure that it is properly labeled and insert it into its drive.

12. If system malfunctions, immediately notify the TSVC Help Desk at 202-307-5368.

13. If you need to print, use **only** the locally associated printer. (Network printing is not allowed.)

14. Ensure all printer material is properly labeled with highest level of classification contained therein.

15. Do not load any unauthorized software on system.

To shut down the system:

1. Save any material to the A: drive or the removable hard drive.
Note: Some workstations may not have removable hard drives. If working on a machine without a hard drive please disregard the steps referring to the removable hard drives.

2. Remove any diskettes in the A: drive or CDs, label them with appropriate classification and set aside for storage in the GSA-approved container.

3. Shut down the computer. ***Note:*** *A logoff script will run when the computer is shutting down. Depending upon the type of printer (inkjet or laser) the printer may print 3 sheets of paper to clear the memory and clean the drum.*

4. Turn off the printer.

5. Shut down the TACLANE using the following procedures.
   - Select "Operations" and press the **Select** button.
   - Select the "Shutdown" and press the **Select** button.
   - The prompt "Perform Shutdown?" will appear.
   - Select "Yes". – Wait a moment until the TACLANE states you may shut the TACLANE off.
   - Turn off the TACLANE.
   - Turn the CIK key 1/8th of a turn in the counter clockwise direction and remove the CIK.

6. Remove the hard drive from the workstation.

7. Ensure all products/media are properly marked.

8. Place all classified media (hard drive and the CIK key) into the GSA-approved security container.

9. Store the hard drive key.

JCON-TS (JWICS) User Agreement Form

The User Account Application consists of two forms: 1) JCON-TS User Agreement Form and 2) The COMSEC Access Certification Form. Each form consists of pertinent information and a signature block. Please be sure to fully complete, sign, and obtain approval (if necessary). All forms must be completely filled out, **originally signed** and returned to your component point of contact (POC) before system access will be granted.

**Please note that if sections of the forms are not completed they will be returned to the component POC.

JCON-TS (JWICS) User Agreement Form

This check-in brief outlines basic computer or automated information system (AIS) security practices that shall be followed while utilizing DOJ JWICS System workstations processing Top Secret / SCI Information. Users requesting access to the AIS, shall:

1. Read pages 5-7 of this package. **Initial the bottom of each page**.
2. Fill out, sign, and date the DOJ JWICS User Agreement Form.
3. Have your Supervisor fill out, sign and date his/her section of the DOJ JWICS User Agreement Form.
4. Keep pages 1-3 for your reference.
5. Send the package to the system Information System Security Officer **(ISSO)** for processing.

Basic User Responsibilities are discussed below. More detailed information is available in the SPOM and individual system SOPs.

USER RESPONSIBILITIES

AIS Security Officials	The Information System Security Manager **(ISSO)** is responsible for establishing and enforcing AIS security policy for the DOJ JWICS system. The system **ISSO** implements AIS security policy and procedures on individual workstations. Each user shall know how to contact the security officials for the information system that he/she is authorized to access. The ISSO is Dale Long and he can be reached at 202-353-9856.
Passwords	Every user of a DOJ JWICS system will use a "strong" password of eight ALPHANUMERIC CHARACTERS (combination of numbers and letters). A "strong" password must contain **all four** types of characters: upper case letter, lower case letter, western Arabic numeric and non-alphanumeric. To prevent passwords from being easily guessed, they shall not be names/numbers that can easily be associated with your person (i.e. well known nicknames, spouse's or close relatives (son, daughter, mother, etc.) name, favorite sports teams, type of car you drive, etc.) nor should they be dictionary words (e.g. "SPIDER" or "OFFICE"). Choose a password that is easy for you to remember but is not easily guessed. Passwords are for individual use only. The sharing of passwords is prohibited as is writing it down in easily accessible places (such as "post-it" notes on your desk or in your organizer file under "P", etc.). Your password is used to authenticate you and only you as a valid user of the system. Protect passwords, when combined with user account names, at the highest classification level of the system to which the passwords allow access. If you feel your password has been compromised or that unauthorized personnel are accessing your files, report it immediately to the system **ISSO**.
Physical Security	Physical security and environmental controls shall be used to provide an acceptable level of security to all information systems. Physical security can be achieved through basic measures such as challenging strangers/unknown personnel in your workplace or computer area and by never leaving an active terminal unattended. At the end of a session the printer and computer must be shut down and powered off for at least 10 seconds. These are important practices that safeguard against unauthorized use. Individuals providing escort duty are responsible for ensuring the person being escorted does not gain unauthorized access to a DOJ JWICS automated information system. Failure to do so may result in a security incident and adverse action
Individual Account Protection	To ensure individual account and system protection log-off the system each time you leave the workstation. Users are required to logoff when departing for the day. **Ensure this is always done!** Failure to secure the workstation by logging off is a practice dangerous to security and may result in adverse administrative action.

JCON-TS (JWICS) User Agreement Form

Processing Restrictions	Information systems connected to the DOJ JWICS LAN can process, store, and transmit information up to a classification level of Top Secret/ SCI. If higher classification is inadvertently processed on the DOJ JWICS LAN, report the incident immediately to the **ISSO.** The contaminated workstation(s) and servers will be disconnected from the network and sanitized.
Software	Requests to use non-standard DOJ JWICS software, including free and unsolicited demonstration software, shall be submitted to the **DOJ JWICS ISSO**. Personally owned software, regardless of source, may not be introduced into DOJ JWICS computers.
Modems	The use of modems is prohibited.
Wireless adapters	The use of wireless adapters are prohibited.
Removable Media	All removable magnetic media must bear a label indicating the classification level of information to which the media contains. A color-coded security classification label must be affixed to media. Place the labels in a conspicuous place where they will not adversely affect operation of the equipment. **For destruction, return removable media to the system ISSO**.
Output	Users will ensure that all output contains proper classification and control markings and is adequately protected, including classified information cover sheets. This includes all messages and correspondence generated on electronic mail systems. Printed Top Secret information that does not leave the restricted area is normally exempt from accountability. See the **ISSO** with questions regarding printed collateral Top Secret material.
Toner Cartridges	**Return used toner cartridges from classified laser printers and secure fax to the system ISSO for recycling or disposal.** Generally, used toners from classified systems, that have successfully completed a printing cycle, are considered unclassified.
Copying Files	**Users are not authorized to move files between systems with differing classifications unless designated in writing by the ISSO.** When a user has a requirement to copy or move files between systems with differing classifications, the user shall contact the system **ISSO** for assistance. The **ISSO** has software utilities and procedures to comply with secure copy policy.
Electronic Mail	E-Mail is a DOJ owned communications system used to supplement the record message system. It is subject to the same for official use only constraints as government mail or telephones, and shall be used to conduct Government business only. Users should be aware that administrators and technicians have the ability to review e-mail and disseminate it as necessary. **There is no expectation of privacy while using DOJ information systems!**
Electronic Equipment	Items generally prohibited in restricted areas include personally owned: photographic, video, audio recording equipment, computers & associated media, and **cell phones**. Personally owned electronic calculators, electronic spell-checkers, wristwatches, receive only pagers and radios are allowed in a Restricted Area.
Virus/Malicious Programs	Users shall make very effort to prevent the transmission of computer viruses and Trojan horses. Anti-virus software is installed on all DOJ JWICS workstations. Any removable media introduced from outside **DOJ** shall be inspected by the **ISSO** prior to being placed into a DOJ JWICS workstation.

JCON-TS (JWICS) User Agreement Form

To begin using the classified system:

1. Make sure the hard drive key is accessible.

Note: The hard drive key may not be stored in the same location as the hard drive.

2. Clear work area of all unauthorized personnel.

3. Review System Security Plan.

4. Do not leave classified material unattended or unsecured during processing.

5. Upon completion of boot-up initiate desired program.

6. If storage media is needed ensure that it is properly labeled and insert it into its drive.

7. If system malfunctions, immediately notify the TSVC Help Desk at 202-307-5368.

8. If you need to print, use only the associated printer.

9. Ensure all printer material is properly labeled with highest level of classification contained therein.

10. Do not load any unauthorized software on system.

To shut down the system:

1. Save any material to the A: drive or the removable hard drive.

2. Clear printer memory and clear the paper path by turning off the printer for at least 10 seconds.

3. Remove any diskette in the A: drive, label it with appropriate classification and set aside for storage in the GSA-approved container.

4. Clear computer memory by turning off the computer for at least 10 seconds.

5. Ensure all products/media are properly marked.

6. Store the hard drive key.

Remember: The hard drive key may not be stored in the same location as the hard drive.

JCON-TS User Agreement Form

Part 1	USER INFORMATION				
Last Name	**First Name, MI**	**SSN**	**Grade**	**Phone**	**Dept/Compnt/Sec.**
Gorsuch	Neil M.	[redacted]	SES	305-1434	DOJ/OASG

Access requested to system: *(Check one. Submit separate form for each system requested)*

☒ **JCON TS**

Are you a Cadre Member?

Yes_____ **No**_____

Contractor? No_____ ***Yes***_____ ***Company***_____

If yes Govt. COTAR_____ ***Phone#***_____

Reason for access:

This person requires access and is authorized to a TOP SECRET(SCI)workstation to perform his/her duties

Robert D. McCallum, Jr. (202) 514-9500

Government Supervisor's Name (print) *Phone Number*

Supervisor Certification:

[signature] OASG 1-9-06

Signature *Staff Symbol* *Date*

Part 2 USER AUTHORIZATION & ACKNOWLEDGEMENT

Scope of Authorization

Subject to the limitations detailed in the User Responsibilities of this brief and the respective system Standard Operating Procedures (SOP), the user is authorized access to DOJ JWICS information systems classified Top Secret/ SCI as required. This authorization contains no implied authorization to access any computer system of the United States Government not specifically identified herein. This authorization shall be revoked upon separation, retirement, reassignment of duties, change of organization or when determined by the Information Systems Security Officer **(ISSO)** to be in the best interest of the Government.

WARNING: Only Authorized Users May Use These Systems. Individuals using DOJ computer systems without authority, or in excess of their authority, are subject to having all of their activities on these systems monitored and recorded by system personnel. In the course of monitoring individuals improperly using these systems, or in the course of system maintenance, the activities of authorized users may be monitored. Anyone using these systems expressly consents to such monitoring and is advised that if such monitoring reveals possible evidence of criminal activity, management may authorize system personnel to provide the evidence of such monitoring to law enforcement officials.

DOJ JWICS ISSO Review:

User is authorized/not authorized access to: _____ _____ _____

System Signature Date

User Acknowledgement

I understand that I am authorized to access to Department of Justice computer systems as necessary. Access for purposes beyond the Scope of Authorization is a violation of Federal law (18 U.S.C. 1030 et al.). I acknowledge the above briefing along with my responsibility to protect information processed by the Department of Justice owned and operated computer systems, directly or via remote access. I understand that only official Department of Justice business may be conducted on the system. Any records produced are government records and must be handled in accordance with the Paperwork Management and Information Security Manuals.

I understand THERE IS NO EXPECTATION OF PRIVACY WHILE USING THIS CLASSIFIED DEPARTMENT OF JUSTICE SYSTEM and that ALL DEPARTMENT OF JUSTICE SYSTEMS ARE SUBJECT TO MONITORING BY AUTHORIZED PERSONNEL. I further understand that if security monitoring reveals evidence of possible improper or criminal activity, such evidence will be provided to appropriate management and/or law enforcement personnel and may result in prosecution and/or removal of my account.

I have read and initialed the user responsibilities pages attached to this form and retained a copy for my reference. I agree to abide by the applicable system SOP.

User Signature: [signature] Date: January 9, 2006

DOJ JWICS ISSO USE ONLY	Activated on:
Username:	Hostname:

PRIVACY ACT STATEMENT: SSN info will be used to verify personal identification and security clearance levels to allow individuals access to classified computer systems.

JCON – TS (JWICS) User Agreement Form

This check-in brief outlines basic computer or automated information system (AIS) security practices that shall be followed while utilizing DOJ JWICS System workstations processing Top Secret / SCI Information. Users requesting access to the AIS, shall:

6. Read pages 5-7 of this package. **Initial the bottom of each page**.
7. Fill out, sign, and date the DOJ JWICS User Agreement Form.
8. Have your Supervisor fill out, sign and date his/her section of the DOJ JWICS User Agreement Form.
9. Keep pages 1-3 for your reference.
10. Send the package to the system Information System Security Officer **(ISSO)** for processing.

Basic User Responsibilities are discussed below. More detailed information is available in the SPOM and individual system SOPs.

USER RESPONSIBILITIES

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Passwords	Every user of a DOJ JWICS system will use a "strong" password of eight ALPHANUMERIC CHARACTERS (combination of numbers and letters). A "strong" password must contain **all four** types of characters: upper case letter, lower case letter, western Arabic numeric and non-alphanumeric. To prevent passwords from being easily guessed, they shall not be names/numbers that can easily be associated with your person (i.e. well known nicknames, spouse's or close relatives (son, daughter, mother, etc.) name, favorite sports teams, type of car you drive, etc.) nor should they be dictionary words (e.g. "SPIDER" or "OFFICE"). Choose a password that is easy for you to remember but is not easily guessed. Passwords are for individual use only. The sharing of passwords is prohibited as is writing it down in easily accessible places (such as "post-it" notes on your desk or in your organizer file under "P", etc.). Your password is used to authenticate you and only you as a valid user of the system. Protect passwords, when combined with user account names, at the highest classification level of the system to which the passwords allow access. If you feel your password has been compromised or that unauthorized personnel are accessing your files, report it immediately to the system **ISSO**.
Physical Security	Physical security and environmental controls shall be used to provide an acceptable level of security to all information systems. Physical security can be achieved through basic measures such as challenging strangers/unknown personnel in your workplace or computer area and by never leaving an active terminal unattended. At the end of a session the printer and computer must be shut down and powered off for at least 10 seconds. These are important practices that safeguard against unauthorized use. Individuals providing escort duty are responsible for ensuring the person being escorted does not gain unauthorized access to a DOJ JWICS automated information system. Failure to do so may result in a security incident and adverse action
Individual Account Protection	To ensure individual account and system protection log-off the system each time you leave the workstation. Users are required to logoff when departing for the day. **Ensure this is always done!** Failure to secure the workstation by logging off is a practice dangerous to security and may result in adverse administrative action.
Processing	Information systems connected to the DOJ JWICS LAN can process, store, and transmit information

Restrictions	up to a classification level of Top Secret/ SCI. If higher classification is inadvertently processed on the DOJ JWICS LAN, report the incident immediately to the **ISSO.** The contaminated workstation(s) and servers will be disconnected from the network and sanitized.
Software	Requests to use non-standard DOJ JWICS software, including free and unsolicited demonstration software, shall be submitted to the **DOJ JWICS ISSO**. Personally owned software, regardless of source, may not be introduced into DOJ JWICS computers.
Modems	The use of modems is prohibited.
Wireless adapters	The use of wireless adapters are prohibited.
Removable Media	All removable magnetic media must bear a label indicating the classification level of information to which the media contains. A color-coded security classification label must be affixed to media. Place the labels in a conspicuous place where they will not adversely affect operation of the equipment. **For destruction, return removable media to the system ISSO.**
Output	Users will ensure that all output contains proper classification and control markings and is adequately protected, including classified information cover sheets. This includes all messages and correspondence generated on electronic mail systems. Printed Top Secret information that does not leave the restricted area is normally exempt from accountability. See the **ISSO** with questions regarding printed collateral Top Secret material.
Toner Cartridges	**Return used toner cartridges from classified laser printers and secure fax to the system ISSO for recycling or disposal.** Generally, used toners from classified systems, that have successfully completed a printing cycle, are considered unclassified.
Copying Files	**Users are not authorized to move files between systems with differing classifications unless designated in writing by the ISSO.** When a user has a requirement to copy or move files between systems with differing classifications, the user shall contact the system **ISSO** for assistance. The **ISSO** has software utilities and procedures to comply with secure copy policy.
Electronic Mail	E-Mail is a DOJ owned communications system used to supplement the record message system. It is subject to the same for official use only constraints as government mail or telephones, and shall be used to conduct Government business only. Users should be aware that administrators and technicians have the ability to review e-mail and disseminate it as necessary. **There is no expectation of privacy while using DOJ information systems!**
Electronic Equipment	Items generally prohibited in restricted areas include personally owned: photographic, video, audio recording equipment, computers & associated media, and **cell phones**. Personally owned electronic calculators, electronic spell-checkers, wristwatches, receive only pagers and radios are allowed in a Restricted Area.
Virus/Malicious Programs	Users shall make very effort to prevent the transmission of computer viruses and Trojan horses. Anti-virus software is installed on all DOJ JWICS workstations. Any removable media introduced from outside **DOJ** shall be inspected by the **ISSO** prior to being placed into a DOJ JWICS workstation.

JCON – TS (JWICS) User Agreement Form

To begin using the classified system:

1. Make sure the hard drive key is accessible.

Note: The hard drive key may not be stored in the same location as the hard drive.

2. Clear work area of all unauthorized personnel.

3. Review System Security Plan.

4. Do not leave classified material unattended or unsecured during processing.

5. Upon completion of boot-up initiate desired program.

6. If storage media is needed ensure that it is properly labeled and insert it into its drive.

7. If system malfunctions, immediately notify the TSVC Help Desk at 202-307-5368.

8. If you need to print, use only the associated printer.

9. Ensure all printer material is properly labeled with highest level of classification contained therein.

10. Do not load any unauthorized software on system.

To shut down the system:

1. Save any material to the A: drive or the removable hard drive.

2. Clear printer memory and clear the paper path by turning off the printer for at least 10 seconds.

3. Remove any diskette in the A: drive, label it with appropriate classification and set aside for storage in the GSA-approved container.

4. Clear computer memory by turning off the computer for at least 10 seconds.

5. Ensure all products/media are properly marked.

6. Store the hard drive key.

Remember: The hard drive key may not be stored in the same location as the hard drive.

JCON-TS (JWICS) User Agreement

COMSEC ACCESS BRIEFING

You have been selected to perform duties requiring access to sensitive COMSEC information. It is, therefore, essential that you are made fully aware of certain facts relative to the protection of this information before access is granted. This briefing will provide you with a description of the types of COMSEC information you may have access to, the reasons why special safeguards are necessary for protecting this information, the directives and rules, which prescribe those safeguards, and the penalties that you will incur for willful disclosure of this information to unauthorized persons.

COMSEC equipment and keying material are especially sensitive because they are used to protect other sensitive information against unauthorized access during the process of communicating that information from one point to another. Any particular piece of COMSEC equipment, keying material, or other cryptographic material may be the critical element, which protects large amounts of sensitive information from interception, analysis, and exploitation. If the integrity of the COMSEC system is weakened at any point, all the sensitive information protected by that system might be compromised; even more damaging, this loss of sensitive information may never be detected. The procedural safeguards placed on physical security, covering every phase of their existence from creation through disposition, are designed to reduce or eliminate the possibility of such compromise.

Communications Security (COMSEC) is the general term used for all steps taken to protect information of value when it is being communicated. COMSEC is usually considered to have four main components: Transmission security, physical security, emission security, and cryptographic security. Transmission security is that component of COMSEC which is designed to protect transmissions from unauthorized intercept, traffic analysis, imitative deception and disruption. Physical security is that component of COMSEC, which results from all physical measures to safeguard cryptographic materials, information, documents, and equipment from access by unauthorized persons. Emission security is that component of COMSEC which results from all measures taken to prevent compromising emanations from cryptographic equipment or telecommunications systems. Finally, cryptographic security is that component of COMSEC which results from the use of technically sound cryptosystems, and from their proper use. To ensure that telecommunications are secure, all four of these components must be considered.

Part of the physical security protection given to COMSEC equipment and materials is afforded by the special handling it receives from distribution and accounting. There are two separate channels used for handling of such equipment and materials: "COMSEC channels" and "administrative channels". The COMSEC channel, called the COMSEC Material Control System (CMCS) is used to distribute accountable COMSEC items such as keying material, maintenance manuals, and classified and CCI equipment. (EXCEPTION: Some military departments have been authorized to distribute CCI equipment through their standard logistics system.) The CMCS channel is comprised of a series of COMSEC accounts, each of which has an appointed COMSEC Custodian who is personally responsible and accountable for all COMSEC material charged to the account. The COMSEC Custodian assumes responsibility for the material upon receipt, and then controls its dissemination to authorized individuals on a need-to-know basis. The administrative channel is used to distribute COMSEC information and material other than that which is accountable in the CMCS.

JCON-TS (JWICS) User Agreement

COMSEC ACCESS BRIEFING (cont'd)

Particularly important to the protection of COMSEC equipment and material are an understanding of all security regulations and the timely reporting of any compromise, suspected compromise, or other security problem involving these materials. If a COMSEC system is compromised but the compromise is not reported, the continued use of the system, under the incorrect assumption that it is secure, can result in the loss of all information that was ever protected by that system. If the compromise is reported, steps can be taken to change the system, replace the keying material, etc. to reduce the damage done. In short, it is your individual responsibility to know and to put into practice all the provisions of the appropriate publications, which relate to the protection of the COMSEC equipment and material to which you will have access.

Public disclosure of any COMSEC information is not permitted without the specific approval of your Government contracting office representative or the National Security Agency (NSA). This applies to both classified and unclassified COMSEC information, and means that you may not prepare newspaper articles, speeches, technical papers, or make any other "release" of COMSEC information without the specific Government approval. The best personal policy is to avoid any discussions, which reveal your knowledge of, or access to COMSEC information and thus avoid making yourself of interest to those who would seek the information you possess.

Finally, you must know that should you willfully disclose or give to any unauthorized persons any of the classified or CCI COMSEC equipment, associated keying material, or other classified COMSEC information to which you have access, you will be subjected to prosecution under the criminal laws of the United States. The laws, which apply, are contained in Title 18, United States Code, and sections 641, 793, 794, 798, and 952.

If your duties include access to classified COMSEC information, in addition to the above, you should avoid travel to any countries which are adversaries of the United States, or to their establishments/facilities within the U.S. Should such travel become necessary, however, your security office must be notified sufficiently in advance so that you may receive a defense security briefing. Any attempt to elicit the classified COMSEC information you have, either through friendship, favors, or coercion must be reported immediately to your security office.

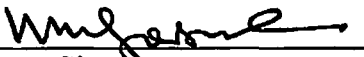
JCON-TS (JWICS) User Agreement

COMSEC ACCESS CERTIFICATION

I understand that as result of performing my duties as Primary/Alternate COMSEC Representative, I am being granted access to United States cryptographic information. I understand that my being granted access to this information involves me in this position of special trust and confidence concerning matters of national security. I hereby acknowledge that I have been briefed concerning my obligations with respect to such access.

I understand that safeguarding United States Cryptographic information is of the utmost importance and that the loss or compromise could cause serious or exceptionally grave damage to the national security of the United States. I understand that I am obligated to protect U. S. cryptographic information and I have been instructed in the special nature of this information and the reasons for the protection of such information. I agree to comply with any special instructions issued by my department or office regarding unofficial foreign travel or contracts with foreign nationals.

I understand fully the information presented in the written briefing I have received. I have read this certificate and my questions if any, have been satisfactorily answered. I understand that, if I willfully disclose to any unauthorized person any of the U. S. cryptographic information to which I might have access, I may be subject to prosecution under the criminal laws of the United States, as appropriate. I understand and accept that unless I am released in writing by an authorized representative of my department or office, the terms of this certificate and my obligation to protect U. S. cryptographic information to which I have access, apply during the time of my access and at all time thereafter.



Signature

January 9, 2006

Date

Neil M. Gorsuch

Print Name

JCON-S Computer Security Awareness and Training Certification

The Computer Security Awareness and Training Certification is to be completely filled out, **originally signed** and returned to your component point of contact (POC) before system access will be granted.

**Please note that if the form is not completed the form will be returned to the component POC.

**Please note that the Computer Security Awareness training is provided to users on a DVD and written presentation is provided via CD.

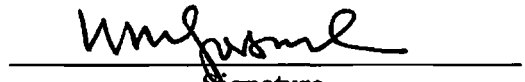
JCON - S Network User Agreement Form

Computer Security Awareness Certification

I understand that as result of performing my duties, I am being granted access to United States SECRET level information. I understand that my being granted access to this information involves me in this position of special trust and confidence concerning matters of national security. I hereby acknowledge that I have been briefed concerning my obligations with respect to such access.

I understand that safeguarding SECRET Level information is of the utmost importance and that the loss or compromise could cause serious or exceptionally grave damage to the national security of the United States. I understand that I am obligated to protect the SECRET Level information and I have been instructed in the special nature of this information and the reasons for the protection of such information. I agree to comply with any special instructions issued by my department or office regarding unofficial foreign travel or contracts with foreign nationals.

I understand fully the information presented in the DVD, oral and/or written briefing I have received. I have read this certificate and my questions if any, have been satisfactorily answered. I understand that, if I willfully disclose to any unauthorized person any of SECRET Level information to which I might have access, I may be subject to prosecution under the criminal laws of the United States, as appropriate. I understand and accept that unless I am released in writing by an authorized representative of my department or office, the terms of this certificate and my obligation to protect SECRET Level information to which I have access, apply during the time of my access and at all time thereafter.



Signature

January 9, 2006

Date

Neil M. Gorsuch

Print Name

U.S. Department of Justice

Office of the Associate Attorney General

Deputy Associate Attorney General

Washington, D.C. 20530

August 30, 2005

Via Facsimile (703) 299-3326
Jury Division
United States District Court
Eastern District of Virginia
401 Courthouse Square
Alexandria, VA 22314

Re: Juror Number 01-0060, Participant Number 100362022

To the Jury Division:

I am currently scheduled to serve beginning September 2, 2005 (this Friday). I write respectfully to request a two month deferral of my service for reasons set forth below.

I serve as Principal Deputy to the Associate Attorney General, Robert McCallum. Mr. McCallum is the Department of Justice's number three officer. Due to a resignation on August 16, Mr. McCallum has now been asked to take on the additional responsibility of serving as the Acting Deputy Attorney General, the Department's second most senior officer. This additional temporary responsibility – in effect until a new Deputy Attorney General is confirmed by the Senate – has imposed substantial new duties on our small office, and has come at a time when we are not fully staffed. Given these extraordinary and temporary circumstances, I would be very grateful for a short deferral of service so that I might assist Mr. McCallum in fulfilling his dual responsibilities. Mr. McCallum is aware of my request.

Both Mr. McCallum and I take jury service seriously and consider it a point of civic responsibility and pride. I therefore do not request this deferral lightly and apologize for any inconvenience my request may cause the Court. If you have any questions about any of the foregoing, please do not hesitate to call me; my direct dial is [redacted]

Sincerely,

Neil M. Gorsuch

TRANSMISSION VERIFICATION REPORT

TIME : 08/30/2005 10:31
NAME :
FAX :
TEL :
SER.# : BROF3J497892

DATE,TIME	08/30 10:30
FAX NO./NAME	917032993326
DURATION	00:00:25
PAGE(S)	02
RESULT	OK
MODE	STANDARD ECM

U.S. Department of Justice

Office of the Associate Attorney General

FACSIMILE TRANSMITTAL COVER SHEET

Date: 8/30/05

To: Jury Division

Organization: U.S. District Ct.

Fax #: (703) 299-3326

Number of pages 1 **+ cover sheet**

From: Neil Gorsuch

Office of the Associate Attorney General

DOJ_NMG_0143676

U.S. Department of Justice
Office of the Associate Attorney General

FACSIMILE TRANSMITTAL COVER SHEET

Date: 8/30/05

To: Jury Division

Organization: U.S. District Ct.

Fax #: (703) 299-3326

Number of pages 1 **+ cover sheet**

From: Neil Gorsuch

Office of the Associate Attorney General
950 Pennsylvania Avenue NW, Room 5706
Washington, D.C. 20530-0001
Telephone: (202) 514-9500
Fax: (202) 514-0238

Comments:

The United States of America

United States Court of Appeals
for the Tenth Circuit

I, Doug Cressler, Acting Clerk of the United States Court of Appeals for the Tenth Circuit, do hereby certify that

Neil M. Gorsuch

of Washington, D.C., being duly qualified, was admitted as an Attorney and Counselor of the United States Court of Appeals for the Tenth Circuit on the 21st day of October, A.D. 2005.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Tenth Circuit at my office in Denver, Colorado, on the 21st day of October, A.D. 2005.

Acting Clerk of Court

Neil M. Gorsuch [redacted]

NAME (Last, First, Middle name or initial) Please PRINT — Social Security Number

APPLICATION FOR ADMISSION

I am of good moral and professional character, and I am admitted to practice before

Colorado Bar ID# 024235

I do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States.

Neil M. Gorsuch

Applicant's Signature

U.S. Department of Justice
Firm Name
950 Pennsylvania Ave., NW
Business Address Room 5706
Washington, DC 20530-0001
City State Zip

Phone: (202) 305-1434

For Court Use Only

Admission Date:_____

Fee Waived: ( ) A-1 10/99

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In Re: The Application of

Neil M. Gorsuch
(Print Name of Applicant)

MOTION FOR ADMISSION

Lily Fu Swenson (movant), a member of the bar of the United States Court of Appeals for the Tenth Circuit, moves the admission of the captioned applicant to the bar of this court. To my knowledge, applicant is of good moral character and meets the requirements of Fed. R. App. P. 46(a)(1).

Dated: 10/19/05

Signature of Movant

United States Department of Justice

Disclosure and Authorization
Pertaining to Consumer Reports
Pursuant to the Fair Credit Reporting Act
(Title 15, U.S. Code, Section 1681)

This is a release for the Department of Justice to obtain one or more consumer/credit reports about you in connection with your application for Federal employment, during the course of your Federal employment (including employment under contract), and/or in connection with your security clearance or your access to classified information. One or more reports about you may be obtained for purposes of evaluating your fitness for employment, promotion, reassignment, retention, access to classified information, or other employment purposes.

I, Neil M. Gorsuch, hereby authorize the Department of Justice to obtain, and I further instruct any consumer/credit reporting agency to release to DOJ, any such report(s) for the above purposes.

Neil Gorsuch
Signature

May 23. 2005
Date

[redacted]
Social Security Number

Office of the Associate Attorney General
Current Organization Assigned

DOJ-555
Revised Dec. 2004
Security and Emergency Planning Staff

THIS FORM IS TO BE USED FOR INVESTIGATIONS AND REINVESTIGATIONS WHICH ARE INITIATED BY THE PERSONNEL SECURITY GROUP, SECURITY AND EMERGENCY PLANNING STAFF

U.S. Department of Justice

Tax Check Waiver

I am signing this waiver to permit the Internal Revenue Service to release information about me which would otherwise be confidential. This information will be used in connection with my appointment or employment by the United States Government. This waiver is made pursuant to 26 U.S.C. § 6103(c).

I request that the Internal Revenue Service release the following information to **James L. Dunlap, Director, Security and Emergency Planning Staff, U.S. Department of Justice (or designee)**:

1. Have I failed to file any Federal income tax return for any of the last three years for which filing of a return might have been required? (If the filing date without regard to extensions and normal processing period for most recent year's return has not yet elapsed on the date IRS receives this waiver, and the IRS records do not indicate a return for the most recent year, the "last three years" will mean the three years preceding the year for which returns are currently being filed and processed.)

2. Were any of the returns in #1 filed more than 45 days after the due date for filing (determined with regard to any extension(s) of time for filing)?

3. Have I failed to pay any tax, penalty or interest during the current or last three calendar years within 45 days of the date on which the IRS gave notice of the amount due and requested payment?

4. Am I now or have I ever been under investigation by the IRS for possible criminal offenses?

5. Has any civil penalty for fraud been assessed against me during the current or last three calendar years?

I authorize the IRS to release any additional relevant information necessary to respond to the questions above.

To help the IRS find my tax records and the Department of Justice to evaluate my tax history, I am voluntarily giving the following information:

MY NAME: Neil M. Gorsuch (Please print or type) MY SSN: [redacted]

CURRENT ADDRESS: [redacted]

TELEPHONE NUMBERS: (HOME) [redacted] (WORK) _____ (Please include area codes)

IF MARRIED AND FILED A JOINT RETURN:

SPOUSE'S NAME: [redacted] SPOUSE'S SSN [redacted]

DOJ_NMG_0[redacted]82

NAMES AND ADDRESSES SHOWN ON RETURNS (IF DIFFERENT FROM ABOVE)

YEAR	NAME	ADDRESS

1. If a tax return for any of the last three years was not filed, please explain why in the space provided below.

2. If a tax return for any of the last three tax years was filed more than 45 days after the due date for filing, please explain why in the space provided below.

3. If a tax payment for any of the last three tax years was made more than 45 days after notice and demand, please explain why in the space provided below.

4. If there was insufficient income to meet filing requirements or filing requirements were met by filing with a foreign tax agency (e.g., Puerto Rico or the Virgin Islands), please describe the circumstances in the space provided below.

[redacted]

DATE: 05/28/05

(Waiver Invalid Unless Received
By the IRS Within 60 Days of This Date)

(Signature of Taxpayer Authorizing
the Disclosure of Return Information)

DOJ-488A (Rev. 10/97)

PLEASE READ THIS BEFORE SIGNING.

I understand that as a condition of my appointment to a position in the U.S. Department of Justice:

1. I must provide to the Drug-Free Workplace Program a urine specimen for the purpose of testing it for the presence of illegal substances; and

2. If my urine tests positive for illicit drug use, the positive test results may be used as grounds for my removal from the position to which I am being appointed.

Signature

May 23, 2005
Date

Neil M. Gorsuch
Type/Print Full Name

Office of the Associate Attorney General
Emergency Contact List

Name: Neil M. Gorsuch

SSN: [redacted]

DOB: 8/29/1967

Home Address: [redacted]

Home Telephone

Cell Phone:

Pager:

Allergies or other medical conditions n/a

****

IN CASE OF EMERGENCY NOTIFY

Name: [redacted] **Relationship** wife

Contact Number(s): [redacted]

Name: [redacted] **Relationship** sister

Contact Number(s): [redacted]

Name: [redacted] **Relationship** brother

Contact Number(s): [redacted]

PLEASE PROVIDE THIS INFORMATION AND RETURN TO CURRIE ASAP
ALL INFORMATION WILL BE KEPT CONFIDENTIAL

Gorsuch, Neil M

From: Tyler.Harvey@hro.com
Sent: Friday, October 14, 2005 3:44 PM
To: Gorsuch, Neil M
Subject: Walden


tmp.htm


SFX2078.pdf


10e80j0vs.pdf


PDF_Docu.pdf

Neil,

Certainly great to talk with you today as well. I look forward to meeting you in person and hopefully spending a little time on the river together. Attached are two copies of the assignment. Please send me back signed copies of both either via e-mail or fax. If you want to fax you can just use the HRO number. Also, please send the two originals via overnight courier.

In case you need them, I have also attached the Articles of Organization and the EIN number for your files. I will get you the bank account info as soon as I receive it.

If you have questions or need to reach me my cell is [redacted] and home is [redacted] (I always have access to e-mail as well).

Have a great weekend!

Best Regards,

Tyler

Tyler Y. Harvey, Esq.
Holme Roberts & Owen, LLP
1700 Lincoln Street, Suite 4100
Denver, CO 80203
Telephone: 303-866-0404
Fax: 303-866-0200

<<SFX2078.pdf>> <<10e80j0vs.pdf>> <<PDF_Docu.pdf>>

KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
SUMNER SQUARE
1615 M STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20036-3209

(202) 326-7900
FACSIMILE:
(202) 326-7999

May 31, 2005

Colorado Supreme Court
Board of Continuing Legal and Judicial Education
600 17th Street, Suite 520-S
Denver, Colorado 80202-5451

Re: Change of Address

Dear Administrator:

I am a member of the Colorado bar and write to alert you to my change of address. Effective 6/13/05, please change your records and send any future correspondence to the following:

Neil M. Gorsuch
[redacted]
Registration No. 024235

I appreciate your assistance in this matter.

Sincerely,

Neil M. Gorsuch

Memorandum

PRIVACY ACT PROTECTED INFORMATION

Subject	Date
Request for Security Clearance to Access National Security Information	June 13, 2005

To	From
James L. Dunlap Department Security Officer	Currie Gunn Security Programs Manager OASG

This memorandum is to request a security clearance, to access National Security Information, be granted to the below individual. In accordance with 28 CFR, Part 17, "National Security Information Program," a continuing evaluation of the established need-to-know will be conducted and your office will be immediately notified to administratively withdraw the clearance when it is no longer required.

The following information is submitted: Top Secret Sensitive Compartmented Information

NAME OF EMPLOYEE: Neil M. Gorsuch

SSN: [redacted] **ORGANIZATION: Office of the Associate Attorney General**

DEGREE OF CLEARANCE REQUIRED: TS, SCI, SI, TK, G, HCS

JUSTIFICATION: Neil M. Gorsuch joined the Office of the Associate Attorney General as Principal Deputy Associate Attorney General on June 13, 2005 and will need a Top Secret clearance in order to attend meetings with the WH, AG, DAG, and ASG, as well as handling Top Secret documents.

THE REMAINDER OF THIS DOCUMENT WILL BE COMPLETED BY THE PERSONNEL SECURITY GROUP

TO: DATE: June 14, 2005

This acknowledges your request for Neil Gorsuch to be granted a security clearance. This office has determined that the employee is eligible to receive and has been granted a security clearance at the level of *Interim Top Secret. In addition, the Standard Form (SF) 312, Classified Information Nondisclosure Agreement, must be completed by the employee, witnessed by another DOJ employee, and forwarded to this office within 30 days of the granting of the security clearance or the security clearance cannot be certified and may be administratively canceled. The SF 312 may also be faxed to the Personnel Security Group at (202) 514-4555, ATTN: File Room.

Subsequently, the individual is eligible to have access to classified information on a need-to-know basis up to the level indicated above. Furthermore, your office is required to request the administrative withdrawal of the security clearance of the employee when there is not a foreseeable need for access to classified information or material in connection with the performance of their official duties (i.e., termination of employment, EMPLOYEE TRANSFER, change in position, etc.).

If you have any questions regarding this endorsement, please contact Anna Harrison, Chief, Personnel Security Group, at (202) 514-2325.

COMMENTS (if any): *Interim Top Secret will be upgraded to final upon completion and favorable adjudication of the background.*

cc: 1 - Employee Component
1 - Security File

PRIVACY ACT PROTECTED INFORMATION

Monday, September 19, 2005	
5:00 p.m. - 7:00 p.m.	**Registration and Exhibit Set-up**

Tuesday, September 20, 2005	
7:30 a.m. - 8:20 a.m.	**Registration**
8:30 a.m. - 8:45 a.m.	**Opening** ***Ted McBurrows***, Director Equal Employment Opportunity Staff Justice Management Division
8:45 a.m. - 9:00 a.m.	**Welcome** ***Mari Barr Santangelo***, Deputy Assistant Attorney General for Human Resources and Administration Justice Management Division
9:00 a.m. - 10:00 a.m.	**Opening Plenary Session I** - The President's Management Agenda and Human Capital **Speakers:** ***Mari Barr Santangelo***, Deputy Assistant Attorney General for Human Resources and Administration Justice Management Division ***Debra Tomchek***, Director Personnel Staff Justice Management Division
10:00 a.m. - 10:15 a.m.	**Break**

10:15 a.m. - 11:45 a.m.	**Plenary Session II** - Current Status and Future Direction of EEO and Diversity at the Department of Justice (DOJ): A Panel of DOJ Executives **Facilitator:** ***Paul R. Corts***, Assistant Attorney General for Administration **Speakers:** ***Carl J. Truscott***, Director Bureau of Alcohol, Tobacco, Firearms and Explosives ***Karen P. Tandy***, Administrator Drug Enforcement Administration ***Michael Battle***, Director Executive Office for U.S. Attorneys ***Robert S. Mueller***, Director Federal Bureau of Investigation ***Harley G. Lappin***, Director Federal Bureau of Prisons ***Regina B. Schofield***, Assistant Attorney General Office of Justice Programs ***John F. Clark***, Acting Director U.S. Marshals Service
11:45 a.m. - 12:00 p.m.	**Break**
12:00 p.m. - 1:30 p.m.	**Luncheon** - The Department of Justice's Commitment to EEO and Diversity **Speaker:** ***Robert D. McCallum, Jr.***, Acting Deputy Attorney General/Associate Attorney General
1:30 p.m. - 1:40 p.m.	**Break**

1:40 p.m. - 3:00 p.m.	**Plenary Session III** - Diversity and Affirmative Employment in the Workplace **Speaker:** ***Mauricio Velásquez***, President The Diversity Training Group
3:00 p.m. - 3:15 p.m.	**Break**
3:15 p.m. - 4:30 p.m.	**Plenary Session IV** - ADR-What's Working **Facilitator:** ***Charles Cephas***, Equal Employment Opportunity Manager Equal Employment Opportunity Staff Justice Management Division **Speakers:** ***Linda A. Cinciotta***, Senior Counsel for Alternative Dispute Resolution Office of the Associate Attorney General ***Mina Raskin***, Senior Counsel/EEO Officer Discrimination Complaints and Ethics Office Federal Bureau of Prisons ***Nicole Swann***, Equal Employment Opportunity Specialist Office of Equal Employment Opportunity Affairs Federal Bureau of Investigation

Wednesday, September 21, 2005	
7:30 a.m. - 8:20 a.m.	**Coffee Break/Registration**
8:30 a.m. - 9:30 a.m.	**Plenary Session V** - Legal and Regulatory Updates **Facilitator:** ***Anthony Torres***, Executive Assistant Office of Equal Opportunity Bureau of Alcohol, Tobacco, Firearms and Explosives **No FEAR Act** ***Carlotta Wells***, Attorney Federal Programs Branch Civil Division **EEOC Management Directive - 715** ***Carlton Hadden***, Director Office of Federal Operations Equal Employment Opportunity Commission
9:30 a.m. - 9:45 a.m.	**Break**
9:45 a.m. - 11:00 a.m.	**Plenary Session VI** - Contemporary Issues: Impact on EEO and Diversity Programs **Facilitator:** ***Oliver C. Allen, Jr.***, Equal Employment Opportunity Officer Equal Employment Opportunity Staff Drug Enforcement Administration **Reasonable Accommodation in the Workplace** ***Allison Nichol***, Deputy Chief Disability Rights Section Civil Rights Division **Union Involvement in the EEO Complaint Process** ***Eric S. Daniels***, Senior Attorney Workforce Relations Group Personnel Staff Justice Management Division

11:00 a.m. - 12:00 p.m.	**Plenary Session VII** - Analyses and Update on Recent Court and EEOC Decisions **Facilitator:** ***Juan Milanés***, Assistant Director for Equal Employment Opportunity Executive Office for U.S. Attorneys **Speakers:** ***Mark Gross***, Complaint Adjudication Officer Civil Rights Division ***Jennifer Rivera***, Director Federal Programs Branch Civil Division
12:00 p.m. - 12:15 p.m.	**Break**
12:15 p.m. - 1:15 p.m.	**Luncheon** - The Current Status and Future Direction of EEO and Diversity in the Federal Government **Speaker:** ***Cari Dominguez***, Chair Equal Employment Opportunity Commission

Wednesday, September 21, 2005

MODULES for EEO Counselor Training

Strategies for Conducting the EEO Inquiry (Foggy Bottom Room)	***Kathleen V. Buttrey***, Director of EEO and Minority Enterprise U.S. Consumer Product Safety Commission
Understanding Claims of Retaliation and Harassment (DuPont Room)	***Mark Gross***, Complaint Adjudication Officer; ***Kathryn Rapp***, Attorney & ***Chip Taylor***, Attorney Complaint Adjudication Office Civil Rights Division
What EEO is and What EEO is Not (City Center I Room)	***Dexter Brooks***, Acting Director Federal Sector Programs Office of Federal Operations Equal Employment Opportunity Commission

Module A

1:30 p.m. - 2:30 p.m.	**What EEO is and What EEO is Not**
2:30 p.m. - 2:45 p.m.	**Break**
2:45 p.m. - 4:00 p.m.	**Strategies for Conducting the EEO Inquiry**
4:00 p.m. - 5:15 p.m.	**Understanding Claims of Retaliation and Harassment**

Module B

1:30 p.m. - 2:30 p.m.	**Strategies for Conducting the EEO Inquiry**
2:30 p.m. - 2:45 p.m.	**Break**
2:45 p.m. - 4:00 p.m.	**Understanding Claims of Retaliation and Harassment**
4:00 p.m. - 5:15 p.m.	**What EEO is and What EEO is Not**

Module C

1:30 p.m. - 2:30 p.m.	**Understanding Claims of Retaliation and Harassment**
2:30 p.m. - 2:45 p.m.	**Break**
2:45 p.m. - 4:00 p.m.	**What EEO is and What EEO is Not**
4:00 p.m. - 5:15 p.m.	**Strategies for Conducting the EEO Inquiry**

* * * * * * * * * * * * * * * * *

MODULE for Special Emphasis/
Affirmative Employment Program Managers Training

Conducting Barrier Analysis Under MD-715 *Robert Patterson*, President
(City Center II Room) TechSolutions

1:30 p.m. - 2:30 p.m.	**Conducting Barrier Analysis Under MD-715**
2:30 p.m. - 2:45 p.m.	**Break**
2:45 p.m. - 5:15 p.m.	**Continuation of Topic**

Thursday, September 22, 2005

MODULES for EEO Counselor Training

Conflict Resolution (DuPont Room)	***Lynn Sylvester***, Commissioner Federal Mediation and Conciliation Service
Settlements at the EEO Counselor Level (City Center I Room)	***Veroneca Burgess***
Writing EEO Counselor Reports (Foggy Bottom Room)	***Marcel A. Coates***, Equal Employment Opportunity Specialist Equal Employment Opportunity Staff Justice Management Division

MODULE A

8:00 a.m. - 9:15 p.m.	**Settlements at the EEO Counselor Level**
9:15 a.m. - 9:30 a.m.	**Break**
9:30 a.m. - 10:45 a.m.	**Writing EEO Counselor Reports**
10:45 a.m. - 12:00 p.m.	**Conflict Resolution**

MODULE B

8:00 a.m. - 9:15 p.m.	**Writing EEO Counselor Reports**
9:15 a.m. - 9:30 a.m.	**Break**
9:30 a.m. - 10:45 a.m.	**Conflict Resolution**
10:45 a.m. - 12:00 p.m.	**Settlements at the EEO Counselor Level**

MODULE C

8:00 a.m. - 9:15 p.m.	**Conflict Resolution**
9:15 a.m. - 9:30 a.m.	**Break**
9:30 a.m. - 10:45 a.m.	**Settlements at the EEO Counselor Level**
10:45 a.m. - 12:00 p.m.	**Writing EEO Counselor Reports**

MODULE for Special Emphasis/
Affirmative Employment Program Managers Training

Identifying Challenges and Establishing Priorities for Affirmative Employment Planning
(City Center II Room)

Facilitator: ***Deborah K. Lewis***, Director
U.S. Customs and Immigration Services Equal Employment Opportunity Team
Office of Equal Employment Opportunity
Department of Homeland Security

8:00 a.m. - 9:15 p.m.	**Identifying Challenges and Establishing Priorities for Affirmative Employment Planning**
9:15 a.m. - 9:30 a.m.	**Break**
9:30 a.m. - 12:00 p.m.	**Continuation of Topic**

Photo Caption - National Symposium 2005
Planning Committee

U.S. Department of Justice

Equal Employment Opportunity Officials

Bureau	EEO Official	Contact Numbers	Address
ATF	[redacted]	[redacted]	650 Massachusetts Avenue, NW Room 8210 Washington, DC 20226
BOP	[redacted]	[redacted]	320 First Street, NW Room 936 Washington, DC 20534 320 First Street, NW Room 770A Washington, DC 20534
DEA	[redacted]	[redacted]	700 Army Navy Drive Suite 7300 LP-2 Building Arlington, VA 22202
EOIR	[redacted]	[redacted]	5107 Leesburg Pike Suite 2400 Skyline Towers Falls Church, VA 20530
EOUSA	[redacted]	[redacted]	1331 Pennsylvania Avenue, NW Room 524 National Place Building Washington, DC 20530
FBI	[redacted]	[redacted]	935 Pennsylvania Avenue, NW Room 7901 Washington, DC 20535
OBD	[redacted]	[redacted]	1110 Vermont Avenue, NW Suite 620 Washington, DC 20530
OJP	[redacted]	[redacted]	810 7th Street, NW Room 6225 Washington, DC 20531
USMS	[redacted]	[redacted]	1735 Jefferson Davis Highway Suite 103 LP-1 Building Arlington, VA 22202

United States Interagency Council on Homelessness

451 7th Street SW, Washington, DC 20410
Philip F. Mangano, Executive Director
202-708-4663 phone • 202-708-1216 fax

Fax

To:	The Honorable Alberto Gonzales	**From:**	USICH
Fax:	202-307-2825	**Pages:**	5 (including cover)
Re:	INTERAGENCY COUNCIL REPORT	**Date:**	5/10/2005

Philip F. Mangano
Executive Director

May 5, 2005

The Honorable Alberto Gonzales
Attorney General of the United States
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

Since the first meeting of the revitalized United States Interagency Council on Homelessness was held at the White House on July 18, 2002, progress in creating the federal strategy and coordinating the response to achieve the Administration's commitment to end chronic homelessness has been historic and substantive.

It was noted at that first meeting that we have a remarkable opportunity to change the way this nation perceives - and addresses - the issue of homelessness. Since that time, the Council has moved forward to create unprecedented interagency collaborations, fostering 51 state interagency councils on homelessness, and developing 190 city and county 10-year plans to end chronic homelessness.

The Council is establishing partnerships that extend from the White House to the streets, partnering through federal agencies, state houses, city halls and county executive offices in the public sector, and through the United Way, non-profits, providers and advocates, Chambers of Commerce, businesses and corporations, faith-based and community organizations, and including homeless people themselves, in the private sector. Together, the Council and the public and private sectors are creating planful partnerships, strategic solutions, and innovative initiatives in pursuit of our goal.

- more -

Section 203[c] of the McKinney-Vento Homeless Assistance Act, as amended, (42 USC 11313) requires the Council and each member agency of the Council to prepare an annual report on their activities. Under the Act, which was reauthorized in 2001, each agency is required to prepare and submit a report to the Congress and the Council that describes:

- "Each program to assist homeless individuals administered by your agency and the number of homeless individuals served by such program;
- Impediments, including any statutory and regulatory restrictions, to the use by homeless individuals of each such program and to obtaining services or benefits under each such program; and
- Efforts made by your agency to increase the opportunities for homeless individuals to obtain shelter, food and supportive services."

The Council itself prepares a report that assesses the nature and extent of homelessness, describes USICH accomplishments and those of other agencies, and provides recommendations for legislative and administrative actions. HUD, HHS, VA and Labor have additional Congressionally mandated reporting requirements.

Attached are detailed submission instructions. Please contact Mary Ellen Hombs, USICH Deputy Director, if you have questions, at 202/708-4663. Please ensure that we receive your agency's report by Friday, June 10, 2005.

Thank you for your cooperation and support.

Sincerely,

Philip F. Mangano
Executive Director

Attachment

United States Interagency Council on Homelessness

ATTACHMENT

2004 ANNUAL REPORT:

SUBMISSION REQUIREMENTS FOR MEMBER AGENCIES

Please provide a hard copy and an electronic copy (requested format: Microsoft Word/Arial 12 font) of your report by June 10, 2005. Your submission should include:

1. Overview of agency homeless assistance responsibilities and 2004 activities and accomplishments (up to two pages).

2. For *each program* that provides homeless assistance, a description (*not to exceed one page*) of the following:

   a) Statutory authority

   b) *For targeted homeless assistance programs:* 2004 appropriation

   c) *For non-targeted programs:* Best estimate of the amount of that program's assistance to the homeless for the most recent year for which information is available

   d) FY 2005 President's budget request

   e) Program description (purpose, eligible applicants/recipients, eligible activities, etc.)

   f) Planned evaluations or other studies or reports of the program's administration, performance or impact.

NOTE: In 2000 the Senate Appropriations Committee instructed the Council to specifically require HUD, HHS, Labor and VA to:

- quantify the number of their program participants who become homeless
- address ways in which mainstream programs can prevent homelessness among those they serve
- describe specifically how they provide assistance to people who are homeless.

The four agencies named above should provide this specific information on mainstream programs in addition to the general information above.

3. For *each program* that provides homeless assistance, a description of the following (*not to exceed one page*):

   a) Known impediments to access by homeless people or homeless service providers (as appropriate) and the current or planned agency response to remove those impediments; and

   b) Efforts to increase participation in the program by (as appropriate) homeless people or organizations serving homeless people.

We will also be compiling a list of currently available Federal publications on homelessness to be included as an appendix to the report. Please also provide:

1. One copy of each such publication
2. Information on how to order it (name, address, telephone number and cost, if any)
3. The Web address, if the publication is available on the Web.

Please address your submission of publications or other hard-copy material to:

U.S. Interagency Council on Homelessness
451 Seventh Street, S.W., Suite 2200
Washington, DC 20410

Because we have difficulties with timely receipt of mail due to security procedures, please send a copy of your agency's report by e-mail directly to Mary Ellen Hombs: Mary_E._Hombs@hud.gov

U.S. Department of Justice
Office of the Associate Attorney General

1 Sparks
2 Cy Harvey
[redacted]
3 Nicole. DoD
errata
[redacted]
4 Walter Monroe
JJ Smith Peter Zotkin
[redacted]
5 Adrian Silas 4-7276

(1)

→ Ken Van Schaumburg.
Deputy GC EPA

x 564-1779

---

(2) Kyle Sampson
x1061.

Cabinet Liaison Meeting with Veterans
Monday - Aug 15 4PM

SIGN IN

Name	Title	Agency	Phone	E-mail
JOHN MOLINO	DEPUTY UNDER SECY	DoD	[redacted]	
Neil Gorsuch	Principal Deputy Assoc. Atty	DOJ		
J.V. Schwan	Dep Chief of Staff	DOC		
Jim PARENTI	Chief of Staff - DEP. SEC.	HUD		
MARY MAZANEC	Chief Medical Officer Director Div of Public Health	HHS		
John Barsa	Director, Public Liaison	DHS		
Katie Wheelbarger	Senior Policy Advisor, CRCL	DHS		
Michael Molina	ASSOCIATE DIRECTOR WHITE HOUSE LIAISON	STATE		
BRIAN WALDMANN	Chief of Staff Interior Dept.	DOI		
Bill Kloiber	Special Asst to the secretary	DOI		
ERIC BURGESON	CHIEF OF STAFF DEPT. OF ENERGY	DoE		
Drew DeBerry	Deputy COS USDA	DOA		
Joanna Nunan	Military Assistant to Secretary of Transportation	DOT		
Bob Carroll	Deputy Assistant Sec'y Tax Analysis	Treasury		
MICHAEL DOVILLA	EXECUTIVE DIRECTOR, CHCO COUNCIL	OPM		
Tom BOLLMAN	Deputy Chief of STAFF VA	VA		
Mike Desmond	Acting Tax Legislative Counsel - Treasury	Treasury		
JOHN MACKELBAUER	Special Asst. Office of Asst Sec. Veterans Emp	DOL		
Erika Baum	Spec Asst Employment Trans, Adm USDOL	DOL		
Shannon Burkhart	Assoc Dir, WH Comms	WH		
Erin Healy	Assist Press Sec. WH	WH		
Nicolle Devenish	White House communications Dir.	WH		
Luis A. Luna	Assistant Administrator	EPA		
BOB SMOLEN	NSC DEFENSE	NSC		

SIGN IN

Name	Title	Agency	Phone	E-mail
Jeremy Katz	Special Assistant COS	WH	[redacted]	
Brett Gerry	Associate WH Counsel	WH		
Toni Hustead	Chief, Veterans Affairs & Defense Health, OMB	OMB		

U.S. Department of Justice

Office of the Associate Attorney General

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

October 19, 2005

To: [redacted]
Attorney Civil Rights Division

From: Neil Gorsuch N. M. Gorsuch 10/25/05
Principal Deputy Associate Attorney General

Re: Grievance of Performance Appraisal

In light of the fact that the Acting Assistant Attorney General had served as the reviewing official for your 2004-2005 performance appraisal, the Office of the Associate Attorney General has reviewed the grievance you have filed pertaining to said appraisal. After reviewing the relevant documents, including the letters you submitted, the decision of the reviewing official is affirmed.

Office of the Attorney General

Washington, D.C.

May 9, 2006

Dear Mr. President:

It is an honor to enclose the nomination of Neil M. Gorsuch, of Colorado, to be a United States Circuit Judge for the Tenth Circuit, vice David M. Ebel, retired.

Mr. Gorsuch was born August 29, 1967, in Denver, Colorado, is married and has two children. He received a B.A. degree in 1988 from Columbia University, a J.D. degree in 1991 from Harvard Law School, and a D.Phil. degree in 2004 from Oxford University. He was admitted to the Colorado bar in 1994.

Since 2005, Mr. Gorsuch has been Principal Deputy to the Associate Attorney General, United States Department of Justice. Prior to his a current position, he was an associate, 1995-1997, and a partner, 1998-2005, with Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC. He served as a law clerk to the Honorable Byron R. White and the Honorable Anthony M. Kennedy of the United States Supreme Court, 1993-1994, and a law clerk to the Honorable David B. Sentelle of the United States Court of Appeals for the District of Columbia Circuit, 1991-1992.

Mr. Gorsuch has an excellent reputation as to character and integrity, possesses judicial temperament, and is, I believe, worthy of appointment as a United States Circuit Judge.

I recommend that he be nominated.

Respectfully,

Alberto R. Gonzales
Attorney General

The President
The White House

Neil M. Gorsuch

Birth:	August 29, 1967	Denver, Colorado
Legal Residence:	Virginia	
Marital Status:	Married	Marie L. Gorsuch Two children
Education:	1985 - 1988	Columbia University B.A. degree
	1988 - 1991	Harvard Law School J.D. degree
	1993 – 1995	Oxford University D.Phil. degree, 2004
Bar:	1994	Colorado
Experience:	1991 – 1992	United States Court of Appeals for the District of Columbia Law Clerk to the Honorable David B. Sentelle
	1993 – 1994	Supreme Court of the United States Law Clerk to the Honorable Byron R. White and the Honorable Anthony M. Kennedy
	1995 – 2005	Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC Associate (1995-1997) Partner (1998-2005)
	2005 – present	United States Department of Justice Office of the Associate Attorney General Principal Deputy to the Associate Attorney General

Office: United States Department of Justice
950 Pennsylvania Avenue, N.W., Room 5706
Washington, D.C. 20530
202-305-1434

Home: [redacted]

Ethnic Group: Caucasian

Salary: $175,100

	1988 - 1991	Harvard Law School J.D. degree
	1993 – 1995	Oxford University
Bar:	1994	Colorado
Experience:	1991 – 1992	United States Court of Appeals for the District of Columbia Law Clerk to the Honorable David B. Sentelle
	1993 – 1994	Supreme Court of the United States Law Clerk to the Honorable Byron R. White and the Honorable Anthony M. Kennedy
	1995 – 2005	Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC Associate (1995-1997) Partner (1998-2005)
	2005 – present	United States Department of Justice Office of the Associate Attorney General Principal Deputy to the Associate Attorney General

Office: United States Department of Justice
950 Pennsylvania Avenue, N.W., Room 5706
Washington, D.C. 20530
202-305-1434

To be United States Circuit Judge for the Tenth Circuit

Neil M. Gorsuch

Birth:	August 29, 1967	Denver, Colorado
Legal Residence:	Virginia	
Marital Status:	Married	[redacted] Two children
Education:	1985 - 1988	Columbia University B.A. degree
	1988 - 1991	Harvard Law School J.D. degree
	1993 – 1995	Oxford University D.Phil. degree, 2004
Bar:	1994	Colorado
Experience:	1991 – 1992	United States Court of Appeals for the District of Columbia Law Clerk to the Honorable David B. Sentelle
	1993 – 1994	Supreme Court of the United States Law Clerk to the Honorable Byron R. White and the Honorable Anthony M. Kennedy
	1995 – 2005	Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC Associate (1995-1997) Partner (1998-2005)
	2005 – present	United States Department of Justice Office of the Associate Attorney General Principal Deputy to the Associate Attorney General
Office:	United States Department of Justice 950 Pennsylvania Avenue, N.W., Room 5706 Washington, D.C. 20530 202-305-1434	
Home:	[redacted]	
Ethnic Group:	Caucasian	
Salary:	$175,100	

The White House,

To the

Senate of the United States.

I nominate Neil M. Gorsuch, of Virginia, to be United States Circuit Judge for the Tenth Circuit, vice David M. Ebel, retired.

U.S. Department of Justice

Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

May 4, 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: Kyle Sampson
Chief of Staff

FROM: Rachel L. Brand
Assistant Attorney General
Office of Legal Policy

SUBJECT: United States Circuit Judge Candidate for the Tenth Circuit

The background investigation on Neil M. Gorsuch has been completed and has been reviewed. Based on Mr. Gorsuch's background investigation, and other information, we are satisfied that Mr. Gorsuch is well qualified to serve as a United States Circuit Judge for the Tenth Circuit and recommend that his nomination be forwarded to the President.

Attachments

1041194

U.S. Department of Justice

Washington, D.C. 20530

July 31, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

THROUGH: Neil M. Gorsuch 8/2/06
Acting Associate Attorney General

FROM: Lee J. Lofthus
Acting Assistant Attorney General
for Administration

SUBJECT: Regime Crimes Liaison Office (RCLO) – Senior Executive Service (SES) Pay Adjustment and Limited Term (LTA) SES Appointment

PURPOSE: To obtain your approval to increase Regime Crimes Liaison (RCL) [redacted] salary and to utilize an SES allocation and appoint [redacted] to an LTA SES appointment as the Deputy Regime Crimes Liaison (DRCL) in the Office of the Deputy Attorney General.

TIMETABLE: As soon as possible.

DISCUSSION: This is to request your approval to elevate [redacted] salary to $149,000. In January 2006, [redacted] was appointed to the Iraqi Special Tribunal (IST) as RCL at a salary of $143,000. As RCL, [redacted] leads U.S. investigative efforts in support of the IST and is the U.S. Liaison to the IST and to the Iraqi government in IST-related matters. In the performance of these duties, he oversees dozens of attorneys and investigators who are on the support team prosecuting Saddam Hussein and other members of his regime.

During his tenure as RCL, [redacted] has performed these highly sensitive and critical responsibilities in an exemplary manner. Working under adverse conditions, his leadership over the judgment in the first trial and the start of the second trial on genocide of the Kurds in Northern Iraq has been outstanding. His extensive legal experience has allowed him to respond to legal situations that are unique to Saddam Hussein's regime crimes trial.

In addition, this is to request approval to establish the SES position of DRCL utilizing one of DOJ's SES allocations, and to appoint [redacted] as the DRCL, in the Office of the Deputy Attorney General, at the salary of $135,000.

The establishment of the DRCL at the SES level is necessary to provide executive level advice and assistance to the RCL on all matters relating to the Iraqi High Tribunal in accordance with National Security Presidential Directive-37. The DRCL will work closely with the RCL in managing and coordinating the RCLO's numerous national and international agencies. RCLO has operations in a number of different locations and includes as many as 100 contract employees who are involved in mass gravesite exploitations.

[redacted] is currently on a temporary assignment to RCLO as an attorney with a salary of $111,104. Approval to set his pay at $135,000 represents a 21 percent increase over his currently salary. Although more than the 10 percent typically approved for initial appointment to the SES, pay at $135,000 will recognize [redacted] outstanding qualifications as well as the importance of the RCLO. If you concur, we will request the Office of Personnel Approval to appoint him as a LTA SES.

RECOMMENDATION: I recommend approval:
1. To adjust [redacted] pay to $149,000;
2. To utilize one of DOJ's undistributed SES allocations for the DRCL; and
3. To appoint [redacted] on a LTA SES appointment as the DRCL at the salary of $135,000.

ASAG:

Approve: _____ Concurring Components: None

Disapprove: _____ Nonconcurring Components: None

Other: _____

DAG:

Approve: _____ Concurring Components: None

Disapprove: _____ Nonconcurring Components: None

Other: _____

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/31/2006 **WORKFLOW ID:** 1041194
DATE RECEIVED: 08/01/2006 **DUE DATE:** 08/07/2006

FROM: Mr. Lee J. Lofthus
Acting Assistant Attorney General for Administration
Justice Management Division
950 Pennsylvania Avenue, NW, Room 1112
Washington, DC 20530

TO: DAG

MAIL TYPE: Action Memorandum

SUBJECT: Memo requesting the DAG's approval to increase the salary of Regime Crimes Liaison [redacted] and to utilize an SES allocation and appoint [redacted] to a Limited Term SES appointment as the Deputy Regime Crimes Liaison in ODAG. (J1040960)

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
08/01/2006	For ASG initialing on Action Memorandum. Return to ES for forwarding to the DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Kim Tolson: 202-514-8588

OASG CORRESPONDENCE ROUTING AND ACTION

From: Lee Lofthus	Date: 8/1/2006	Due Date: 8/7/2006	Workflow ID: 1041194
Subject: Memo requesting the DAG's approval to increase the salary of Regime crimes Liaison [redacted] and to utilize an SES allocation and appoint [redacted] to a limited term SES appointment as the Deputy Regime Crimes Liaison in ODAG			
Reviewer:		Due Back for Processing to Exec Sec: 8/6/2006	
Instructions: **Please review and provide written comments.**			
From:	To: **Neil Gorsuch**		Date:
Comments:			
From:	To: **Neil Gorsuch**		Date:
Comments:			

1041194

U.S. Department of Justice

Washington, D.C. 20530

July 31, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

THROUGH: Neil M. Gorsuch 8/2/06
Acting Associate Attorney General

FROM: Lee J. Lofthus
Acting Assistant Attorney General
for Administration

SUBJECT: Regime Crimes Liaison Office (RCLO) – Senior Executive Service (SES) Pay Adjustment and Limited Term (LTA) SES Appointment

PURPOSE: To obtain your approval to increase Regime Crimes Liaison (RCL) [redacted] salary and to utilize an SES allocation and appoint [redacted] to an LTA SES appointment as the Deputy Regime Crimes Liaison (DRCL) in the Office of the Deputy Attorney General.

TIMETABLE: As soon as possible.

DISCUSSION: This is to request your approval to elevate [redacted] salary to $149,000. In January 2006, [redacted] was appointed to the Iraqi Special Tribunal (IST) as RCL at a salary of $143,000. As RCL, [redacted] leads U.S. investigative efforts in support of the IST and is the U.S. Liaison to the IST and to the Iraqi government in IST-related matters. In the performance of these duties, he oversees dozens of attorneys and investigators who are on the support team prosecuting Saddam Hussein and other members of his regime.

During his tenure as RCL, [redacted] has performed these highly sensitive and critical responsibilities in an exemplary manner. Working under adverse conditions, his leadership over the judgment in the first trial and the start of the second trial on genocide of the Kurds in Northern Iraq has been outstanding. His extensive legal experience has allowed him to respond to legal situations that are unique to Saddam Hussein's regime crimes trial.

In addition, this is to request approval to establish the SES position of DRCL utilizing one of DOJ's SES allocations, and to appoint [redacted] as the DRCL, in the Office of the Deputy Attorney General, at the salary of $135,000.

The establishment of the DRCL at the SES level is necessary to provide executive level advice and assistance to the RCL on all matters relating to the Iraqi High Tribunal in accordance with National Security Presidential Directive-37. The DRCL will work closely with the RCL in managing and coordinating the RCLO's numerous national and international agencies. RCLO has operations in a number of different locations and includes as many as 100 contract employees who are involved in mass gravesite exploitations.

[redacted] is currently on a temporary assignment to RCLO as an attorney with a salary of $111,104. Approval to set his pay at $135,000 represents a 21 percent increase over his currently salary. Although more than the 10 percent typically approved for initial appointment to the SES, pay at $135,000 will recognize [redacted] outstanding qualifications as well as the importance of the RCLO. If you concur, we will request the Office of Personnel Approval to appoint him as a LTA SES.

RECOMMENDATION: I recommend approval:

1. To adjust [redacted] pay to $149,000;
2. To utilize one of DOJ's undistributed SES allocations for the DRCL; and
3. To appoint [redacted] on a LTA SES appointment as the DRCL at the salary of $135,000.

ASAG:

Approve: _____ Concurring Components: None

Disapprove: _____ Nonconcurring Components: None

Other: _____

DAG:

Approve: _____ Concurring Components: None

August 3, 2006

Disapprove: _____ Nonconcurring Components: None

Other: _____

1025467

U.S. Department of Justice

Washington, D.C. 20530

July 18, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

THROUGH: Robert D. McCallum, Jr. NMq (Acty) 7/28/06
Associate Attorney General

FROM: Lee J. Lofthus
Acting Assistant Attorney General
for Administration

SUBJECT: Increase in Basic Pay for [redacted] on her Reassignment to the Senior Executive Service (SES) Position of Comptroller, Office of Justice Programs (OJP)

PURPOSE: To obtain your approval to increase [redacted] basic pay from $146,000 to $152,000 upon reassignment as the Comptroller, OJP.

TIMETABLE: As soon as possible.

SYNOPSIS: Ms. Regina Schofield, Assistant Attorney General for Justice Programs, selected [redacted] as the Comptroller, OJP. [redacted] currently the SES Deputy Director, Finance (Auditing), Justice Management Division, is a recognized talent in the financial management community, and for her deft management of the OJP audit.

DISCUSSION: Ms. Schofield requests DAG approval to set [redacted] basic pay at $152,000, an increase of 4.2 percent over [redacted] current basic pay of $146,000, on reassignment as the Comptroller, OJP. In accordance with 5 CFR 534.404(c)(4)(ii), the DAG has the authority to make exceptions to the rule that prohibits an adjustment in an SES member's rate of basic pay more than once during a 12-month period if the SES member is reassigned to a position with substantially greater scope and responsibility. [redacted] reassignment to the position of Comptroller, OJP, meets this exception. Attached is a five-year pay history reflecting [redacted] appointment to the SES in October 2005, and prior pay adjustments, quality increases, and monetary awards during this time period. Based on salary history, [redacted] would not be considered for a pay adjustment in January 2007.

RECOMMENDATION: I recommend you approve to set [redacted] SES basic pay at $152,000, as the Comptroller, OJP.

APPROVE: _____

DISAPPROVE: _____

OTHER: _____

Concurring Components:
OJP

Nonconcurring Components:
n/a

Attachments

OASG CORRESPONDENCE ROUTING AND ACTION

From: Lee Lofthus	Date: 07/21/2006	Due Date: 7/25/2006	Workflow ID: 1035467
Subject: Memo requesting the DAG's approval to increase the OJP employee's basic pay on her reassignment to the Senior Executive Service position of Comptroller - Office of Justice Programs			
Reviewer: Jeff Senger		Due Back for Processing to Exec Sec: 7/24/2006	
Instructions: **Please review and provide written comments.**			
From: **Jeff Senger**	To: **Neil Gorsuch**		Date: 7/26/06
Comments: Looks okay. Jeff			
From: **Neil Gorsuch**	To: **Robert McCallum**		Date:
Comments:			

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/18/2006 **WORKFLOW ID:** 1035467
DATE RECEIVED: 07/20/2006 **DUE DATE:** 07/25/2006

FROM: Mr. Lee J. Lofthus
Acting Assistant Attorney General for Administration
Justice Management Division
950 Pennsylvania Avenue, NW, Room 1112
Washington, DC 20530

TO: DAG

MAIL TYPE: Action Memorandum

SUBJECT: Memo requesting the DAG's approval to increase an OJP employee's basic pay on her reassignment to the Senior Executive Service position of Comptroller, Office of Justice Programs. (J1032227)

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
07/20/2006	For ASG initialing on Action Memorandum. Return to ES for forwarding to the DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

1025467

U.S. Department of Justice

Washington, D.C. 20530

July 18, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

THROUGH: Robert D. McCallum, Jr. NMq (Acty) 7/28/06
Associate Attorney General

FROM: Lee J. Lofthus
Acting Assistant Attorney General
for Administration

SUBJECT: Increase in Basic Pay for [redacted] on her Reassignment to the Senior Executive Service (SES) Position of Comptroller, Office of Justice Programs (OJP)

PURPOSE: To obtain your approval to increase [redacted] basic pay from $146,000 to $152,000 upon reassignment as the Comptroller, OJP.

TIMETABLE: As soon as possible.

SYNOPSIS: Ms. Regina Schofield, Assistant Attorney General for Justice Programs, selected [redacted] as the Comptroller, OJP. [redacted] currently the SES Deputy Director, Finance (Auditing), Justice Management Division, is a recognized talent in the financial management community, and for her deft management of the OJP audit.

DISCUSSION: Ms. Schofield requests DAG approval to set [redacted] basic pay at $152,000, an increase of 4.2 percent over [redacted] current basic pay of $146,000, on reassignment as the Comptroller, OJP. In accordance with 5 CFR 534.404(c)(4)(ii), the DAG has the authority to make exceptions to the rule that prohibits an adjustment in an SES member's rate of basic pay more than once during a 12-month period if the SES member is reassigned to a position with substantially greater scope and responsibility. [redacted] reassignment to the position of Comptroller, OJP, meets this exception. Attached is a five-year pay history reflecting [redacted] appointment to the SES in October 2005, and prior pay adjustments, quality increases, and monetary awards during this time period. Based on salary history, [redacted] would not be considered for a pay adjustment in January 2007.

Subject: Increase in Basic Pay for [redacted] on her Reassignment to the Senior Executive Service (SES) Position of Comptroller, Office of Justice Programs (OJP)

RECOMMENDATION: I recommend you approve to set [redacted] SES basic pay at $152,000, as the Comptroller, OJP.

APPROVE: _____ 8/15/06

DISAPPROVE: _____

OTHER: _____

Concurring Components:
OJP

Nonconcurring Components:
n/a

Attachments

1005324

U.S. Department of Justice

Washington, D.C. 20530

July 14, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 7/28/06

FROM: Lee J. Lofthus
Acting Assistant Attorney General
for Administration

SUBJECT: Extension of a Detail for an Office of Justice Programs Employee

PURPOSE: To obtain your approval to extend the detail of an Office of Justice Programs (OJP) employee to the United Nations Office of Drugs and Crime (UNODC).

TIMETABLE: The detail for [redacted] Office of Justice Programs, is scheduled to expire on July 18, 2006. The approval of this extension will extend the detail to July 18, 2007. [redacted] has been detailed to UNODC since July 2004.

SYNOPSIS: [redacted] will continue to serve as the coordinator of projects funded through the UNODC. She has been instrumental in a number of initiatives at the UNODC. [redacted] work is a great influence in the global struggle against transnational criminal activity and terrorism. This is a reimbursable detail. Details to international organizations may be approved for up to five years.

The proposed detail extension for [redacted] is in the best interest of the Department, and I recommend your approval.

APPROVE: _____ Concurring Component
OJP

DISAPPROVE: _____ Nonconcurring Component

OTHER: _____

Attachment

OASG CORRESPONDENCE ROUTING AND ACTION

From: Lee J. Lofthus	Date: 7/17/2006	Due Date: 7/20/2006	Workflow ID: 1005324

Subject: (Cable rec'd from ODAG) Requesting renewal of the extension of the detail of OJP employee [redacted] so that she may continue to lead the program at the UN Office on Drugs and Crime to strengthen the implementation of the UN convention against Transnational Organized Crime.

Review:] Jeffrey Senger	Due Back for processing to Exec Secy: **7/18/2006**

Instructions: **Please review and provide written comments.**

From: Jeffrey Senger	To: **Neil M. Gorsuch**	Date: 7/27/06

Comments:

Looks okay.

J ll

From: **Neil M. Gorsuch**	To: **Robert D. McCallum, Jr.**	Date:

Comments:

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 05/06/2006 **WORKFLOW ID:** 1005324
DATE RECEIVED: 05/19/2006 **DUE DATE:** 07/20/2006

FROM: The Honorable Gregory L. Schulte
Ambassador
U.S. Mission to International Organizations
Vienna
Austria

TO: AG, DAG, OJP Schofield and CRM Swartz

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: (Cable rec'd from ODAG) Requesting renewal of the extension of the detail of OJP employee [redacted] so that she may continue to lead the program at the UN Office on Drugs and Crime to strengthen the implementation of the UN convention against Transnational Organized Crime. See WFs 996768, 647808, 786642 & other related corres in ES.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
07/17/2006	For ASG initialing on Action Memorandum. Return to ES for forwarding to the DAG. Office of the Associate Attorney General

INFO COMPONENT: AG, OAG (Underhill), DAG, ODAG (McAtamney), OJP, CRM, OASG

COMMENTS: 7/17/2006: JMD submitted an action memo dated 7/14/06 recommending approval. (J1006431)
6/7/2006: Per JMD, they are working with OJP on this and requests a due date ext from 6/6 to 6/15/06. Ext approved by ES/Paige.
5/22/2006: Per ODAG (McAtamney), assign to JMD to prepare recommendation and appropriate documentation to the DAG, in coordination with OJP and CRM.

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

U.S. Department of Justice

Washington, D.C. 20530

July 14, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ACTING ASSOCIATE ATTORNEY GENERAL 7/28/06

FROM: Lee J. Lofthus
Acting Assistant Attorney General
for Administration

SUBJECT: Extension of a Detail for an Office of Justice Programs Employee

PURPOSE: To obtain your approval to extend the detail of an Office of Justice Programs (OJP) employee to the United Nations Office of Drugs and Crime (UNODC).

TIMETABLE: The detail for [redacted] Office of Justice Programs, is scheduled to expire on July 18, 2006. The approval of this extension will extend the detail to July 18, 2007. [redacted] has been detailed to UNODC since July 2004.

SYNOPSIS: [redacted] will continue to serve as the coordinator of projects funded through the UNODC. She has been instrumental in a number of initiatives at the UNODC. [redacted] work is a great influence in the global struggle against transnational criminal activity and terrorism. This is a reimbursable detail. Details to international organizations may be approved for up to five years.

The proposed detail extension for [redacted] is in the best interest of the Department, and I recommend your approval.

APPROVE: _____ 8-5-06

Concurring Component
OJP

DISAPPROVE: _____

Nonconcurring Component

OTHER: _____

Attachment

1014193

U.S. Department of Justice

Washington, D.C. 20530

July 11, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 7/28/06

FROM: Lee J. Lofthus
Acting Assistant Attorney General
for Administration

SUBJECT: Request to Extend the Detail of a Civil Division Employee

PURPOSE: To obtain your approval to extend the detail of [redacted] Assistant Legal Adviser, to the Department of State.

TIMETABLE: Request to extend the detail for an additional 12 months. If approved, the detail will expire on July 17, 2007.

SYNOPSIS: [redacted] will continue to serve as a Program Officer in the Office for Afghanistan.

DISCUSSION: As a Program Officer, [redacted] contributes to the overall effort to strengthen good governance in Afghanistan by assisting with the implementation of policies and programs related to the judicial sector, anti-corruption efforts, and counter-narcotics programs. This is a partially reimbursable detail. The Department of Justice is responsible for the employee's salary and benefits. The Department of State will be responsible for all costs associated with temporary duty in Afghanistan, including hardship, differential, and danger pay; travel costs; per diem; and housing. A copy of the Memorandum of Understanding is attached.

RECOMMENDATION: For the reasons outlined in the attached memorandum from the Department of State, the proposed extension appears to be in the Department's interest and I recommend your approval. Civil Division concurs with this request. If approved, a Standard Form 52, Request for Personnel Action, is also attached for your signature.

APPROVE: _____

DISAPPROVE: _____

OTHER: _____

Concurring Component
Civil

Nonconcurring Component
None

Attachments

OASG CORRESPONDENCE ROUTING AND ACTION

From: Harry Thomas	Date: 07/12/2006	Due Date: 7/17/2006	Workflow ID: 1014193
Subject: Memo (rec'd from ODAG/McAtamney) requesting the DAG's approval to extend the detail of Civil employee [redacted] of the Office of Afghanistan for an additional 12 months. (Attaches a proposed memorandum of understanding for DAG review and approval)			
Reviewer: Lily Swenson		Due Back for Processing to Exec Sec: 7/16/2006	
Instructions: **Please review and provide written comments.**			
From: **Lily Swenson**	To: **Neil Gorsuch**		Date: 7/28/06
Comments: Recommend approval.			
From: **Neil Gorsuch**	To: **Robert McCallum**		Date:
Comments:			

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 06/06/2006 **WORKFLOW ID:** 1014193
DATE RECEIVED: 06/07/2006 **DUE DATE:** 07/17/2006

FROM: Mr. Harry K. Thomas, Jr.
Executive Secretary
U.S. Department of State
Washington, DC 20520-0001

TO: ODAG (McAtamney)

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: Memo (rec'd from ODAG/McAtamney) requesting the DAG's approval to extend the detail of CIV employee [redacted] to the Office for Afghanistan for an additional 12 months. Attaches a proposed Memorandum of Understanding for DAG review and approval. See WFs 922332 and 627630.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
07/12/2006	For ASG initialing on Action Memorandum. Return to ES for forwarding to the DAG. Office of the Associate Attorney General

INFO COMPONENT: OAG, ODAG, OASG, CIV

COMMENTS: 7/12/2006: JMD submitted an action dated 7/11/06 recommending approval. (J1016116)
JMD to coordinate with CIV and prepare appropriate decision documentation for the DAG.

FILE CODE:

EXECSEC POC: Kim Tolson: 202-514-8588

U.S. Department of Justice

Washington, D.C. 20530

July 11, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 7/28/06

FROM: Lee J. Lofthus
Acting Assistant Attorney General
for Administration

SUBJECT: Request to Extend the Detail of a Civil Division Employee

PURPOSE: To obtain your approval to extend the detail of [redacted] Assistant Legal Adviser, to the Department of State.

TIMETABLE: Request to extend the detail for an additional 12 months. If approved, the detail will expire on July 17, 2007.

SYNOPSIS: [redacted] will continue to serve as a Program Officer in the Office for Afghanistan.

DISCUSSION: As a Program Officer, [redacted] contributes to the overall effort to strengthen good governance in Afghanistan by assisting with the implementation of policies and programs related to the judicial sector, anti-corruption efforts, and counter-narcotics programs. This is a partially reimbursable detail. The Department of Justice is responsible for the employee's salary and benefits. The Department of State will be responsible for all costs associated with temporary duty in Afghanistan, including hardship, differential, and danger pay; travel costs; per diem; and housing. A copy of the Memorandum of Understanding is attached.

RECOMMENDATION: For the reasons outlined in the attached memorandum from the Department of State, the proposed extension appears to be in the Department's interest and I recommend your approval. Civil Division concurs with this request. If approved, a Standard Form 52, Request for Personnel Action is also attached for your signature.

APPROVE: 8-1-06

Concurring Component
Civil

DISAPPROVE: _____

Nonconcurring Component
None

OTHER: _____

Attachments

1042748

U. S. Department of Justice

Civil Division

Assistant Attorney General *Washington, D.C. 20530*

August 2, 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ACTING ASSOCIATE ATTORNEY GENERAL 8/4/06

FROM: Peter D. Keisler
Assistant Attorney General

SUBJECT: Congratulatory letter marking the retirement of [redacted]

PURPOSE: Recognition of federal employee who is retiring after 32 years with the Department.

TIMETABLE: Retirement date is August 4, 2006, and farewell event is August 19, 2006. Letter could be presented at August 19 event.

SYNOPSIS: Career employee is congratulated on his retirement.

DISCUSSION: [redacted] of the Torts Branch, Civil Division, is retiring on August 4, 2006. He began his federal career with the Civil Division in 1974. In honor of his service, I recommend that you send him a congratulatory letter thanking him for his loyal service to the Department. A proposed letter is attached to this memorandum. The justification for the letter is summarized below.

[redacted] has been unstinting in his commitment to the work of the Torts Branch for the past 32 years. He has been a trusted advisor to the Civil Division, to United States Attorney's Offices, and to agency counsel. His advice is frequently sought because of his wealth of substantive legal knowledge, his keen strategic sense, and his understanding of the internal workings of the federal government. [redacted] expertise in national security matters is recognized widely; his counsel is sought on numerous important matters that have substantial national impact. In addition, he is

exceptionally skilled in the art of writing briefs that are persuasive and well-crafted.

RECOMMENDATION: I recommend you sign the attached letter recognizing [redacted] on the occasion of his retirement and thanking him for his long and devoted service to the United States.

APPROVE: _____

DISAPPROVE: _____

OTHER: _____

Concurring components:
None

Non-concurring components:
None

Attachment

Office of the Attorney General
Washington, D.C.

[redacted]
Deputy Director
Federal Tort Claims Act Staff
Torts Branch, Civil Division
Washington, D.C. 20004

Dear [redacted]

Congratulations on your 32 years of dedicated service to the Federal Government. It is my understanding that your colleagues value your expertise and appreciate your many contributions to the Department of Justice. On behalf of the Department of Justice, I commend your efforts.

Thank you for your many years of service to our great Nation. I wish you all the best in your future endeavors.

Sincerely,

Alberto R. Gonzales
Attorney General

OASG CORRESPONDENCE ROUTING AND ACTION

From: Peter Keisler	Date: 8/4/2006	Due Date: 8/9/2006	Workflow ID: 1042748
Subject: Memo requesting the AG's signature on the attached congratulatory letter to Civil employee [redacted] who is retiring after 32 years of service in the Civil Division.			
Reviewer: Lily Swenson		Due Back for Processing to Exec Sec: 8/8/2006	
Instructions: **Please review and provide written comments.**			
From: Lily Swenson	To: **Neil Gorsuch/Greg Katsas**		Date:
Comments:			
From:	To: **Neil Gorsuch/Greg Katsas**		Date:
Comments:			

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 08/02/2006
DATE RECEIVED: 08/03/2006
WORKFLOW ID: 1042748
DUE DATE: 08/09/2006

FROM: The Honorable Peter D. Keisler
Assistant Attorney General
Civil Division
Department of Justice

Washington, DC 20530-0001

TO: AG

MAIL TYPE: Action Memorandum

SUBJECT: Memo requesting the AG's signature on the attached congratulatory letter to CIV employee [redacted] who is retiring after 32 years of service in the Civil Division, DOJ.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
08/04/2006	For ASG initialing on Action Memorandum. Return to ES for forwarding to the DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Kim Tolson: 202-514-8588

1042748

U. S. Department of Justice

Civil Division

Assistant Attorney General *Washington, D.C. 20530*

August 2, 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL 8/11/06

THROUGH: THE ACTING ASSOCIATE ATTORNEY GENERAL 8/4/06

FROM: Peter D. Keisler
Assistant Attorney General

SUBJECT: Congratulatory letter marking the retirement of [redacted]

PURPOSE: Recognition of federal employee who is retiring after 32 years with the Department.

TIMETABLE: Retirement date is August 4, 2006, and farewell event is August 19, 2006. Letter could be presented at August 19 event.

SYNOPSIS: Career employee is congratulated on his retirement.

DISCUSSION: [redacted] of the Torts Branch, Civil Division, is retiring on August 4, 2006. He began his federal career with the Civil Division in 1974. In honor of his service, I recommend that you send him a congratulatory letter thanking him for his loyal service to the Department. A proposed letter is attached to this memorandum. The justification for the letter is summarized below.

[redacted] has been unstinting in his commitment to the work of the Torts Branch for the past 32 years. He has been a trusted advisor to the Civil Division, to United States Attorney's Offices, and to agency counsel. His advice is frequently sought because of his wealth of substantive legal knowledge, his keen strategic sense, and his understanding of the internal workings of the federal government. [redacted] expertise in national security matters is recognized widely; his counsel is sought on numerous important matters that have substantial national impact. In addition, he is

exceptionally skilled in the art of writing briefs that are persuasive and well-crafted.

RECOMMENDATION: I recommend you sign the attached letter recognizing [redacted] on the occasion of his retirement and thanking him for his long and devoted service to the United States.

APPROVE: _____

DISAPPROVE: _____

OTHER: _____

Concurring components:
None

Non-concurring components:
None

Attachment

Office of the Attorney General

Washington, D.C.

August 15, 2006

[redacted]
Deputy Director
Federal Tort Claims Act Staff
Torts Branch, Civil Division
Washington, D.C. 20004

Dear [redacted]

Congratulations on your 32 years of dedicated service to the federal government. It is my understanding that your colleagues value your expertise and appreciate your many contributions to the Department of Justice. On behalf of the Department of Justice, I commend your efforts.

Thank you for your many years of service to our great Nation. I wish you all the best in your future endeavors.

Sincerely,

/s/

Alberto R. Gonzales
Attorney General

ACC Association of Corporate Counsel

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425

tel 202.293.4103
fax 202.293.4701

WWW.ACCA.COM

Mind Let's put in Exec Sec, prep a response from me in coordination with ODAG & Tempora RDM

To Robert

Monica Goodling has asked that you follow up on this as you think appropriate - I can provide more background whenever you're ready for it. Mary 2.15.06

February 13, 2006

The Honorable Alberto G Hand
Attorney General
U.S. Department of Justic
Robert F. Kennedy Buildi
950 Pennsylvania Avenue
Washington, DC 20530

Re: Concerns of the Assoc osion of attorney-client privilege and work product protections in the corporate legal context

Dear Attorney General Gonzales:

On behalf of the Association of Corporate Counsel ("ACC"), thank you for the opportunity to provide input from the business community's lawyers regarding the U.S. Department of Justice's policy regarding waiver of the attorney-client and work product protections in the corporate context. As you know, ACC is the in-house bar association, serving over 19,300 individual members who work as in-house counsel in over 8,000 public, private, and not-for-profit organizations. Our officers (who send their regrets that they could not join us today), board of directors, and general members from across the country (and increasingly from around the world) appreciate the invitation to air our concerns with you today.

Concerns of the Business Community Regarding Attorney-Client and Work Product Protections

As you know, attorney-client privilege and the work product doctrine are fundamental protections in the U.S. legal system that foster corporate compliance by encouraging employees and corporate leaders alike to communicate candidly with the company's counsel. Unfortunately, our members tell us of increasing concerns that their clients' rights to privileged meetings with counsel are under attack in a number of ways:

1. when prosecutors (at the federal and state level) begin investigations into allegations of wrongdoing and suggest (demand or infer) that privilege waiver is necessary to any company that wishes to engage in dialogue or influence settlement discussions, charging decisions, or the prosecutors' designation of the company as cooperative.

2. when regulators from the SEC, but also other federal and state level agencies, engage in similar kinds of co-opting behaviors in order to secure access to communications protected by the attorney-client privilege or lawyer work product.

3. when auditors, hearing the sharper scrutiny mandates present in the post-Andersen world, are no longer satisfied when any stone is left unturned, and refuse to certify a company's books or audit unless privilege has been waived and all attorney-client confidences divulged.

4. when third-party plaintiffs demand access to once-privileged records, which – because of these forced waivers – are now open to public scrutiny.

Summary of Key Revisions to the Thompson Memorandum

While ACC and a number of its partner associations in the business and legal community are assessing how to respond to these erosion concerns in all four contexts, we would like to offer you our input on how we would propose that the Department of Justice could help us reverse the trend of privilege erosion within their spheres of influence.

ACC would like to see revisions to key sections of the Thompson Memorandum. We feel that the time has come for us all to sit at the table as parties interested in ensuring that our justice system works well for all participants: we know that we both have constructive thoughts on concrete ways that the Justice Department could work with the business community to address these concerns in a mutually beneficial way. And we believe that your offices' outreach to the regional field offices is a part of that process and an important key to any solution we might craft.

Because we wish to encourage you to focus on the larger areas of common ground that we must find first, rather than starting with a re-draft of the specifics that we'd like to see changed (and that will likely engender a more argumentative response), we're only offering a summary of our general direction, below, to see if we can come to some general agreements in theory before we start looking at the technicalities and the words.

Indeed, ACC and the ABA's Task Force on Attorney-Client Privilege, along with all of the groups represented in that working group, have each developed specific language suggestions that we will all be pleased to present to you and your legal / policy team at the time and with the persons you designate as you deem appropriate. After you've had time to consider our general concerns, we would like to follow up with the appropriate leaders to arrange a meeting to further discuss our ideas in specific: perhaps in a few weeks (once Mr. McNulty is confirmed and seated?).

Here is a summary of the revisions we propose for the Thompson Memorandum:

1. Delete the waiver requirement for corporate leniency. We believe that prosecutors should be barred from requesting any waiver of attorney-client or work product protections and from "consider[ing] whether a corporation has waived its attorney-

client and work product protections in assessing that corporation's cooperation for any purpose, including in the course of conducting an investigation, determining whether to bring charges, or negotiating plea agreements." Consistent with this approach, we are suggesting that references to production of information subject to attorney-client or work product protections should be eliminated or limited to the production of information not subject to these protections. These proposed revisions directly address the policy issue of greatest concern to the business community.

2. Differentiate isolated cases from a broad pattern of misconduct. These proposed revisions acknowledge the reality that even law-abiding corporate citizens occasionally have rogue employees that engage in misconduct. Conclusions about the culture, compliance programs, or even supervision of employees should be based upon a corporation's general patterns and practices, and should not be extrapolated from an isolated incident.

3. Identify practical limitations on corporate cooperation regarding individual employees. Although the Department's expectation of assistance from a corporation in targeting culpable employees and agents is appropriate in general, there are practical limitations that corporations want the DOJ to acknowledge. These include provisions addressing the recognition that companies may be bound by state indemnification laws to pay the legal fees of certain employees until they have been proven guilty, and that employees have a variety of individual rights that company's must respect, as well.

We appreciate your consideration of our concerns regarding the Department's policy on waiver of attorney-client privilege and work product protections in the corporate context.

Please do not hesitate to contact me on this or any other matter. ACC thanks you for your time and your gracious invitation to join you in your offices to open the lines of communication between our constituencies.

Sincerely,

Susan Hackett
Senior Vice President and General Counsel

The Decline Of the Attorney-Client Privilege in the Corporate Context[1]
Survey Results Presentation/Testimony

Before the United States Sentencing Commission
March 15, 2006

Presented by Susan Hackett of the Association of Corporate Counsel

On Behalf of
The Coalition to Preserve the Attorney-Client Privilege

Honorable Commissioners, thank you for the opportunity to present the results of our newest survey on attorney-client privilege erosion in the corporate context.

My name is Susan Hackett, and I am the Senior Vice President and General Counsel of the Association of Corporate Counsel. I am here today as the representative of The Coalition to Preserve the Attorney-Client Privilege, which is composed of the following organizations: the American Chemistry Council, the American Civil Liberties Union[2], the Association of C[illegible]erties, Inc., the Business Roundtable, The Financi[illegible]Freedom, the National Association of Criminal [illegible]iation of Manufacturers, the National Defense [illegible]ustry Leaders Association, the U.S. Chambe[illegible]n Legal Foundation. The American Bar Associ[illegible]s to the U.S. Sentencing Commission regardin[illegible]ttorney-client privilege and work product doct[illegible]al governmental policies and practices th[illegible]ese fundamental rights.[3]

The coalition's most recent testimony & supporting docs before the US Sentencing Commission — March 15, 2006

[1] The underlying survey results document was submitt[illegible] and is available online at http://www.acca.com/Surveys/attyclient2.pd[illegible]

[2] The American Civil Liberties Union (ACLU) is a part of our coalition, but was not able to secure an approval to co-sign our underlying survey results document for its submission to the Commission by their March 1, 2006 deadline. The ACLU did sign on to our coalition's March 7, 2006, Congressional testimony on this subject, which featured and attached these survey results. In the event that you are interested, the Coalition's Congressional hearing submission is online at http://www.acca.com/public/accapolicy/coalitionstatement030706.pdf.

[3] The ABA is prevented by internal policies from formally joining coalitions, but has worked in close cooperation with this Coalition in the preparation and distribution of the surveys referenced in this document.

The Decline Of the Attorney-Client Privilege in the Corporate Context[1] Survey Results Presentation/Testimony

Before the United States Sentencing Commission March 15, 2006

Presented by Susan Hackett of the Association of Corporate Counsel

On Behalf of The Coalition to Preserve the Attorney-Client Privilege

Honorable Commissioners, thank you for the opportunity to present the results of our newest survey on attorney-client privilege erosion in the corporate context.

My name is Susan Hackett, and I am the Senior Vice President and General Counsel of the Association of Corporate Counsel. I am here today as the representative of The Coalition to Preserve the Attorney-Client Privilege, which is composed of the following organizations: the American Chemistry Council, the American Civil Liberties Union[2], the Association of Corporate Counsel, Business Civil Liberties, Inc., the Business Roundtable, The Financial Services Roundtable, Frontiers of Freedom, the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, the National Defense Industrial Association, the Retail Industry Leaders Association, the U.S. Chamber of Commerce, and the Washington Legal Foundation. The American Bar Association has also expressed similar views to the U.S. Sentencing Commission regarding the importance of preserving the attorney-client privilege and work product doctrine and protecting them from federal governmental policies and practices that now seriously threaten to erode these fundamental rights.[3]

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[1] The underlying survey results document was submitted to the Commission in support of this testimony and is available online at http://www.acca.com/Surveys/attyclient2.pdf.

[2] The American Civil Liberties Union (ACLU) is a part of our coalition, but was not able to secure an approval to co-sign our underlying survey results document for its submission to the Commission by their March 1, 2006 deadline. The ACLU did sign on to our coalition's March 7, 2006, Congressional testimony on this subject, which featured and attached these survey results. In the event that you are interested, the Coalition's Congressional hearing submission is online at http://www.acca.com/public/accapolicy/coalitionstatement030706.pdf.

[3] The ABA is prevented by internal policies from formally joining coalitions, but has worked in close cooperation with this Coalition in the preparation and distribution of the surveys referenced in this document.

Our coalition believes that the attorney-client privilege and work product doctrine as applied in the corporate context are vital protections that serve society's interests and protect clients' rights to consult counsel. The attorney-client privilege is fundamental to fairness and balance in our justice system and essential to corporate compliance regimes. Without reliable privilege protections, executives and other employees will be discouraged from asking difficult questions or seeking guidance regarding the most sensitive situations and will be penalized for reporting problems they identify in the organization. Without meaningful privilege protections, lawyers are more likely to be excluded from operating in a preventive (rather than reactive) manner.

In today's complex business environment, it is increasingly important to encourage business executives and even line managers to regularly – and without any hesitation – engage their lawyers in open discussions about anything that concerns them in furtherance of assuring the corporation's legal health. It is our belief that attorney-client communications, and the confidentiality that fosters those communications, are more important than ever, and must be protected.

This coalition's members have previously testified before the Commission on the Guidelines' Chapter 8 Commentary[4] in Application Note 12 to Section 8C2.5, bestowing authority for lawyers in the Department of Justice to unilaterally determine *in their discretion* whether privilege waiver requests are appropriate or necessary in the corporate context. It is not our purpose today to repeat what's already been said; we believe the Commission already understands our positions well.

Instead, my purpose in appearing before you today is to: first, commend you for your decision to consider retracting the privilege waiver language that concerns us in Chapter 8's Commentary[5]; second, provide you with an overview of the survey results document you requested, which has been provided to you in support of our contentions; and third, reiterate our request that the Commission remove the clause "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization" from the Guidelines'

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[4] Amendments made to the US Sentencing Guidelines, which became effective in November of 2004, state that in order to qualify for a reduction in sentence for providing assistance to a government investigation, a corporation is required to waive confidentiality protections if "such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." [U.S. Sentencing Guidelines Manual § 8C2.5 (2004) available at http://www.ussc.gov/2004guid/8c2_5.htm.]

[5] The coalition is fully aware that the Commission, in drafting the current language, did not intend to do harm to clients' right to counsel, and that they attempted to accommodate a number of constituencies' concerns. We don't believe that the Commission intended many of the results which we're reporting to you as concerns, but we we do hope that now that you have knowledge and evidence of them and you've re-opened the process of amendment, you'll help us redress the issue.

commentary, and consider new language stating that privilege waivers are not appropriate for the Department of Justice to demand or consider.

The 2005 Privilege Survey

I begin with a short summary of the results of the 2005 survey on privilege erosion in the corporate context[6], which provided the first meaningful empirical data on privilege erosion issues. That survey confirmed our contention that companies faced with a potential investigation, prosecution, or enforcement action:

1. are increasing in number to the point that waiver requests or expectations are considered "routine,"
2. have no meaningful ability to resist waiver expectations or demands, however they are presented,
3. will face severe consequences if they do insist on exercising their privilege rights, and
4. suffered a significant and discernable "chill" in the lawyer-client relationship, negatively impacting the lawyer's ability to work with clients to develop, implement, monitor and report on compliance initiatives that are core to the company's legal health.

Upon presentation of these survey results in hearings before this Commission in November of 2005, several Commissioners and the Department of Justice representative in particular requested that we collect further information on the nature and frequency of corporate privilege waiver requests by the government. The Coalition responded with a new survey instrument and we are pleased to offer you the survey's results here today. Please note that the results are reported in detail in the survey document referenced previously and submitted to the Commission on March 1st.

The 2006 Coalition Privilege Survey[7]

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[6] An Executive Summary of the March 2005 survey may be accessed via the following links: for the in-house version: http://www.acca.com/Surveys/attyclient.pdf, and for the outside counsel version: http://www.acca.com/Surveys/attyclient_nacdl.pdf. Based on feedback from those who read the previous survey results, the 2006 survey results reside in one document that combines the results of both the in-house and outside counsel surveys.

[7] In January 2006, the Association of Corporate Counsel directly contacted approximately 4,700 of its approximately 19,000 members, including only those members whose titles included either "general counsel" or "chief legal officer," so as to avoid duplicate responses from the same company which could have led to double-counting the same incidents. Also in January, the National Association of Criminal Defense Lawyers emailed the web link for a companion outside counsel version of the survey to its 13,000 members; and then posted the web link for the survey on its listserv for white-collar practitioners, which has approximately 1,200 subscribers. Both the in-house and outside counsel email

Demographic Information about Respondents

In-house counsel: Almost 90% of the in-house counsel survey respondents were General Counsel. Approximately 40% indicated that the government (federal or state) had initiated some form of investigation into allegations of wrongdoing at their company during the past 5 years. Fifty-one percent of the respondents indicated their companies were privately-held/owned; 35% said their companies were publicly traded but not in the Fortune 500; and 9% of respondents worked for non-profits. Quasi-governmental entities and Fortune-ranked companies each represented 1% of the survey respondents. Respondents were asked to identify the primary industry that best describes their client company's main line of business and were given 22 response options. The top three industries selected were: Finance and Insurance (18%), Manufacturing (13%), and Information Technology (11%). Almost 90% of respondents worked in law departments of less than 20 lawyers: 33% were solo practitioners, 46% had offices of 2-7 lawyers, and 10% had offices of 8-19 lawyers. Of the remaining respondents, approximately 4% had law departments of over 100 lawyers, and less than 1% had law departments of over 500 lawyers.

These demographics are significant in that they show that even among a general population of company counsel, almost half have experienced some kind of privilege erosion. The vast majority of these respondents who experienced privilege erosions do not work for mega-corporations with extremely high visibility and the potential for "blockbuster" failures; they work for a wide variety of differently sized businesses, representing the full spectrum of industries.

Outside counsel: Seventy-one percent of those who answered the survey for outside counsel were partners in law firms, and 40% practiced criminal litigation as their

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solicitations requested recipients to complete a web-based survey on attorney client privilege protections and erosion. The web link to the survey was also made available to the Coalition's leaders, and the ABA Task Force on Attorney-Client Privilege, which in turn publicized it to the many groups participating in the Task Force's endeavors, including approximately 5,000 members of the Business Law and Criminal Justice Sections. The survey was "open" for approximately 2 weeks. Five hundred sixty-six of the 676 responses to the in-house version of the survey were received from the Association of Corporate Counsel emailing to its general counsel members; the remaining corporate counsel responses are from contacts initiated by the other groups. Five hundred thirty-eight outside counsel responded to this survey, the vast majority coming from the National Association of Criminal Defense Lawyers' white-collar practitioners' membership. In total, our surveys generated approximately 1200 responses.

Both surveys included 23 questions primarily seeking specific responses to multiple choice or yes/no questions, with 4 open-ended questions at the end seeking text responses that would provide personal detail on situational experiences.

The survey results are presented in numbers and percentages that are approximated by rounding to the nearest whole integer. Some direct quotations drawn from the open-ended text responses are also included, but not all responses to those questions are included out a concern for confidentiality in some cases and to avoid unnecessary repetition in most cases. We believe the survey's response rate should be considered robust; but since we are not an independent surveying company or statisticians, we can make no proffer that the sampling is statistically significant or representative of the entire profession. We can note that statisticians have designated the Association of Corporate Counsel's membership as statistically representative of the entire in-house legal profession.

primary area of concentration (26% indicated civil litigation and 20% indicated transactional work as their primary practice areas). Sixty-three percent represented companies that had been subject to a criminal or enforcement investigation in the last five years. Further demographics show that 22 % of outside counsel respondents represented privately-held or -owned companies with revenues of less than $200 million annually; 20% represented individual officers or employees of organizations; only 12% represented publicly traded companies with more than $1 billion in annual revenue; and only 11% represented publicly-traded companies with between $500 million and $1 billion in annual revenue. About the outside counsel themselves, we know that 35% of respondents work for firms of between 2 and 20 lawyers; the rest of the respondents were fairly evenly distributed among the following categories: solo (19%); 21-100 lawyers (17%); 101-500 lawyers (15%); more than 500 lawyers (14%).

As with the results of the survey of in-house counsel, outside counsel answers indicate that among a general population of outside counsel with a wide array of experience, both in terms of the types of law that they practice and the types of clients that they represent, 51% indicate that they experienced a demand, suggestion, inquiry, or other expectation of waiver by the government. A commanding 73% agree that a culture of waiver has evolved with respect to the corporate attorney-client privilege. The sizable plurality of lawyers who answered this survey represented either smaller, privately held companies or individuals—thus belying the conclusion that waiver requests, demands, and expectations are a rare problem only experienced by large, publicly-traded companies who are at the center of "headline" scandals and somehow deserving of whatever treatment the government dishes out.

What the Respondents Said

We encourage the Commission particularly to listen the voices of corporate counsel and defense attorneys as captured in the survey results document on several pages containing direct quotes at the end of the document. These responses are but a portion of those penned in response to the open-ended questions at the end of the survey, which asked respondents the following:

> 24) Please describe a typical situation, or situations, in which your corporation/client waived attorney-client privilege and/or work product protections in order to avoid criminal prosecution or more severe civil penalties; please consider including information on which party suggested or demanded waiver, whether the company waived, what material was sought or produced pursuant to the waiver, and what kind of charges were being investigated.

25) If the Federal Sentencing Guidelines for organizations were mentioned during negotiations with a prosecutor or enforcement official, please describe how they were cited, and whether the commentary language in the Guidelines regarding privilege waiver was specifically referred to.

26) If your corporation or client has waived privilege at the neutral suggestion of a prosecutor or enforcement official, or without any suggestion or demand from a government official, please describe the situation, including why the corporation decided to waive privilege and as to what material.

27) Please provide any additional commentary on privilege erosion, protection or waiver issues that you think is germane.

I do not need to read these responses into the record for you to hear respondents' outrage (or perhaps another apt description would be "disbelief") regarding government practices *vis a vis* the privilege; it jumps off the pages. Respondents wrote time and again of prosecutorial abuses (their words), coercion (their words), and inappropriate hijacking of court-governed doctrines that their clients were subjected to when privilege waiver discussions arose. The comments detail stories about prosecutors demanding waiver of companies that are not even the target of the government's investigation. They tell of prosecutors whose opening requests at their first meetings with counsel – before any discussion of the facts or knowledge of what the investigation into allegations might entail or uncover – were to demand privilege waivers as a condition of cooperation and as a requirement for any further conversation to continue. Respondents wrote about how their clients were painted into a privilege waiver corner where they were told that of course they had choices: to waive or face criminal charges against the corporation, with entity-threatening consequences (the suggestion being that if the company did waive, it wouldn't be charged at all). And underlying all of these stories are concerns that these lawyers have regarding the damage done to their relationship with clients as a result of this culture of waiver: they're concerned that employees are no longer confident about including attorneys in business discussions or seeking legal advice when thorny problems arise. These are real voices. These are hundreds of lawyers who've personally witnessed waiver demands made by the government. And these are only a small number of voices whom we happened to contact and hear back from. You cannot read these pages and conclude that waiver problems are non-existent or rare; indeed, you must conclude, as do our respondents, that a government culture of waiver now exists and that it infects large numbers of government investigations and prosecutions.

What did respondents say in specific?

Does a Government Culture of Waiver Exist? Yes. Almost 75% of both inside and outside counsel expressed agreement (almost 40% agreeing strongly) with a statement that "a 'culture of waiver' has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections." Only 1% of inside counsel and 2.5 % of outside counsel disagreed with the statement.

The 'Government's Expectation'[8] of Waiver Confirmed: Of the respondents who confirmed that they or their clients had been subject to investigation in the last five years, approximately 30% of in-house respondents and 51% of outside respondents said that the government expected waiver as a condition to engaging in bargaining or to be eligible to receive more favorable or lenient treatment.

Waiver is a Condition of Cooperation: Fifty-two percent of in-house respondents and 59% of outside respondents confirmed that they believe that there has been a marked increase in waiver requests as a condition of cooperation. Consistent with that finding, roughly half of all investigations or other inquiries experienced by survey respondents resulted in privilege waivers.

Further, and to refute the point often made that corporations aren't asked to waive, but they "volunteer" to waive on their own: **Prosecutors Typically Request Privilege Waiver – It Is Rarely "Inferred" by Counsel.** Of those who have been investigated, 55% of outside counsel responded that waiver of the attorney-client privilege was requested by enforcement officials either directly or indirectly. Twenty-seven percent of in-house counsel confirmed this to be true.[9] Only 8% percent of outside counsel and 3% of in-house counsel said that they "inferred it was expected."

The Sentencing Guidelines are Listed by Respondents as Among the Top Three Reasons Given For Waiver Demands. This Commission specifically asked us to find out if it was reasonable to assume that the Sentencing Guidelines' language was in

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[8] The survey defined 'government expectation' of waiver as a demand, suggestion, inquiry or other showing of expectation by the government that the company should waive the attorney-client privilege.

[9] Sixty percent of in-house counsel who'd had experience with a waiver request responded "N/A" (not applicable) to this question, suggesting they had not been present when privilege waivers were discussed.

some part responsible for privilege waiver problems – if it was a "hook," in essence, upon which to hang a privilege waiver request – or if our concerns should be addressed to others who engage in privilege waiver discussions on a direct basis. The facts are in: outside counsel indicated that the DOJ's internal policies (the Thompson/Holder/McCallum Memoranda) are cited most frequently when a reason for waiver is provided by a prosecutor or enforcement official, and the Sentencing Guidelines are cited second. In-house counsel placed the Guidelines third, behind the need for "a quick and efficient resolution of the matter," and DOJ policies (Thompson/Holder/McCallum), respectively. Given that a number of other choices were presented, it's more than fair to conclude that respondents have been hearing about the Guidelines from prosecutors quite regularly when waiver discussions arise.

And it's Likewise Clear that the Majority of Waiver Requests are Coming from US Attorneys. For both in-house and outside counsel, the U.S. Attorneys' Offices were identified as the government agency that most often indicated an expectation of waiver. The survey asked respondents to identify which agencies indicated an expectation of waiver and were given a choice of seven enumerated agencies/categories of agencies, as well as the opportunity to state that the question did not apply or to write-in a response. (About one-third of the in-house respondents and one-fourth of outside counsel respondents indicated that this question was not applicable.) The top agencies/categories identified as most often expecting waiver (in descending order) were: (for in-house counsel) U.S. Attorneys' Offices, the SEC, the Department of Justice – "Main" (e.g., antitrust or criminal fraud), other federal agencies (e.g., DOL, EPA, HHS, FEC, etc.), and State Attorneys General Offices; for outside counsel, the order was exactly the same except that the number 2 and 3 slots for the SEC and DOJ – Main were reversed.

In the interest of time, I will not further summarize findings in my oral statement which are already discussed in greater detail in the written statement we've submitted, but please note that the written statement included additional information about the types of attorney-client communications or work product documents that are sought in waiver demands, and further details of the timing and "atmospherics" of waiver demands made of corporations. We also added a few questions with interesting answers on the experiences of corporations regarding government demands beyond waiver requests, but related to corporate employees: including requests for the company not to advance legal expenses (even in the presence of state laws and corporate bylaw provisions which mandate indemnification), company experiences with prosecutors who wish to control decisions related to joint defense agreements with targeted employees, requests that the company refuse to share requested documents with targeted employees, and demands that a company discharge an employee who would not consent to a government interview.

Taken together, these survey results present an unparalleled look into the role of waiver in the prosecutorial process that most of us hope we'll never personally experience, but which we now know is relatively commonplace for companies that have received notice that an allegation of wrongdoing has been made against them.

Movement Toward a Solution to these Problems ...

As you know, our Coalition has petitioned this Commission to reconsider the privilege waiver language of the Commentary at USSG Section 8C2.5, Application Note 12. We believe that our submission of evidence from our surveys in 2005 and now in 2006 documents that 1.) waiver demands are being made routinely and inappropriately, 2.) that waiver demands are being justified under the authority given through this provision of the Sentencing Guidelines, and that 3.) clients experiencing waiver demands are becoming less likely to consult their lawyers or include them in daily decision-making as a result of 1.) and 2.), to the detriment of corporate compliance programs. Accordingly, we request that at a minimum, the waiver clause in the Guidelines' Commentary be removed, and that the Commission consider inserting language in its stead that prohibits the DOJ from any consideration of privilege waivers – positive or negative – in the charging or negotiation discussions and decisions.

Specifically, we'd suggest that in Section 8C2.5, Application Note 12 would read as follows:

"12. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent non-privileged information known by the organization. A prime test of whether the organization has disclosed all pertinent non-privileged information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. *Waiver of attorney-client privilege and of work product protections is not* a factor in determining whether ~~a prerequisite to~~ a reduction in

culpability score under subdivisions (1) and (2) of subsection (g) is warranted ~~unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization~~."

We are hopeful that in light of the empirical information we've provided that you will favorably consider our request and propose amendment of the Sentencing Guidelines accordingly in your 2006 Amendment cycle. We believe that if we are able to remove the sources of waiver authority that the Department relies upon, it will be possible to begin to argue more effectively for a change to inappropriate prosecutorial policies and practices, and find a solution that will help to restore the attorney-client privilege to its rightful position: as every client's right.

My original testimony referenced the statements of Associate Attorney General Robert McCallum of the Department of Justice before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, which held hearings on March 7, 2006 at the Coalition's request on the privilege erosion issue. Mr. McCallum suggested that the DOJ did not have any problems with removing the privilege waiver language from the Guidelines. I understand that in his appearance before you this morning, he retracted that statement and said that the Department's request of the Commission is to leave the language of the Commentary as it is.

I would noted that Mr. McCallum's comments before the Congress were made in an environment in which every Member of the Subcommittee, from both sides of the aisle, expressed rigorous support for the coalition's goals and were openly critical of DOJ policies and practices on wavier. The record of that hearing will soon be available, and we will be happy to forward it to you so that you can be advised of the Judiciary Committee's reaction to this issue; it may be possible for the Commission to get a jump on responding to this issue in a fashion that is consistent with Congress' current thinking.

Thank you for your time and attention to this important matter, and your kind consideration of my comments. I'm happy to answer any questions I can for you.

March 28, 2006

VIA ELECTRONIC FILING

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Attention: Public Affairs—Priorities Comment

Re: Comments on "Chapter Eight – Privilege Waiver"

Dear Sir/Madam:

The Coalition to Preserve the Attorney-Client Privilege, which is composed of the undersigned organizations,[1] is pleased to provide these comments on the Commission's Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings for the amendment cycle ending May 1, 2006.[2] These comments exclusively address Final Priority (6): "review, and possible amendment," of the language regarding waiver of attorney-client privilege and work product protections contained in the Commentary to Section 8C2.5 of the Federal Sentencing Guidelines. For the reasons explained below, we urge the Commission to amend that language to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction for cooperation with the government is warranted.

Background

On April 30, 2004, the Commission submitted to Congress a number of amendments to Chapter 8 of the Guidelines relating to organizations. Included in these amendments, all of which became effective on November 1, 2004, was the addition of the following new language to the Commentary for Section 8C2.5of the Guidelines:

> Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government]...unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.

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[1]The Coalition to Preserve the Attorney-Client Privilege includes the following organizations: American Chemistry Council, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, the Financial Services Roundtable, Frontiers of Freedom, National Association of Criminal Defense Lawyers, National Association of Manufacturers, National Defense Industrial Association, Retail Industry Leaders Association, the U.S. Chamber of Commerce, and Washington Legal Foundation. The American Civil Liberties Union (ACLU) is a part of the coalition as well but was not able to secure approval to co-sign this comment letter prior to today's deadline. The ACLU did sign the coalition's August 15, 2005 comment letter to the Commission, referenced in footnote 5, *infra*, which makes many of the same substantive points outlined in this comment letter. Although the American Bar Association is prevented by internal policies from formally joining coalitions, it is working in close cooperation with the Coalition to Preserve the Attorney-Client Privilege on the privilege waiver issue and will be filing separate comments with the Commission today on the issue of "Chapter Eight – Privilege Waiver."

[2] 71 Fed. Reg. 4782-4804 (January 27, 2006)

Before the adoption of the privilege waiver amendment, the Commentary was silent on privilege and contained no suggestion that such a waiver would ever be a factor in charging or sentencing decisions. The issue of waiver emerged during deliberations of the Commission's Ad Hoc Advisory Group on the Organizational Guidelines. The Advisory Group was concerned about the effect on effective corporate compliance programs of the Justice Department's privilege waiver policies, as spelled out in the Holder and Thompson Memoranda.[3] After considering the views of the Department of Justice, various bar associations, and regulated entities—and weighing the concerns raised by numerous representatives of the business community and various legal groups—the Advisory Group recommended privilege waiver language somewhat similar to, though more general than, the language quoted above. The Commission revised that language and incorporated it into the 2004 amendments to the Guidelines.

After the 2004 privilege waiver amendment to the Guidelines was adopted, a broader cross-section of business, legal, and public policy organizations, including many of the undersigned entities and the American Bar Association (ABA), began to evaluate the substantive and practical impact of the waiver provision on their operations—and on the legal and business communities in general—and communicated their concerns to the Commission. On March 3, 2005, the coalition sent a letter to the Commission expressing its concerns over the privilege waiver amendment. The ABA expressed similar concerns in its separate letter to the Commission dated May 17, 2005.

In June 2005, the Sentencing Commission issued its "Notice of Proposed Priorities and Request for Public Comment" for the amendment cycle ending May 1, 2006, in which it stated its tentative plans to reconsider the 2004 privilege waiver amendment to the Federal Sentencing Guidelines during its 2005-2006 amendment cycle. In response, the coalition submitted a comment letter to the Commission on August 15, 2005, urging it to reverse the privilege waiver amendment and add language to the Guidelines stating that waiver should not be a factor in determining cooperation. Similar comment letters opposing the November 2004 privilege waiver amendment were also filed by a prominent group of nine former senior Justice Department officials—including three former Attorneys General—and by the ABA.

In August 2005, the Sentencing Commission issued its "Notice of Final Priorities" for the amendment cycle ending May 1, 2006, in which it stated its intent to formally reconsider the 2004 privilege waiver amendment to the Federal Sentencing Guidelines. Subsequently, several organizations from the coalition, former Attorney General Dick Thornburgh, and the ABA, testified before the Commission on November 15, 2005, on the subject of privilege waiver. During the November 15 hearing, the coalition presented the results of its April 2005 surveys of in-house and

[3] The Justice Department's privilege waiver policy originated with the adoption of a 1999 memorandum by then-Deputy Attorney General Eric Holder, also known as the "Holder Memorandum," that encouraged federal prosecutors to request that companies waive their privileges as a condition for receiving cooperation credit during investigations. The Department's waiver policy was expanded in a January 2003 memorandum written by then-Deputy Attorney General Larry Thompson, also known as the "Thompson Memorandum." Subsequently, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Heads in October 2005 instructing each of them to adopt "a written waiver review process for your district or component," although the directive—also known as the "McCallum Memorandum"—does not establish any minimum standards for, or require national uniformity regarding, privilege waiver demands by prosecutors. The Thompson and McCallum Memoranda are available online at http://www.usdoj.gov/dag/cftf/business_organizations.pdf and http://www.abanet.org/poladv/mccallummemo212005.pdf, respectively.

outside counsel, both of which confirmed the importance of the privilege to corporate counsel and the growing trend of government-coerced privilege waiver.[4] At that hearing, the Commission asked coalition members to help to gather additional information and data regarding the frequency with which governmental entities have been requesting that businesses waive their privileges as a condition for cooperation credit, as well as the effects of these waiver requests.

After considering the comments and testimony presented by the coalition, the ABA, and others,[5] the Commission issued its Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings on January 27, 2006. One of the issues on which the Commission sought public comment was the issue of "Chapter Eight – Privilege Waiver." In particular, the Commission sought additional comment on the following specific issues:

> (1) whether this commentary language [in Application Note 12 of Section 8C2.5 of the Guidelines] is having unintended consequences; (2) if so, how specifically has it adversely affected the application of the sentencing guidelines and the administration of justice; (3) whether this commentary language should be deleted or amended; and (4) if it should be amended, in what manner.[6]

In response to the Commission's November 15, 2005, request for additional information and data on the frequency of government demands for privilege waiver and their effects, the coalition undertook a second, more detailed survey of in-house and outside corporate counsel. The results of the new survey were presented to the Commission in early March 2006.[7] Subsequently, on March 15, 2006, two representatives of the coalition—Susan Hackett of the Association of Corporate Counsel (ACC) and Kent Wicker of the National Association of Criminal Defense Lawyers (NACDL)—testified before the Commission regarding the results of the new survey.

Unintended Consequences of the 2004 Privilege Waiver Amendment to the Guidelines

The coalition continues to believe that the 2004 changes to the Section 8C2.5 Commentary of the Sentencing Guidelines, though well-intentioned, have helped cause a number of profoundly negative unintended consequences. The results of our new survey provide substantial and compelling evidence supporting the validity of these concerns. In our view, the 2004 privilege waiver amendment to the Guidelines, combined with the existing Justice Department privilege waiver policy as expressed in the Holder and Thompson Memoranda, has led to the following negative consequences:

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[4] Executive summaries of these April 2005 surveys are available online at www.acca.com/Surveys/attyclient.pdf and www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf, respectively.

[5] Links to all of the comment letters, written testimony, and other statements that the coalition, the ABA, and the former senior Justice Department officials previously presented to the Sentencing Commission and Congress are available at http://www.abanet.org/poladv/acprivilege.htm. In addition, other useful materials regarding privilege waiver are available on the ABA Task Force on Attorney-Client Privilege website at http://www.abanet.org/buslaw/attorneyclient/.

[6] *See* Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings, 71 Fed. Reg. 4782-4804 (January 27, 2006).

[7] The detailed results of the new March 2006 surveys of in-house and outside corporate counsel are available online at http://www.acca.com/Surveys/attyclient2.pdf.

•The privilege waiver amendment and related Justice Department policies and practices have forced companies to waive their attorney-client and work product protections in most cases. The problem of coerced waiver that began with the 1999 Holder Memorandum and the 2003 Thompson Memorandum was exacerbated when the Commission added the new privilege waiver language to the Section 8C2.5 Commentary in 2004. While the new language begins by stating a general rule that a waiver is "not a prerequisite" for a reduction in the culpability score—and leniency—under the Guidelines, that statement is followed by a very broad and subjective exception for situations where prosecutors contend that waiver "is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." Without some meaningful oversight over what waivers prosecutors may deem to be "necessary," this exception essentially swallows the rule. Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required.

Now that this amendment has become effective, it is the experience of our members that the Justice Department is even more likely than it was before to require companies to waive their privileges in almost all cases. Adding to our concern, it is our perception that the Justice Department, as well as other enforcement agencies, view the lack of Congressional disapproval of this amendment as Congressional ratification of the Department's policy of routinely requiring privilege waiver. From a practical standpoint, companies increasingly have no choice but to waive these privileges whenever the government demands it, as the government's threat to indict them for being "uncooperative" presents an unacceptable prospect of diminished or destroyed public image, stock price, and standing in the marketplace.

The concerns previously expressed by the coalition that government-coerced waiver had become routine—and that the 2004 privilege waiver amendment was a significant factor contributing to that trend—were confirmed by the results of the new coalition survey. In particular, the survey revealed the following trends:

A Government "Culture of Waiver" Exists. Almost 75% of both inside and outside corporate counsel respondents believe (almost 40% believe strongly) that a "'culture of waiver' has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections." (Only 1% of inside counsel and 2.5 % of outside counsel disagreed with the statement.)

Waiver is a Condition of Cooperation. Fifty-two percent of in-house respondents and 59% of outside respondents confirmed that they believe that there has been a marked increase in waiver requests as a condition of cooperation. Consistent with that finding, roughly half of all investigations or other inquiries experienced by survey respondents resulted in privilege waivers.

A "Government Expectation"[8] of Waiver of Attorney-Client Privilege Confirmed. Of the respondents who confirmed that they or their clients had been subject to investigation in the last five years, approximately 30% of in-house respondents and 51% of outside respondents said that the government expected waiver in order for a company to engage in bargaining or to be eligible to receive more favorable treatment.

[8] The survey defined 'government expectation' of waiver as a demand, suggestion, inquiry or other showing of expectation by the government that the company should waive the attorney-client privilege.

Prosecutors Typically Request Privilege Waiver – It Is Rarely "Inferred" by Counsel. Of those who have been investigated, 55% of outside counsel responded that waiver of the attorney-client privilege was requested by enforcement officials either directly or indirectly. Twenty-seven percent of in-house counsel confirmed this to be true.[9] Only 8% percent of outside counsel and 3% of in-house counsel said that they "inferred it was expected."

Sentencing Guidelines Rank Second Only to Justice Department Policies Among the Reasons Given For Waiver Demands. Outside counsel indicated that while the Justice Department's waiver policies (i.e., the Thompson/Holder/McCallum Memoranda) are cited most frequently when a reason for waiver is provided by an enforcement official, the Sentencing Guidelines are cited second. In-house counsel placed the Guidelines third, behind "a quick and efficient resolution of the matter," and Justice Department policies, respectively.

Based on this survey data, and the voluminous anecdotal evidence provided by the in-house and outside corporate counsel in the essay portions of our survey, it is clear that government demands for privilege waiver have become routine and that the 2004 privilege waiver amendment to the Guidelines have been a significant contributing factor to this growing trend.

•The 2004 privilege waiver amendment has helped to weaken the confidentiality of communications between companies and their lawyers. Lawyers for companies and other organizations play a key role in helping these entities and their officials comply with the law and act in the entity's best interests. To fulfill this role, lawyers must enjoy the trust and confidence of managers, boards, and other key personnel of the entity and must be provided with all relevant information necessary to properly represent that entity. By authorizing and encouraging routine government demands for waiver of attorney-client and work product protections, the privilege waiver amendment discourages personnel within companies and other organizations from consulting with their lawyers. This, in turn, seriously impedes the lawyers' ability to effectively counsel compliance with the law.

The results of the original, April 2005 surveys of in-house and outside corporate counsel conducted by the ACC and the NACDL confirmed the important purpose that privilege and work product doctrines serve in facilitating the lawyer's work, with over 95% of respondents expressing agreement with this principle. (*See* April 2005 ACC and NACDL surveys at pgs. 4 and 5, respectively) In addition, over 90% of respondents in both surveys believed that the privilege enhances the likelihood that company employees will discuss sensitive/difficult issues regarding legal compliance. (*Id.* at pgs. 4 and 6, respectively) The April 2005 surveys also confirmed the chilling effect that privilege waiver would have on the confidential attorney-client relationship. According to those surveys, approximately 95% of both in-house and outside corporate counsel agreed that there would be "a 'chill' in the flow/candor of information provided to counsel if the privilege did not offer protection to client communications or your attorney work-product." (*Id.* at p. 3)

In addition, in response to the open-ended text questions offered at the end of the new March 2006

[9] Sixty percent of in-house counsel who had experience with a waiver request responded "N/A" (not applicable) to this question, suggesting they had not been present when privilege waivers were discussed.

survey, numerous in-house and outside corporate counsel confirmed that government-coerced waiver policies have had a severe chilling effect on the attorney-client relationship and on the ability of corporate attorneys to counsel their clients to comply with the law. The following quotations are typical of the many narrative responses to the survey's open-ended questions:

> "The fear of privilege waiver has curtailed my ability to frankly and strongly direct my colleagues in areas of risk. I can no longer send memos that say: 'under no circumstances may you do this,' or the like, for fear of reprisal [in the future]. My inability to speak forthrightly forces my advice to be sugar-coated in ways that I believe lessen my power and effectiveness to force others to do the right thing...When things appear as if they will be highly sensitive, I carefully retain outside counsel, often in matters I could handle better internally, thereby wasting significant not-for-profit dollars because of the government's inappropriate intrusion in this formerly sacrosanct land." (*See* March 2006 survey results at p. 15)

> "Our corporate strategy is to have in-house counsel active and involved in business deals early and often. We have found that this significantly minimizes the risk that employees engage in questionable behavior. This 'prevention' strategy demands on open dialogue with employees. DOJ demands for waiver have a chilling effect on our employees seeking out in-house counsel to discuss potentially tricky legal situations. We depend on open lines of communication with employees and these are being strained by DOJ's policy and their push to alter the Sentencing Guidelines. We should have policies in place that encourage dialogue with employees. DOJ's waiver push is short sighted and counter productive." (*Id.*)

> "It is my opinion that the concept of the government asking any person (either individual or corporate) to waive attorney-client privilege in order to facilitate their investigation is a travesty of justice. The attorney-client privilege is there as a means to have open discussions between the client and their attorney regarding all possibilities. To allow for this type of request will merely result in many corporations no longer including in-house counsel in important decision making processes which may in fact lead to even more wrongdoing." (*Id.*)

> "In my experience, it is remarkably difficult for corporations and their employees to get legal advice in today's environment. There is a clear expectation -- sometimes unspoken, often spoken -- that any communication, privileged or not, will be shared with the government. There is no balancing of the advantages of waiver against the risks, including the company's ability to defend itself in ongoing civil litigation. This puts company counsel in a completely untenable position, unable to give or seek advice freely. The important purposes behind the privilege are simply being ignored." (*Id.* at p. 16)

> "Reviewing the reports of waivers and requested waivers in the general press and in the legal periodicals has had a chilling effect on my function as general counsel. I warn our senior managers regularly that they should not count on having any privilege regarding their communications with me. We try hard to follow the law at this organization, so criminal prosecution is not a concern. What is a concern is that the continued erosion of privilege in prosecution by state and federal agencies will spill over into the civil arena. We are in a business sector in which litigation is common and the stakes are often very large. The self-censoring I feel compelled to do at this point hinders the company's ability to protect against or plan for anticipated claims." (*Id.*)

> "As a result of our experiences, we now routinely advise our clients that there is...[no] such thing as information protected by the attorney client privilege. Although I have no belief that the prosecutors requiring the waivers understand what they have done, within a matter of a few years, these attorneys have utterly eviscerated the attorney client privilege and undermined the most important aspect of the attorney client relationship. As a result, instead of advancing the interests of the public, government attorneys have now created a situation where clients are going to be less, not more, forthcoming; a result that will only lead to more corporate misdeeds." (*Id.*)
>
> "At this stage, much of the damage is done--one has to conduct affairs, take (or not) notes, write communications and obtain information on the assumption that there will be no protection. In that environment, lawyers are already much less effective in discovering information and counseling compliant conduct." (*Id.*)

The sheer number of these and the many other unequivocal responses to the new survey demonstrate that prosecutors' routine demands for waiver—further exacerbated by the 2004 amendment to the Guidelines—have seriously weakened the confidential attorney-client relationship between many companies and their lawyers and made it more difficult for the lawyers to counsel compliance with the law.

•**The privilege waiver amendment helps to undermine internal compliance programs.** The net effect of the privilege waiver amendment and other government policies encouraging routine waiver is to make the detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. As the Commission itself has repeatedly emphasized, effective corporate compliance mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, are one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act. The April 2005 surveys confirmed the important contribution that the attorney-client privilege makes to internal compliance programs, with over 94% of corporate counsel respondents agreeing that the privilege improves the lawyer's ability to monitor, enforce, and improve compliance initiatives. (*See* April 2005 ACC and NACDL surveys at pgs. 4 and 6, respectively.) Unfortunately, because the effectiveness of these internal investigations depends on the ability of the individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client and work product privileges will be honored makes it more difficult for companies to detect and remedy wrongdoing early. Therefore, by further encouraging prosecutors to seek waiver on a routine basis, the privilege waiver amendment undermines, rather than promotes, good compliance practices.

The new March 2006 survey confirmed the fact that when prosecutors request that a company waive its privileges, they often seek sensitive documents directly relating to companies' internal investigations, including (1) written reports of an internal investigation, (2) files and work papers that supported an internal investigation, (3) lawyers' interview notes or memos or transcripts of interviews with employees who were targets, (4) notes/oral recollections of privileged conversations with or reports to senior executives, board members, or board committees, and (5) lawyers' interview notes with employees who were not available for interviews by the government or memos/transcripts of the same. (*See* March 2006 survey at pgs. 8-10) Clearly, prosecutors are taking a very expansive view

regarding the types of sensitive internal materials that companies should be forced to turn over during investigations.

•The privilege waiver amendment unfairly harms employees by infringing on their individual rights. The privilege waiver amendment and the other governmental policies encouraging routine waiver place the employees of a company or other organization in a very difficult position when their employers ask them to cooperate in an investigation. They can cooperate and risk that statements made to the company's or organization's lawyers will be turned over to the government by the entity, or they can decline to cooperate and risk losing their employment. It is fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights.

In the new survey, many outside corporate counsel confirmed that government-coerced waiver has had substantial adverse effects on companies' employees in a number of specific ways. A majority of the outside counsel who responded to the survey cited instances in which prosecutors encouraged or required companies to take certain actions against employees, including (1) not advancing legal expenses to, or agreeing to reimburse, a targeted employee, (2) not entering into, or breaching, a joint defense agreement with a targeted employee, (3) refusing to share requested documents with a targeted employee, or (4) discharging an employee who would not consent to be interviewed by the government. (*See* March 2006 survey at p. 13.)

Moreover, many if not most corporate criminal investigations do not involve black-and-white types of potential criminality, such as embezzlement. Particularly in the environmental field, there can be substantial question whether the conduct that the government posits is even illegal. In such cases, companies are often being coerced to identify, and treat as possible criminals, employees whose conduct they regard as lawful. In such "gray" areas, the possibility that employees' conversations with company counsel may be turned over to the government can quickly and prematurely squelch such communications.

For all these reasons, we believe that the privilege waiver amendment is flawed and uniquely dangerous to our shared goal of protecting the policies that are advanced by the attorney-client relationship.

Congressional Concern Regarding Privilege Wavier

In addition to the coalition, the ABA, and the former senior Justice Department officials referenced above, many prominent Congressional leaders have also expressed serious concerns regarding both the 2004 privilege waiver amendment to the Sentencing Guidelines and the Justice Department's internal privilege waiver policy.

On March 7, 2006, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the subject of "White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers." Witnesses testifying at the hearing included Associate Attorney General Robert McCallum, former Attorney General Dick Thornburgh, U.S. Chamber of Commerce President Thomas Donohue, and William Sullivan, Jr. of the law firm of Winston & Strawn.[10]

[10] The written testimony of each of the witnesses who appeared at the March 7, 2006 hearing and the letter submitted by

During the hearing, the Chairman of the Subcommittee, Rep. Howard Coble (R-NC), expressed his strong support for the attorney-client privilege and his concerns regarding routine prosecutor demands for waiver during investigations. After noting the "institutional tension between preserving corporate attorney-client and work product privileges and a prosecutor's quest to unearth the truth about criminal acts," Chairman Coble made the following remarks:

> Prosecutors must be zealous and vigorous in their efforts to bring corporate actors to justice. However, zeal does not in my opinion equate with coercion in fair enforcement of these laws. To me, the important question is whether prosecutors seeking to investigate corporate crimes can gain access to the information without requiring a waiver of the attorney-client privilege. There is no excuse for prosecutors to require privilege waivers as a routine matter, it seems to me. This subcommittee will examine the important issue with a keen eye to determine whether Federal prosecutors are routinely requiring cooperating corporations to waive such privilege...[In addition to the McCallum Memorandum of October 21, 2005,] I am also aware of the fact that the Sentencing Commission is examining its current policy of encouraging such waivers when determining the nature and extent of cooperation. While the guidelines do not explicitly mandate a waiver of privileges for the full benefit of cooperation, in practical terms we have to make sure that they do not operate to impose a requirement...

During the March 7 hearing, the Subcommittee's Ranking Member, Rep. Robert Scott (D-VA), expressed similar concerns regarding erosion of the attorney-client privilege. After acknowledging the many policy reasons for preserving the privilege, Rep. Scott noted:

> For some time now I have been concerned about reports that the Department of Justice is coercing corporations to waive their attorney-client privilege during criminal investigations of the corporation and its employees by making waiver a prerequisite for consideration by the Department and its recommendation for not challenging leniency should criminal conduct be established...It is one thing for officials of a corporation to break the attorney-client privilege in their own self-interest by their own volition. It is another thing for the Department to require or coerce it by making leniency considerations contingent upon it, even when it is merely on a fishing expedition on the part of the Department. Complaints have indicated that the practice of requiring a waiver of the corporate attorney-client privilege has become routine. And of course, why wouldn't it be the case? What is the advantage to the Department of not requiring a waiver in the corporate investigation?...Now, coercing corporate attorney-client privileges has not been—has not long been the practice in the Department. It has really been the last two administrations that have practiced this, and it has been growing by leaps and bounds...

Similar concerns were also raised during the hearing by Reps. Dan Lungren (R-CA)—who previously served as California Attorney General—and William Delahunt (D-MA)—a long-time former prosecutor. During the question and answer period, Rep. Lungren reiterated his longstanding opposition to the 2004 privilege waiver amendment to the Sentencing Guidelines:

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the ABA to the Subcommittee regarding the hearing are available at http://www.abanet.org/poladv/testimony306.pdf.

> Just to put it on the record, I have submitted a letter last August to the Sentencing Commission regarding my concerns about the Sentencing Commission's commentary with respect to the rule. It looks to me like that amendment authorizes and encourages the Government to require entities to waive the attorney-client privilege and work product protections as a condition of showing cooperation. And that is the huge concern that I have here.

During his questioning of Associate Attorney General McCallum, Rep. Lungren favorably compared companies' current efforts to preserve their attorney-client privilege with the Bush Administration's recent attempts to invoke and preserve executive privilege:

> If we in the Congress were to every time the President says that there is a reason to protect executive privilege, not only for his administration but for future administrations, that every time he did that he was violating the sense of cooperation that should prevail between two equal branches of government, I think we would be wrong. And I see the Justice Department taking a position that if a corporate defendant or potential defendant refuses to waive that privilege, that is a priori evidence of the fact that they are not cooperating. And that is the problem I really have here...And so I would ask, don't you see the creeping intrusion here? I mean, first you have the first [Holder] memorandum. Now we have the second [Thompson] memorandum, which is a little tighter and a little tougher. And then, following that, you have the Sentencing Commission...[adding privilege waiver language to the Guidelines], well, that is a bad idea...

Rep. Delahunt expressed similar concerns regarding the erosion of the privilege in recent years and questioned Associate Attorney General McCallum's assertion that government-coerced waiver may be necessary to effectively investigate complex corporate frauds. Rep. Delahunt stated:

> You know what I can't understand, Mr. McCallum, is what happened in the past 10 years?... For 20 years of my own professional life...I was a prosecutor. Did a number of sophisticated white collar crime investigations. And, I mean, there are grand juries. There is the use of informants...We knew how to squeeze people without sacrificing or eroding the attorney-client privilege...I just have this very uneasy feeling that it is the easy way to do it...There is a certain level of...why should I have to really exercise myself to secure the truth...I got to tell you something. I am a little annoyed with the Sentencing Commission, too, making this [e.g., privilege waiver] a factor...

At the conclusion of the hearing, Rep. Delahunt summed up the serious concerns that various Subcommittee members had previously expressed regarding governmental privilege waiver policies. In his final comments to Mr. McCallum, Rep. Delahunt explained:

> I think you can probably sense by the questions that have been posed, as well as observations by individual members, that there is a real concern here. And you don't want someone like [Rep.] Lungren from California, you know a far right conservative

> Republican, and [Rep.] Delahunt, this Northeast liberal, filing legislation on this because I think that is the order of magnitude that is being expressed here. So respectfully, that is a message that I think you can bring back to Justice, is that there is concern about the Thompson/McCallum Memorandum. Okay?

The concerns that the members of the House Judiciary Subcommittee expressed during the March 7 hearing are consistent with those previously expressed on November 16, 2005 by Sen. Arlen Specter (R-PA), Chairman of the Senate Judiciary Committee, and Rep. James Sensenbrenner (R-WI), Chairman of the House Judiciary Committee.[11]

Proposed Changes to the 2004 Privilege Waiver Amendment to the Sentencing Guidelines

In order to stop and reverse the negative consequences resulting from the 2004 privilege waiver amendment to the Guidelines, we urge the Commission to amend the applicable language in the Commentary to Section 8C2.5 of the Guidelines to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction under the Guidelines is warranted for cooperation with the government.

To accomplish this, we recommend that the Commission (1) add language to the Commentary clarifying that cooperation only requires the disclosure of "all pertinent non-privileged information known by the organization", (2) delete the existing Commentary language "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization", and (3) make the other minor wording changes in the Commentary outlined below.

If our recommendations were adopted, the relevant portion of the Commentary would read as follows[12]:

> "12. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent non-privileged information known by the organization. A prime test of whether the organization has disclosed all pertinent non-privileged information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization

[11] On November 16, 2005, Sen. Specter and Rep. Sensenbrenner spoke at a conference dealing with the erosion of the attorney-client privilege that was sponsored by the U.S. Chamber of Commerce, the ABA, the ACC, the NACDL, and the American Civil Liberties Union. A transcript of Sen. Specter's comments and Rep. Sensenbrenner's prepared statement are available online at http://www.abanet.org/poladv/acpriv_transcriptofsenspecter11-16-05.pdf and http://www.abanet.org/poladv/acprivsensenbrenner11-16-05.pdf, respectively.

[12] Note: The Commission's November 1, 2004 amendments on the privilege waiver issue are shown in italics. Our suggested additions are underscored and our suggested deletions are noted by strikethroughs.

despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. *Waiver of attorney-client privilege and of work product protections is not* a factor in determining whether ~~*a prerequisite to*~~ *a reduction in culpability score under subdivisions (1) and (2) of subsection (g)* is warranted. ~~*unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.*~~."

Thank you for the opportunity to present our views on this important matter.

Respectfully submitted,

AMERICAN CHEMISTRY COUNCIL

ASSOCIATION OF CORPORATE COUNSEL

BUSINESS CIVIL LIBERTIES, INC.

BUSINESS ROUNDTABLE

THE FINANCIAL SERVICES ROUNDTABLE

FRONTIERS OF FREEDOM

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

NATIONAL ASSOCIATION OF MANUFACTURERS

NATIONAL DEFENSE INDUSTRIAL ASSOCIATION

RETAIL INDUSTRY LEADERS ASSOCIATION

THE U.S. CHAMBER OF COMMERCE

WASHINGTON LEGAL FOUNDATION

cc: Members of the U.S. Sentencing Commission
Charles R. Tetzlaff, General Counsel, U.S. Sentencing Commission
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Amy L. Schreiber, Assistant General Counsel, U.S. Sentencing Commission

The Decline Of the Attorney-Client Privilege in the Corporate Context[1]

Survey Results

Presented to the United States Congress and the United States Sentencing Commission by the Following Organizations:

The most recent survey on A/C priv. we conducted

The basis for our USSC & House Judiciary Committee comments

American Chemistry Council
Association of Corporate Counsel
Business Civil Liberties, Inc.
Business Roundtable
The Financial Services Roundtable
Frontiers of Freedom
National Association of Criminal Defense Lawyers
National Association of Manufacturers
National Defense Industrial Association
Retail Industry Leaders Association
U.S. Chamber of Commerce
Washington Legal Foundation

BACKGROUND

The coalition of organizations listed above[2] believes that the attorney-client privilege and work product doctrine as applied in the corporate context are vital protections that serve society's interests and protect clients' Constitutional rights to counsel. The attorney-client privilege is fundamental to fairness and balance in our justice system and essential to corporate compliance regimes. Without reliable privilege protections, executives and other employees will be discouraged from asking difficult questions or seeking guidance regarding the most sensitive situations. Without meaningful privilege protections, lawyers are more likely to be excluded from operating in a preventive (rather than reactive) manner. In today's complex business environment, it is increasingly important to encourage business executives and even line managers to regularly – and without any hesitation – engage their lawyers in open discussions about anything that concerns them in furtherance of assuring the corporation's legal health. It is our belief that attorney-client communications, and the confidentiality that fosters those communications, are more important than ever, and laudably serve society's and our legal system's public policy goals.

Our coalition has been very active in protecting the attorney-client privilege in the corporate context from

[1] This survey is also available online at http://www.acca.com/Surveys/attyclient2.pdf

[2] The American Bar Association has also expressed similar views to Congress and the U.S. Sentencing Commission regarding the importance of preserving the attorney-client privilege and work product doctrine and protecting them from federal governmental policies and practices that now seriously threaten to erode these fundamental rights. The ABA has also worked in close cooperation with the coalition in the preparation and distribution of the surveys referenced in this document.

governmental policies and practices whose daily applications, we believe, erode the privilege. Our work has been advanced through educational programs, study groups and task forces, and various filings, communications, meetings, and testimony before authoritative bodies examining privilege erosions.[3]

In March of 2005, in response to increasing concerns expressed by in-house counsel and outside criminal defense counsel regarding their experiences with the policies and practices just noted, coalition members asked their respective constituencies to complete an online survey titled: "*Is the Attorney-Client Privilege Under Attack?*"[4] According to the survey, approximately one-third of the survey respondents had personally experienced some kind of privilege erosion. This powerful finding offered some of the first empirical evidence documenting the difficulty – indeed, the Hobson's Choice – that corporate clients confront when the government begins an investigation into an allegation of wrongdoing and presumes that confidentiality should be waived, or when company auditors demand access to confidential information in order to certify the company's books. The 2005 survey also found that: 1) clients may be increasingly unwilling to rely on the long-established protections of the confidentiality of their lawyer's counsel (affirming the logic of the US Supreme Court's insight that "an uncertain privilege is no privilege at all"[5]); 2) companies that refuse to waive their privileges suffer consequences (being labeled uncooperative or obstructionist, even if they fully cooperated with every other legitimate request of the investigator); and 3) contrary to the claims of many prosecutors and other regulators, privilege waiver demands are neither uncommon nor rarely exercised.

On November 15, 2005, the results of this survey were presented to the United States Sentencing Commission, which had begun to re-examine the commentary language regarding privilege that the Commission had inserted into Chapter 8 of the guidelines in the 2004 amendment process.[6] At that hearing, the Commission asked coalition members to help to gather additional information and data regarding the frequency with which governmental entities have been requesting that businesses waive their attorney-client and work product protections as a condition for cooperation credit, as well as the effects of these waiver requests. In response to that and similar requests for more detailed information about the erosion of the privilege, our coalition undertook a second, more detailed survey, and obtained an even greater response rate (more than 1,200) from our constituents. We are pleased to present the findings of this second survey, which was designed to capture more detailed information about government and auditor requests and implicit expectations for privilege and work product waivers.[7]

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[3] Representatives from all of the organizations listed here have participated in previous testimony before the US Sentencing Commission on this issue, some both prior and subsequent to the Commission's 2004 adoption of new commentary language on privilege in Chapter 8, which our organizations find offensive (see, most recently, http://www.ussc.gov/AGENDAS/agd11_05.htm). Please visit each organization's website or contact their staff for more information on educational programs, resources, and additional advocacy (including communication with Congressional leaders and their staffs, the Department of Justice, Securities & Exchange Commission, Public Company Accounting and Oversight Board, and others), which our organizations have engaged in to seek better protection of the attorney-client privilege.

[4] An Executive Summary of the March 2005 survey may be accessed via the following links: for the in-house version: http://www.acca.com/Surveys/attyclient.pdf, and for the outside counsel version: http://www.acca.com/Surveys/attyclient_nacdl.pdf. Based on feedback from those who read the previous survey results, this document provides in one place the combined 2006 results of both the in-house and outside counsel surveys.

[5] *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

[6] The USSC Commentary to Section 8C2.5 (adopted in November of 2004) states that "waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government]...unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." It is our position that the exception listed in the latter part of that sentence swallows the rule. Under this exception, prosecutors are free to make routine requests for waivers, and organizations will be forced routinely to grant them, because there is no obvious method by which the corporation can challenge the government's assertion that waiver is "necessary."

[7] In January 2006, the Association of Corporate Counsel directly contacted approximately 4,700 members, whose titles included the words either "general counsel" or "chief legal officer," requesting them to complete this web-based survey. The web link to the survey was also made available to the coalition partners offering this summary and the ABA Task Force on Attorney-Client

Survey Results

We prepared two surveys with virtually identical questions except for some minor wording changes that reflected that one survey was for in-house counsel and one was for outside counsel.[8] Section I summarizes key themes emerging from the survey. Section II shows information on respondent demographics. Section III summarizes results shared by companies who have experienced government expectations to waive attorney-client privilege or work product protections and/or expectations regarding other employee actions. Section IV summarizes themes that emerged from the open-ended questions on situational experiences regarding privilege waiver and additional commentary on privilege erosion. Quotes from survey respondents are also interspersed throughout the text as illustrations of the points made.

I. KEY THEMES *(additional discussion follows)*

- **A Government Culture of Waiver Exists:** Almost 75% of both inside and outside counsel who responded to this question expressed agreement (almost 40% agreeing strongly) with a statement that a "'culture of waiver' has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections." **(Only 1% of inside counsel and 2.5 % of outside counsel disagreed with the statement.)**
- **Waiver is a Condition of Cooperation:** Fifty-two percent of in-house respondents and 59% of outside respondents confirmed that they believe that there has been a marked increase in waiver requests as a condition of cooperation. Consistent with that finding, roughly half of all investigations or other inquiries experienced by survey respondents resulted in privilege waivers.
- **'Government Expectation'[9] of Waiver of Attorney-Client Privilege Confirmed:** Of the respondents who confirmed that they or their clients had been subject to investigation in the last five years, approximately 30% of in-house respondents and 51% of outside respondents said that the

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Privilege, which in turn publicized it to the many groups participating in the Task Force's endeavors. The survey was "open" for approximately 2 weeks. Five hundred sixty-six of the 676 responses to the in-house version of the survey were received from the Association of Corporate Counsel emailing to 4,700 general counsel members; the remaining corporate counsel responses are from contacts initiated by the other groups. Also in January, the National Association of Criminal Defense Lawyers emailed the web link for the survey to its 13,000 members. NACDL also posted the web link for the survey on its listserv for white collar practitioners, which has approximately 1,200 subscribers. The survey was also made available to approximately 5,000 members of the Business Law and Criminal Justice sections of the American Bar Association. Five hundred thirty-eight outside counsel responded to this survey.

Both surveys included 23 questions primarily seeking specific responses to multiple choice or yes/no questions, with 4 open-ended questions at the end seeking text responses with additional detail on situational experiences. Since the open-ended questions were not mandatory and did not "apply" to those who said they'd had no occasion to run into a privilege erosion situation, the number of responses to those questions was not as robust.

This document offers the survey results in numbers and percentages that are approximated by rounding to the nearest whole integer. Summaries of broad themes and quotations drawn from the open-ended text responses are also included, but not all responses to those questions are included out a concern for confidentiality and to avoid unnecessary repetition. We believe the survey's response rate can be considered robust; but since we are not an independent surveying company or statisticians, we can make no proffer that the sampling is statistically significant or representative of the entire profession. We can note that statisticians have designated the Association of Corporate Counsel's membership as statistically representative of the entire in-house legal profession.

[8] The majority of differences between the two surveys were in the information requested in the respondent demographic information categories, and in general question phrasing such as "your company" for the in-house lawyers, and "your client(s)" for the outside lawyers. No "substantive" differences between the surveys' questions exists. If you would like a copy of the questions asked on these surveys, please contact Susan Hackett at hackett@acca.com.

[9] The survey defined 'government expectation' of waiver as a demand, suggestion, inquiry or other showing of expectation by the government that the company should waive the attorney-client privilege.

government expected waiver in order to engage in bargaining or to be eligible to receive more favorable treatment.

- **Prosecutors Typically Request Privilege Waiver – It Is Rarely "Inferred" by Counsel:** Of those who have been investigated, 55% of outside counsel responded that waiver of the attorney-client privilege was requested by enforcement officials either directly or indirectly. Twenty-seven percent of in-house counsel confirmed this to be true.[10] Only 8% percent of outside counsel and 3% of in-house counsel said that they "inferred it was expected."
- **DOJ Policies Rank First, and Sentencing Guidelines Second, Among the Reasons Given For Waiver Demands:** Outside counsel indicated that the Thompson/Holder/McCallum Memoranda are cited most frequently when a reason for waiver is provided by an enforcement official, and the Sentencing Guidelines are cited second. In-house counsel placed the Guidelines third, behind "a quick and efficient resolution of the matter," and DOJ policies (Thompson/Holder/McCallum), respectively.
- **Third Party Civil Suits Among Top Consequences of Government Investigations:** Fifteen percent of companies that experienced a governmental investigation within the past 5 years indicated that the investigation generated related third-party civil suits (such as private antitrust suits or derivative securities law suits). Of the eight response options that asked respondents to list the ultimate consequences of their clients' investigations, related third-party civil suits rated third for in-house lawyers. The first and second most common outcomes for in-house counsel were that the government decided not to pursue the matter further (24%), or that the company engaged in a civil settlement with the government to avoid further prosecution (18%). For outside counsel, the most cited outcome was criminal charges against individual leaders/employees of the company (18%), and a decision by the government not to prosecute (14%). "Related third party civil litigation" finished fifth (for outside counsel respondents) with 12%.

II. RESPONDENT DEMOGRAPHICS

In-house: Almost 90% of the in-house counsel survey respondents were General Counsel. Approximately 40% indicated that the government (federal or state) had initiated some form of investigation into allegations of wrongdoing at their company during the past 5 years. Below is a summary of information on the in-house counsel respondent demographics.

- **Company Type:** Fifty-one percent of the respondents indicated their companies were privately-held/owned; 35% said their companies were publicly-traded but not in the Fortune 500; and 9% of respondents worked for non-profits. Quasi-governmental entities and Fortune-ranked companies each represented 1% of the survey respondents, and less than 1% of the respondents said they worked for FTSE 200 companies.
- **Industry Group:** Respondents were asked to identify the primary industry that best describes their client company's main line of business and were given 22 response options. The top three industries selected were: Finance and Insurance (18%), Manufacturing (13%), and Information Technology (11%).
- **Size of Law Department:** Almost 90% of respondents had law departments of less than 20 lawyers: 33% were solo practitioners, 46% had offices of 2-7 lawyers, and 10% had offices of 8-19 lawyers. Of the remaining respondents, approximately 4% had law departments of over 100 lawyers, and less than 1% had law departments of over 500 lawyers.

These demographics are significant in that they show that even among a general population of company counsel, almost half have experienced some kind of privilege erosion. The vast majority of these

[10] Sixty percent of in-house counsel who'd had experience with a waiver request responded "N/A" (not applicable) to this question, suggesting they had not been present when privilege waivers were discussed.

respondents who experienced privilege erosions do not work for mega-corporations with extremely high visibility and the potential for "blockbuster" failures; they work for a wide variety of differently-sized businesses, representing the full spectrum of industries. While the companies participating in the survey are obviously large enough to afford full-time in-house counsel staff, only 1% of those responding worked for Fortune 1000 employer/clients, and three-quarters work in departments with fewer than 8 lawyers. We conclude that this sampling represents a breadth of experience from the "norm" of corporate America, and not just the perspective of the biggest companies, where the stakes and publicity attendant to the most prominent governance failures may attract disproportionate attention or be perceived as requiring "setting an example" responses.

Outside counsel: Seventy-one percent of those who answered the survey for outside counsel were partners in law firms, and 40% practiced criminal litigation as their primary area of concentration (26% indicated civil litigation and 20% indicated transactional work as their primary practice areas). Sixty-three percent represented companies that had been subject to a criminal or enforcement investigation in the last five years. Further demographics show:

- **Client Type:** Results were distributed in the following categories: Privately-held or -owned with revenues of less than $200 million annually (22%); individual officers or employees of organizations (20%); publicly traded companies with more than $1 billion in annual revenue (12%); publicly traded companies with between $500 million and $1 billion in annual revenue (11%).
- **Size of Law Practice:** Thirty-five percent of respondents worked for firms of between 2 and 20 lawyers. The rest of the responses were fairly evenly distributed among the following categories: solo (19%); 21-100 lawyers (17%); 101-500 lawyers (15%); more than 500 lawyers (14%).

As with the results of the survey of in-house counsel, these answers indicate that among a general population of outside counsel with a wide array of experience, both in terms of the types of law that they practice and the types of clients that they represent, 51% indicate that they experienced a demand, suggestion, inquiry, or other expectation of waiver by the government. A commanding 73% agree that a culture of waiver has evolved with respect to the corporate attorney-client privilege. The sizable plurality of lawyers who answered this survey represented either smaller, privately held companies or individuals—thus belying the conclusion that waiver requests, demands, and expectations are a problem only for large, publicly-traded companies who are at the center of "headline" scandals.

III. SUMMARY OF WAIVER EXPECTATIONS AND EXPERIENCES

> *"Whether to waive the privilege has not been subject to discussion; the only question is how far the waiver will go. And, thus far, there appears to be no limit."* (Response to in-house counsel survey)

> *"I think the forced waiver and related policies have become a problem of Constitutional proportions. There are many examples of government pressuring companies to waive privileges, stop advancing legal fees, and make statements against employees, under pain of corporate destruction. ... When I was a prosecutor, we recognized that big white collar cases are hard and that they should be. Now, the attitude seems to have changed, and if the corporation does not partner with the government to prosecute individuals, the government views it as obstruction. This view is becoming part of the culture, having begun with the Thompson,*

Holder, and USSG pronouncements. It's simply wrong ...."
(Response to outside counsel survey.)

A. Experiences relating to waiver

Almost 60% of respondents identified government expectations of waiver of **attorney-client privilege/communications** as relevant to their personal experience with their clients. Of those respondents, almost 30% confirmed that they experienced a government expectation that the company should waive the attorney-client privilege if it wanted to engage in any form of bargaining or receive more favorable treatment from the government's officials.

Almost 23% of respondents said that a question regarding government expectations for waiver of **work product protections** was applicable to their situations. Of those respondents, around 45% said their clients had experienced a governmental expectation of waiver of work product protections if the company wanted to engage in bargaining or receive more favorable treatment.

Responses regarding these experiences, including which agencies indicated an expectation of waiver, how these expectations were expressed, the type of requested material, justifications for waiver requests, and whether companies waived are summarized below.

1. AGENCIES REQUESTING WAIVER

For both in-house and outside counsel, the U.S. Attorneys' Offices were identified as the government agency that most often indicated an expectation of waiver. The survey asked respondents to identify which agencies indicated an expectation of waiver and were given a choice of seven enumerated agencies/categories of agencies, as well as the opportunity to state that the question did not apply or to write-in a response. (About one-third of the in-house respondents and one-fourth of outside counsel respondents indicated that this question was not applicable.) The top agencies/categories identified as most often expecting waiver (in descending order) were:

In-house counsel	Outside counsel
▪ U.S. Attorneys' Office	▪ U.S. Attorneys' Office
▪ SEC	▪ Department of Justice – 'Main' (e.g., Antritrust or Criminal Fraud)
▪ Department of Justice-'Main' (e.g., Antitrust or Criminal Fraud)	▪ SEC
▪ Other Federal Agencies (e.g., DOL, EPA, HHS, FEC, etc.)	▪ Other Federal Agencies (e.g., DOL, EPA, HHS, FEC, etc.)
▪ State Attorneys General Offices	▪ State Attorneys General Offices

"It is clear to me that this has become the 'rage' among prosecutors. ... In effect, prosecutors are overriding the [evidentiary precedent] that the attorney client privilege is to be maintained." (Response to in-house counsel survey)

"[An AUSA told us] that he expected a full investigation and waiver of attorney-client privilege in order for my client to demonstrate that it was cooperating in an investigation into possible wrongdoing, including interviews of my client's outside

counsel who provided advice contemporaneous to one of the events the AUSA wanted to investigate. He also expected that we would conduct interviews of foreign personnel not subject to U.S. jurisdiction and obtain documents that had only ever existed in foreign jurisdictions. He described a scorecard method he used ... he defined cooperation as the company conducting a full internal investigation, including interviewing outside counsel, submitting a written report of the investigation to him, and giving full waiver of the attorney-client privilege – and no joint defense agreements with any other person or entity. He said that otherwise he would issue grand jury subpoenas and conduct the full investigation with DOJ resources and it would be much worse for us if he had to do that. This was after he informed us that our company was NOT the target!" (Response to in-house counsel survey)

2. HOW WAIVER EXPECTATIONS WERE EXPRESSED

Respondents were asked how prosecutors or enforcement officials conducting the investigation(s) have indicated that privilege waiver was expected.

Only 11 % of outside counsel who said that their clients had recently been involved in enforcement actions where there was an expectation that their clients would waive privilege said that prosecutors never mentioned waiver as an expectation. Nearly three-quarters (73%) of outside counsel said that the expectation was communicated and not inferred. Of these, 26% said that "waiver was requested in a direct and specific statement, along with an indication that waiver was a condition precedent for the company if it wishes to be considered cooperative." Twenty-one percent indicated that waiver was "requested in an indirect statement that suggested (without explicit statements) that waiver was encouraged and in the company's interests." Only 13% said that waiver was requested directly but without any indication that positive or negative consequences would flow from the decision to waive.

Similarly, 66% of in-house respondents who indicated experience with this issue said that waiver expectations were communicated through direct and specific and/or indirect statements by prosecutors or enforcement officials. When waiver expectations were expressed, these in-house respondents said they were made using direct and specific statements more often than indirect statements. According to in-house counsel, direct statements with an indication that waiver was a condition precedent for the company to be considered cooperative occurred almost twice as often as direct statements indicating generally that positive or negative consequences would flow from the decision.

"The very nature of the self-reporting schema (at use in many federal and state regulatory contexts) is waiver of privileges." (Response to in-house counsel survey)

"My company restated its earnings, after first notifying the SEC that we were about to do so. SEC's Corp Fin referred the matter to Enforcement. During our first meeting with Enforcement, we described the internal investigation we conducted that led to the decision to restate. Enforcement expressed the opinion that 'of course' we would waive privilege as to the investigation report, as a condition of being deemed 'cooperative.'" (Response to in-house counsel survey)

"During an investigation by a state attorney general, we were told that we would be considered uncooperative and would not be able to settle with the agency unless we turned over lawyers' interview notes." (Response to outside counsel survey)

3. KINDS OF MATERIALS REQUESTED IN WAIVER DEMANDS

On a 2:1 basis,[11] in-house counsel who experienced privilege waiver indicated that prosecutors or enforcement officials do not draw distinctions regarding attorney-client privilege and work-product protections and the kinds of materials these privileges protect. Outside counsel concurred with this observation by a margin of 4:3.[12] However, when a distinction is drawn in the course of a government investigation, both in-house and outside counsel respondents indicated again on almost a 2:1 basis[13] that the distinctions were made at the initiative of defense or corporate counsel rather than by the prosecutor or enforcement official.

Respondents were asked about the types of privileged materials requested by the government in connection with **attorney-client privilege waiver requests** (as opposed to work product waiver requests). A choice of 11 types of possibly privileged materials was provided and respondents could check all that had been requested in their experiences. Respondents could also indicate that the question did not apply and/or include an additional text response.

About 46% of the responses of in-house counsel and 82% of the responses for outside counsel were for choices other than the "n/a" or the write-in category options. Around 90% of both in-house and outside counsel responses (other than the "n/a" group) identified specific types of material that enforcement officials had requested, with around 10% indicating that prosecutors or enforcement officials simply asked for complete waivers without articulating a specific material type.

Materials believed to be protected by attorney-client privilege and identified as most often requested by prosecutors or enforcement officials were (top 3, in descending order, for both categories of respondents):

- Written reports of an internal investigation (16% for outside counsel; 21% for in-house counsel)
- Files and work papers that supported an internal investigation (13% for outside counsel; 18% for in-house counsel)
- Lawyers' interview notes or memos or transcripts of interviews with employees who were targets (13% for outside counsel, a tie with "files and work papers"; 13% for in-house counsel)

For in-house respondents, numbers 4 and 5 were:

- Regular compliance performance reports and audits (11%)
- Notes/oral recollections of privileged conversations with or reports to senior executives, board members, or board committees (10%)

For outside counsel, numbers 4 and 5 were:

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[11] 68% versus 31%.

[12] 56% versus 43%.

[13] 66% versus 33 % for outside counsel; 65% versus 34% for in-house counsel.

- Notes/oral recollections of privileged conversations with or reports to senior executives, board members, or board committees (10%)
- Lawyers' interview notes with employees who were not available for interviews by the government or memos/transcripts of the same (8%)

As part of this same question, respondents could also choose three categories of material related to advice of counsel: advice contemporaneous with the conduct being investigated absent the assertion of an advice of counsel defense; same as foregoing but requested after an advice of counsel defense was asserted; and advice relating to the investigation itself (rather than the underlying conduct being investigated). The responses selecting these three types of material comprised around 15% of requests experienced by in-house counsel and 20% of requests experienced by outside counsel. According to outside counsel, enforcement officials only asked for communications with counsel ***pursuant to*** the assertion of a company's advice of counsel defense 6% of the time, placing it eighth among nine types of requested material.

Likewise, respondents were asked about the types of protected materials requested by the government in connection with **work product waiver requests.** Six types of material protected by work-product were listed and respondents could check all that applied. Respondents could also provide a text response. Of the six types, the three most often requested were:

In-house counsel:	Outside counsel:
▪ Results of written internal investigation reports (29%);	▪ Interview memos with witnesses (30%);
▪ Interview memos with witnesses (22%); and	▪ Results of written internal investigation reports (25%); and
▪ Results of reports prepared by non-lawyers or contractors hired to investigate a corporate matter (14%).	▪ Results of reports prepared by non-lawyers or contractors hired to investigate a corporate matter (16%).

> *"Usually the government does not justify its request. They want you to make their case for them."* (In-house counsel respondent.)

> *"In my experience, government enforcement officials simply have no respect for the attorney-client privilege and simply demand it be waived. In some cases, the demand seems to have been driven by sheer laziness and an expectation that we would do all the government's work for them ...."* (In-house counsel respondent.)

4. JUSTIFICATIONS PROFFERED FOR WAIVER REQUESTS

Sixty-two percent of in-house respondents and 48% of outside counsel who had been asked to waive indicated that government officials did not give a specific reason to justify their waiver requests. In a question asking for additional details on justifications when they were received, nine possible justifications were provided, as well as the opportunity to indicate that the respondent didn't remember or wished to submit a write-in response. The top "justification responses" follow (in descending order):

In-house counsel:	Outside counsel:
▪ The government said waiver was needed in order to facilitate a quick and efficient resolution of the	▪ The government cited their internal policies sanctioning privilege waiver requests: The Holder, Thompson, or

matter/because it would ease their fact-finding process (19%)	McCallum Memoranda (18%)
▪ The government cited their internal policies sanctioning privilege waiver requests: The Holder, Thompson, or McCallum Memoranda (13%)	▪ The government cited the negative impact of non-cooperation by corporations as articulated in the U.S. Sentencing Guidelines (17%)
▪ The government cited the negative impact of non-cooperation by corporations as articulated in the U.S. Sentencing Guidelines (10%)	▪ The government said waiver was needed in order to facilitate a quick and efficient resolution of the matter/because it would ease their fact-finding process (15%)[14]

"US Attorneys indicted my company despite complete cooperation and waivers of [attorney-client and work product] privileges, and despite the fact that only two lower-level employees were indicted." (In-house counsel respondent)

"The Holder/Thompson policy and the Guidelines themselves have created an unintended result. To claim certain material rightfully to be privileged is now a bad thing, only someone hiding something would hide behind it. Waiving is a good thing. The result has lead to such erosion of the concept behind a claim of privilege as to bring shame to whomever would make it." (Outside counsel respondent)

[14] For outside counsel, the next most frequently cited justifications were: (4) privilege did not apply because of a crime-fraud exception (11%); (5) no reasons were offered—the demand was simply made (10%); (6) information protected by privilege was necessary to the investigation (8%). **Susan: complete.**

"[The Sentencing Guidelines] came up at the first meeting with the US Attorney or the second meeting." (Outside counsel respondent)

"[The Sentencing Guidelines] were mentioned in a not-so-subtle threatening manner." (Outside counsel respondent)

"Prosecutors casually refer to Thompson and the Sentencing Guidelines." (Outside counsel respondent)

"[The Sentencing Guidelines] were specifically discussed as a negotiating tool for a better or for any deal." (Outside counsel respondent)

"[The Sentencing Guidelines] were cited in pre-indictment settings re: possible penalties if no cooperation." (Outside counsel respondent)

"Waiver as an indictator of co-operation under the Guidelines was specifically mentioned." (Outside counsel respondent)

5. WAIVER AND TIMING

Asked whether their clients ever waived the attorney-client privilege, approximately 52% of in-house counsel but only 23% of outside counsel said that they never had occasion to consider the issue (either because they had not been subject to an investigation in the last five years or because waiver was not an issue in any particular representation). When clients did have occasion to consider waiver and decided to waive,[15] the top two of six reasons (for both in-house and outside counsel) that the client decided to do so were:

- Government officials' stated expectations that waiver would be required for the company to be treated as cooperative (37% for outside counsel, 30% for in-house counsel), and
- Government officials' unstated but perceived expectations that the company would not be treated as cooperative if waiver were withheld (27% for outside counsel, 28% for in-house counsel).

In addition, when clients waived, the most frequent point in the process for waiver was during the government's fact-finding process (36% for inside counsel and 27% for outside counsel): waivers were most likely provided at this point when the investigator raised concerns that the investigation could not be completed through gathering non-privileged information. For in-house counsel, the next most frequent point for waiver to occur was during the first meeting or communication with the government: around 26% of waivers at that stage were at the government's request or implicit suggestion, as opposed to 8% which were offered by the client without formal prompting or demand (on the presumption that privilege waivers were expected). For outside counsel, the second-most frequent point for waiver to occur was during the bargaining and charging decision (25.5%). Twenty percent of outside counsel said that the decision to waive was made during the first meeting or communication with the government at the government's suggestion, with and only 11% said waiver was offered without prompting or demand. According to all respondents, about 10% of the waiver decisions were made when the problem first surfaced – before any contact with enforcement

[15] Eighteen percent of outside counsel and 6% of in-house counsel said that their clients did not waive the privilege but instead asserted their rights when faced with pressure to waive.

officials. Approximately 8% of in-house respondents and 5% of outside counsel indicated that their clients do not assert the privilege.

> *"My experience ... is that government agencies routinely 'blackmail' companies with threats of indictment, fines, etc., in order to get them to waive privilege and take other actions (discharge of employees, and so forth). This was true in my dealings at the federal level with agencies (FTC, for example) as well as with federal and state prosecutors."* (In-house counsel respondent)

> *"Federal prosecutors in particular have begun to treat waiver as almost synonymous with cooperation."* (Outside counsel respondent)

> *"The decision by a client to waive the privilege is always agonizing. In part, it has to do with the unexpected ... the law on partial waiver is so unclear, does a decision to waive once ever stop? What will other agencies or third parties do if they get the material? How will an internal investigation ever be conducted in the future if employees feel the company has 'betrayed' them? It's the easy case when the company has identified a discrete problem. When the government seeks this material, however, the extent of the problem is usually not known."* (Outside counsel respondent)

B. Experiences relating to employees

Respondents were asked whether the government had ever indicated certain expectations with regard to employees during the course of a governmental investigation. Around 60% of outside counsel indicated that this question applied to their own experiences. (Around 10% of in-house respondents to this question indicated that it applied.) Outside counsel who responded to this question said that they had experienced the following government expectations or demands with regard to employee actions:

- Not advance legal expenses (or agree to reimburse) to a targeted employee (26%);
- Not enter into, or breach, a joint defense agreement with a targeted employee (24%);
- Refuse to share requested documents with a targeted employee (21%)
- Discharge an employee who would not consent to be interviewed by the government (16%)

> *"The biggest issue is the pressure that the government puts on companies to terminate employees under investigation (long before any status determination is made) and then not to cover legal fees for loyal employees. A criminal investigation can bankrupt an individual quickly leaving them unemployed and destitute. The government does not want people to have adequate and competent counsel."* (Outside counsel respondent)

> *"[B]ecause of prosecutor demands for cooperation, corporate attorneys often decline to provide access to key documents critical to prepare a wholly legitimate defense based on*

actual facts. Government policies are interfering with the defense function, and will lead to increased charges against individuals who should not be charged." (Outside counsel respondent)

"The culture of 'cooperate or be fired' has severely impacted the ability to represent executives in corporate investigations." (Outside counsel respondent)

IV. SUMMARY OF WRITE-IN SITUATIONAL EXPERIENCES AND ADDITIONAL COMMENTARY

As noted above, some of the respondents completed open-ended text questions offered at the end of the survey, in which the survey requested them to provide examples of experiences they'd had with privilege erosion and to provide feedback on the general subject. Highlighted below are a few of the many illuminating responses to these questions.

In-house counsel:

.....

"In connection with a routine SEC investigation we were told that if we did not produce e-mail the matter would be referred to enforcement (i.e., the only wrongdoing would be failure to produce the e-mail – there was no other allegation of misconduct). When we produced our e-mail with a privilege log, we were told that the privilege log was insufficient because it did not describe the content of the e-mails not produced (which on advice of our outside securities counsel, a major law firm, we were advised could serve to waive the privilege). After a conference call in which SEC attorneys advised us that they did not recognize the work product doctrine and that internal compliance investigations were not privileged,' we ended up simply producing most of the e-mails without asserting privilege because 'we had nothing to hide'."

.....

"The company for which I work has commissioned an investigation of alleged accounting improprieties. The investigator is sharing its work with several outside regulators including the SEC and DOJ. All expect, and have received, a great deal of privileged material through this process. Whether to waive the privilege has not been subject to discussion; the only question is how far the waiver will go. And, thus far, there appears to be no limit. From speaking with my in-house counterparts, I know that my experience is not unique."

.....

"Gov[ernment] lawyers and investigators have asked – demanded - that we produce attorney notes of interviews with employees as well as internal studies that constitute work product."

.....

"The government investigated our company starting about four years ago. At the request of the FBI agent, with her suggestion that it would help us to cooperate, we proffered several upper level employees for them to interview... About a year later, the government executed a warrant on our office. They seized an entire closet full of legal documents, most of which were not related to the investigation or appropriately seized under the warrant. They returned copies of all of the documents after numerous requests, but never returned the originals... . Over the next two years, requests were made to interview several employees and repeated requests for information were made. It was repeatedly outright said or implied that cooperation would make things easier for us... Prior to joining this company, I worked for the government. I feel that the government has behaved inappropriately and illegally with respect to this ongoing investigation. They have abused their authority and terrorized our employees...."

.....

"...The real concern goes [to how the] judiciary ... react to and support such activities. Our matter focused on an alleged credit fraud charge that spread from the accused's business to his family and any attorney he had ever engaged. It was as if the government forgot how to spell privilege. They improperly sought and obtained warrants and subpoenas for everything, including protected matters. Eventually the matters were quashed, but only after significant effort."

.....

"We produced the documents because the privilege claim was not beyond doubt and because we wanted to be viewed as cooperative."

.....

"Our general practice is not to waive[] AC or work product protection. However, in circumstances in which a prior opinion of counsel was obtained and an 'advice of counsel' defense exists we will consider waiver of that opinion during the charging decision process."

.....

"We are forced to practice in a world where we cannot expect that any privilege will be respected by government investigators. In addition to a chilling effect on communications with between the client and the lawyer, waiver of privilege subjects companies to disclosure of these materials in litigation, potentially causing grievous harm to the company."

.....

"The assault on privilege seems to me deeply misguided from a long- or medium-term policy standpoint. Counsel serve a critical role in encouraging compliance and transparency. These current policies run a significant risk of chilling attorney client communications in the future which will heighten, rather than reduce, compliance risks. Simply, this is a terrible idea which is solving a problem which doesn't exist - ... agencies can proceed with their investigations on the basis of evidence obtained through [other means]."

.....

"The fear of privilege waiver has curtailed my ability to frankly and strongly direct my colleagues in areas of risk. I can no longer send memos that say: "under no circumstances may you do this," or the like, for fear of reprisal [in the future]. My inability to speak forthrightly forces my advice to be sugar-coated in ways that I believe lessen my power and effectiveness to force others to do the right thing... . When things appear as if they will be highly sensitive, I carefully retain outside counsel, often in matters I could handle better internally, thereby wasting significant not-for-profit dollars because of the government's inappropriate intrusion in this formerly sacrosanct land."

.....

"Outside counsel urge their retention in part because they contend in-house counsel cannot assert the privilege as effectively as outside counsel."

.....

"The privilege was established so persons could seek competent legal advice and thereby understand their rights and obligations under the law. To treat corporations differently creates the specter that companies won't seek appropriate legal advice, as they have no ability to feel confident in the confidentiality of their communications."

.....

"Our corporate strategy is to have in-house counsel active and involved in business deals early and often. We have found that this significantly minimizes the risk that employees engage in questionable behavior. This 'prevention' strategy demands on open dialogue with employees. DOJ demands for waiver have a chilling effect on our employees seeking out in-house counsel to discuss potentially tricky legal situations. We depend

on open lines of communication with employees and these are being strained by DOJ's policy and their push to alter the Sentencing Guidelines. We should have policies in place that encourage dialogue with employees. DOJ's waiver push is short sighted and counter productive."

.....

"It is my opinion that the concept of the government asking any person (either individual or corporate) to waive attorney-client privilege in order to facilitate their investigation is a travesty of justice. The attorney-client privilege is there as a means to have open discussions between the client and their attorney regarding all possibilities. To allow for this type of request will merely result in many corporations no longer including in-house counsel in important decision making processes which may in fact lead to even more wrongdoing."

.....

"In my experience, it is remarkably difficult for corporations and their employees to get legal advice in today's environment. There is a clear expectation -- sometimes unspoken, often spoken -- that any communication, privileged or not, will be shared with the government. There is no balancing of the advantages of waiver against the risks, including the company's ability to defend itself in ongoing civil litigation. This puts company counsel in a completely untenable position, unable to give or seek advice freely. The important purposes behind the privilege are simply being ignored."

.....

"I think the government's policy and position that companies should/must waive privilege and threatening criminal sanctions if they refuse to cooperate from the outset is frighteningly wrong, unconstitutional, over-reaching by the government, misguided, and is serving to undermine the efficacy of our system of jurisprudence and the assumption of innocent until proven guilty."

.....

"Reviewing the reports of waivers and requested waivers in the general press and in the legal periodicals has had a chilling effect on my function as general counsel. I warn our senior managers regularly that they should not count on having any privilege regarding their communications with me. We try hard to follow the law at this organization, so criminal prosecution is not a concern. What is a concern is that the continued erosion of privilege in prosecution by state and federal agencies will spill over into the civil arena. We are in a business sector in which litigation is common and the stakes are often very large. The self-censoring I feel compelled to do at this point hinders the company's ability to protect against or plan for anticipated claims."

.....

"While I have not experienced any problems, privilege erosion is a real fear that affects how we do business. A free and open dialogue between counsel (in house and outside) and management is critical to any business, and if the privilege becomes even more endangered, it will have a crippling effect on how we conduct our business."

.....

"As a result of our experiences, we now routinely advise our clients that there is not such thing as information protected by the attorney client privilege. Although I have no belief that the prosecutors requiring the waivers understand what they have done, within a matter of a few years, these attorneys have utterly eviscerated the attorney client privilege and undermined the most important aspect of the attorney client relationship. As a result, instead of advancing the interests of the public, government attorneys have now created a situation where clients are going to be less, not more, forthcoming; a result that will only lead to more corporate misdeeds."

.....

"At this stage, much of the damage is done--one has to conduct affairs, take (or not) notes, write communications and obtain information on the assumption that there will be no protection. In that

environment, lawyers are already much less effective in discovering information and counseling compliant conduct."

.....

"That waiver may be just 'a factor' in the determination of cooperation as mitigation under the Guidelines is very little - in fact, no - comfort at all."

.....

"The government is out of control. The Bar and the Judiciary should stand up and recognize this is wrong. Individual companies cannot afford to do it on their own; the stakes are too high."

.....

"We are involved in several investigations/subpoenas/lawsuits in which AGs, DOLs, or other regulators have retained plaintiffs firms and are using their state powers to demand production to those firms of documents we would not produce in discovery. Some of those law firms are paid on contingency basis. They typically ask for investigation reports."

.....

"From discussions with other general counsel, top law firm partners, and reading case law, it appears that failure to "cooperate" with federal investigators will incur their wrath, whether it's obstruction of justice charges, increased fines/penalties, new charges, character assassinations, pressure on a company to terminate an employee, pressure to have a state bar "review" an attorney's conduct, etc. (translation of "cooperate" meaning, waive the privilege and work-product protection and give them everything they ask for; asserting one's rights is seen as trying to defy the federal government). This is frightening (the federal gov[ernment] becoming more like a police state), and just the threat of such action from the feds changes the way attorneys and their clients work together, and changes the defense strategies when handling such issues – all for the worse with regard to the Constitutional and legal rights of individuals and companies. The law becomes a weapon wielded by the feds against the "people," and the protections that people and corporations are entitled to become a meaningless facade."

.....

"It is clear to me that this has become the "rage" among prosecutors. Frankly, if this is to be the expectation of all prosecutors in corporate criminal investigations, then it will essentially eliminate the privilege as to corporations in all of those cases. Indeed the waiver has also become prevalent in grand jury work with individuals in which the prosecutor hints at avoiding target status if the individual will waive his attorney client (and reporter/source) materials. In effect, prosecutors are overriding the legislative decision that the attorney client privilege is to be maintained."

.....

"On more than one occasion in small group meetings with government lawyers, such as in discussions of the requirements and expectations under Sarbanes Oxley, government lawyers have stated in absolute terms that they expect complete, open and full cooperation and that any actions, including assertions of privilege, significantly affect their assessment of culpability, the level of fines or civil or criminal penalties that should apply."

.....

"The attorney/client privilege is critical for clients, because they need to be frank with their attorneys in order to obtain accurate advice. If the privilege is not there or is likely to be waived, the client may not inform its attorneys of all the relevant facts. The heavy-handed "requests" for waiver of the attorney/client privilege, with heavy penalties levied for failure to "cooperate," will undermine the administration of justice in the long run. These requests are not fair or appropriate."

.....

"The DOJ routinely ignores the role of corporate counsel in establishing the ground rules for communications with company employees and the rights of both the company employee and the company of having a company lawyer present during questioning."

.....

"Waiving privilege through coercion is bad policy. It prevents an in-house attorney from advising his/her client the company. It interferes with the company's and employees' rights ... . If the government can't make a case without waiver, then perhaps the case isn't that strong. [They already] have a large club they can use to access company records and interview employees, far beyond what is available in civil litigation."

.....

"The balance of power in America now weighs heavily in the hands of government prosecutors. Honest, good companies are scared to challenge government prosecution for fear of being labeled uncooperative and singled out for harsh treatment. See Arthur Andersen for details...oh yeah...they cease to exist."

.....

"Currently, during the course of annual audit by a big 4 public accounting firm, the firm has demanded that the company waive privilege by turning over a legal memorandum prepared by outside tax counsel. The [accountants have] taken the position that their review of the memorandum is "necessary" to complete their Sarbox internal control review. We have been informed that our failure to waive will result in the firm not issuing a clean opinion in connection with our 10K. The firm has cited litigation as support for its position."

.....

"Auditors are asking for privileged information in connection with reviewing the company's accrual of potential or contingent liabilities; opening the door even before investigations start. Need accountant client privilege in addition to attorney client privilege."

.....

"Where we see the most potential for privilege erosion is during our regular interactions with our external auditors who are asking for more and more information impinging on attorney/client privilege..."

.....

"Privilege should be maintained inviolate, and pressure brought to force waiver should be prevented. If a company chooses to waive the privilege it should be purely voluntary and not coerced."

.....

"I believe the issue of government supported waiver of attorney-client privilege and work-product is one of the most critical issues facing in-house companies, and, indeed, companies, today. Waivers will cause non-lawyers to avoid consulting with lawyers because to do so would expose the company to civil and/or criminal prosecution. The net result will be to reduce the effectiveness of counsel, particularly in-house counsel, and, ultimately, increased violations of regulations and rules."

<u>Outside counsel:</u>

Two responses in particular to the long-answer questions in the outside counsel survey are discursive and thoughtful, and merit reproduction in their entirety:

"My practice focuses exclusively on environmental crimes cases most always being conducted out of the Environmental Crimes Section at the DOJ, an office I used to head. For many years now, dating back to the end of the Bush I administration the Section has become increasingly aggressive in demanding a

waiver of the privilege, most always excluding materials on strategy, direct advice to the client and mental impressions of the lawyers. Everything else must be turned over. Sometimes explicitly, more often subtly it is expressed that the waiver is a condition for even entering into plea negotiations. In no case have I ever felt that the client received any benefit for the waiver (or for that matter overall cooperation), rather it had evolved over time to be an expectation that the client has to waive. More to the point, any claim of privilege or refusal to waive implies that something is being hidden from the government and that before a case can be concluded, the government must have that information even where it duplicates , for instance, information the government already has in its possession through the grand jury or otherwise. It has become so prevalent as to be casual. To fail to waive is to impede, it is said, often with the suggestion that a decision not to waive is to obstruct. I have been on many panels on this subject and I always hear the gov't representatives describe their request in sterile tones as if there were only infrequent demands for a waiver and then only when there was no other way for the government to obtain the evidence in counsel's possession. Something is missing in the discussion. The give and take with line prosecutors never sounds like the supervisor's view of how and when the demand for waiver takes place. What's more invidious in my view is how the concept of waiver/cooperation has made any suggestion or discussion of the concept of privilege a 'dirty word.' Prosecutors act as if a claim of privilege were an implement of the crime itself or a legal concept without any historical or important basis in our jurisprudential system. To claim a privilege is to force the government to work harder, they want a short cut. And yet, ironically, while I have never felt a client received any credit for waiving, I have also never felt that the material the government obtained from a waiver served any purpose. This has led me to conclude, it is not the actual material the government wants, it simply that the government wants to obtain waiver per se to be able to claim a thorough investigation."

.....

"I was a federal prosecutor for 16 years, in the EDNY (6 years), District of Arizona (2.5 years) and NDCA (7 years) (where I was the Chief of the Criminal Division and the US Attorney (interim appointment) for the last five of those years). I have been in private practice for the past 3 years.

Several US Attorneys' Offices were historically aggressive in demanding waivers, and that practice has become more prevalent, along with demands that companies fire employees who decline to talk to government investigators or who the government believes may have done wrong, even if those employees have not been indicted. The demands from some US Attorneys' Offices have sometimes required an immediate response, without giving the company time to evaluate the demand or distinguish among different documents. For example, one US Attorney's Office accused a client of failing to cooperate because it spent 2 weeks reviewing the documents that would be the subject of the waiver.

Even more troubling, however, is the lack of consideration that government prosecutors have provided to companies that waive privileges. Unlike the Antitrust Division, which has a history of granting amnesty to those companies that waive the privilege and otherwise cooperate, some US Attorneys' Offices demand waivers, demand that companies force executives and employees to be interviewed by the government on pain of termination, and suggest that the company should not pay the legal fees of those employees or officers (on pain of indictment of the company).

These tactics are intended to deprive employees of top legal representation and cause employees to resent the corporation for 'abandoning' them, both attempts by the government to convince those employees to provide damning information about others in the company. While truthful cooperation is in the government's interest, several US Attorneys' Offices have resorted to making false statements to counsel for individual employees and mischaracterizing companies' cooperation in an effort to extract guilty pleas from individuals and from companies.

In addition, some prosecutors, including prosecutors at Main Justice in Washington, D.C., have demanded that companies retain separate 'independent' counsel to conduct internal investigations and turn the results of those investigations over to the government. In my experience, our client declined that demand, recognizing the client might incur the wrath of the prosecutor, because it was unnecessary. Such demands essentially require the companies to conduct the investigation for the government, turn over the results, and then agree to punitive measures for the company.

Finally, prosecutors recognize the difficult position that companies are in when they face criminal prosecution, because of negative public and shareholder reaction and because of possible government debarment. Some prosecutors exploit that fear to obtain information and then use it against the companies to extract unnecessary corporate guilty pleas or deferred prosecution agreements. Prosecutors' primary goal should be to indict individuals who commit crimes; in my experience, prosecutors have failed to give adequate weight to the factors identified in the Thompson memo and have disregarded mitigating factors when the companies do not accede to the prosecutors' version of events."

Other responses by outside counsel follow:

"Environmental enforcement case, handled by DOJ Environmental Crimes Section (ECS) and U.S.Atty. DOJ ECS lawyer made clear that favorable disposition (misdemeanor Water Act and diversion of felony hazardous waste charges) would not occur absent waiver. Produced approximately 80 typed interviews and notes. At other times in the litigation, was suggested that company terminate funding of counsel fees for employees (despite company bylaws authorizing). Demanded that company withdraw from all joint defense agreements in settlement agreement, despite pendency of continuing parallel civil litigation.

Environmental prosecution under Clean Water Act; U.S. Attorney and staff made clear that government decision to prosecute, despite company general cooperation and violation conduct caused by employee contrary to explicit company policy, hinged on company decision not to waive privilege. Govt immunized employee who committed violation then used him against company that had informed employee that pollution violations were contrary to company policy."

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"Typical situation: environmental crimes investigation in which the company is invariably expected to turn over its internal investigation. Although DOJ lawyers give lip service to the proposition that waiver is not required to get Thompson Memo cooperation credit, they invariably asked for the information (or the client knew they would invariably ask for the information) in such a manner as to make it plain they would not consider any company that did not waive to be a 'good corporate citizen' deserving of consideration for a charging decision less than 'the most serious readily provable offense.' In fact DOJ and USAO lawyers say the only way they are authorized under DOJ policy to charge less than the most serious readily provable offense is if the company shows it comes within the mitigating categories in the Thompson memo, and invariably waiver of work product and attorney client protections are discussed."

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"For all intents and purposes, there is no such thing as an attorney-client privilege or work product protection in a public company. This is true for inside counsel as well as outside counsel. In-house counsel should probably periodically issue a blanket warning to senior executives that they should expect that, in the event of a future governmental investigation, any conversations that would otherwise be viewed as privileged will likely be disclosed to the government. For outside counsel coming in to perform an investigation, we do so now in the expectation that our client will instruct us to turn over all of our

materials to the government. We are, as a consequence, also fair game for testimony in class action and other civil cases brought by shareholders. Public companies currently have little choice in this matter and it is likely, at least in my opinion, that executives are beginning to realize that they cannot bring difficult problems to their counsel and receive their advice for fear that advice will be disclosed and decisions will later be second-guessed by the government."

.....

"The AUSA wrote a letter to the company's counsel explicitly stating that whether the company receives any credit for cooperation would be determined by whether it had 'fully' met the factors set forth in the Thompson Memo, including the company's willingness to make a firm commitment to provide the government prompt access to all 'potentially relevant information, including information protected by the attorney-client privilege and work product privilege.'

Shortly thereafter, and even though the company waived privilege and work product with respect to the subject matter of the investigation, the prosecutor complained of a lack of cooperation, and demanded that the parent company's General Counsel, Audit Committee Chairman and CEO meet with him personally so that they could respond directly to his demands. Surprisingly, the company acceded to this request and there were one or more meetings at which the General Counsel (and, I believe) other top executives were lectured by the AUSA in a threatening manner.

As he realized that these pressure tactics were actually working, the AUSA continued to make escalating demands, including a series of demands for virtually unlimited waiver of the attorney-client privilege. When the company's outside counsel pointed out that the company had in fact complied with the Thompson Memo by providing, inter alia, the facts, the identity of witnesses, the documents, voluntary presentations on various issues and even limited waivers of attorney-client privilege, the AUSA apparently concluded that this attorney was an obstructionist and not cooperating."

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"When we assert privilege with regard to an independent counsel investigation report, records and recommendations, the government (in my case state attorneys general and state departments of insurance) tells us that we are being uncooperative and unreasonable and that we are the only person who has received such a subpoena that is withholding this kind of information. The state also requests information on the process our client followed to prepare its answers to other questions in the subpoena, including inquiries and analysis done by outside and inside counsel. We have also resisted that (on work product and other grounds) and received the same reply that we are the most unreasonable, uncooperative person in our industry, and that if we want to save the time and money of the government's investigation then we should cooperate."

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"The Department of Justice and the CFTC have extorted the energy industry into waiving privileges and paying huge unjustified settlements for "false reporting" trade data to the trade publications."

.....

"While guidelines for various agency voluntary disclosure programs may permit the assertion of privileges, in reality, agents who investigate apparent misconduct, those administering the disclosure programs and government lawyers who evaluate the issue that is the subject of the disclosure clearly expect waiver as a matter of course. Assertions of privilege, in such circumstances, are usually met with raised eyebrows and "tisk-tisks" rather than by direct threats or explicit statements of unfavorable treatment. Corporate clients, in particular, quickly get the message from the regulators and investigators and elect to waive the privilege in expectation favorable treatment in agency and prosecution decision

making. The most common privileged material provided to government investigators and lawyers are interview memoranda prepared by counsel."

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"Government suspension and debarment and exclusion officials routinely demand that companies disclose internal investigations, including notes, in order to be deemed 'responsible' contractors and receive Federal contracts. Also, Congressional investigators routinely request such waivers. I have not had a serious issue with the Civil Division of the Justice Department. I routinely get this request from Assistant US Attorneys when they are conducting grand jury investigations."

.....

"The government now expects a waiver as their inherent right. In return, almost no credit is given."

.....

"In situations where the government is aware that an investigation has occurred, it has been indicated directly and indirectly that they need all of the gathered information to make a proper assessment elsewise they view any claims of cooperation or truthfulness unacceptable."

.....

"We generally advise clients to be prepared to waive certain privileges when the results of a preliminary investigation uncover a potential violation of law that, absent an affirmative disclosure, could subject the client to increased penalties or a potential qui tam action."

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"AUSA stated that asserting the attorney-client privilege was inconsistent with cooperation."

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"Corporate counsel are scared, and are the functional equivalent of AUSAs."

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"Seems like the guidelines have bred a culture of arrogance in our US attorney's office since the late 1980s. Prosecutors seemed more human and reasonable before."

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"The increase in pressure on companies to waive erodes the confidence some clients have in seeking advice from counsel who will then need to cooperate with the government."

.....

"It seems the government has taken the stand that because they are the government the rules do not apply to them and can by force and intimidation take whatever they want."

.....

(For further information on this survey and results, please contact Susan Hackett at hackett@acca.com, or Stephanie Martz at stephanie@nacdl.org.)

U.S. Department of Justice

Office of the Associate Attorney General

Principal Deputy Associate Attorney General *Washington, D.C. 20530*

April 12, 2006

MEMORANDUM FOR HEADS OF THE
TAX DIVISION
CIVIL DIVISION
ANTITRUST DIVISION
CIVIL RIGHTS DIVISION
ENVIRONMENT AND NATURAL RESOURCES DIVISION

FROM: Neil M. Gorsuch
Principal Deputy Associate Attorney General
Office of the Associate Attorney General

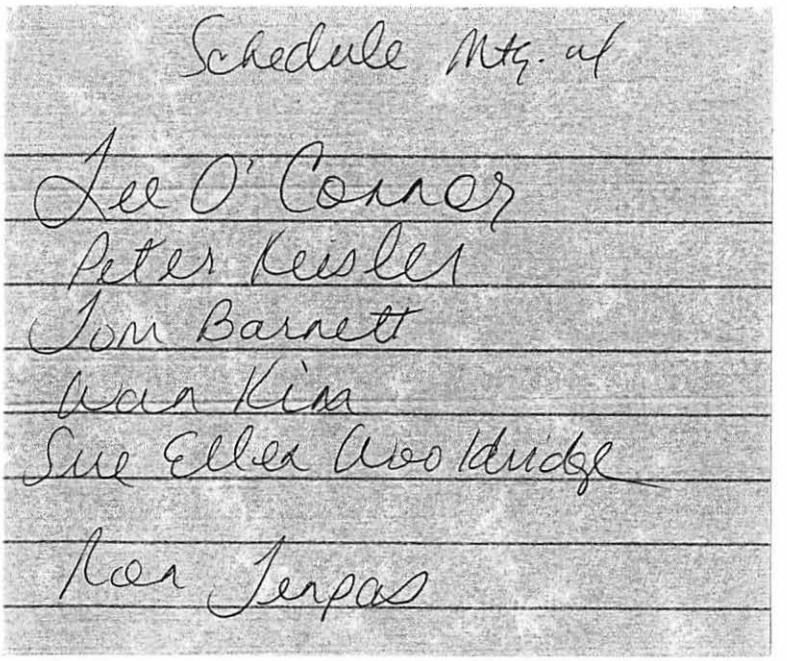
SUBJECT: Advisory Committee on Evidence Rules

Please review the attached materials from the Advisory Committee on Evidence Rules pertaining to the attorney-client waiver issue. The Office of the Associate Attorney General and the Office of the Deputy Attorney General plan to schedule a meeting next week with you to discuss the Department's response to this draft and would appreciate having your views then.

Many thanks.

Attachments

cc: Robert D. McCallum, Jr.
Ronald J. Tenpas



PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 502. Attorney-Client Privilege and Work Product; Waiver By Disclosure

(a) Waiver by disclosure in general. — A person waives an attorney-client privilege or work product protection if that person — or a predecessor while its holder — voluntarily discloses or consents to disclosure of any significant part of the privileged or protected information. The waiver extends to undisclosed information concerning the same subject matter if that undisclosed information ought in fairness to be considered with the disclosed information.

(b) Exceptions in general. — A voluntary disclosure does not operate as a waiver if:

(1) the disclosure is itself privileged or protected;

(2) the disclosure is inadvertent and is made during discovery in federal or state litigation or administrative

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*New material is underlined; matter to be omitted is lined through.

proceedings — and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B); or

(3) the disclosure is made to a federal, state, or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigation.

(c) Controlling effect of court orders. — Notwithstanding subdivision (a), a court order concerning the preservation or waiver of the attorney-client privilege or work product protection governs its continuing effect on all persons or entities, whether or not they were parties to the matter before the court.

(d) Controlling effect of party agreements. — Notwithstanding subdivision (a), an agreement on the effect

of disclosure is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order.

(e) Included privilege and protection. — As used in this rule:

1) "attorney-client privilege" means the protections provided for confidential attorney-client communications under either federal or state law; and

2) "work product" means the immunity for materials prepared in preparation of litigation as defined in Fed.R.Civ.P. 26 (b) (3) and Fed.R.Crim.P. 16 (a) (2) and (b)(2), as well as the federal common- law and state-enacted provisions or common-law rules providing protection for attorney work product.

Committee Note

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of material protected by the attorney-client privilege or the work product doctrine— specifically those disputes involving inadvertent disclosure and selective waiver.

2) It responds to the widespread complaint that litigation costs for review and protection of material that is privileged or work product have become prohibitive due to the concern that any disclosure of protected information in the course of discovery (however innocent or minimal) will operate as a subject matter waiver of all protected information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Rowe Entertainment, Inc. v. William Morris Agency,* 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (finding that in a case involving the production of e-mail, the cost of pre-production review for privileged and work product material would cost one defendant $120,000 and another defendant $247,000, and that such review would take months). *See also Report to the Judicial Conference Standing Committee on Rules of Practice and Procedure by the Advisory Committee on the Federal Rules of Civil Procedure,* September 2005 at 27 ("The volume of information and the forms in which it is stored make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming yet less likely to detect all privileged information."); *Hopson v. City of Baltimore,* 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of information protected by the attorney-client privilege or work product doctrine. As part of that predictability, the rule is intended to regulate the consequences of disclosure of information protected by the attorney-client privilege or work product doctrine at both the state and federal level. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable in both state and federal courts. If a federal court's confidentiality order is not enforceable in a state court (or vice versa) then the burdensome costs of privilege review and retention are unlikely to be reduced.

The Committee is well aware that a privilege rule proposed through the rulemaking process cannot bind state courts, and indeed that a rule of privilege cannot take effect through the ordinary rulemaking process. See 28 U.S.C § 2074(b). It is therefore anticipated that Congress must enact this rule directly, through its authority under the Commerce Clause. Cf. Class Action Fairness Act of 2005, 119 Stat. 4, PL 109-2 (relying on Commerce Clause power to regulate state class actions).

Subdivision (a). This subdivision states the general rule that a voluntary disclosure of information protected by the attorney-client privilege or work product doctrine constitutes a waiver of those protections. *See, e.g., United States v. Newell,* 315 F.3d 510 (5th Cir. 2002) (client waived the privilege by disclosing communications to other individuals who were not pursuing a common interest). The rule provides, however, that a voluntary disclosure generally results in a waiver only of the information disclosed; a subject matter waiver is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information. *See, e.g., In re von Bulow,* 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged -

information in a book did not result in unfairness to the adversary in a litigation, therefore a subject matter waiver was not warranted). The rule thus rejects the result in *In re Sealed Case,* 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The rule governs only waiver by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.,* 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson,* 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (b). This subdivision collects the basic common-law exceptions to waiver by disclosure of attorney-client privilege and work product.

Protected disclosure: Disclosure does not constitute a waiver if the disclosure itself is protected by the attorney-client privilege or work product immunity. For example, if a party privately discloses a privileged communication to another party pursuing a common legal interest, that disclosure is itself protected and the privilege covering the underlying information is not waived. *See, e.g., Waller v. Financial Corp. of America,* 828 F.2d 579 (9th Cir. 1987) (communications by a client to his lawyer remained privileged where the lawyer shared the communications with codefendants pursuing a common defense); *Hodges, Grant & Kaufman v. United States Gov't Dept. of Treasury,* 768 F.2d 719, 721 (5th Cir. 1985) (noting that the

privilege is not waived "if a privileged communication is shared with a third person who has a common legal interest with respect to the subject matter of the communication"). Similarly, the protection of the attorney-client privilege or work product immunity is not waived if protected information is disclosed by one lawyer to another in a law firm.

Inadvertent disclosure during discovery: Courts are in conflict on whether an inadvertent disclosure of privileged information or work product, made during discovery, constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in preserving the privilege and failed to request a return of the information in a timely manner. And a few courts hold that any mistaken disclosure of protected information constitutes waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of privileged or protected information during discovery constitutes a waiver only if the party did not take reasonable precautions to prevent disclosure and did not make reasonable and prompt efforts to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver. *See, e.g., Alldread* v. *City of Grenada,* 988 F.2d 1425 (5th Cir. 1993) (governmental attorney-client privilege); *Zapata v. IBP,* Inc., 175 F.R.D. 574, 576-77 (D. Kan. 1997) (work product); *Hydraflow, Inc. v. Enidine, Inc.,* 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege); *Edwards v. Whitaker,* 868 F.Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege). The rule establishes a compromise between two competing premises. On the one hand, information protected by the attorney-client privilege or work product immunity

should not be treated lightly. On the other hand, a rule imposing strict liability for an inadvertent disclosure during discovery threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.

Selective waiver: Courts are in conflict on whether disclosure of privileged or protected information to a government agency conducting an investigation of the client constitutes a general waiver of the information disclosed. Most courts have rejected the concept of "selective waiver", holding that waiver of privileged or protected information to a government agency constitutes a waiver for all purposes and to all parties. *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines,* 951 F.2d 1414 (3d Cir. 1991). Other courts have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government agency. *See, e.g., Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.,* 521 F. Supp. 638 (S.D.N.Y. 1981). And a few courts have held that disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties. *See, e.g., Diversified Industries, Inc. v. Meredith,* 572 F.2d 596 (8th Cir. 1977).

The rule rectifies this conflict by providing that disclosure of protected information to an investigating government agency does not constitute a general waiver of attorney-client privilege or work product protection. A rule protecting selective waiver to investigating government agencies furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litigation,* 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting) (noting that the "public interest in easing government investigations" justifies a rule that disclosure to

government agencies of information protected by the attorney-client privilege or work product immunity does not constitute a waiver to private parties).

The Committee considered whether the protection of selective waiver should be conditioned on obtaining a confidentiality agreement from the government agency. It rejected that condition for a number of reasons. If a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the attorney-client privilege and work product immunity. Moreover, a government agency might need to use the information for some purpose and then would find it difficult to be bound by an air-tight confidentiality agreement, however drafted. If such an agreement were nonetheless required to trigger the protection of selective waiver, the policy of furthering cooperation with and efficiency in government investigations would be undermined. Ultimately, the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule. The Committee found it sufficient to condition selective waiver on a finding that the disclosure is limited to persons involved in the investigation.

Subdivision (c). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. *See Manual for Complex Litigation Fourth* § 11.446 (Federal Judicial Center2004) (noting that fear of the consequences of waiver "may add cost and delay to the discovery process for all sides" and that courts have responded by encouraging counsel "to stipulate at the outset of discovery to a 'nonwaiver' agreement, which they can adopt as a

case-management order."). But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the information can be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case can bind non-parties from asserting waiver by disclosure in a separate litigation. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law. The rule provides that such orders are enforceable against non-parties. As such the rule provides a party with a predictable protection that is necessary to allow that party to limit the prohibitive costs of privilege and work product review and retention.

Subdivision (c) contemplates that the court may order production and guarantee confidentiality under criteria different from those providing exceptions to waiver under subdivision (b). For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product..

Subdivision (d). Subdivision (d) codifies the well-established proposition that parties to litigation can enter an agreement to limit the effect of waiver by disclosure between or among them. *See, e.g., Dowd v. Calabrese,* 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the parties stipulated in advance that certain testimony at a deposition "would not be deemed to constitute a waiver of the attorney-client or work product privileges"); *Zubulake*

v. UBS Warburg LLC, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection from a finding of waiver by disclosure in a separate litigation, the agreement must be made part of a court order. *See Hopson v. City of Baltimore,* 232 F.R.D. 228, 238 (D.Md. 2005) (noting that "it is essential to the success of this approach in avoiding waiver that the production of inadvertently produced privileged electronic data must be at the compulsion of the court, rather than solely by the voluntary act of the producing party").

Subdivision (d) contemplates that the parties may agree to production and guarantee confidentiality under criteria different from those providing exceptions to waiver in subdivision (b). For example, the parties may provide for return of documents without waiver irrespective of the care taken by the disclosing party, and may agree to "claw-back" or "quick peek" arrangements to reduce the cost of pre-production review for privilege and work product.

Subdivision (e). This subdivision makes clear that the rule governs waiver by disclosure for the attorney-client privilege and work product immunity under both state and federal law.

The rule's coverage is limited to attorney-client privilege and work product. The limitation in coverage is consistent with the goals of the rule, which are 1) to provide a reasonable limit on the costs of privilege and work product review and retention that are incurred by parties to litigation; and 2) to encourage cooperation with government investigations and reduce the costs of those investigations. These two interests arise mainly, if not exclusively, in the context of disclosure

of attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.

Judicial Conference Advisory Committee on Evidence Rules

Hearing on Proposed Rule Governing Waiver of Attorney-Client Privilege and Work Product

April 24, 2006

Biographical Summaries of Participants

David M. Brodsky is a partner in the New York office of Latham & Watkins, and Co-Chair of the Securities Litigation and Professional Liability Practice Group. Prior to joining Latham & Watkins, Mr. Brodsky served as Managing Director and General Counsel – Americas at Credit Suisse First Boston (CSFB), and was chairman of the Litigation Department of Schulte Roth & Zabel. With more than 30 years trial experience as both a federal prosecutor and private practitioner, Mr. Brodsky's practice focuses primarily on securities litigation with particular focus on internal investigations, SEC and other regulatory investigations and enforcement actions, securities actions and white collar criminal inquiries and prosecutions. Mr. Brodsky is a frequent lecturer in forums on shareholder actions, securities enforcement, both civil and criminal, internal investigations, corporate attorney-client privilege, corporate ethics, and the roles of audit committees and boards of directors in crisis management in programs sponsored by the Association of the Bar of the City of New York, Practicing Law Institute, American Lawyer Conferences and American Conference Institute. Mr. Brodsky has written numerous works on litigation topics, including "Federal Securities Litigation: A Deskbook for the Practitioner" (co-author with Daniel J. Kramer); "Opening Statements in Business and Commercial Litigation in Federal Courts;" "Judgments in Commercial Litigation in New York State Courts;" and "The Planning Process in Successful Partnering Between Inside and Outside Counsel." He is a graduate of Harvard Law School and Brown University.

Timothy Glynn is a professor at Seton Hall University School of Law School, where he has taught since 1999. He teaches courses in the corporate, employment, and civil procedure areas. His current scholarship focuses on corporate law, employment law, and the law of evidentiary privileges. Professor Glynn received his B.A., magna cum laude, from Harvard University, and his J.D., magna cum laude, from the University of Minnesota Law School, where he served as Editor-in-Chief of the Minnesota Law Review. He clerked for the Honorable Donald P. Lay, United States Court of Appeals for the Eighth Circuit. He then practiced law as an associate at the firm of Leonard, Street and Deinard in Minneapolis, Minnesota, focusing in the areas of securities, business, and employment litigation. Prior to joining Seton Hall, he again served as a judicial clerk, this time for the Honorable John R. Tunheim, United States District Court for the District of Minnesota.

Bruce A. Green is the Louis Stein Professor at Fordham Law School, where he directs the Louis Stein Center for Law and Ethics. He teaches and writes primarily in the areas of legal ethics and criminal law. Professor Green currently serves as the Reporter to the ABA Task Force on the Attorney-Client Privilege and as a member of a N.Y. State Bar Association task force on the same subject. Prior to joining the Fordham faculty in 1987, Professor Green was a law clerk to Judge James L. Oakes and Justice Thurgood Marshall and an Assistant U.S. Attorney and Chief Appellate Attorney in the Office of the U.S. Attorney for the Southern District of New York.

Hon. Paul W. Grimm, United States Magistrate Judge, District of Maryland. Judge Grimm is a 1973 graduate of the University of California, Davis, and a 1976 graduate of the University of New Mexico School of Law. Following graduation from law school, he served on active duty in the Army Judge Advocate General's Corps. Thereafter, he served as an Assistant State's Attorney for Baltimore County, an Assistant Attorney General for the State of Maryland, and was in private practice for 13 years. He was appointed as a United States Magistrate Judge in February, 1997. Judge Grimm is an adjunct faculty member at the University of Maryland School of Law, where he teaches pretrial civil procedure, evidence and trial evidence. He has authored two books on evidence, one on deposition practice, and most recently co-authored *Discovery Problems and their Solutions*, published by the American Bar Association Litigation Section. He also has authored numerous articles on evidence and civil procedure. He lectures frequently on the subjects of evidence, civil procedure, and trial practice. He is a retired Lieutenant Colonel, United States Army Reserve.

Richard M. Humes, has been an Associate General Counsel of the Securities Exchange Commission since 1990. He previously served as Assistant General Counsel, Special Trial Counsel, and Staff Attorney to the Office of General Counsel, SEC. He has also served as Special Assistant to the United States Attorney for the District of Columbia. Mr. Humes has received the SEC Distinguished Service Award and the Presidential Meritorious Executive Award. Mr. Humes is a graduate of Howard University Law School and Brown University.

Gregory P. Joseph is a past Chair of the ABA Section of Litigation (1997-98) and is currently a member of the Board of Regents of the American College of Trial Lawyers. He served on the Advisory Committee on the Federal Rules of Evidence from 1993-98. He is the author of Sanctions: The Federal Law of Litigation Abuse (3d ed. 2000; Supp. 2006); Modern Visual Evidence (Supp. 2005); and Civil RICO: A Definitive Guide (2d ed. 2000). He is also a member of the Editorial Board of Moore's Federal Practice and a member of the American Law Institute.

John Kenney, Retired Partner, Simpson Thacher & Bartlett. Fellow, American College of Trial Lawyers; former Chair of the Committee on the Federal Rules of Evidence. President, Federal Bar Council, 1994-96. Chair, Committee on Criminal Law, Association of the Bar of the City of New York, 1992-95. President, New York County Lawyers' Association, 1997-98. J.D. Fordham, 1969. A.B., St. Michael's College, 1966.

Hon. John G. Koeltl, United States District Judge, Southern District of New York. Nominated by William J. Clinton on April 26, 1994, confirmed by the Senate on August 9, 1994, and received commission on August 10, 1994. Education: Georgetown University, A.B., 1967. Harvard Law School, J.D., 1971. Law clerk, Hon. Edward Weinfeld, U.S. District Court, Eastern District of New York, 1971-1972. Law clerk, Justice Potter Stewart, Supreme Court of the United States, 1972-1973. Assistant special prosecutor, Watergate Special Prosecution Force, 1973-1974 Private practice, New York City, 1975-1994. Member of the Judicial Conference Committee on Court Administration and Case Management. Former Chair and Member, Committee on Federal Legislation, Association of the Bar of the City of New York. Adjunct Professor, NYU School of Law.

Peter B. Pope was appointed Deputy Attorney General for the Criminal Division of the New York State's Attorney General's Office in August 2000, having joined the office as Special Counsel to the Attorney General in January 1999. Prior to his appointment, Mr. Pope served as Vice President and Inspector General of the New York City School Construction Authority; Vice President at Goldman Sachs; and Assistant District Attorney for the Hon. Robert M. Morgenthau, in whose office he was Deputy Chief of the Labor Racketeering Unit. Mr. Pope was a law clerk to the Hon. Robert W. Sweet. He is a graduate of Yale Law School and Harvard College.

James K. Robinson is a partner in the law firm of Cadwalader, Wickersham & Taft, resident in the D.C. office. He served as Assistant Attorney General in charge of the Criminal Division of the U.S. Department of Justice from 1998-2001. He has testified frequently before Congress concerning criminal justice issues, including testimony with respect to money laundering, encryption export control policy, campaign finance, and grand jury reform. He also represented the United States in a wide variety of international fora, including service as head of the U.S. delegation to the G-8 government/industry cybercrime conference in Paris and the South American Justice Ministers conference in Argentina. Mr. Robinson is a former partner and head of the litigation department at the law firm of Honigman Miller Schwartz & Cohn in Detroit where he practiced for 18 years. He was also the Dean and a Professor of Law at Wayne State University Law School, where he taught courses in the area of evidence law. He chaired the Michigan Supreme Court committee that drafted the Michigan Rules of Evidence and has co-authored a three-volume treatise and a courtroom handbook on evidence published by West. Mr. Robinson served two terms as a member of the Advisory Committee on Evidence Rules. He is chair of the committee of the National Conference of Bar Examiners that drafts the evidence questions for the Multistate Bar Exam. Mr. Robinson holds a B.A. with honors from Michigan State University and a J.D., magna cum laude, from Wayne State University Law School where he was Editor-in-Chief of the Wayne Law Review. Following law school he served as a law clerk to the Honorable George C. Edwards of the United States Court of Appeals for the Sixth Circuit.

Stephen D. Susman, is the founding Partner of Susman Godfrey, a firm specializing in commercial litigation. He served as a law clerk to Justice Hugo Black and to Judge John R. Brown of the Fifth Circuit Court of Appeals. He has served as Chairman of the Section on Antitrust and

Trade Regulation of the Texas State Bar. He has been appointed to many positions in the American Bar Association, including the Section of Antitrust Law (member of Council, 1989-91); the Section of Litigation (currently member of Trial Advisory Board and Federal Practice Task Force and formerly co-chair of Task Force on Training the Advocate, Chairman of Task Force on Fast Track Litigation, and member of Committee to Improve Jury Comprehension); and the Section of Intellectual Property. He is a member of the American Law Institute. He serves on the ALI-ABA Advisory Group on Antitrust, and on the Editorial Advisory Board for the BNA Civil RICO Reporter and "Inside Litigation." He also serves on the Advisory Board of the University of Texas School of Law's Review of Litigation. Mr. Susman is the Chairman of the Texas Supreme Court Advisory Committee's Discovery Subcommittee, and Director of the Texas Association of Civil Trial and Appellate Specialists. Mr. Susman is a magna cum laude graduate of the University of Texas School of Law and Yale University.

Ariana J. Tadler is a partner at Milberg Weiss Bershad & Schulman. Ms. Tadler has extensive experience litigating complex securities class actions, and is one of the principal liaison counsel on behalf of plaintiffs in the Initial Public Offering Securities Litigation. In that capacity, she manages on a day-to-day basis 309 separate class actions which have been coordinated for pretrial purposes. Ms. Tadler has attended numerous lectures and seminars nationwide at which she has been a selected speaker on various topics. Recent conferences include: The Sedona International Conference, "International Electronic Information Management Discovery and Disclosure" (July 2005); ABA Panel Securities Section Meeting, "Recent Developments in Federal Securities Class Actions" (August 2005); 8th Circuit Judicial Conference, "Panel on E-Discovery"; SEC Institute Conference, "Staying Out of Trouble with the SEC, Analysts and the Plaintiff's Bar" (October 2005). Ms. Tadler is the co-author of "Damages in Federal Securities Litigation," Securities Litigation 1991: Strategies and Current Developments," Practicing Law Institute, 1991. Ms. Tadler is also a member of the Steering Committee of The Sedona Conference and has been a selected speaker on various panels regarding "Electronic Document Retention and Production." Ms. Tadler is a member of the Federal Bar Council, the American Bar Association, the Association of Trial Lawyers of America, the New York State Bar Association and the New York County Lawyers Association. She received her J.D. from Fordham in 1992 and her B.A. from Hamilton College in 1989.

John Vail is an original member of the Center for Constitutional Litigation, where he is Vice President and Senior Litigation Counsel. He has focused his work solely on access to justice issues since 1997, representing clients in numerous state supreme courts and in the Supreme Court of the United States. His legal theories, and the evidence he has developed to support them, have been used widely to keep open the doors to America's courtrooms. His articles, such as "Big Money v. The Framers," Yale L.J. (The Pocket Part), Dec. 2005, "A Common Lawyer Looks at State Constitutions," 32 Rutgers L.J. 977 (Summer 2001) and "Defeating Mandatory Arbitration Clauses," 36 TRIAL 70 (January 2000), have enlivened scholarly debate and have guided practitioners. Mr. Vail is a graduate of the College of the University of Chicago and of Vanderbilt Law School.

Mary Jo White is Chair of the litigation group of Debevoise & Plimpton LLP. Ms. White's practice concentrates on internal investigations and defense of companies and individuals accused by the government of involvement in white collar corporate crime or SEC and civil securities law violations, and on other major business litigation disputes and crises. Ms. White is a Fellow in the American College of Trial Lawyers, a Fellow in the International Academy of Trial Lawyers, and was named to The National Law Journal's 2002 list of Top 10 Women Litigators. Ms. White served as the United States Attorney for the Southern District of New York from June 1, 1993 until January 7, 2002. Ms. White also served as the first Chairperson of Attorney General Janet Reno's Advisory Committee of United States Attorneys from all over the country. Prior to becoming the United States Attorney in the Southern District of New York, Ms. White served as the First Assistant United States Attorney and Acting United States Attorney in the Eastern District of New York from March 1990 until June 1, 1993.

Thank for the kind introduction, DR. FRANKEL.

It's a pleasure to be here with you and participate with Judge Braden. Perspective of trial lawyer and spend time before jury.

As a representative of the legal community - I must express my pleasure at spending time today with so many folks whose careers are dedicated to seeking truth and advancing the human condition.

As we all know, that's not exactly how the legal profession has come to be seen in the eyes of many – sadly even within the legal profession.

There is the story about two lawyers who went through v. contentious case – came to distrust each other and even hate the judge understandably became exasperated by it all.

At one point during trial, one of the attorneys couldn't contain himself and, in open court shouted "You are a cheat!" to his opponent.

"And you're a liar!", bellowed the opposition.

Banging his gavel loudly, the judge interjected, "Now that both attorneys have been identified for the record, let's get on with the case."

And so it is that the legal profession has a less than stellar reputation among many.

From where I sit, that is a very sad thing because -- devoted my career to trying cases &

And –

Bad apples aside –

I continue to see the legal profession as a noble calling, one that is dedicated, much like yours to seeking truth and advancing the human condition

~~Devoted my career to trying cases.~~

In speaking today, want to share with you my concern that what has happened to my profession in the eyes of so many does not happen to yours as well.

What do I mean?

Want to talk a bit about the role of expert witnesses – and the role of science and ~~medicine~~ in the court room, its use and misuse.

At one point or another in your career, you are likely to be asked, given your qualifications, to participate as an expert witness in a court proceeding.

Many of your colleagues make very good livelihoods providing expert testimony

Others supplement their income from universities with lucrative practices in providing such testimony.

And there are many good reasons to participate in the legal process beyond the obvious financial rewards.

As our society becomes increasingly more complex and technologically advanced, courts and jurors increasingly NEED the assistance of expert witnesses

Experts like yourselves provide a critical function in the truth-finding process

Ensuring that justice is done in individual cases

And the ~~last~~ ~~apply~~ to participate in some aspect of legal process will

Pose highly interesting issues that will intrigue some of you.--

~~Body~~ ~~work~~

scientific + social

ranging from the balancing the social costs and benefits associated with design of consumer products –

- SW roll over protection v. fun to drive.
- toasters that don't cause fire & too expensive

to finding the proper balance in antitrust law between allowing free competition and protecting against monopolistic abuse

~~• Abuse of~~

- Many concentration these mergs efficient or anticompetitive

and ascertaining the right line between compensating for medical malpractice in individual cases while not so draining the resources of doctors that no one wishes to enter the profession

- do we cap awards or not?

Frankly, our legal system NEEDS your expertise in resolving these and many other issues confronting our society ~~today,~~ and the legal profession.

Justice Breyer article p 2: EB said long ago "the age of chivalry is dead." The age of sophists + calculators – perhaps he meant lawyers + experts w/ them

We will need it all the more in the future. Ever more complicated and difficult issues associated with science are sure to emerge over the span of your careers – + technology

– is upon us. And the glory of Europe is extinguished forever"

Like for example how should our legal regime analyze and resolve the profound ethical and technological issues associated with advances in medicine - ranging from cloning new life to treatment and prolongation at the end of life?

- cloning new life?
- stem cells?
- use of med technology to prolong life ~~of~~ near its end?

While I encourage you to become involved with the legal system to help us reach rational and compassionate answers to these and other important questions – while I think it is inevitable that science will continue to influence law and legal proceedings more and more – I also want to issue something of a warning.

w/ sincerity to serve ~~[illegible]~~

If you do not guard carefully your professional and personal standards of intellectual honesty and integrity you will quickly find yourself and your professions in a similar state of disrepute as my profession finds itself today in the eyes of far too many people.

And, frankly, there is reason for concern.

Take this exchange – an injured plaintiff suing for tort damages being questioned by his own lawyer on direct examination

By Plaintiff's Attorney: What doctor treated you for the injuries you sustained while at work?

By Plaintiff: Dr. Johnson.

Plaintiff's Attorney: And what kind of physician is Dr. Johnson?

Plaintiff: Well, I'm not sure, but I do remember that you said he was a good plaintiff's doctor.

No one wants to be Dr. Johnson.

But the problem is hardly isolated.

In another case, a leading PHD economist disclosed in his written report that he was being paid $400 per hour. By the time of trial, he reported that he had worked 350 hours. That's $140,000 in fees.

A lot, but not extraordinary given the magnitude of the case.

The witness failed to mention in his report, however, that he also received a "finders fee" from a consulting firm that helped him perform his economic analysis.

Embarrassed at trial to be forced to reveal to the jury that he had received another $150,000 from this finder's fee that he failed to disclose in his report.

How does that make him – and really his entire profession – look?

Or how about a famous professor who represented that he held an MBA from Harvard Business School under oath, when it was later revealed that he held a Master's in Public Administration from the Harvard Kennedy School of Govt.

Some might consider that a peccadillo – but it is enough to tarnish a career for life

Or how about the expert accountant of a major accounting firm who testified that a hospital was not viable as an ongoing business at trial only to be confronted by a report done by others in his firm done for the federal government saying that the firm was unable to assess the viability of the hospital?

Q: Isn't it true that without doing a financial projection you can't render a formal opinion on the viability [of the hospital]?

A: I can have an expert opinion on what the outcome of the hospital would have been....

witness his own

But later the lawyer hands the firm's prior opinion to the fed' govt

Q: If you could turn to page 2 of the document. "It is impt to note that we have not performed a financial projection of any kind ....and therefore are unable to render a formal opinion as to the [viability of the hospital]"? That was true when your company said it?

And after some haggling, eventually the witness admits that the disclaimer "was part of the deliverable to the client"

Why do I share these unpleasant war stories?

Two reasons.

First, no one wants to see you or your professions suffer from disrepute in the eyes of the public.

Be rigidly professional in all your dealings in the legal system.

Don't overstate your credentials or understate your compensation ~~when asked.~~

Don't be induced into taking a position you don't believe is supported by the scientific evidence.

Don't oversell your conclusions or "mold" them to suit a client.

Don't ignore or suppress important caveats or limitation in your testimony

before a jury. Admit readily the limitations of your findings.

Do your homework before rendering a professional opinion in court to the same extent as you would before you publish a piece in a professional journal.

Jurors and judges deserve the same standard of care.

Beware of the temptation of falling into working for one "side" or the other – becoming someone who works strictly for the plaintiff or defense side.

In short, if you bring the same humility, care, and forthrightness to any legal work you take on as you do to your scientific work you will be well served.

But there's a second reason I tell some of these war stories.

In addn to Individually

~~Beyond~~ my concern for you, I want to consider more broadly the problem of what my former law partner, Peter Huber, has called "junk science."

Peter, an MIT PHD and former professor there before going to law school, illustrated the point in this way in his book "Galileo's Revenge"

> "So here it is, Mr Professional Witness USA. He works alone or in partnership with a handful of others. He advertises. His clients gradually learn that they can't risk going without him, for the opposition will surely hire his mirror-image clone from the other referral agency. He is neat but not dapper, respectable but not pompous, mature but not senile. ... He sees himself as a team player who helps with trial preparation, assists in the examination of opposing witnesses, advises on new areas of inquiry. He has honed strong, adversarial instincts . . . he can earn hundreds of dollars an

hour... Where have we seen this character before? In his employer's office. He is the spit and image of a trial lawyer."

And let me give you an example of the sort of science that regularly has been allowed in our courtrooms.

Suppose a stock price declines after the disclosure of a fraud.

But the stock market independently declines at the same time due to general market forces.

For years, many courts allowed experts to "battle it out" before juries in deciding whether or not to find liability – regardless of whether or not an expert could point to any evidence showing that the stock's decline was CAUSED by stock-specific news or general market forces.

Give you concrete example from a recent case before the Supreme Court that I was involved in while still in private practice.

On Feb 24, 1998, a pharmaceutical co. announced a revenue shortfall for the following year – unrelated to any alleged fraud.

The next day, the company's shares dropped from $39 to $21 – a 47% decline.

NINE months later, the company announced that the FDA had declined to approve its product – an announcement that plaintiffs contend constituted the first public disclosure of a fraud designed to cover up the problems associated with the company's product.

Following this disclosure of the alleged fraud, the price dropped only $2 1/2 per share.

Plaintiffs and their experts never sought damages based on this small price decline. Rather they, demanded damages based on the 47% decline NINE months BEFORE the fraud was disclosed on unrelated news.

Only this last Term did the Supreme Court finally resolve this issue, holding - perhaps not surprisingly - that the plaintiff and his or her expert must come forward with SOME evidence showing that the price decline was not caused by general market forces! BUT by the ~~d~~ public disclosure of the alleged fraud

---

What I am getting at here is that as you enter your profession – with so many opportunities before you – you also bear an interest and a responsibility to ensure that

your professions are not abused

That members of your professional societies police their own

And (that the ethics of your professional societies are enforced

In short –

That "junk science" by your colleagues is not permitted go without scrutiny

Now . . .

To be sure, the legal system has to weed out real from junk science.

And courts have done much in this regard in recent years.

With the Supreme Court in a line of cases associated with Daubert, setting forth new requirements regarding the use of science in the court room.

• peer review
• testable/verifiable
• ~~connected to facts of case~~ • closely tailored to actual facts of case • vetting before goes to jury

But frankly judges and lawyers cannot ~~achieve~~ this alone.

address the prob. of junk science alone

Just as we need you to help us understand the complex and difficult questions that arise in litigation,

We ALSO need scientists to help us monitor and scrutinize themselves to ensure that what we use is QUALITY science, not junk science.

Your professions are, after all in the best position to separate quality from ~~the junk~~ shoddy science

Some professional societies are doing this now.

But as science enters the court room more every day, this issue will grow in importance and the role of you and your professional societies will become more important to ensure that the public continues to hold your professions in the high esteem they enjoy today.

I encourage you to participate in that process.
It is in your prof's interest
your interest
and, ultimately, the public's interest

U.S. Department of Justice 851261

Office of Justice Programs

Office of the Assistant Attorney General

Washington, D.C. 20531

AUG 12 2005

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL RDM 8/17/05

FROM: Regina B. Schofield RBS
Assistant Attorney General

SUBJECT: Bullet-resistant Vests

RECEIVED
DEPT OF JUSTICE
2005 AUG 12 PM 1:21
EXECUTIVE SECRETARIAT

PURPOSE:

- To provide the Attorney General with a copy of the *Third Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities*, published by the Office of Justice Programs' National Institute of Justice.
- To seek approval for certain changes to the Bulletproof Vest Partnership program operated by the Office of Justice Programs' Bureau of Justice Assistance and to the requirements of the voluntary body armor compliance testing program of the National Institute of Justice.
- To provide a plan to announce the release of the report and to inform key audiences about the Department's commitment to the safety of our nation's law enforcement officers.

TIMETABLE: As soon as possible.

BACKGROUND:

In November 2003, Attorney General Ashcroft directed the Office of Justice Programs (OJP) to implement a number of priority projects in response to the failure of a body armor vest worn by a police officer in Pennsylvania. Collectively, these projects are known as the Attorney General's Body Armor Safety Initiative and include the examination of new and used Zylon®-based bullet-resistant vests and the review of the National Institute of Justice's (NIJ) existing compliance testing program. NIJ has issued two status reports to the Attorney General containing results from its body armor studies; they are available at https://vests.ojp.gov. NIJ is now transmitting its third report that details the results of ballistics testing and research on Zylon®-containing body armor. NIJ prepared the report in collaboration with its technical partner, the Office of Law Enforcement Standards within the National Institute of Standards and Technology, U.S. Department of Commerce.

The vest worn by the officer in Pennsylvania was manufactured by Second Chance Body Armor, Inc., and contained ballistic-resistant fiber known as Zylon®. Various state Attorneys General have filed suits against Second Chance and Toyobo Co., Ltd. (the manufacturer of Zylon® fiber). On June 22, 2005, Second Chance issued a public statement alleging that penetrations of Zylon® body armor are due to residual acid in Zylon® fibers (essentially attempting to cast liability for the vest failure on the fiber manufacturer). Toyobo has denied these Second Chance allegations.

On June 30, 2005, the Department of Justice filed suit against both Second Chance and Toyobo, alleging, among other things, that the two companies suppressed evidence that the Zylon® fiber degraded substantially faster than expected when exposed to light, heat, and humidity, and sold Zylon®-containing vests to the U.S. government, knowing them to be defective. *United States v. Second Chance, et al.*, CV-No. 04-280 (D.D.C.).

NIJ has now completed ballistic and mechanical properties testing on 103 used Zylon®-containing body armor vests provided by law enforcement agencies across the United States. Sixty of these used vests (58%) were penetrated by at least one round during a six-shot test series. Of the vests that were not penetrated, 91% showed excessive backface deformation, an indicator of the potential blunt trauma experienced by the officer wearing the armor. Only four of the used Zylon®-containing vests met all performance criteria expected under the NIJ standard for new body armor compliance.

Although these results do not conclusively prove that all Zylon®-containing body armor models have performance problems, the results clearly show that used Zylon®-containing body armor may not provide the intended level of ballistic resistance. In addition, the results imply that a visual inspection of a vest and its ballistic panels does not indicate whether a particular piece of Zylon®-containing body armor has maintained its ballistic performance. NIJ is now prepared to announce these results through the *Third Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities*.

We estimate that 240,000 State and local law enforcement officers have vests that contain Zylon® fibers. Statements by Second Chance and Toyobo, and the various lawsuits against one or both of them, raise (or have failed to remove) significant concerns in the law enforcement community about the safety of these officers. The release of NIJ's third status report is likely to compound these concerns.

The Bureau of Justice Assistance (BJA) is receiving inquiries as to whether its Bulletproof Vest Partnership program (BVP) will pay for the costs of vests to replace those that contain Zylon®. The BVP program is designed to provide a critical resource to State and local law enforcement that otherwise would not be available. The BVP program funds up to 50% of the costs of each vest purchased or replaced by law enforcement applicants. Eligible law enforcement officers include police officers, sheriff deputies, correctional officers, parole and probation agents, prosecutors, and judicial officials. Only body armor models that comply with NIJ requirements may be purchased with BVP program funds. The BVP program regulations, at 28 C.F.R. § 33.101, provide in pertinent part that BJA "will assist your jurisdiction in

determining which type of armor vest will best suit your jurisdiction's needs, and will ensure that each armor vest obtained through the program meets the NIJ standard."

RECOMMENDATIONS:

1. A. We recommend the development and implementation by NIJ of a new replacement standard for bullet-resistant body armor, applicable to all manufacturers that participate in the NIJ voluntary compliance testing program, that takes into account not only the performance of new (unused) body armor, but also the potential for degradation in performance over the reasonably expected life of the armor.

APPROVE: _____ Date: _____

DISAPPROVE: _____ Date: _____

OTHER: _____ Date: _____

1. B. Pending completion of the new replacement standard, to aid in ensuring the protection of officers by body armor that maintains its ballistic performance during its entire warranty period, we recommend that NIJ adopt interim requirements for its body armor compliance testing program and issue advisory notices listing materials whose ballistic performance appears to degrade significantly. Pursuant to these steps, models containing any material (such as Zylon®) listed on an NIJ advisory notice would not be compliant, unless their manufacturers provide satisfactory evidence to NIJ that the models will maintain their ballistic performance over their declared warranty period.

APPROVE: _____ Date: _____

DISAPPROVE: _____ Date: _____

OTHER: _____ Date: _____

1. C. We recommend that NIJ prepare within 45 days a detailed plan for assessments of certifications submitted by manufacturers pursuant to NIJ's interim requirements. The assessments will aid in ensuring that body armor models found or deemed compliant with such interim requirements, in fact maintain their ballistic performance during their respective declared warranty periods.

APPROVE: _____ Date: _____

DISAPPROVE: _____ Date: _____

OTHER: _____ Date: _____

2. We recommend that OJP make $33.6 million available to distribute to law enforcement through the BVP Program, to assist in the purchase of vests as follows: $23.6 million from FY05 BVP Program funding and $10 million from OJP deobligated funds. In addition, we recommend that OJP pursue the reprogramming of $17.8 million, from the Police Corps Program, for this purpose.

APPROVE: _____ Date: _____

DISAPPROVE: _____ Date: _____

OTHER: _____ Date: _____

3. We recommend that, until the effective date of the NIJ interim requirements (referred to above), BJA provide that jurisdictions that participate in the BVP program will be ineligible to receive payment for new orders placed for any bullet-resistant body armor models containing any material listed on an NIJ body armor standard advisory notice.

APPROVE: _____ Date: _____

DISAPPROVE: _____ Date: _____

OTHER: _____ Date: _____

4. We recommend that OJP, in conjunction with OIPL, hold a briefing for law enforcement stakeholder group representatives. OJP, in coordination with OLA and JMD, will notify and brief appropriations and authorization staff.

APPROVE: _____ Date: _____

DISAPPROVE: _____ Date: _____

OTHER: _____ Date: _____

5. We recommend that the Attorney General sign the attached letters to the other Cabinet heads, which inform them about the findings of the report and encourage them to share the report with the enforcement units in their departments.

APPROVE: _____ Date: _____

DISAPPROVE: _____ Date: _____

OTHER: _____ Date: _____

Attachments

* *Third Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities*
* Executive Summary of the *Third Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities*
* NIJ 2005 Interim Requirements for Bullet-Resistant Body Armor
* NIJ Body Armor Standard Advisory Notice #1-2005
* Talking points
* Q & As
* Letters for the Attorney General's Signature

The Honorable

Dear :

I am pleased to provide you with the enclosed Third Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities, prepared by the National Institute of Justice, Office of Justice Programs, Department of Justice, in collaboration with its technical partner, the Office of Law Enforcement Standards, National Institute of Standards and Technology, Department of Commerce.

The report details the results of extensive ballistics testing on body armor made of Zylon fiber. I urge you to review the report carefully, and to share it with your law enforcement and security units, as it contains critical findings that well may bear upon their body armor choices and procurement decisions.

Please direct any questions you may have to Regina B. Schofield, Assistant Attorney General, Office of Justice Programs; she may be reached on 202/307-5933.

Sincerely,

Alberto R. Gonzales
Attorney General

Enclosure

NIJ

Special REPORT

Third Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities

www.ojp.usdoj.gov/nij

Aug. XX, 2005

U.S. Department of Justice
Office of Justice Programs
810 Seventh Street N.W.
Washington, DC 20531

Alberto R. Gonzales
Attorney General

Regina B. Schofield
Assistant Attorney General

Sarah V. Hart
Director, National Institute of Justice

This and other publications and products of the National Institute of Justice can be found at:

National Institute of Justice
www.ojp.usdoj.gov/nij

Office of Justice Programs
Partnerships for Safer Communities
www.ojp.usdoj.gov

NIJ

AUG. XX, 2005

Third Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities

NCJ 210418

NIJ

Sarah V. Hart
Director

Cover photograph of law enforcement officer by Larry Levine, courtesy of the Washington Metropolitan Area Transit Authority, 2001.

The National Institute of Justice is a component of the Office of Justice Programs, which also includes the Bureau of Justice Assistance, the Bureau of Justice Statistics, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime.

About the National Institute of Justice

NIJ is the research, development, and evaluation agency of the U.S. Department of Justice. NIJ's mission is to advance scientific research, development, and evaluation to enhance the administration of justice and public safety. NIJ's principal authorities are derived from the Omnibus Crime Control and Safe Streets Act of 1968, as amended (see 42 U.S.C. §§ 3721–3723), and Title II of the Homeland Security Act of 2002.

The NIJ Director is appointed by the President and confirmed by the Senate. The Director establishes the Institute's objectives, guided by the priorities of the Office of Justice Programs, the U.S. Department of Justice, and the needs of the field. The Institute actively solicits the views of criminal justice and other professionals and researchers to inform its search for the knowledge and tools to guide policy and practice.

Strategic Goals

NIJ has seven strategic goals grouped into three categories:

Creating relevant knowledge and tools

1. Partner with State and local practitioners and policymakers to identify social science research and technology needs.
2. Create scientific, relevant, and reliable knowledge—with a particular emphasis on terrorism, violent crime, drugs and crime, cost-effectiveness, and community-based efforts—to enhance the administration of justice and public safety.
3. Develop affordable and effective tools and technologies to enhance the administration of justice and public safety.

Dissemination

4. Disseminate relevant knowledge and information to practitioners and policymakers in an understandable, timely, and concise manner.
5. Act as an honest broker to identify the information, tools, and technologies that respond to the needs of stakeholders.

Agency management

6. Practice fairness and openness in the research and development process.
7. Ensure professionalism, excellence, accountability, cost-effectiveness, and integrity in the management and conduct of NIJ activities and programs.

Program Areas

In addressing these strategic challenges, the Institute is involved in the following program areas: crime control and prevention, including policing; drugs and crime; justice systems and offender behavior, including corrections; violence and victimization; communications and information technologies; critical incident response; investigative and forensic sciences, including DNA; less-than-lethal technologies; officer protection; education and training technologies; testing and standards; technology assistance to law enforcement and corrections agencies; field testing of promising programs; and international crime control.

In addition to sponsoring research and development and technology assistance, NIJ evaluates programs, policies, and technologies. NIJ communicates its research and evaluation findings through conferences and print and electronic media.

To find out more about the National Institute of Justice, please visit:

http://www.ojp.usdoj.gov/nij

or contact:

National Criminal Justice
Reference Service
P.O. Box 6000
Rockville, MD 20849–6000
800–851–3420
e-mail: *askncjrs@ncjrs.org*

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Executive Summary

On November 17, 2003, Attorney General John Ashcroft announced the U.S. Department of Justice's Body Armor Safety Initiative in response to concerns from the law enforcement community regarding the effectiveness of body armor in use. These concerns followed the failure of a relatively new Zylon®-based[1] body armor vest worn by a Forest Hills, Pennsylvania, police officer. The Attorney General directed the National Institute of Justice (NIJ) to initiate an examination of Zylon®-based bullet-resistant armor (both new and used), to analyze upgrade kits provided by manufacturers to retrofit Zylon®-based bullet-resistant armors, and to review the existing program by which bullet-resistant armor is tested to determine if the process needs modification.

As part of the Body Armor Safety Initiative, NIJ has issued two status reports to the Attorney General containing results from the body armor studies.[2] The first two status reports highlighted the following findings:

- Ballistic-resistant material, including Zylon®, can degrade due to environmental factors, thus reducing the ballistic resistance safety margin that manufacturers build into their armor designs.
- The ultimate tensile strength[3] of single yarns removed from the rear panel of the Forest Hills armor was up to 30-percent lower than that of yarns from "new" armor supplied by the manufacturer. Artificially-aged armor of the same type that failed in the Forest Hills incident was ballistically tested, but no bullet penetrations occurred.[4]
- The upgrade kits tested did not appear to bring used armor up to the level of performance of new armor. However, used armors with upgrade kits performed better than the used armors alone.

NIJ has now completed ballistic and mechanical properties testing on 103 used Zylon®-containing body armors provided by law enforcement agencies across the United States. Sixty of these used armors (58%) were penetrated by at least one round during a six-shot test series. Of the armors that were not penetrated, 91% had backface deformations in excess of that allowed by

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[1] Zylon® (PBO fiber – poly-*p*-phenylene benzobisoxazole) is a high-strength organic fiber produced by Toyobo Co., Ltd. Zylon® is a registered trademark of Toyobo Co., Ltd.

[2] "Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities," March 11, 2004, and "Supplement I: Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities," December 27, 2004.

[3] Ultimate tensile strength is the maximum stress (force per unit area) that a material, in this case a Zylon® yarn, can withstand prior to failure. All Zylon® yarns were nominally 500 denier; *i.e.*, the yarns did not vary in linear density or effective cross-sectional area.

[4] NIJ continues to study the Forest Hills body armor penetration, to resolve the cause of that failure.

the NIJ standard for new armor. Only four of the used Zylon®-containing armors met all performance criteria expected under the NIJ standard for new body armor compliance.

Although these results do not conclusively prove that all Zylon®-containing body armor models have performance problems, the results clearly show that **used Zylon®-containing body armor may not provide the intended level of ballistic resistance.** In addition, the results imply that a visual inspection of body armor and its ballistic panels does not indicate whether a particular piece of Zylon®-containing body armor has maintained its ballistic performance.

Part of the Body Armor Safety Initiative entailed an applied research component that examined material properties of Zylon® in order to understand the causes of the ballistic failures. Zylon® fibers show a systematic loss in tensile strength, tensile strain, and ballistic performance correlated with the breakage of specific bonds in the chemical structure of the material.

Preliminary findings from the applied research effort indicate that:

- It is likely that the ballistic performance degradation in Zylon®-containing armors is closely related to the chemical changes in poly-*p*-phenylene benzobisoxazole (PBO), the chemical basis of Zylon® fiber. The breakage of one particular part of the PBO molecule, known as the oxazole ring, correlates with degradation of the mechanical properties of Zylon® fibers. The breakage in the oxazole ring can be monitored using an analysis technique known as Fourier transform infrared (FTIR) spectroscopy.
- Preliminary investigations into Zylon® degradation mechanisms have suggested that oxazole-ring breakage occurs as a result of exposure to both moisture and light.
- When there was no potential for external moisture to contact Zylon® yarns, there was no significant change in the tensile strength of these yarns. External moisture may be necessary to facilitate the degradation of Zylon® fibers.

Based on the direction from the Attorney General and recommendations from the law enforcement community, NIJ has examined its body armor compliance testing program. The current NIJ testing program is based on the ballistic resistance of new armor and does not take into account performance degradation in used armor. NIJ is concerned that Zylon® and other materials may be incorporated into body armor, with minimal understanding of performance degradation that may result from environmental exposures. NIJ's research indicates that its testing program should take into account the possibility of ballistic performance degradation over time.

NIJ intends to adopt interim changes to its body armor compliance testing program, to aid in ensuring that officers are protected by body armor that maintains its ballistic performance during its entire warranty period. These actions are set forth in detail in Section VI of this report. Under the NIJ 2005 Interim Requirements for Bullet-Resistant Body Armor, armor models containing PBO (the chemical basis of Zylon®) will not be compliant, unless their manufacturers provide satisfactory evidence to NIJ that the models will maintain their ballistic performance over their declared warranty period.

All manufacturers will be required to submit information concerning materials used in the construction of any armor submitted for testing.

NIJ will recommend that those who purchase new bullet-resistant body armor select body armor models that comply with the NIJ 2005 Interim Requirements for Bullet-Resistant Body Armor. A list of models that comply with the requirements will be made available at http://www.justnet.org.

NIJ will also encourage manufacturers to adopt a quality-management system to ensure the consistent construction and performance of NIJ-compliant armor over its warranty period. In the future, NIJ will issue advisories to the field regarding materials used in the construction of body armor that appear to create a risk of death or serious injury as a result of degraded ballistic performance. Any body armor model that contains any material listed in such an advisory will be deemed no longer NIJ-compliant unless and until the manufacturer satisfies NIJ that the model will maintain its ballistic performance over its declared warranty period. NIJ will continue its research and evaluation program to determine what additional modifications to the requirements of NIJ's compliance testing program may be appropriate, to understand better the degradation mechanisms affecting existing or new ballistic materials, and to develop test methods for the ongoing performance of body armor.

NIJ continues to encourage public safety officers to wear their Zylon® - containing armor until it is replaced. Even armor that may have degraded ballistic performance is better than no armor.

I. Introduction

In the summer of 2003, a Forest Hills, Pennsylvania, police officer was shot and seriously injured when a bullet penetrated the front panel of his Second Chance Ultima® armor, an armor made of multiple layers of fabric woven from Zylon® yarn. The incident was the first case reported to the National Institute of Justice (NIJ) in which NIJ-compliant body armor appears to have failed to prevent penetration from a bullet it was designed to defeat. Promptly after learning of this potential armor failure, NIJ initiated a review of the incident to determine the potential causes of failure.

On November 17, 2003, former Attorney General John Ashcroft announced the U.S. Department of Justice's Body Armor Safety Initiative in response to concerns from the law enforcement community regarding the effectiveness of their armor. He directed NIJ to initiate an examination of Zylon®-based bullet-resistant armor (both new and used), to analyze upgrade kits provided by manufacturers to retrofit Zylon®-based bullet-resistant armors, and to review the existing process by which bullet-resistant armor is certified to determine if the process needs modification. To accomplish these goals, NIJ has worked in collaboration with its technical partners, the Office of Law Enforcement Standards at the National Institute of Standards and Technology and the National Law Enforcement and Corrections Technology Center–National.

Previously, NIJ has issued two status reports to the Attorney General containing results from their body armor studies.[5] The reports, available at https://vests.ojp.gov/index.jsp, contained the following key findings:

- Ballistic-resistant material, including Zylon®, can degrade, thus reducing the ballistic resistance safety margin that manufacturers build into their armor designs. Certain analytical tools and techniques may be available to reveal and measure degradation in Zylon® and other ballistic-resistant fibers.
- The ultimate tensile strength of single yarns removed from the rear panel of the Forest Hills armor were up to 30-percent lower than yarns from "new" armors supplied by Second Chance Body Armor. Armors of the same type that failed in the Forest Hills incident were artificially aged and ballistically tested with the intent of focusing on five major variables that were believed to be potential contributors to the Forest Hills armor penetration. No penetrations were observed during testing. [Note: At the time, no definitive conclusions could be drawn, and efforts continue to explain the cause of the Forest Hills body armor penetration.]
- Upgrade kits did not appear to bring used Second Chance armor up to the level of performance of new Second Chance armor.
- In Phase I testing ("Worst Case Conditions"), 10 of the 18 used Zylon®-containing armors were penetrated by at least one round during the 6-shot ballistic testing series. The findings suggested that there may be degradation occurring in the ballistic-resistant performance of used Zylon®-containing body armor. Because of the small sample size, it was not possible to draw any statistically based conclusions about specific manufacturers, models, service life, or geographical regions.

Toyobo, the manufacturer of Zylon®, has reported that the strength of Zylon® decreases under conditions of high temperature, high humidity, and exposure to ultraviolet (UV) and visible light.[6] To combat the effects of light and humidity, ballistic panels made from Zylon® must be protected.

In addition, several body armor manufacturers have released statements, recalls, and warranty-adjustment notices as a result of Zylon®-related concerns. NIJ has reviewed this publicly available information but has not consulted with manufacturers concerning any specific actions taken by armor manufacturers concerning Zylon®-containing body armor.

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[5] "Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities," March 11, 2004, and "Supplement I: Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities," December 27, 2004.

[6] Technical Information Bulletin, "PBO Fiber Zylon®," Toyobo Co., Ltd., revised 2001.

NIJ has found that over 260 different models of Zylon®-containing ballistic body armor from 16 different manufacturers comply with NIJ's current standard, NIJ Standard–0101.04, or its predecessor, NIJ Standard–0101.03. Preliminary information from the U.S. Department of Justice's Bulletproof Vest Partnership Program indicates that, as of 2003, more than 240,000 Zylon®-containing armors may have been in field use, and information from additional sources suggests the number may have been greater.

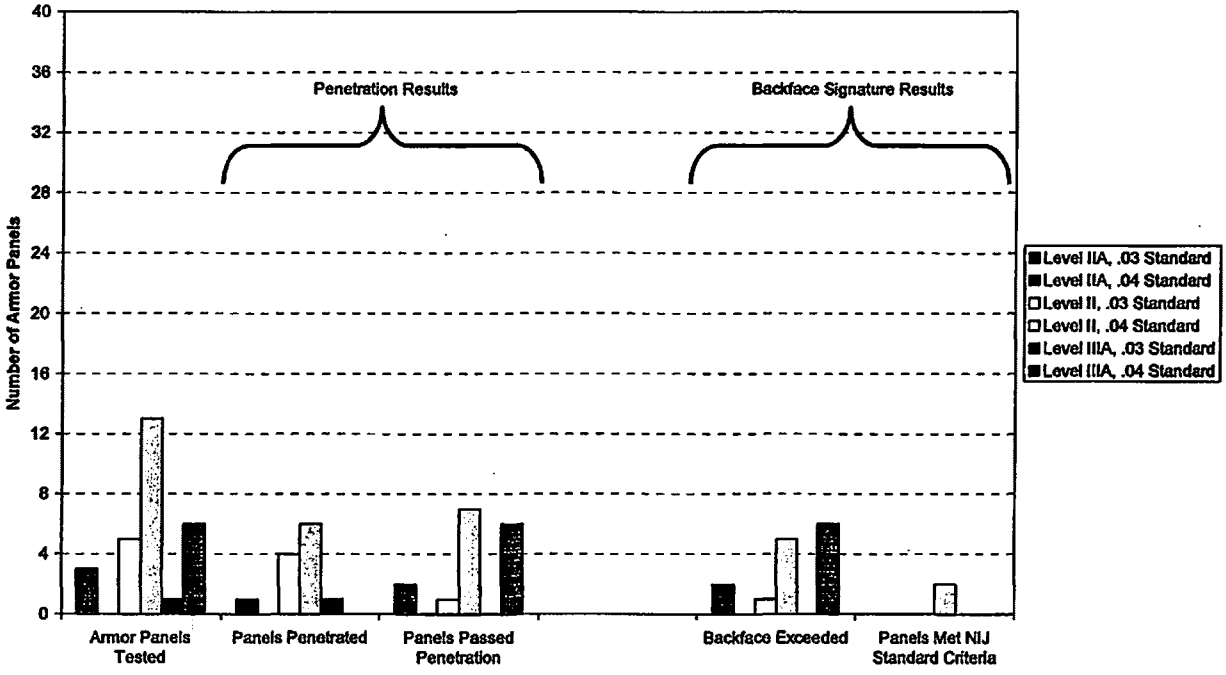
This supplement will report on findings from NIJ's broad-based ballistic testing of Zylon®-containing armors obtained from law enforcement agencies across the United States. In addition, this supplement will describe critical findings concerning performance degradation mechanisms of Zylon®-containing armors based on NIJ's applied research.

II. Supplemental Results From Phase I Testing

Since the first two status reports were submitted to the Attorney General, NIJ has tested 10 additional Zylon®-containing armors as part of Phase I of its multiphase test plan. Testing of the 10 armors concludes Phase I of NIJ's Body Armor Safety Initiative.

All of the Zylon®-containing armors tested in Phase I showed a general decline in performance. The front panels from 28 armors (18 originally reported plus the 10 additional armors) were tested with the 6-shot ballistic testing protocol described in the first report to the Attorney General. Penetrations were observed in 12 of the 28 samples (43%). Results are shown in Figure 1 and Appendix A. Backface signature results are presented for armors that passed penetration testing.

Figure 1. Summary of Phase I (Worst Case) P-BFS Testing



NIJ measured the tensile strength of the yarns from 22 of the 28 front armor panels tested in the 6-shot penetration test series. The mean ultimate tensile strength and comparison to a baseline value is shown in Figure 2 and Appendix B. There is no way to know the actual "new armor" yarn tensile strength for each armor panel, so a baseline value of 4.78 GPa[7] was assumed to apply to all woven Zylon® samples. This baseline value was determined on the basis of average tensile strength measurements of yarns that were taken from woven Zylon® fabric. The fabrics were cut from newly constructed Zylon® armor panels that had been manufactured in September 2003 and tensile tested in October 2003. The baseline tensile strength provides some indication of how much tensile strength is lost after the armor has been manufactured. For yarns from the 22 panels studied, ultimate tensile strength losses averaged 41% (with a minimum loss of 11% and a maximum loss of 61%). Reductions in mechanical properties, such as tensile strength, may have a detrimental effect on ballistic performance.

The back panels from the 28 armor samples were subjected to ballistic limit testing.[8] Figure 3 compares these ballistic limit values to baseline ballistic limit values from new armors of the same type (available for 19 of the 28 armor samples tested). The diagonal line in the figure

[7] GPa, or gigapascal, is a unit that describes the force exerted over an area.

[8] Ballistic limit testing estimates the velocity at which a given bullet is expected to completely penetrate a body armor panel 50 percent of the time. These tests used a conventional full metal jacketed 9-mm bullet weighing approximately 8 grams (124 grains).

represents the baseline ballistic limit, i.e., the ballistic limit that would be seen if the armor had performed as well as it did when new. Therefore, points above the diagonal line represent improved performance, while points below the line represent degraded performance. Because of the limitations of the ballistic limit test methodology, differences of approximately 100 ft/s are probably not significant, but greater differences suggest a significant loss in performance. Nine of the 19 armors exhibit such a performance loss. Those nine are shown as a shaded red circle in Figure 3.

Figure 2. Tensile Strength of Zylon® Yarns

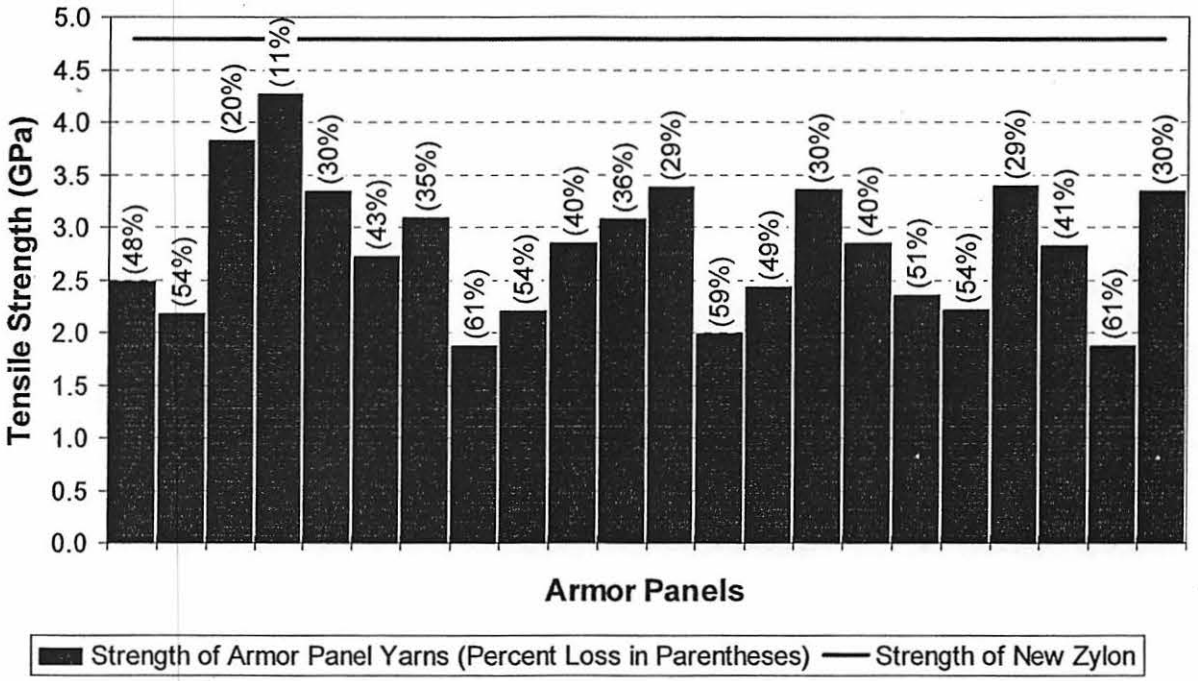
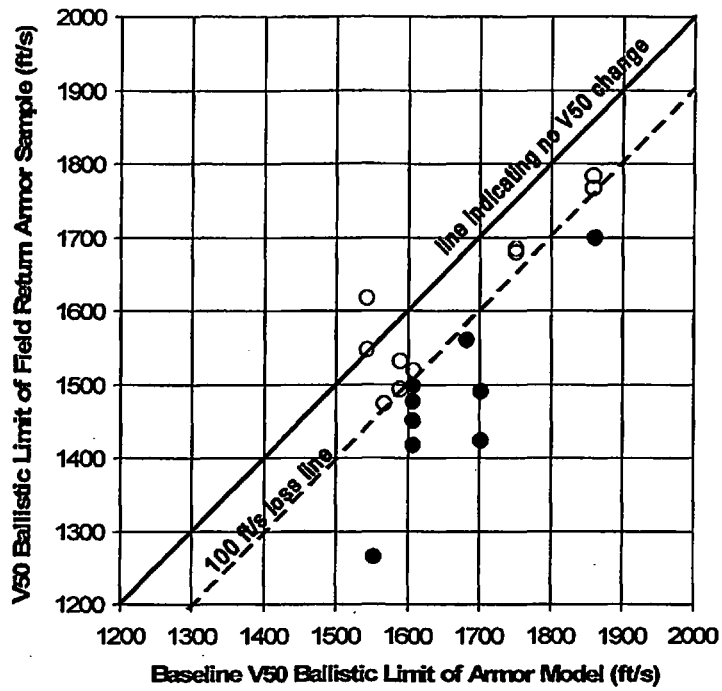


Figure 3. Comparison of Baseline and Field Return Ballistic Limit (V50) Values



Conclusions based on Phase I results are limited by several concerns with the test methodology: sample sizes were limited, they were not random, they did not represent the wide variety of models and manufacturers, and the environments to which these armor specimens were exposed are not known. Despite the limitations, these results continue to support the working theory that degradation is occurring in the ballistic performance of used Zylon®-containing armors.

III. Phase II Testing Results

Following the test failures observed in Phase I, NIJ's Phase II test plan was designed to examine the effects of age, climate, and armor design on armor performance. This broad-based testing phase was intended to determine the ongoing performance and reliability of Zylon® body armor in field use based on a statistically representative sample of armors in use by law enforcement. However, this phase was hindered by the lack of available armor to test. The test plan initially called for the evaluation of nearly 500 armor samples, but NIJ was able to obtain less than 80 armors for two primary reasons: first, some major manufacturers of Zylon® armors initiated buyout or replacement programs for many of their Zylon®-containing armor models, which greatly reduced the number of available armors in the field. Second, NIJ found discrepancies

between what armor models were believed to be in use and what law enforcement agencies actually had in service.

A total of 75 Zylon®-containing body armors were examined during the initial part of Phase II testing. One panel was randomly selected from each armor and subjected to penetration-backface signature[9] (P-BFS) testing in a protocol similar to that used during Phase I testing. Each panel was tested using the two different calibers associated with the armor's classification (Type IIA, Type II, or Type IIIA). Three shots of each caliber consistent with the NIJ Standard were fired (for a total of six shots), with one of the three shots for each caliber fired at a 30-degree impact angle. Unlike Phase I, during the Phase II P-BFS tests, all of the armor panels were tested in a wet condition in accordance with the NIJ standard.

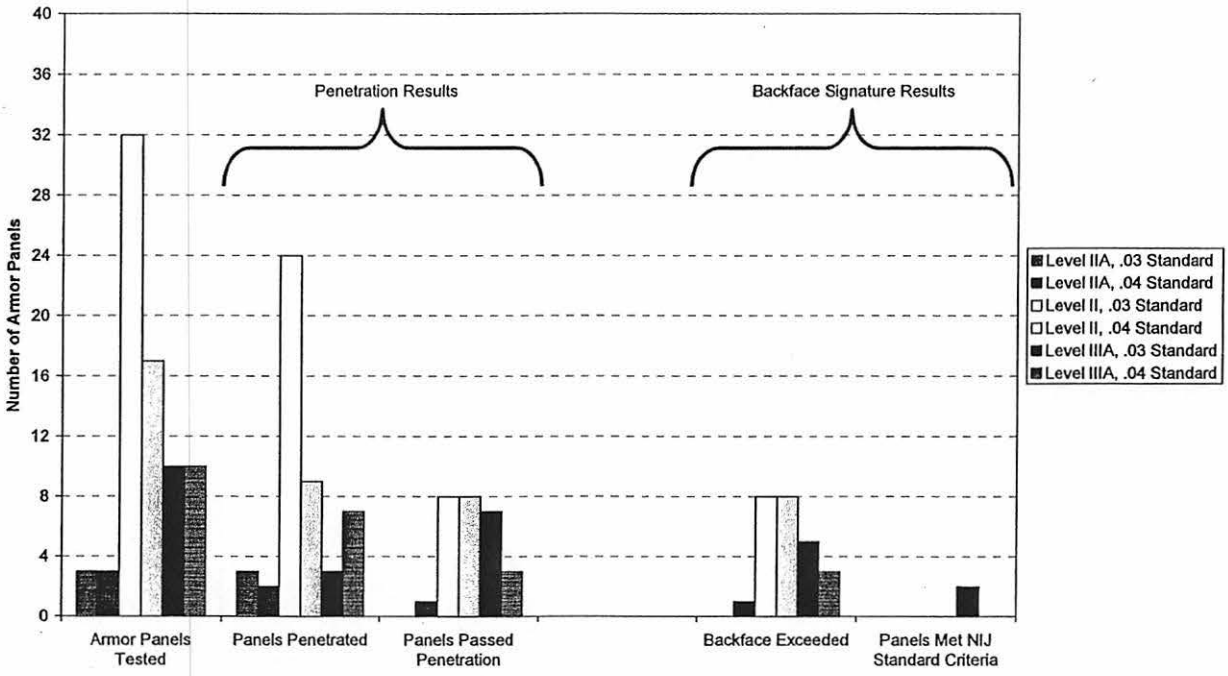
During the final part of Phase II testing, the companion panels will be subjected to ballistic limit testing to determine if, and how much, the ballistic limit has shifted since the armor model was originally tested for compliance to an NIJ standard. Zylon® yarns will be taken from selected armor panels and subjected to tensile testing. These results will be described in a subsequent report.

A large number of the tested armor samples experienced penetrations and/or backface signatures that exceeded the maximum allowable limit of 44 mm (1.73 in) specified in the NIJ standard. Penetrations were observed in 48 of the 75 (64%) armor panels; 34 (45%) were penetrated more than once. Ten of the 75 (13%) armor panels were penetrated by all six rounds. Of the 27 armor panels that were not penetrated, all but two experienced at least one excessive backface signature. Figure 4 shows the number of armors tested from each threat level and test standard and summarizes the results of the P-BFS tests. Appendix C contains the complete results. Appendix D summarizes the data for specific armor types.

While these results do not conclusively prove that all Zylon®-containing body armor models have performance issues, they clearly show that ***used Zylon®-containing body armor may not provide the intended level of ballistic resistance.***

[9] Backface Signature (BFS): when armor is tested, it is mounted on clay backing materials whose consistency is controlled. After the shot, the depth of the clay deformation behind the armor panel is measured and recorded as the BFS.

Figure 4. Summary of Phase II P-BFS Testing



A. Analysis of Results by Age of Armor

The 75 armors tested in the Phase II P-BFS tests ranged in age from 17 to 71 months. Fifty-three were less than 5 years old, or within the standard warranty period for most body armor (although the warranty period for some of these vests is as low as 30 months). Of these 53 armors, 35 (66%) were penetrated. Twelve armors were between 60 and 70 months old, exceeding the warranty period by up to 10 months. Of these 12 older armors, eight (67%) were penetrated. The age of 10 armors could not be determined; five of the 10 (50%) were penetrated.

Table 1 lists the performance of the tested armors by age. There is no clear correlation between armor age and penetration rate. These results imply that used Zylon®-containing armor may not provide the intended level of ballistic protection, regardless of age, although the number of armors in this data set with less than two years of service life is quite limited.

Table 1. Results of Penetration Testing with Respect to Age

Age of armors (months)	Number tested	Number passed Penetration	Number Penetrated	Percent Penetrated
less than 24	2	1	1	50%
24 to 30	4	1	3	75%
30 to 36	6	3	3	50%
36 to 42	5	1	4	80%
42 to 48	15	4	11	73%
48 to 54	8	1	7	88%
54 to 60	13	7	6	46%
60 to 66	8	1	7	88%
66 to 72	4	3	1	25%
unknown	10	5	5	50%

Note: Shaded areas are armors whose age is beyond the standard warranty period of 60 months

B. Analysis of Results by Percentage of Zylon® in Armor

The percentage of Zylon® material in the ballistic resistant panels varied greatly between the armor models. For the purposes of this study, the percentage of Zylon® material in a model of armor was calculated by dividing the number of layers in the ballistic panel that were constructed from either woven Zylon® yarns or laminated sheets of Zylon® fibers by the total number of material layers. Four of the armors tested contained less than 15% Zylon®. Of these, none experienced penetrations during testing. No armors were tested that contained between 15% and 25% Zylon®. Three of nine armors containing 25% to 30% Zylon® layers experienced penetrations. For the groups of armors containing more than 30% Zylon®, the penetration rates ranged from 60% to 100%. Table 2 lists the penetration rates for groups of armors with various percentages of Zylon® layers. These results clearly indicate that used armors containing more than a small percentage of Zylon® material are unlikely to reliably provide the intended level of ballistic protection.

Table 2. Results of Penetration Testing with Respect to Quantity of Zylon®

Fraction of Layers Containing Zylon®	Number Tested	Number Passed Penetration	Number Penetrated	Percent Penetrated
Less than 15%	4	4	0	0
15% to 25%	0	-	-	-
25% to 30%	9	6	3	33%
30% to 35%	11	0	11	100%
35% to 50%	5	2	3	60%
50% to 75%	11	3	8	73%
75% to 99%	4	0	4	100%
100%	31	12	19	61%

C. Analysis of Results by Threat Round

During NIJ compliance testing of levels IIA, II, and IIIA armor, each armor model is shot with two threats: a 9 mm bullet and either a 40 S&W, 357 Magnum, or 44 Magnum bullet (hereafter referred to as the "other" round) depending on the armor's threat level. These threat rounds are intended to subject the armor to both penetrative and blunt trauma threats.

Table 3 lists which threat round penetrated armors for each of the threat levels. Of the 48 armors that were penetrated, 25 were penetrated by both rounds, six by the 9 mm round only, and 17 by the other round only. These results indicate that both threat rounds may be nearly as penetrative. Therefore, both rounds should be considered to determine the ballistic performance of a particular armor.

Table 3. Results of Penetration Testing with Respect to Threat Round

Armor Type				Number of Armors Penetrated			
Threat Level	NIJ Standard	Number Tested	Number Passed Penetration	Either Round	9 mm	Other Threat	Both Rounds
All Armors		75	27 (36 %)	48 (64 %)	31 (41 %)	42 (56 %)	25 (33 %)
IIA	.03	3	0 (0 %)	3 (100 %)	3 (100 %)	1 (33 %)	1 (33 %)
	.04	3	1 (33 %)	2 (67 %)	2 (67 %)	0 (0 %)	0 (0 %)
II	.03	32	8 (25 %)	24 (75 %)	13 (41 %)	23 (72 %)	12 (38 %)
	.04	17	8 (47 %)	9 (53 %)	4 (24 %)	9 (53 %)	4 (24 %)
IIIA	.03	10	7 (70 %)	3 (30 %)	3 (30 %)	3 (30 %)	3 (30 %)
	.04	10	3 (30 %)	7 (70 %)	6 (60 %)	6 (60 %)	5 (50 %)

D. Analysis of Results by Armor Condition

All armors tested as part of the DOJ Body Armor Safety Initiative were visually inspected and given a condition rating that indicated how well worn or damaged the armor was before testing. The condition ratings range from Condition 1 for armor that appeared to be "like new" to Condition 4 for armors that showed signs of extreme wear or abuse. The armors tested during Phase II P-BFS tests ranged from Condition 2 (light to moderate wear) to Condition 4; the vast majority rated Condition 3 (significant wear - daily use for extended period) or Condition 4.

Table 4 lists the test results based on the armor condition rating. More than half the armor in each condition category was penetrated. There appears to be no correlation between condition ratings and performance. The results imply that a visual inspection of the armor and its ballistic panels cannot determine if a particular piece of Zylon®-containing body armor will perform acceptably.

Table 4. Results of Penetration Testing with Respect to Armor Condition

Condition Rating	Explanation	Number Tested	Number Passed Penetration	Number Penetrated	Percent Penetrated
Note that the armor condition rating is based on a visual inspection.					
1	Armors that show no visible signs of wear and is in new or "like new" condition.	0	0	0	-
2	Armors that show light to moderate signs of wear.	10	4	6	60%
3	Armors that show significant signs of wear (daily use for extended period).	34	15	19	56%
4	Armors that show signs of extreme wear or abuse.	31	8	23	74%

IV. Results of Phase I and Phase II Ballistic Testing

Although the test methodologies and sampling criteria were slightly different between Phase I and Phase II, combined ballistic test results for the 103 Zylon®-containing armor samples demonstrate that much of the used Zylon®-containing armor did not maintain ballistic performance in field use. Table 5 and Figure 5 show the combined test results from Phases I and II. Key findings are:

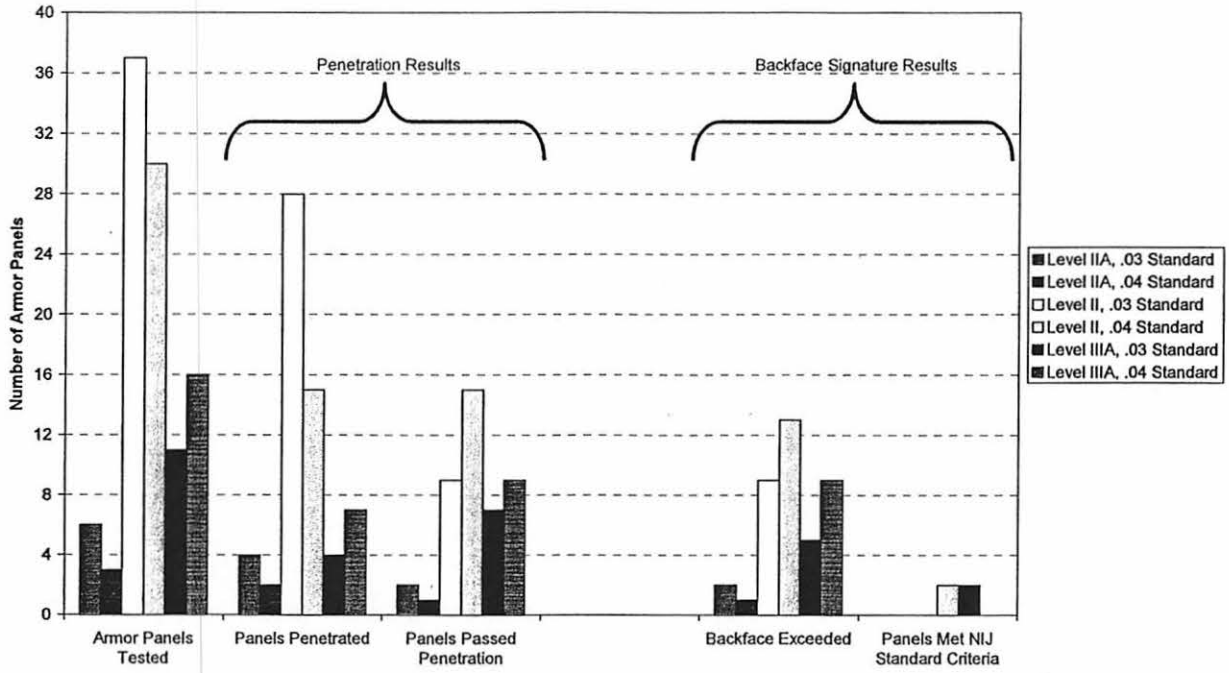
- Zylon®-containing armor may not provide the intended level of ballistic protection.

- Ballistic limits of used armor samples were generally less than the original compliance samples. In many cases there were declines in ballistic limit values of 100 ft/s or more.
- Zylon® yarns taken from used armor samples exhibited degraded tensile strength characteristics.
- Age and visual examination did not correlate with demonstrated ballistic performance, thus they appear to be ineffective indicators of potential ballistic performance.
- Of the used armor samples that were not penetrated, nearly all exhibited higher backface signatures than permitted by the NIJ Compliance Testing Program.

Table 5. Overview of Phase I and Phase II P-BFS Tests

	Phase I	Phase II	Combined
Armor Selection	Worst case armors from selected agencies	Much larger number of Zylon® armors in BVP database	
Test Conditions	Front panel tested dry	Random panel tested wet	
Armors Tested	28	75	103
Armors Penetrated	**12 (43%)**	**48 (64%)**	**60 (58%)**
Passed Penetration	16 (57%)	27 (36%)	43 (42%)
Armors with Excessive BFS	14 (50%)	25 (33%)	39 (38%)
Armors Met All NIJ Criteria	2 (7%)	2 (3%)	4 (4%)

Figure 5. Summary of Phase I and II Combined P-BFS Testing



V. Applied Research

While NIJ's examination and testing of used Zylon®-containing body armor does show that there is degradation in performance, it is critical to understand the fundamental nature of Zylon® degradation and how the degradation relates to ballistic performance. To complement the ballistic test program, NIJ initiated a number of applied research activities to:

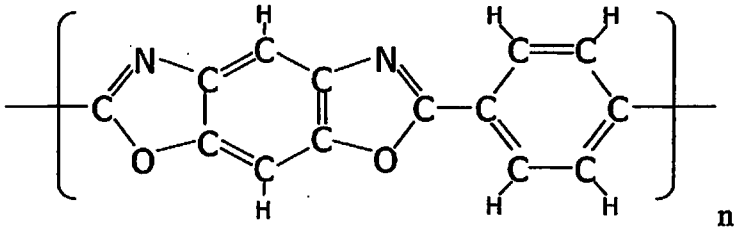
- Identify analytical techniques for characterizing the chemical, physical, and mechanical properties of PBO and other ballistic materials.
- Determine what factors may contribute to the degradation Zylon® (e.g. heat, humidity, UV and visible light, mechanical stress).
- Correlate changes in chemical and mechanical fiber properties to the performance of ballistic resistant materials.
- Determine if the presence of moisture or other trace materials in the virgin fiber may contribute to performance degradation, even without external influences.
- Determine if an accelerated aging process or other nondestructive processes can be developed to predict and evaluate the ongoing ballistic performance of used body armor.

The results of the research are documented in a report[10] and a technical paper,[11] both of which will be published shortly. Most of the research described here is ongoing and will be updated as new findings become available. While NIJ's initial research has focused primarily on Zylon®, future phases of this applied research program will examine other ballistic-resistant materials.

The ballistic material called by the trade name Zylon® is also known by its chemical name, poly(*p*-phenylene benzobisoxazole), or PBO. PBO is a polymer that can be thought of as a long chain of repeat units that are bonded together in a linear arrangement. One repeat unit is depicted in Figure 6. Millions of these polymer chains arrange themselves into a long thin fiber. In some cases the individual fibers are incorporated into nonwoven ballistic resistant fabrics, such as the case with Z Shield®.[12] In other cases, hundreds of these fibers are bundled together to form a yarn, which is then woven into fabric, as is the case with the traditional woven Zylon® fabric.

The chemical structure of PBO provides high thermal stability and outstanding mechanical properties. PBO fibers are extremely strong, tough, and stiff, with certain mechanical properties, such as tensile strength and elastic modulus,[13] that are superior to those of para-aramid fibers (e.g., Kevlar®, Twaron®) or ultra-high molecular weight polyethylene fibers (e.g. Dyneema®, Spectra®).

Figure 6. Chemical structure of poly(*p*-phenylene benzobisoxazole), or PBO, repeat unit



A number of questions exist concerning the hydrolytic and ultraviolet (UV)-visible light stability of PBO, or described differently, the susceptibility of PBO to degrade when exposed to moisture and light. Toyobo has reported tensile strength degradation of PBO fiber following exposure to

[10] Chin, J., et al., "Chemical Analysis of Poly(*p*-phenylene benzobisoxazole) Fibers Used in Ballistic Applications," NISTIR TBD (forthcoming).

[11] Holmes, G.A., et al., "Ballistic Fibers: A Review of the Thermal, Ultraviolet and Hydrolytic Stability of the Benzoxazole Ring Structure," accepted for publication in the *Journal of Materials Science* (forthcoming).

[12] Z Shield is a registered trademark of Honeywell International Inc.

[13] Modulus is a technical term that describes the stiffness of a material.

heat and moisture[14]. Only a few studies in the peer-reviewed literature provide any data on the hydrolytic stability of PBO in aqueous and acidic conditions.[15] As far back as 1995, researchers at NASA evaluated the chemical resistance of PBO and observed significant losses in tensile strength following immersion in water, hydrochloric acid, nitric acid, sulfuric acid, sodium chloride and sodium hypochlorite.[16]

In general, PBO and similar materials undergo hydrolysis[17] in conditions ranging from neutral to acidic and at ambient as well as elevated temperatures. One study documents the effects of ultraviolet and visible light on PBO fibers, where substantial (> 90 %) loss in tensile strength was observed following harsh UV exposure conditions.[16]

A. Relationship Between Ballistic Capability and Mechanical Properties

This report discusses mechanical properties of fibers, since materials used in textile-based armor systems have certain desirable mechanical properties that relate to ballistic performance. The relationship between mechanical properties and ballistic performance has been established by both experiment and theory. For example, Cunniff empirically demonstrated this relationship by developing a parameter known as U^* that correlates with the ballistic performance[18] of many armor systems.[19] Phoenix and Porwal established a theoretical basis for U^* from first principles modeling of an armor's response to ballistic impact.[20] In addition, a number of experiments have demonstrated good agreement with the ballistic performance predicted using the U^* parameter. The expression for U^* is as follows:

$$U^* = \frac{\sigma_{uts}\varepsilon_f}{2\rho}\sqrt{\frac{E}{\rho}}$$

[14] http://www.toyobo.co.jp/e/seihin/kc/pbo/pdf/Attachment_1970KB.pdf

[15] Y.-H. So, S.J. Martin, K. Owen, P.B. Smith, and C.L. Karas, J. "A study of benzobisoxazole and benzobisthiazole compounds and polymers under hydrolytic conditions." *Journal of Polymer Science Part A: Polymer Chemistry*, 37, 2637-2643 (1999).

[16] E. Orndoff, *NASA Technical Memorandum 104814*, (September 1995).

[17] Hydrolysis is the decomposition of a chemical compound by reaction with water.

[18] Specifically, the ballistic performance here refers to the V50 ballistic limit of the armor system against fragment-simulating projectiles.

[19] Cunniff, P.M. and M.A. Auerbach, "23rd Army Science Conference," Assistant Secretary of the Army (Acquisition, Logistics, and Technology), Orlando, FL, (December 2002).

[20] Phoenix, S.L. and P.K. Porwal, "A New Membrane Model for the Ballistic Impact Response and V50 Performance of Multi-Ply Fibrous Systems." *International Journal of Solids and Structures*, 40, 6723 (2003).

In this equation, σ_{uts} is the fiber's ultimate tensile strength; , ε is the fiber's ultimate tensile strain, a measure of the amount a fiber stretches before breaking; E is the modulus, a measure of how much a fiber stretches under a load; and ρ is the density of the fiber. Thus, changes in any of these physical properties will change the ballistic performance of a material. The U^* parameter relates changes in certain physical properties of a fiber to the ballistic performance of an armor made from that fiber. Therefore, Cunniff's equation provides a basis for evaluating Zylon® or any other fiber used in body armor.

B. Comparative Analysis of Zylon® from Different Sources

A comparative analysis of PBO materials was performed as part of the applied research effort. The studies used yarn samples from the following sources:

- **Officer's armor:** The back panel of the Forest Hills officer's armor that was penetrated. The armor was manufactured in November 2002. The front panel, where the bullet penetration occurred, is currently being retained as evidence and could not be obtained for analysis at the time of this writing.
- **New armor:** A new, unworn armor of the same model and construction as the officer's armor, style SMU-IIA+105130, manufactured in September 2003.
- **Archive armor:** An armor from the National Law Enforcement and Corrections Technology Center (NLECTC) Compliance Test Program archives, style SMU-IIA+105130, manufactured in March 2001, and submitted for compliance testing in May 2001.
- **Virgin yarn:** PBO spool yarn, manufactured in August 2003 and provided to the National Institute of Standards and Technology (NIST) by the fiber manufacturer in May 2004 for this study.

C. Changes in Mechanical Properties of Zylon® Yarn

The mechanical properties of the yarns were measured and compared to virgin yarn. The results are shown in Table 6. The yarns from the officer's armor are clearly lower in tensile strength and tensile strain than the yarns from the new and archive armors, as well as the virgin yarn. The tensile strength of the yarns from the archive armor is also lower than that of the new armor and virgin yarns. When yarn is woven into fabric, there may be as much as 10–20 % loss in tensile strength due to mechanical fiber damage. The difference between the tensile properties of the virgin yarn and the new armor yarn, approximately 10%, may be due to this mechanical damage; however, this type of mechanical damage alone would not explain the further reduction in tensile strength of yarns from the archive vest and the officer's vest.

Interestingly, the moduli—or stiffness—of the yarns from the three vests are not substantially different. Toyobo previously reported results of environmental conditioning tests on Zylon® fiber.[21] In that report, they stated that the "tensile modulus for Zylon® fiber remains constant" and that "energy dissipation remains constant and extremely high." The results in Table 6 support the first statement, but not the second. The moduli are relatively constant, indicating that the stiffness of the Zylon® yarns from the different vests is about the same, but the energy dissipating characteristics of the yarns are dramatically different, as indicated by the "Energy to Break Point" column in Table 6. Essentially, this quantity is the area under the stress versus strain curve. When the tensile strength and strain at break are each reduced, the energy-absorbing ability of the yarn will also be reduced. In this case, yarns from the officer's vest can absorb only about half of the energy before breaking compared to yarns from the new vest.

Table 6: Tensile Properties of Armor Yarns[22]

Source of Fiber	Tensile Strength (GPa)	Strain at Break (%)	Modulus at Break (GPa)	Energy to Break Point (N m)
Officer	3.22	2.50	136.61	0.31
New	4.78	3.29	141.80	0.61
Archive	3.65	2.65	141.60	0.37
Virgin	5.34	3.52	147.11	0.91

D. Chemical Changes in Zylon® When Examined with Infrared Spectroscopy

A large body of scientific literature reveals that the oxazole ring, the five-member ring that appears within the chemical structure of PBO, has characteristics that cause it to be susceptible to degradation due to moisture and light exposure. Determining if there is scientific evidence of this degradation in real armor samples is important. Fourier transform infrared (FTIR) spectroscopy is a common technique used in crime laboratories. FTIR relies on the fact that different types of chemical bonds preferentially absorb infrared light of different wavelengths, and by measuring which wavelengths are absorbed, a characteristic "spectrum," or fingerprint,

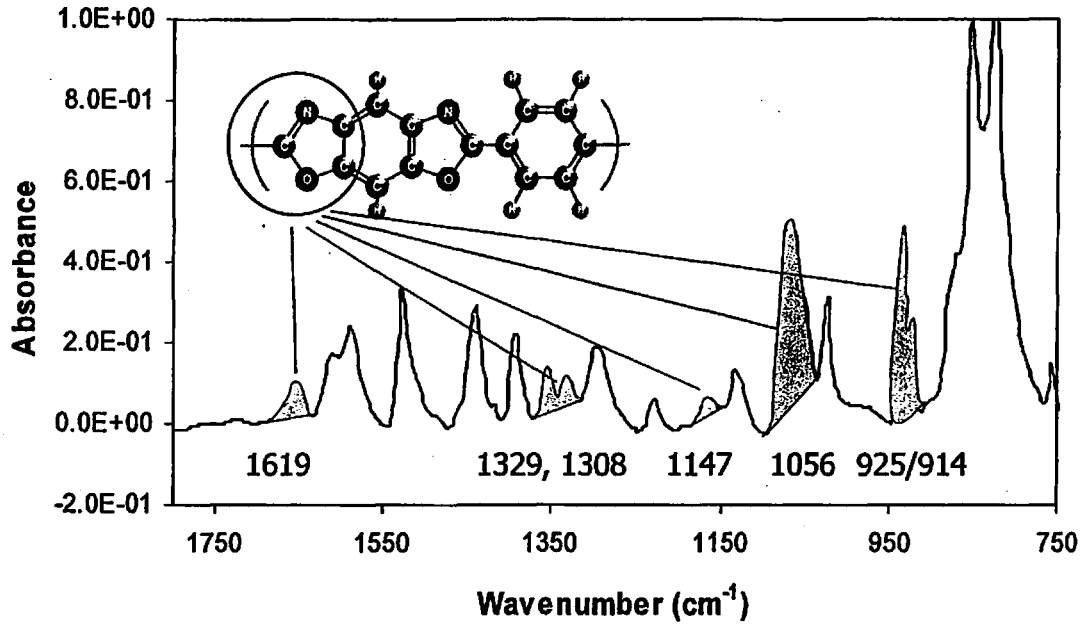
[21] Toyobo Co., Ltd., Letter to Customers, March 9, 2004, http://www.toyobo.co.jp/e/seihin/kc/pbo/pdf/Letter_on_modulus_030904.pdf and http://www.toyobo.co.jp/e/seihin/kc/pbo/pdf/modulus_graph.pdf

[22] Values presented are mean values. Chin, J., et al., "Chemical Analysis of Poly(*p*-phenylene benzobisoxazole) Fibers Used in Ballistic Applications," NISTIR TBD (forthcoming).

for the material being studied can be obtained. By comparing the spectrum to other spectra of known model compounds,[23] the identity of the subject material can be determined.

FTIR has been applied successfully to the effort to measure changes in the oxazole ring and to look for evidence that helps identify the degradation mechanisms. PBO produces an FTIR spectrum similar to that shown in Figure 7. The oxazole ring is circled. Key spectral components are highlighted that correspond to certain bonds on the oxazole ring.

Figure 7: Typical IR spectra of PBO



Chemical changes due to polymer degradation are often difficult to detect from a simple visual inspection of the FTIR spectra because the differences in the various peaks and valleys are minor in many cases. Even subtle differences can be indicative of significant chemical changes. Figure 8 demonstrates this: the FTIR spectra from all four yarn samples appear to be the same (the lines are offset from each other vertically to better show their shapes). To solve this problem, the spectrum of each material is subtracted from the spectrum of a control sample. This approach highlights even minor differences between spectra. This technique was validated during the artificial aging process described in Supplement I in which FTIR was used to monitor the progressive breaking of the oxazole ring in PBO over time.

[23] Model compounds are stand-alone compounds that can be an effective method for studying unique characteristics of another compound and for studying small changes that may occur in a complex polymer.

Figure 9 shows the spectra that result when the FTIR spectrum of the virgin yarn is subtracted from each of the armor yarn spectra. A flat spectral difference line at "0" absorbance would indicate that there are no differences between the virgin yarn control sample and the other sample. Downward-pointing peaks in the spectra indicate chemical bonds that have been lost while upward-pointing peaks are indicative of bonds that have increased. Figure 9 indicates that there is a progressive change. The new vest yarn is most similar to the virgin yarn, the archive vest yarn is next, and the officer's vest yarn is the most changed.

In this study, the FTIR data show that the oxazole ring degraded in the officer's armor yarn compared to unused armor. Thus, it is likely that the ballistic performance degradation in PBO armors is closely related to the chemical changes in the PBO fiber resulting from oxazole ring breakage. This change can be monitored using FTIR, implying that this analysis technique may provide a basis for nondestructive monitoring of ballistic performance.

Figure 8. FTIR spectra of armor yarns, compared with virgin yarn

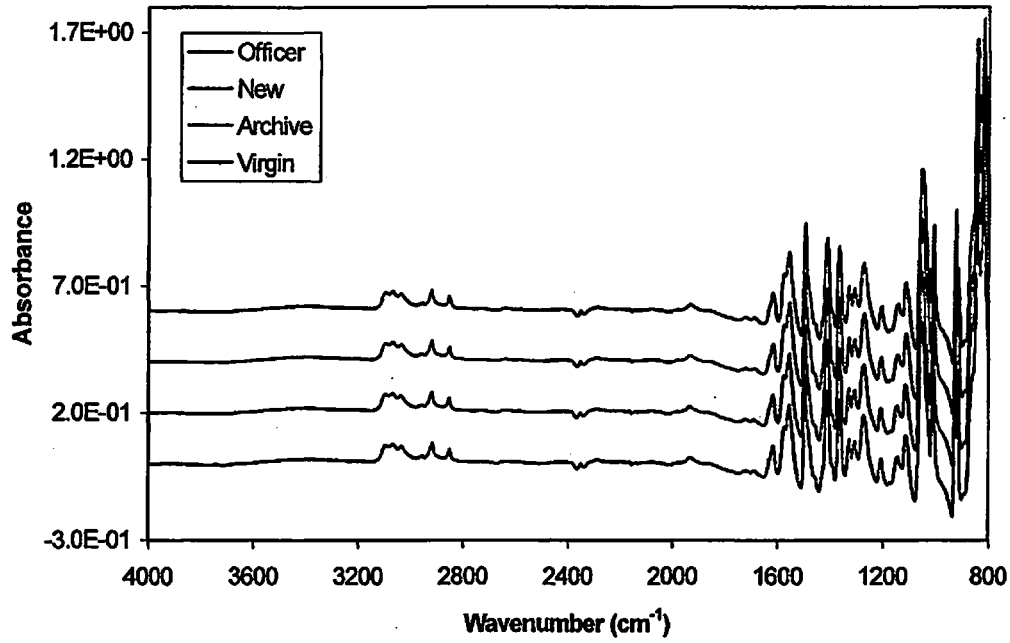
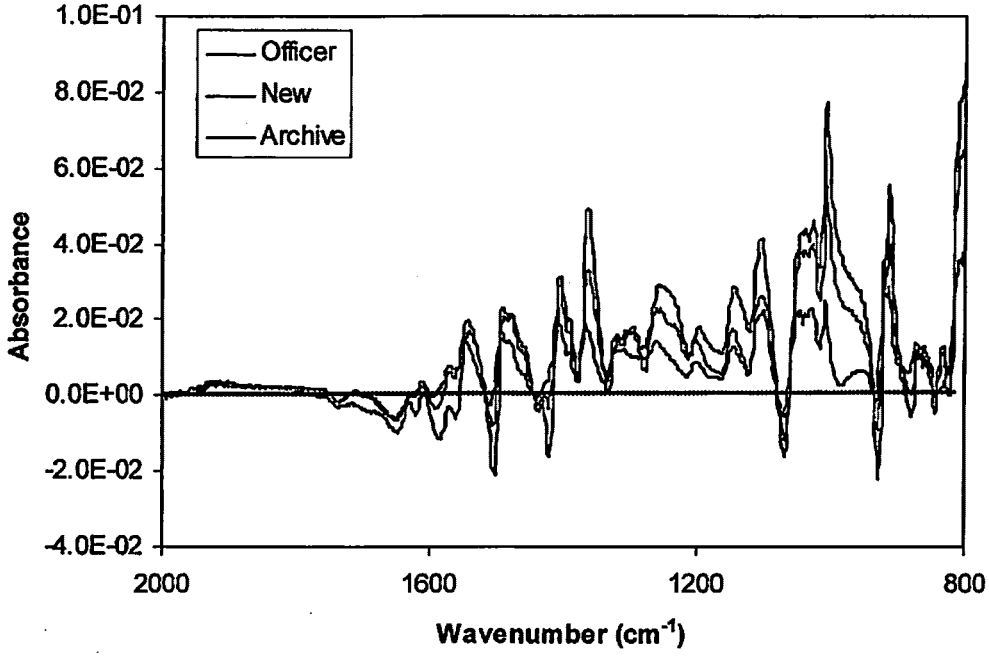


Figure 9. Difference spectra of armor yarns



E. Moisture Effect on Armor Degradation

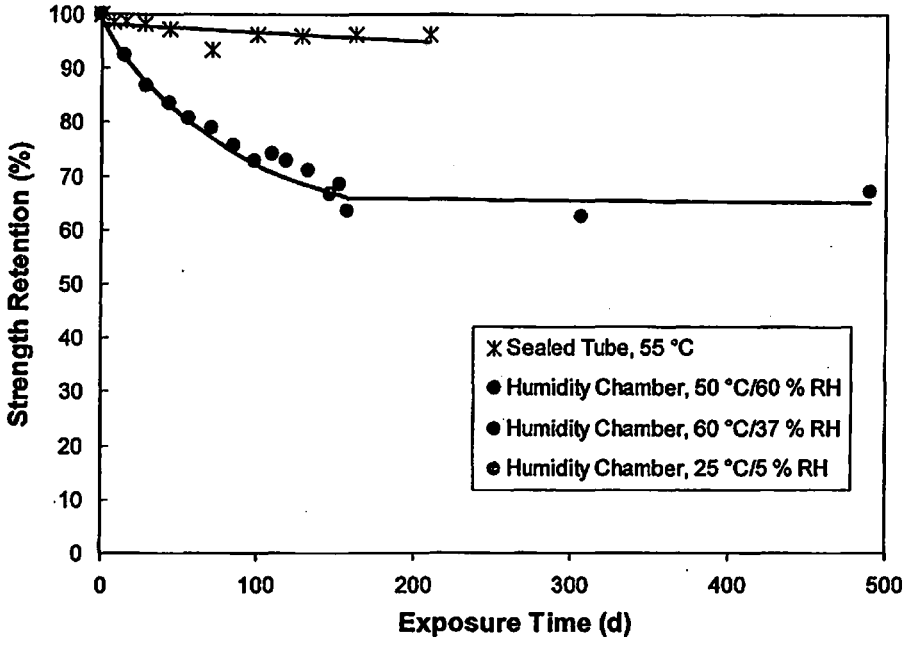
In the Forest Hills study reported previously, new armor was artificially aged in a temperature-humidity chamber. The artificial aging process provided experimental evidence that moisture could drive the degradation of Zylon®-containing body armor. Mechanical properties were monitored to confirm that the new armor panels had been weakened to match the weakened state of the officer's body armor from the Forest Hills incident. Once that weakened state had been achieved, the temperature-humidity chamber was adjusted in an attempt to halt the hydrolysis process. Some of the armor panels that were not used for the Forest Hills ballistics tests remained in the temperature-humidity chamber for an extended period of time. After 157 days, the humidity level was changed to a very low value (5% relative humidity). As seen in Figure 10, the Zylon® yarn tensile strength did not change in low-humidity conditions.

Based on this finding, the following questions were posed: 1) If the Zylon® fiber were prevented from coming into contact with external moisture, would degradation be slowed down or prevented? 2) Is there enough moisture trapped in the Zylon® fiber to promote degradation, even if there were no exposure to external moisture?

To study these questions, virgin Zylon® yarns were placed inside glass tubes, backfilled with argon, and then sealed so that there was no potential for external moisture to contact the yarn. The only moisture present would be moisture that was initially present in the fiber structure or on

the fiber surface. This would represent the "ideal" if one could effect a perfect hermetic seal for PBO in body armor. The sealed tubes were held at a constant temperature of 55°C and periodically sampled. Over a period of seven months there was no significant change in the tensile strength of these yarns, as indicated by the flat line for the "Sealed Tube" study in Figure 10.

Figure 10: Tensile Strength Retained by Zylon® Yarns (humidity-exposed vs. sealed tube)



The sealed tube study confirms that PBO does not degrade under hot and dry conditions. The results indicate that if PBO is isolated from external sources of moisture, there is no significant change in its properties. This is a key finding because examinations of many used armor samples have revealed that most designs do little to protect the PBO from all forms of moisture. Traditionally, many armor models have used armor panel materials considered to be "waterproof," and their purpose was to lessen the amount of liquid water that could pass through the covering and into the ballistic materials. The Phase I and Phase II tests have revealed that many armor designs do not address the potential for water vapor transmission through the armor panel covering. Some armor models actually incorporate breathable membranes or fabrics that encourage the passage of humidity through the armor panel. Chemically, hydrolytic degradation would occur in the presence of either liquid water or water vapor.

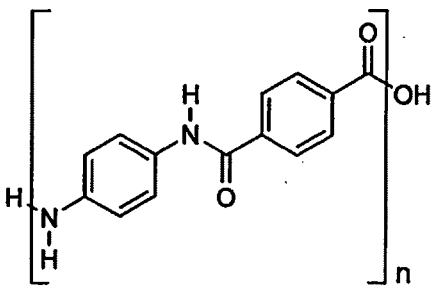
F. Correlation of Chemical Changes to Mechanical Properties

Examination and comparison of the spectra from the various yarns in Figure 9 indicate that the degree of hydrolysis is greatest in the officer's armor, followed by the archive armor, and the least in the new armor, relative to the virgin yarn. This rank order follows the same rank order of tensile strength loss reported in Table 6. Tensile strength loss is therefore correlated with the degree of hydrolysis.

G. Degradation Mechanisms

Current data suggests that hydrolytic degradation in PBO may occur in two steps, with the first step resulting in the opening of the oxazole ring to form a new chemical structure that is similar to, but not the same as Kevlar (Figure 11). Kevlar is known to have tensile properties that are less than PBO, so it is reasonable to expect that this degradation product has mechanical properties that are less than PBO. This particular structure still forms a continuous, but weakened, polymer chain. The scientific literature also indicates that this degradation product could be further degraded in a second step by a complete breakage in the polymer chain. Establishing the extent of these two degradation steps will provide insight into the lower bound of the strength of PBO fiber under normal use conditions.

Figure 11. Chemical Structure of Kevlar, or poly(*p*-phenylene terephthalamide), repeat unit



In the present study, the FTIR technique clearly reveals breakage of the oxazole ring and the formation of other chemical bonds that correspond to degradation products that appear in the chemical degradation pathway described in detail elsewhere[24]. In theoretical models of fiber

[24] Chin, J., et al., "Chemical Analysis of Poly(*p*-phenylene benzobisoxazole) Fibers Used in Ballistic Applications," NISTIR TBD (forthcoming) and Holmes, G.A., et al., "Ballistic Fibers: A Review of the Thermal, Ultraviolet and Hydrolytic Stability of the Benzoxazole Ring Structure," accepted for publication in the *Journal of Materials Science* (forthcoming).

tensile strength and modulus developed by Termonia et al.[25] and Jones and Martin,[26] both groups state that decreases in polymer chain length (i.e., breaking of the molecular bonds) are more detrimental to tensile strength than to elastic modulus. These observations are consistent with the armor yarn tensile properties reported in this study, in which degradation was observed in tensile strength but not elastic modulus. Preliminary investigations into PBO degradation mechanisms have suggested that oxazole ring breakage occurs as a result of both moisture and light exposures. Additional work is underway using model compounds to confirm these degradation theories and to study the sensitivity of PBO to other environments.

The presence of residual acid, left over from the original processing of the PBO fiber, has been alleged to cause degradation. Additional studies are underway to investigate the presence of residual acid and its role in degradation. Results of those studies will be presented in a future report.

VI. Compliance Testing Process Review and Modifications

In his directive, the Attorney General charged NIJ with reviewing the existing process for compliance testing of body armor based on its research findings.

To respond to this directive, the U.S. Department of Justice convened a summit on March 11, 2004, to provide a forum for law enforcement, the scientific community, manufacturers, and other interested parties to discuss concerns with the reliability of body armor. Summit participants also examined the results of the ongoing testing of body armor systems containing Zylon®, the future of body armor technology and the current NIJ compliance testing process. Summit participants strongly recommended that NIJ revise its current compliance testing program to address the continued performance of body armor during its warranty period.

The current NIJ body armor standard is designed to assess the ballistic resistance of new armor systems. The standard does not include tests that address the ongoing performance of armor systems. The current process has adequately assessed the ballistic capabilities of new body armor systems—as demonstrated by the successful use of body armor over the past 30 years. However, the adequate performance of new armor is not, in and of itself, sufficient to ensure that the body armor actually being worn by officers will sufficiently protect them from death or serious injury. NIJ's research findings on Zylon® indicate that ongoing performance must be considered with body armor systems that contain materials whose physical properties degrade substantially as a result of environmental exposures.

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[25] Y. Termonia, P. Meakin, and P. Smith, "Theoretical study of the influence of the molecular weight on the maximum tensile strength of polymer fibers." *Macromolecules*, 18, 2246-2252 (1985).

[26] M.-C. G. Jones and D.C. Martin, "Molecular stress and strain in an oriented extended-chain polymer of finite molecular length." *Macromolecules*, 28, 6161-6174 (1995).

Unfortunately, there are limited data concerning the ongoing performance of ballistic-resistant materials and associated armor systems currently in widespread use in the United States. Also, there is no accepted test protocol to evaluate the performance of used body armor over a period of years of typical law enforcement use. Future testing and research will support the development of a comprehensive and scientifically-rigorous compliance testing process designed to assure officers that their armor will continue to protect them over the armor's full warranty period.

In the meantime, NIJ will implement interim changes to its body armor compliance testing process. These interim changes create new requirements for all body armor manufacturers. However, manufacturers of Zylon®-based armor must satisfy additional requirements. They must affirmatively demonstrate to NIJ that their body armor will maintain its ballistic performance during the declared warranty period. Without such evidence, these body armors will not comply with the requirements of NIJ's body armor compliance testing program.

NIJ is continuing its comprehensive research to examine ballistic-resistant materials and improve our understanding of degradation mechanisms. As new information becomes available, NIJ will issue advisory notices to alert the public if any body armor materials appear to create a risk of death or serious injury as a result of degraded ballistic performance. Any body armor model that contains any material listed in such an advisory notice will be deemed no longer NIJ-compliant unless and until the manufacturer satisfies NIJ that the model will maintain its ballistic performance over its declared warranty period.

NIJ recommends that public safety agencies and officers purchase only bullet-resistant body armor models that comply with NIJ's new interim requirements, especially if their existing armor contains Zylon®. A list of models that comply with the requirements will be made available at http://www.justnet.org.

NIJ 2005 Interim Requirements for Bullet-Resistant Body Armor

The detailed provisions of the interim changes to the NIJ voluntary body armor compliance testing program will be as follows.

Purpose and Scope

These requirements modify and supplement National Institute of Justice (NIJ) Standard 0101.04 (Ballistic Resistance of Personal Body Armor). They are promulgated on an interim basis to address recent NIJ research findings that indicate that certain body armor models previously found by NIJ to be compliant with earlier NIJ requirements for ballistic resistance of new body armor (including NIJ Standard 0101.04) may not adequately maintain ballistic performance during their service life. In keeping with their interim character, these requirements rely in significant part on specific certifications from manufacturers of body armor. To help ensure the accuracy of the certifications, NIJ intends to implement a plan to conduct random or other assessments of the certifications and the evidence that underlies them. Also, in furtherance of

these efforts, from time to time, NIJ may issue Body Armor Standard Advisory Notices, among other things to identify to the public body armor materials that, based on NIJ review, appear to create a risk of death or serious injury as a result of degraded ballistic performance. Such Advisory Notices will be made available at: https://vests.ojp.gov/index.jsp.

NIJ recommends that those who purchase new bullet-resistant body armor after the effective date hereof select body armor models that comply with these interim requirements. A list of models that comply with these requirements will be made available at: http://www.justnet.org. NIJ will no longer publish lists of models found by NIJ (prior to the effective date hereof) to be compliant with earlier NIJ requirements for ballistic resistance of new body armor (including NIJ Standard 0101.04).

NIJ's efforts to ensure the safety of public safety officers are ongoing; NIJ intends to promulgate future modifications to these interim requirements as appropriate in light of its continued research and comments from the law enforcement and manufacturing communities. Comments and suggestions should be directed to the Director, Office of Science and Technology, National Institute of Justice, Office of Justice Programs, U.S. Department of Justice, 810 Seventh Street, N.W., Washington, D.C. 20531.

Requirements

Any body armor model submitted by a manufacturer to the NIJ Voluntary Compliance Testing Program on or after the effective date hereof or otherwise not subject to the Transition Provision (below) shall be subject to the following requirements:

1. Satisfaction, as determined by NIJ, of all of the requirements of NIJ Standard 0101.04 (including Addendum B), except as such requirements may be modified hereby;

2. Either –

   (a) Submission of evidence (*e.g.*, design drawings and specifications, lists of materials of construction of each component of the model, research, ballistic testing, descriptions of performance characteristics of critical components or materials, *etc.*) that demonstrates to the satisfaction of NIJ that the model will maintain ballistic performance (consistent with its originally declared threat level) over its declared warranty period; or

   (b) Submission, by an officer of the manufacturer who has the authority to bind it, of a written certification, the sufficiency of which shall be determined by NIJ, that –

      (1) The model contains no material listed in an NIJ Body Armor Standard Advisory Notice in effect at the time of submission;

(2) Lists the materials of construction of each component of the model;

(3) The officer, on behalf of the manufacturer –

(A) Reasonably believes that the model will maintain ballistic performance (consistent with its originally declared threat level) over its declared warranty period;

(B) Has objective evidence to support that belief; and

(C) Agrees to provide NIJ, promptly on demand, that evidence;

3. Submission, by an officer of the manufacturer who has the authority to bind it, of a written certification, the sufficiency of which shall be determined by NIJ, that labeling of armor shall be in accordance with NIJ Standard 0101.04, except that any references to such standard thereon shall instead be to the "NIJ 2005 Interim Requirements"; and

4. Submission, by an officer of the manufacturer who has the authority to bind it, of a written acknowledgment, the sufficiency of which shall be determined by NIJ, that –

(a) Recent NIJ research findings indicate that certain body armor models that were found by NIJ to be compliant with earlier NIJ requirements for ballistic resistance of new body armor (including NIJ Standard 0101.04) may not adequately maintain ballistic performance during their service life;

(b) NIJ recommends that those who purchase new bullet-resistant body armor select body armor models that comply with the NIJ 2005 Interim Requirements;

(c) NIJ will no longer publish lists of models found by NIJ to be compliant with earlier NIJ requirements for ballistic resistance of new body armor (including NIJ Standard 0101.04); and

(d) Any list or database of compliant body armor models published or sponsored by NIJ will include only models that are found by NIJ to comply with the NIJ 2005 Interim Requirements.

NIJ will issue to the manufacturer an NIJ Notice of Compliance upon determination that these Requirements have been satisfied.

Transition Provision

Any body armor model that was submitted by a manufacturer to NIJ and was found by NIJ to be compliant with NIJ Standard 0101.04 prior to the effective date hereof shall, if made by the same manufacturer, be deemed to comply with the NIJ 2005 Interim Requirements upon issuance to the manufacturer of an NIJ Notice of Compliance. To obtain an NIJ Notice of Compliance, the manufacturer shall submit, with respect to the body armor model –

1. Either –

   (a) The evidence described in Requirements ¶ 2(a); or

   (b) The certification described in Requirements ¶ 2(b)(1) & (2);

2. With respect to armor manufactured more than ten days after the date of the NIJ Notice of Compliance, the certification described in Requirements ¶ 3; and

3. The acknowledgment described in Requirements ¶ 4.

In the event the manufacturer submits a certification pursuant to this Transition Provision ¶ 1(b), the manufacturer also must submit to NIJ, within 90 days of the date of the NIJ Notice of Compliance, the certification described in Requirements ¶ 2(b)(3); if the manufacturer fails to submit this certification, the body armor model shall be deemed no longer to be in compliance with the NIJ 2005 Interim Requirements (and shall be removed from any NIJ list of models that comply with the Requirements) until the manufacturer submits it and NIJ issues a new NIJ Notice of Compliance.

Loss of Compliance Status

A body armor model that is the subject of an NIJ Notice of Compliance shall be deemed no longer to be in compliance with the NIJ 2005 Interim Requirements (and shall be removed from any NIJ list of models that comply with the Requirements) if –

1. NIJ issues an NIJ Body Armor Standard Advisory Notice that identifies a material contained in the model;

2. NIJ determines that any certification or acknowledgment submitted with respect to the model is insufficient or inaccurate;

3. The manufacturer fails to provide NIJ promptly on demand the evidence described in Requirements ¶ 2(b)(3); or

4. NIJ determines, at any time, that the evidence provided to NIJ as described in Requirements ¶ 2(b)(3) and/or in connection with the model is insufficient to demonstrate to the satisfaction of NIJ that the model will maintain its ballistic performance (consistent with its originally declared threat level) over its declared warranty period.

Once a body armor model loses compliance status under this provision, the model will remain out of compliance unless and until NIJ issues a new NIJ Notice of Compliance, following the submission of such evidence (*e.g.*, evidence described in Requirements ¶ 2(a)), documentation, information, or other material as NIJ may require.

Labeling after Loss of Compliance Status
Armor manufactured during a period in which the armor model does not comply (or is deemed not to comply) with the NIJ 2005 Interim Requirements shall not be labeled as compliant with them.

VII. Summary

Body armor manufacturers must consider a number of competing requirements when they design an armor system that will maintain the intended level of ballistic resistance over time. Armor designers face demands to satisfy performance and operational requirements, while making the armor more comfortable by making it thinner, lighter, and cooler. It is critical for the armor design to anticipate potential changes that may occur in the armor during field use, because of the potential for those changes to affect adversely the ballistic performance of the armor. Users of body armor also have a responsibility to properly care for and maintain their body armor to reduce the potential for inadvertent damage to the armor.

There are hundreds of possible combinations of materials, weave patterns, stitching details, layer counts, and ply lay-ups that could be used to produce a body armor design that initially meets the requirements of the NIJ standard. Manufacturers are responsible for building an extra performance margin into their design. Because there are market incentives for building armor models that are thinner, lighter, and more breathable, the safety margins in armors may vary. The Zylon® fiber is susceptible to hydrolytic (moisture) and photolytic (light) degradation. Published scientific literature confirms these degradation mechanisms. Any armor design relying on Zylon® must take into account these susceptibilities and the resulting reduction in mechanical properties and ballistic performance. Based on test results of used armor, if Zylon® material is being relied upon to contribute ballistic resistance to body armor, then the body armor may not maintain the intended level of ballistic resistance.

The findings from ballistic testing and applied research have led to a better understanding of armor degradation mechanisms in Zylon® and other ballistic resistant materials, as well as the correlation between certain material properties and ballistic performance. These findings will also assist in the development of modifications to the existing body armor standard and

compliance testing process, especially as it relates to test methods to ensure the ongoing performance of used body armor.

In the meantime, NIJ will issue the NIJ 2005 Interim Requirements for Bullet-Resistant Body Armor discussed in Section VI of this report. NIJ strongly recommends that those public safety agencies who purchase new bullet-resistant body armor select models that comply with these interim requirements. A list of compliant body armor models can be found at http://www.justnet.org.

NIJ continues to strongly encourage public safety officers to wear their Zylon®-containing body armor until it can be replaced.

Appendix A. Complete Results of Phase I (Worst Case) P-BFS Test

Level IIA Armor, Compliant to NIJ 0101.03

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 1) 1st 0°	2nd 0°	30°	357 Mag (see note 2) 1st 0°	2nd 0°	30°	Result	Back Face Signature: 9 mm 1st 0°	2nd 0°	357 Mag 1st 0°	2nd 0°	Result
1	UZ016	Front	SCBA	ZYL-IIA 898101	All Zylon	July-2001	31	4	No	No	No	No	No	No	Pass	48	44	51	55	Fail
2	UZ021	Front	SCBA	ZYL-IIA 898101	All Zylon	September-2000	41	3	No	No	No	No	No	No	Pass	51	44	55	54	Fail
3	UZ028	Front	SCBA	ZYL-IIA 898101	All Zylon	March-1999	59	3	No	No	No	Yes	Yes	No	Fail	48	47	N/A	N/A	N/A

Level II Armor, Compliant to NIJ 0101.03

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 3) 1st 0°	2nd 0°	30°	357 Mag (see note 4) 1st 0°	2nd 0°	30°	Result	Back Face Signature: 9 mm 1st 0°	2nd 0°	357 Mag 1st 0°	2nd 0°	Result
1	UZ029	Front	SCBA	AZG-II 995120	Zylon Hybrid	June-2002	20	3	No	No	No	No	No	No	Pass	43	44	48	55	Fail
2	UZ003	Front	SCBA	ZYL-II 898101	All Zylon	September-2000	41	4	No	No	No	No	Yes	No	Fail	45	46	46	N/A	N/A
3	UZ015	Front	SCBA	ZYL-II 898101	All Zylon	July-1999	55	3	No	No	No	Yes	Yes	No	Fail	41	45	N/A	N/A	N/A
4	UZ020	Front	SCBA	ZYL-II 898101	All Zylon	June-2000	44	3	No	No	No	No	Yes	No	Fail	49	51	49	N/A	N/A
5	UZ024	Front	SCBA	ZYL-II 898101	All Zylon	July-1999	55	3	No	No	No	Yes	Yes	Yes	Fail	47	46	N/A	N/A	N/A

Level II Armor, Compliant to NIJ 0101.04

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 3) 1st 0°	2nd 0°	30°	357 Mag (see note 4) 1st 0°	2nd 0°	30°	Result	Back Face Signature: 9 mm 1st 0°	2nd 0°	357 Mag 1st 0°	2nd 0°	Result
1	UZ017	Front	PT Armor	PTZG2	Zylon Hybrid	April-2002	22	3	No	No	No	No	No	No	Pass	35	39	35	43	*Pass*
2	UZ027	Front	PT Armor	PTZG2	Zylon Hybrid	February-2002	24	2	No	No	No	No	No	No	Pass	37	37	40	45	Fail
3	UZ002	Front	SCBA	SMU-II+ 001221	All Zylon	September-2001	29	3	No	No	No	No	Yes	Yes	Fail	32	35	40	N/A	N/A
4	UZ018	Front	SCBA	SMU-II+ 001221	All Zylon	February-2003	12	2	No	No	No	No	Yes	No	Fail	34	37	43	N/A	N/A
5	UZ006	Front	ABA	XTX2-1	Zylon Hybrid	September-2003	9	2	No	No	No	No	No	No	Pass	35	32	40	58	Fail
6	UZ008	Front	ABA	XTX2-1	Zylon Hybrid	August-2002	22	3	No	No	No	Yes	No	No	Fail	35	38	N/A	76	N/A
7	UZ009	Front	ABA	XTX2-1	Zylon Hybrid	June-2002	24	3	No	No	No	Yes	Yes	No	Fail	33	57	N/A	N/A	N/A
8	UZ014	Front	ABA	XTX2-1	Zylon Hybrid	February-2003	12	3	No	No	No	No	No	No	Pass	36	35	46	46	Fail
9	UZ022	Front	ABA	XTX2-1	Zylon Hybrid	April-2002	22	3	No	No	No	No	Yes	No	Fail	36	33	40	N/A	N/A
10	UZ023	Front	ABA	XTZX2-1	Zylon Hybrid	#N/A	unknown	3	No	Yes	No	No	Yes	Yes	Fail	37	N/A	48	N/A	N/A
11	UZ007	Front	Gall's	ZL2-2	Zylon Hybrid	#N/A	unknown	2	No	No	No	No	No	No	Pass	30	36	42	42	*Pass*
12	UZ004	Front	PT Armor	ZX-2	Zylon Hybrid	February-2004	3	1	No	No	No	No	No	No	Pass	32	39	40	47	Fail
13	UZ005	Front	PT Armor	ZX-2	Zylon Hybrid	June-2003	11	3	No	No	No	No	No	No	Pass	32	43	51	58	Fail

Level IIIA Armor, Compliant to NIJ 0101.03

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 5) 1st 0°	2nd 0°	30°	44 Mag (see note 6) 1st 0°	2nd 0°	30°	Result	Back Face Signature: 9 mm 1st 0°	2nd 0°	44 Mag 1st 0°	2nd 0°	Result
1	UZ025	Front	SCBA	ZYL-IIIA 898101	All Zylon	August-2001	30	4	No	No	No	No	Yes	No	Fail	50	45	68	N/A	N/A

Level IIIA Armor, Compliant to NIJ 0101.04

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 5) 1st 0°	2nd 0°	30°	44 Mag (see note 6) 1st 0°	2nd 0°	30°	Result	Back Face Signature: 9 mm 1st 0°	2nd 0°	44 Mag 1st 0°	2nd 0°	Result
1	UZ030	Front	P.A.C.A.	04ZPG3A-1	Zylon Hybrid	July-2003	11	2	No	No	No	No	No	No	Pass	23	31	46	52	Fail
2	UZ031	Front	P.A.C.A.	04ZPG3A-1	Zylon Hybrid	February-2004	4	1	No	No	No	No	No	No	Pass	31	31	43	48	Fail
3	UZ010	Front	Point Blank	F13-5	Zylon Hybrid	January-2000	53	2	No	No	No	No	No	No	Pass	30	28	43	63	Fail
4	UZ011	Front	Point Blank	F13-5	Zylon Hybrid	#N/A	unknown	2	No	No	No	No	No	No	Pass	32	31	42	45	Fail
5	UZ019	Front	SCBA	SMU-IIIA+ FEM 109040	All Zylon	June-2003	8	2	No	No	No	No	No	No	Pass	39	43	56	55	Fail
6	UZ026	Front	Point Blank	ZL6	Zylon Hybrid	#N/A	unknown	2	No	No	No	No	No	No	Pass	39	35	43	52	Fail

Notes:
1) The 9 mm threats for level IIA armor are a 124 gr. 9 mm FMJ RN bullet with a velocity of 1090 (+50/-0) ft/s for NIJ 0101.03 armor and a velocity of 1120 (±30) ft/s for NIJ 0101.04 armor.
2) The magnum threats for level IIA armor are a 158 gr. 357 Magnum JSP bullet at 1250 (+50/-0) ft/s for NIJ 0101.03 armor and a 180 gr. 40 S&W FMJ bullet at 1055 (±30) ft/s for NIJ 0101.04 armor.
3) The 9 mm threats for level II armor are a 124 gr. 9 mm FMJ RN bullet with a velocity of 1175 (+50/-0) ft/s for NIJ 0101.03 armor and a velocity of 1205 (±30) ft/s for NIJ 0101.04 armor.
4) The magnum threats for level II armor are a 158 gr. 357 Magnum JSP bullet with a velocity of 1395 (+50/-0) ft/s for NIJ 0101.03 armor and a velocity of 1430 (±30) ft/s for NIJ 0101.04 armor.
5) The 9 mm threats for level IIIA armor are a 124 gr. 9 mm FMJ RN bullet with a velocity of 1400 (+50/-0) ft/s for NIJ 0101.03 armor and a velocity of 1430 (±30) ft/s for NIJ 0101.04 armor.
6) The magnum threats for level IIIA armor are a 240 gr. 44 Mag LSWCGC bullet at 1400 (+50/-0) ft/s for NIJ 0101.03 armor and a 240 gr. 44 Mag SJHP bullet at 1430 (±30) ft/s for NIJ 0101.04 armor.
7) The armor condition refers to a visual inspection. Condition 1 refers to armor that shows no visible signs of wear and is in new or "like new" condition. Condition 2 refers to armor that shows light to moderate signs of wear. Condition 3 refers to armor that shows significant signs of wear (daily use for extended period). Condition 4 refers to armor that shows signs of extreme wear or abuse.

Appendix B. Phase I (Worst Case) Ballistic Limit and Tensile Strength Test Results

Level IIA Armor, Compliant to NIJ-0101.03					Ballistic Limit (V50) (see note 1)						Tensile Strength (see note 2)			
Sample	OLES ID Number	Manufacturer	Model Number	Material	NIJ Max Ref Vel (ft/s)	Compliance V50 (ft/s)	Armor V50 (ft/s)	V50 Diff. (ft/s)	V50 - Ref (ft/s)	Percent Decline[3]	New Yarn (GPa)	Vest Average (GPa)	Strength Loss (GPa)	Strength Loss (%)
1	UZ016	SCBA	ZYL-IIA 898101	All Zylon	1140	-	1350	-	210	-	4.78	2.20	2.59	54%
2	UZ021	SCBA	ZYL-IIA 898101	All Zylon	1140	-	1352	-	212	-	4.78	2.43	2.35	49%
3	UZ028	SCBA	ZYL-IIA 898101	All Zylon	1140	-	1169	-	29	-	4.78	1.87	2.91	61%

Level II Armor, Compliant to NIJ-0101.03					Ballistic Limit (V50) (see note 1)						Tensile Strength (see note 2)			
Sample	OLES ID Number	Manufacturer	Model Number	Material	NIJ Max Ref Vel (ft/s)	Compliance V50 (ft/s)	Armor V50 (ft/s)	V50 Diff. (ft/s)	V50 - Ref (ft/s)	Percent Decline[3]	New Yarn (GPa)	Vest Average (GPa)	Strength Loss (GPa)	Strength Loss (%)
1	UZ029	SCBA	AZG-II 995120	Zylon Hybrid	1225	-	1644	-	419	-	4.78	3.34	1.44	30%
2	UZ003	SCBA	ZYL-II 898101	All Zylon	1225	-	1438	-	213	-	4.78	2.18	2.60	54%
3	UZ015	SCBA	ZYL-II 898101	All Zylon	1225	-	1355	-	130	-	4.78	1.87	2.91	61%
4	UZ020	SCBA	ZYL-II 898101	All Zylon	1225	-	1363	-	138	-	4.78	1.98	2.80	59%
5	UZ024	SCBA	ZYL-II 898101	All Zylon	1225	-	1362	-	137	-	4.78	2.35	2.43	51%

Level II Armor, Compliant to NIJ-0101.04					Ballistic Limit (V50) (see note 1)						Tensile Strength (see note 2)			
Sample	OLES ID Number	Manufacturer	Model Number	Material	NIJ Max Ref Vel (ft/s)	Compliance V50 (ft/s)	Armor V50 (ft/s)	V50 Diff. (ft/s)	V50 - Ref (ft/s)	Percent Decline[3]	New Yarn (GPa)	Vest Average (GPa)	Strength Loss (GPa)	Strength Loss (%)
1	UZ017	PT Armor	PTZG2	Zylon Hybrid	1235	1590	1493	-97	258	27%	4.78	2.85	1.93	40%
2	UZ027	PT Armor	PTZG2	Zylon Hybrid	1235	1590	1531	-59	296	17%	4.78	2.82	1.97	41%
3	UZ002	SCBA	SMU-II+ 001221	All Zylon	1235	1703	1423	-280	188	60%	4.78	2.49	2.30	48%
4	UZ018	SCBA	SMU-II+ 001221	All Zylon	1235	1703	1490	-213	255	46%	4.78	3.08	1.70	36%
5	UZ006	ABA	XTX2-1	Zylon Hybrid	1235	1608	1498	-110	263	29%	4.78	3.82	0.97	20%
6	UZ008	ABA	XTX2-1	Zylon Hybrid	1235	1608	1477	-131	242	35%	4.78	3.34	1.44	30%
7	UZ009	ABA	XTX2-1	Zylon Hybrid	1235	1608	1451	-157	216	42%	4.78	2.72	2.06	43%
8	UZ014	ABA	XTX2-1	Zylon Hybrid	1235	1608	1417	-191	182	51%	4.78	3.09	1.70	35%
9	UZ022	ABA	XTX2-1	Zylon Hybrid	1235	1608	1519	-89	284	24%	4.78	3.36	1.43	30%
10	UZ023	ABA	XTZX2-1	Zylon Hybrid	1235	1554	1264	-290	29	91%	4.78	2.86	1.94	40%
11	UZ007	Gall's	ZL2-2	Zylon Hybrid	1235	1568	1474	-94	239	28%	4.78	4.26	0.52	11%
12	UZ004	PT Armor	ZX-2	Zylon Hybrid	1235	1543	1617	74	382	Increased	-	-	-	-
13	UZ005	PT Armor	ZX-2	Zylon Hybrid	1235	1543	1547	4	312	Increased	-	-	-	-

Level IIIA Armor, Compliant to NIJ-0101.03					Ballistic Limit (V50) (see note 1)						Tensile Strength (see note 2)			
Sample	OLES ID Number	Manufacturer	Model Number	Material	NIJ Max Ref Vel (ft/s)	Compliance V50 (ft/s)	Armor V50 (ft/s)	V50 Diff. (ft/s)	V50 - Ref (ft/s)	Percent Decline[3]	New Yarn (GPa)	Vest Average (GPa)	Strength Loss (GPa)	Strength Loss (%)
1	UZ025	SCBA	ZYL-IIIA 898101	All Zylon	1450	-	1457	-	7	-	4.78	2.22	2.56	54%

Level IIIA Armor, Compliant to NIJ-0101.04					Ballistic Limit (V50) (see note 1)						Tensile Strength (see note 2)			
Sample	OLES ID Number	Manufacturer	Model Number	Material	NIJ Max Ref Vel (ft/s)	Compliance V50 (ft/s)	Armor V50 (ft/s)	V50 Diff. (ft/s)	V50 - Ref (ft/s)	Percent Decline[3]	New Yarn (GPa)	Vest Average (GPa)	Strength Loss (GPa)	Strength Loss (%)
1	UZ030	P.A.C.A.	04ZPG3A-1	Zylon Hybrid	1460	1752	1679	-73	219	25%	-	-	-	-
2	UZ031	P.A.C.A.	04ZPG3A-1	Zylon Hybrid	1460	1752	1684	-68	224	23%	-	-	-	-
3	UZ010	Point Blank	F13-5	Zylon Hybrid	1460	1859	1766	-93	306	23%	-	-	-	-
4	UZ011	Point Blank	F13-5	Zylon Hybrid	1460	1859	1783	-76	323	19%	-	-	-	-
5	UZ019	SCBA	SMU-IIIA+ FEM 109040	All Zylon	1460	1863	1699	-164	239	41%	4.78	3.38	1.41	29%
6	UZ026	Point Blank	ZL6	Zylon Hybrid	1460	1684	1561	-123	101	55%	4.78	3.39	1.39	29%

Notes: 1) The ballistic limit tests were performed on the rear panels of each armor.
2) The tensile tests were performed on yarns extracted from the front panel of each armor.
3) The ballistic limit "Percent Decline" is calculated as the decline in the V50 value divided by the difference between the compliance V50 and the maximum NIJ reference velocity. Thus, a 100% V50 decline will correspond to a used armor V50 that has declined to the maximum NIJ reference velocity.

Appendix C. Results of Phase II P-BFS Testing

Level IIA Armor, Compliant to NIJ-0101.03

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 1) 1st 0°	2nd 0°	30°	357 Mag (see note 2) 1st 0°	2nd 0°	30°	Result	Back Face Signature: 9 mm 1st 0°	2nd 0°	357 Mag 1st 0°	2nd 0°	Result
1	UZ035	Back	SCBA	AZG-IIA 896280	Zylon Hybrid	May-2000	61	4	Yes	Yes	Yes	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
2	UZ041	Front	SCBA	ZYL-IIA 898101	All Zylon	May-2000	61	4	Yes	No	Yes	No	No	No	Fail	N/A	66	58	57	N/A
3	UZ058	Front	SCBA	ZYL-IIA 898101	All Zylon	January-2000	65	4	No	Yes	No	No	No	No	Fail	50	N/A	66	58	N/A

Level IIA Armor, Compliant to NIJ-0101.04

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 1) 1st 0°	2nd 0°	30°	40 S&W (see note 2) 1st 0°	2nd 0°	30°	Result	Back Face Signature: 9 mm 1st 0°	2nd 0°	40 S&W 1st 0°	2nd 0°	Result
1	UZ083	Back	First Choice	MSF1IIA	All Zylon	April-2003	26	3	No	No	Yes	No	No	No	Fail	39	42	50	44	N/A
2	UZ034	Front	SCBA	SMU-IIA +105130	All Zylon	June-2001	48	4	No	No	No	No	No	No	Pass	48	44	49	52	Fail
3	UZ056	Back	PACA	ZPG IIA	Zylon Hybrid	June-2001	48	4	Yes	Yes	Yes	No	No	No	Fail	N/A	N/A	60	45	N/A

Level II Armor, Compliant to NIJ-0101.03

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 3) 1st 0°	2nd 0°	30°	357 Mag (see note 4) 1st 0°	2nd 0°	30°	Result	Back Face Signature: 9 mm 1st 0°	2nd 0°	357 Mag 1st 0°	2nd 0°	Result
1	UZ051	Front	SCBA	AZG-II 995120	Zylon Hybrid	November-2000	54	3	No	No	Yes	Yes	No	No	Fail	45	48	N/A	47	N/A
2	UZ052	Back	SCBA	AZG-II 995120	Zylon Hybrid	October-2001	43	4	-	Yes	Yes	-	Yes	Yes	Fail	-	N/A	-	N/A	N/A
3	UZ063	Front	SCBA	AZG-II 995120	Zylon Hybrid	August-2001	45	3	-	Yes	Yes	Yes	Yes	Yes	Fail	-	N/A	N/A	N/A	N/A
4	UZ074	Back	SCBA	AZG-II 995120	Zylon Hybrid	January-2003	27	3	Yes	Yes	Yes	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
5	UZ082	Back	SCBA	AZG-II 995120	Zylon Hybrid	July-2002	35	4	Yes	Yes	-	Yes	Yes	-	Fail	N/A	N/A	N/A	N/A	N/A
6	UZ092	Back	SCBA	AZG-II 995120	Zylon Hybrid	May-2002	37	3	Yes	Yes	Yes	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
7	UZ094	Front	SCBA	AZG-II 995120	Zylon Hybrid	July-2000	59	4	Yes	Yes	Yes	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
8	UZ095	Back	SCBA	AZG-II 995120	Zylon Hybrid	September-2000	56	4	Yes	Yes	Yes	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
9	UZ096	Back	SCBA	AZG-II 995120	Zylon Hybrid	September-2000	56	4	Yes	Yes	Yes	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
10	UZ097	Front	SCBA	AZG-II 995120	Zylon Hybrid	September-2000	56	4	Yes	Yes	Yes	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
11	UZ036	Back	First Choice	MF2000	All Zylon	July-2001	46	3	No	No	No	No	No	No	Pass	45	46	54	51	Fail
12	UZ042	Front	First Choice	MF2000	All Zylon	August-2001	45	3	No	No	No	No	No	No	Pass	47	47	61	49	Fail
13	UZ043	Front	First Choice	MF2000	All Zylon	August-2001	45	3	No	No	No	No	No	No	Pass	49	42	55	53	Fail
14	UZ059	Back	First Choice	MF2000	All Zylon	November-2001	42	3	No	No	No	No	No	No	Pass	41	-	68	55	Fail
15	UZ071	Back	First Choice	MF2000	All Zylon	August-2001	45	4	No	Yes	No	Yes	No	Yes	Fail	48	46	N/A	58	N/A
16	UZ072	Front	First Choice	MF2000	All Zylon	July-2000	58	3	No	No	No	No	Yes	Yes	Fail	50	48	50	N/A	N/A
17	UZ065	Back	PPI	Z-22	All Zylon	July-2001	46	2	No	No	No	Yes	No	No	Fail	38	38	N/A	54	N/A
18	UZ066	Front	PPI	Z-22	All Zylon	July-2001	46	2	No	No	No	No	Yes	Yes	Fail	42	37	53	N/A	N/A
19	UZ067	Front	PPI	Z-22	All Zylon	July-2001	46	2	No	No	No	Yes	Yes	Yes	Fail	39	40	N/A	N/A	N/A
20	UZ085	Front	PPI	Z-22	All Zylon	May-2001	49	3	No	No	No	Yes	Yes	No	Fail	49	38	N/A	N/A	N/A
21	UZ086	Front	PPI	Z-22	All Zylon	May-2001	49	3	No	No	No	Yes	No	No	Fail	42	36	N/A	53	N/A
22	UZ087	Back	PPI	Z-22	All Zylon	May-2001	48	3	Yes	No	Yes	No	Yes	Yes	Fail	N/A	35	50	N/A	N/A
23	UZ088	Back	PPI	Z-22	All Zylon	April-2001	50	3	No	No	No	No	Yes	No	Fail	41	30	47	N/A	N/A
24	UZ089	Front	PPI	Z-22	All Zylon	April-2001	49	3	No	No	No	No	No	Yes	Fail	35	41	53	-	N/A
25	UZ090	Back	PPI	Z-22	All Zylon	May-2001	49	2	No	Yes	No	No	No	No	Fail	38	N/A	53	60	N/A
26	UZ032	Front	SCBA	ZYL-II 898101	All Zylon	September-2000	56	2	No	No	No	No	No	No	Pass	49	45	65	60	Fail
27	UZ033	Back	SCBA	ZYL-II 898101	All Zylon	September-2000	56	2	No	No	No	No	No	No	Pass	46	47	52	55	Fail
28	UZ040	Front	SCBA	ZYL-II 898101	All Zylon	May-2000	60	4	No	No	No	No	Yes	No	Fail	49	43	62	N/A	N/A
29	UZ047	Front	SCBA	ZYL-II 898101	All Zylon	August-1999	69	4	No	No	No	No	No	No	Pass	51	44	66	-	Fail
30	UZ050	Back	SCBA	ZYL-II 898101	All Zylon	April-2000	61	3	No	No	No	Yes	No	Yes	Fail	44	42	N/A	54	N/A
31	UZ054	Front	SCBA	ZYL-II 898101	All Zylon	May-2000	60	4	No	No	No	Yes	No	No	Fail	47	48	N/A	56	N/A
32	UZ064	Back	SCBA	ZYL-II 898101	All Zylon	November-1999	68	2	No	No	No	No	No	No	Pass	47	-	55	55	Fail

Level IIA Armor Compliant to NIJ 0101.04

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 3) 1st 0°	2nd 0°	30°	357 Mag (see note 4) 1st 0°	2nd 0°	30°	Result	Back Face Signature: 9 mm 1st 0°	2nd 0°	357 Mag 1st 0°	2nd 0°	Result
1	UZ037	Back	Gator Hawk	GH-2-1023	Zylon Hybrid	July-2002	33	4	No	No	No	No	No	Yes	Fail	40	40	55	46	N/A
2	UZ091	Front	Gator Hawk	GH-2-1023	Zylon Hybrid	July-2002	34	4	No	No	No	No	No	No	Pass	40	42	52	45	Fail
3	UZ093	Back	Gator Hawk	GH-2-1023	Zylon Hybrid	September-2002	32	4	No	No	No	No	No	No	Pass	41	38	50	44	Fail
4	UZ045	Front	SCBA	SMU-II+001221	All Zylon	August-2002	33	3	No	No	No	No	No	No	Pass	47	35	53	54	Fail
5	UZ055	Front	SCBA	SMU-II+001221	All Zylon	January-2002	39	3	No	No	No	No	No	No	Pass	39	39	48	48	Fail
6	UZ061	Front	ABA	XTX2-1	Zylon Hybrid	May-2002	36	3	No	Yes	No	Yes	No	No	Fail	45	N/A	N/A	62	N/A
7	UZ068	Back	ABA	XTX2-1	Zylon Hybrid	June-2001	47	4	No	No	No	Yes	No	No	Fail	44	34	N/A	50	N/A
8	UZ073	Front	ABA	XTX2-1	Zylon Hybrid	March-2003	26	3	No	No	No	No	No	No	Pass	35	33	45	44	Fail
9	UZ078	Front	ABA	XTX2-1	Zylon Hybrid	December-2002	29	3	No	No	No	Yes	No	No	Fail	35	39	N/A	45	N/A
10	UZ038	Back	ABA	XTZX2-1	Zylon Hybrid	June-2001	47	2	No	No	No	Yes	Yes	No	Fail	43	44	N/A	N/A	N/A
11	UZ039	Back	ABA	XTZX2-1	Zylon Hybrid	June-2001	47	3	Yes	No	No	Yes	Yes	Yes	Fail	N/A	35	N/A	N/A	N/A
12	UZ081	Front	ABA	XTZX2-1	Zylon Hybrid	June-2003	23	4	Yes	No	Yes	Yes	Yes	-	Fail	N/A	49	N/A	N/A	N/A
13	UZ108	Back	ABA	XTZX2-1	Zylon Hybrid	#N/A	unknown	4	Yes	Yes	Yes	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
14	UZ110	Back	PACA	ZGII	Zylon Hybrid	January-2004	17	2	No	No	No	No	No	No	Pass	32	28	45	43	Fail
15	UZ062	Back	Point Blank	ZL5	Zylon Hybrid	#N/A	unknown	3	No	No	No	No	Yes	Yes	Fail	37	36	50	N/A	N/A
16	UZ084	Back	Point Blank	ZL5	Zylon Hybrid	#N/A	unknown	3	No	No	No	No	No	No	Pass	36	44	53	45	Fail
17	UZ109	Front	Point Blank	ZL5	Zylon Hybrid	#N/A	unknown	3	No	No	No	No	No	No	Pass	38	26	38	47	Fail

Level IIIA Armor Compliant to NIJ 0101.03

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 5) 1st 0°	2nd 0°	30°	44 Mag (see note 6) 1st 0°	2nd 0°	30°	Result	Back Face Signature: 9 mm 1st 0°	2nd 0°	44 Mag 1st 0°	2nd 0°	Result
1	UZ048	Front	SCBA	AZG-IIIA 896280	Zylon Hybrid	January-2002	41	4	Yes	Yes	Yes	No	Yes	No	Fail	N/A	N/A	91	N/A	N/A
2	UZ057	Back	SCBA	AZG-IIIA 896280	Zylon Hybrid	February-2000	64	4	No	No	No	No	No	No	Pass	40	38	48	48	Fail
3	UZ106	Front	SCBA	AZG-IIIA 896280	Zylon Hybrid	October-2000	56	3	No	No	No	No	No	No	Pass	44	42	53	49	Fail
4	UZ100	Back	Point Blank	F04-1	Zylon Hybrid	November-2000	55	4	No	No	No	No	No	No	Pass	27	24	40	40	*Pass*
5	UZ101	Front	Point Blank	F04-1	Zylon Hybrid	November-2000	55	4	No	No	No	No	No	No	Pass	30	29	45	36	Fail
6	UZ102	Front	Point Blank	F04-1	Zylon Hybrid	November-2000	55	3	No	No	No	No	No	No	Pass	29	27	44	43	*Pass*
7	UZ103	Back	Point Blank	F04-1	Zylon Hybrid	November-2000	55	3	No	No	No	No	No	No	Pass	30	22	38	47	Fail
8	UZ044	Front	SCBA	ZYL-IIIA 898101	All Zylon	July-1999	71	4	No	No	No	No	No	No	Pass	49	54	75	67	Fail
9	UZ104	Front	SCBA	ZYL-IIIA 898101	All Zylon	January-2000	65	4	No	Yes	No	No	Yes	No	Fail	43	N/A	70	N/A	N/A
10	UZ105	Back	SCBA	ZYL-IIIA 898101	All Zylon	September-1999	69	4	Yes	No	No	Yes	No	No	Fail	N/A	56	N/A	80	N/A

Level IIIA Armor Compliant to NIJ 0101.04

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 5) 1st 0°	2nd 0°	30°	44 Mag (see note 6) 1st 0°	2nd 0°	30°	Result	Back Face Signature: 9 mm 1st 0°	2nd 0°	44 Mag 1st 0°	2nd 0°	Result
1	UZ107	Front	First Choice	MF733	Zylon Hybrid	June-2002	36	2	No	No	No	Yes	No	No	Fail	36	32	N/A	49	N/A
2	UZ060	Back	ABA	XTX3A-1	Zylon Hybrid	#N/A	unknown	4	Yes	Yes	Yes	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
3	UZ069	Front	ABA	XTX3A-1	Zylon Hybrid	September-2001	45	3	Yes	No	No	Yes	No	No	Fail	N/A	39	N/A	50	N/A
4	UZ080	Front	ABA	XTX3A-1	Zylon Hybrid	September-2001	45	4	Yes	Yes	No	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
5	UZ099	Back	ABA	XTX3A-1	Zylon Hybrid	October-2002	32	3	Yes	Yes	Yes	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
6	UZ046	Back	Point Blank	ZL6	Zylon Hybrid	#N/A	unknown	3	No	Yes	Yes	No	Yes	No	Fail	46	N/A	55	N/A	N/A
7	UZ053	Front	Point Blank	ZL6	Zylon Hybrid	#N/A	unknown	3	No	No	No	No	No	No	Pass	29	39	52	53	Fail
8	UZ070	Back	Point Blank	ZL6	Zylon Hybrid	#N/A	unknown	3	No	No	No	No	No	No	Pass	37	36	58	55	Fail
9	UZ079	Front	Point Blank	ZL6	Zylon Hybrid	#N/A	unknown	4	No	No	Yes	No	No	No	Fail	45	33	53	50	N/A
10	UZ098	Back	Point Blank	ZL6	Zylon Hybrid	#N/A	unknown	3	No	No	No	No	No	No	Pass	34	35	52	51	Fail

Notes:

1) The 9 mm threats for level IIA armor are a 124 gr. 9 mm FMJ RN bullet with a velocity of 1090 (+50/-0) ft/s for NIJ 0101.03 armor and a velocity of 1120 (±30) ft/s for NIJ 0101.04 armor.
2) The magnum threats for level IIA armor are a 158 gr. 357 Magnum JSP bullet at 1250 (+50/-0) ft/s for NIJ 0101.03 armor and a 180 gr. 40 S&W FMJ bullet at 1055 (±30) ft/s for NIJ 0101.04 armor.
3) The 9 mm threats for level II armor are a 124 gr. 9 mm FMJ RN bullet with a velocity of 1175 (+50/-0) ft/s for NIJ 0101.03 armor and a velocity of 1205 (±30) ft/s for NIJ 0101.04 armor.
4) The magnum threats for level II armor are a 158 gr. 357 Magnum JSP bullet with a velocity of 1395 (+50/-0) ft/s for NIJ 0101.03 armor and a velocity of 1430 (±30) ft/s for NIJ 0101.04 armor.
5) The 9 mm threats for level IIIA armor are a 124 gr. 9 mm FMJ RN bullet with a velocity of 1400 (+50/-0) ft/s for NIJ 0101.03 armor and a velocity of 1430 (±30) ft/s for NIJ 0101.04 armor.
6) The magnum threats for level IIIA armor are a 240 gr. 44 Mag LSWCGC bullet at 1400 (+50/-0) ft/s for NIJ 0101.03 armor and a 240 gr. 44 Mag SJHP bullet at 1430 (±30) ft/s for NIJ 0101.04 armor.
7) The armor condition refers to a visual inspection. Condition 1 refers to armor that shows no visible signs of wear and is in new or "like new" condition. Condition 2 refers to armor that shows light to moderate signs of wear. Condition 3 refers to armor that shows significant signs of wear (daily use for extended period). Condition 4 refers to armor that shows signs of extreme wear or abuse.

Appendix D. Individual Armor Models Tested

SCBA Tri-flex® Models

Production of this line of NIJ 0101.03-compliant armors was discontinued by SCBA in the spring of 2004. Fourteen of these armors were tested, including two that were more than five years old.

SCBA Tri-Flex® Models

Protection Level	Model Number	Number Tested
IIA	AZG-IIA 896280	1
II	AZG-II 995120	10
IIIA	AZG-IIIA 896280	3
	Total	14

- Twelve of the 14 Tri-flex® armors were penetrated by at least one round.
- Of those 12, 7 panels (50% of total panels tested) experienced penetrations from all six rounds and eleven of the 14 panels experienced four or more penetrations.
- One third of the 9mm rounds that did not penetrate the armor resulted in an excessive BFS and all armors experienced excessive BFS from the magnum rounds.
- The level IIA armor and the level II armors tested experienced at least two penetrations.

SCBA Ultima® Models

SCBA voluntarily stopped production of these models in the fall of 2003, and issued "Performance Pacs," upgrade kits that were intended to assure an armors performance as originally warranted. NIJ-sponsored tests in the fall of 2004 showed that the upgrade kits were insufficient, and SCBA has recently warned that all of these armors should be removed from service. Fifteen of the original ballistic armor panels were tested, including 10 that were greater than 60 months old.

SCBA Ultima® Models

Protection Level	Model Number	Number Tested
IIA	ZYL-IIA 898101	2
IIA	SMU-IIA+105130	1
II	ZYL-II 898101	7
II	SMU-II+001221	2
IIIA	ZYL-IIIA 898101	3
	Total	15

- Seven of the 15 (43%) Ultima® models tested experienced at least one penetration.
- Of the 8 Ultima® armors that did not experience a penetration, all experienced excessive BFS.

- Twelve of the fifteen armors experienced excessive BFS from both the 9 mm and other rounds.

Protective Products International

Protective Products International (PPI) model Z-22 are constructed entirely from woven Zylon®. Nine armors, collected from two law enforcement agencies, ranged from 47 to 50 months in age.

Protective Products International

Protection Level	Model Number	Number Tested
II	Z-22	9
	Total	9

- All nine armors tested experienced a penetration by at least one round.
- All of the BFS resulting from the other threat round exceeded 44 mm.

ABA Xtreme ZX Model

American Body Armor (ABA) reduced the warranty period of its level II ZX model XTZX2-1 (0101.04 compliant) from 60 months to 30 months in August 2004, in response to evidence that this and other ZX models were showing significant degradation in their ballistic performance. This hybrid armor model is constructed from laminated Zylon®, woven Zylon®, and ultra high molecular weight polyethylene.

American Body Armor ZX

Protection Level	Model Number	Number Tested
II	XTZX2-1	4
	Total	4

- All four armors tested experienced penetrations by at least two rounds.
  - Two of the penetrated armors were nearly four years old.
  - The age of one armor could not be determined.
  - One armor was two years old (within the modified warranty period).

ABA Xtreme X Models

These hybrid armor models are constructed from laminated Zylon®, woven Zylon®, ultra high molecular weight polyethylene, and aramid material.

American Body Armor X		
Protection Level	Model Number	Number Tested
II	XTX2-1	4
IIIA	XTX3A-1	4
	Total	8

- Seven of the eight armors tested experienced penetrations by at least one round.
- The level IIIA armors experienced penetrations by two or more rounds and by both threats.
    - Two of these armors were penetrated by all six rounds.
- Two of the level II armors were penetrated by a single magnum round, and a third was penetrated by one magnum and one 9 mm round.
- Seven of the eight armors were less than four years old, and the age of the eighth armor could not be determined.

Point Blank Concealable Models

Eight Point Blank concealable armors were tested representing two models, ZL5 and ZL6 (levels II and IIIA, respectively, both 0101.04 compliant). These models are constructed from woven Zylon®, and aramid material.

Point Blank		
Protection Level	Model Number	Number Tested
II	ZL5	3
IIIA	ZL6	5
	Total	8

- Three of the eight armors tested were penetrated by at least one round.
- One of the three level II armors was penetrated by multiple magnum rounds.
- Two of the five level IIIA armors were penetrated - one by a single 9 mm round, and one by three rounds, including both threats.
- All of the armors tested experienced excessive BFS, and six of the eight had BFS of 52 mm or greater.
- The age of these armors could not be determined.

Point Blank Tactical Model

Four Point Blank tactical armors were tested, all model F04-1. This level IIIA model (0101.03-compliant) was the only model with multiple samples tested that did not experience any penetrations. These armors are constructed with more layers of ballistic material than any other

model tested, and had the smallest fraction of Zylon® material; less than 14 % of the total layers. These armors were constructed from woven Zylon®, aramid material, and ultra high molecular weight polyethylene.

Point Blank Tactical

Protection Level	Model Number	Number Tested
IIIA	F04-1	4
	Total	4

- None of the armors tested experienced any penetrations.
- Two of the four armors met the NIJ BFS criteria of 44 mm.
- The remaining two armors each had a single excessive magnum BFS (45 mm and 47 mm).

First Choice Armors

Eight First Choice armors were tested representing three models, the MF2000, MF733, and the MSF1IIA. The MF2000 is a NIJ 0101.03-compliant, level II armor, constructed entirely from woven Zylon®. The MF733 and MSF1IIA are NIJ 0101.04-compliant models designed for level IIIA and IIA threats, respectively. The MF733 is a hybrid, constructed of laminated Zylon®, woven Zylon®, and aramid material. The MSF1IIA is constructed from laminated and woven Zylon®. First Choice has indicated that as of June 2005, model MSF1IIA is no longer sold.

First Choice Armors

Protection Level	Model Number	Number Tested
IIA	MSF1IIA	1
II	MF2000	6
IIA	MF733	1
	Total	8

- Two of the six MF2000 armors experienced at least one penetration.
- All six MF2000 armors experienced excessive BFS from the magnum round. Five of the six experienced excessive BFS from the 9 mm round.
- The MSF1IIA and MF733 armors each experienced one penetration during testing, and each experienced at least one excessive BFS.

Gator Hawk Armors

Three Gator Hawk armors of the same model were tested. The GH-2-1023 is an NIJ 0101.04-compliant, level II armor constructed with woven Zylon® and aramid material.

Gator Hawk Armor		
Protection Level	Model Number	Number Tested
II	GH-2-1023	3
	Total	3

- One of the three armors tested was penetrated by a single magnum round.
- All three armors tested experienced at least one BFS of 50 mm or greater.

PACA Armors

Two models of armor from Protective Apparel Corporation of America (PACA) were tested, the ZGII and the ZPG IIA (NIJ 0101.04-compliant, levels II and IIA, respectively). Both models are constructed from woven Zylon® and aramid material.

PACA Armor		
Protection Level	Model Number	Number Tested
II	ZGII	1
IIIA	ZPG IIA	1
	Total	2

- The single ZGII armor tested was 18 months old. It experienced no penetrations, but experienced one excessive BFS.
- The single ZPG IIA armor tested was penetrated by three 9 mm rounds, and experienced two excessive BFS.

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Office of Justice Programs

Office of the Assistant Attorney General

Washington, D.C. 20531

July 20, 2005

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL

FROM: Regina B. Schofield
Assistant Attorney General
Office of Justice Programs

SUBJECT: Bullet-resistant Vests

PURPOSE: To provide the Attorney General with information surrounding recent developments in the safety of bullet-resistant vests made from the Zylon® fiber, including the pending release of the *Third Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities*, published by the Office of Justice Programs' National Institute of Justice, and to seek approval for certain changes to the Bulletproof Vest Partnership program operated by the Office of Justice Programs' Bureau of Justice Assistance and to the requirements of the voluntary body armor compliance testing program of the National Institute of Justice.

TIMETABLE: As soon as possible.

BACKGROUND: In November 2003, Attorney General Ashcroft directed the Office of Justice Programs (OJP) to implement a number of priority projects in response to the failure of a body armor vest worn by a police officer in Pennsylvania. Collectively, these projects are known as the Attorney General's Body Armor Safety Initiative and include the examination of new and used Zylon®-based bullet-resistant vests and the review of the National Institute of Justice's (NIJ) existing compliance testing program. NIJ has issued two status reports to the Attorney General containing results from its body armor studies; they are available at https://vests.ojp.gov. The Initiative is ongoing, and NIJ has now completed its third status report.

The vest worn by the officer in Pennsylvania was manufactured by Second Chance Body Armor, Inc., and contained ballistic-resistant fiber known as Zylon®. Various state Attorneys General have filed suits against Second Chance and Toyobo Co., Ltd. (the manufacturer of Zylon® fiber). On June 22, 2005, Second Chance issued a public statement alleging that penetrations of Zylon® body armor are due to residual acid in

Zylon® fibers (essentially attempting to cast liability for the vest failure on the fiber manufacturer). Toyobo has denied these Second Chance allegations.

On June 30, 2005, the Department of Justice filed suit against both Second Chance and Toyobo, alleging, among other things, that the two companies suppressed evidence that the Zylon® fiber degraded substantially faster than expected when exposed to light, heat, and humidity, and sold Zylon®-containing vests to the U.S. government, knowing them to be defective. *United States v. Second Chance, et al.*, CV-No. 04-280 (D.D.C.).

NIJ has now completed ballistic and mechanical properties testing on 103 used Zylon®-containing body armor vests provided by law enforcement agencies across the United States. Sixty of these used vests (58%) were penetrated by at least one round during a six-shot test series. Of the vests that were not penetrated, 91% had backface deformations in excess of that allowed by the NIJ standard for new armor, which deformations could lead to an increased risk of behind-armor injury. Only four of the used Zylon®-containing vests met all performance criteria expected under the NIJ standard for new body armor compliance.

Although these results do not conclusively prove that all Zylon®-containing body armor models have performance problems, the results clearly show that used Zylon®-containing body armor may not provide the intended level of ballistic resistance. In addition, the results imply that a visual inspection of a vest and its ballistic panels does not indicate whether a particular piece of Zylon®-containing body armor has maintained its ballistic performance. NIJ is now prepared to announce these results through the *Third Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities.*

We estimate that 200,000 state and local law enforcement officers have vests that contain Zylon® fibers. Statements by Second Chance and Toyobo, and the various lawsuits against one or both of them, raise (or have failed to remove) significant concerns in the law enforcement community about the safety of these officers. The release of NIJ's third status report is likely to compound these concerns.

The Bureau of Justice Assistance (BJA) is receiving inquiries as to whether its Bulletproof Vest Partnership program (BVP) will pay for the costs of vests to replace those that contain Zylon®. The BVP program is designed to provide a critical resource to state and local law enforcement that otherwise would not be available. The BVP program funds up to 50% of the costs of each vest purchased or replaced by law enforcement applicants. Eligible law enforcement officers include police officers, sheriff deputies, correctional officers, parole and probation agents, prosecutors, and judicial officials. Only body armor models that comply with NIJ requirements may be purchased with BVP program funds. The BVP program regulations, at 28 C.F.R. § 33.101, provide in pertinent part that BJA "will assist your jurisdiction in determining which type of armor vest will best suit your jurisdiction's needs, and will ensure that each armor vest obtained through the program meets the NIJ standard."

RECOMMENDATIONS:

1. We recommend that NIJ adopt interim changes to its body armor compliance testing program to aid in ensuring that officers are protected by body armor that maintains its ballistic performance during its entire warranty period. Pursuant to those changes, models containing Zylon® will not be compliant, unless a manufacturer can provide satisfactory evidence to NIJ that the models will maintain their ballistic performance over their declared warranty period.

APPROVE: _____ Date: _____

DISAPPROVE: _____ Date: _____

OTHER: _____ Date: _____

2. We recommend that, pending the adoption of interim changes to NIJ's body armor compliance testing program, BJA provide, pursuant to 28 C.F.R. § 33.101, that jurisdictions that participate in the BVP program are ineligible to receive payment for new orders placed for bullet-resistant body armor that contains Zylon®.

APPROVE: _____ Date: _____

DISAPPROVE: _____ Date: _____

OTHER: _____ Date: _____

Attachments

Executive Summary

On November 17, 2003, Attorney General John Ashcroft announced the U.S. Department of Justice's Body Armor Safety Initiative in response to concerns from the law enforcement community regarding the effectiveness of body armor in use. These concerns followed the failure of a relatively new Zylon®-based[1] body armor vest worn by a Forest Hills, Pennsylvania, police officer. The Attorney General directed the National Institute of Justice (NIJ) to initiate an examination of Zylon®-based bullet-resistant armor (both new and used), to analyze upgrade kits provided by manufacturers to retrofit Zylon®-based bullet-resistant armors, and to review the existing program by which bullet-resistant armor is tested to determine if the process needs modification.

As part of the Body Armor Safety Initiative, NIJ has issued two status reports to the Attorney General containing results from the body armor studies.[2] The first two status reports highlighted the following findings:

- Ballistic-resistant material, including Zylon®, can degrade due to environmental factors, thus reducing the ballistic resistance safety margin that manufacturers build into their armor designs.
- The ultimate tensile strength[3] of single yarns removed from the rear panel of the Forest Hills armor was up to 30-percent lower than that of yarns from "new" armor supplied by the manufacturer. Artificially-aged armor of the same type that failed in the Forest Hills incident was ballistically tested, but no bullet penetrations occurred.[4]
- The upgrade kits tested did not appear to bring used armor up to the level of performance of new armor. However, used armors with upgrade kits performed better than the used armors alone.

NIJ has now completed ballistic and mechanical properties testing on 103 used Zylon®-containing body armors provided by law enforcement agencies across the United States. Sixty of these used armors (58%) were penetrated by at least one round during a six-shot test series. Of the armors that were not penetrated, 91% had backface deformations in excess of that allowed by the NIJ standard for new armor, which deformations could lead to an increased risk of behind-armor injury. Only four of the used Zylon®-containing

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1 Zylon® (PBO fiber – poly-*p*-phenylene benzobisoxazole) is a high-strength organic fiber produced by Toyobo Co., Ltd. Zylon® is a registered trademark of Toyobo Co., Ltd.

2 "Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities," March 11, 2004, and "Supplement I: Status Report to the Attorney General on Body Armor Safety Initiative Testing and Activities," December 27, 2004.

3 Ultimate tensile strength is the maximum stress (force per unit area) that a material, in this case a Zylon® yarn, can withstand prior to failure. All Zylon® yarns were nominally 500 denier; *i.e.*, the yarns did not vary in linear density or effective cross-sectional area.

4 NIJ continues to study the Forest Hills body armor penetration, to resolve the cause of that failure.

armors met all performance criteria expected under the NIJ standard for new body armor compliance.

Although these results do not conclusively prove that all Zylon®-containing body armor models have performance problems, the results clearly show that **used Zylon®-containing body armor may not provide the intended level of ballistic resistance**. In addition, the results imply that a visual inspection of body armor and its ballistic panels does not indicate whether a particular piece of Zylon®-containing body armor has maintained its ballistic performance.

Part of the Body Armor Safety Initiative entailed an applied research component that examined material properties of Zylon® in order to understand the causes of the ballistic failures. Zylon® fibers show a systematic loss in tensile strength, tensile strain, and ballistic performance correlated with the breakage of specific bonds in the chemical structure of the material.

Preliminary findings from the applied research effort indicate that:

- It is likely that the ballistic performance degradation in Zylon®-containing armors is closely related to the chemical changes in poly-*p*-phenylene benzobisoxazole (PBO), the chemical basis of Zylon® fiber. The breakage of one particular part of the PBO molecule, known as the oxazole ring, correlates with degradation of the mechanical properties of Zylon® fibers. The breakage in the oxazole ring can be monitored using an analysis technique known as Fourier transform infrared (FTIR) spectroscopy.
- Preliminary investigations into Zylon® degradation mechanisms have suggested that oxazole-ring breakage occurs as a result of exposure to both moisture and light.
- When there was no potential for external moisture to contact Zylon® yarns, there was no significant change in the tensile strength of these yarns. External moisture may be necessary to facilitate the degradation of Zylon® fibers.

Based on the direction from the Attorney General and recommendations from the law enforcement community, NIJ has examined its body armor compliance testing program. The current NIJ testing program is based on the ballistic resistance of new armor and does not take into account performance degradation in used armor. NIJ is concerned that Zylon® and other materials may be incorporated into body armor, with minimal understanding of performance degradation that may result from environmental exposures. NIJ's research indicates that its testing program should take into account the possibility of ballistic performance degradation over time.

NIJ intends to adopt interim changes to its body armor compliance testing program, to aid in ensuring that officers are protected by body armor that maintains its ballistic performance during its entire warranty period. These actions are set forth in detail in the Summary of this report. Under the NIJ 2005 Interim Requirements for Bullet-Resistant Body Armor, armor models containing PBO (the chemical basis of Zylon®) will not be compliant, unless a manufacturer can provide satisfactory evidence to NIJ that the models will maintain their ballistic performance over their declared warranty period.

In addition, NIJ will limit the use of PBO or any previously untested materials. A manufacturer will be able to submit any armor model to NIJ for testing for compliance with the NIJ 2005 Interim Requirements. But armor models containing PBO or new materials will be subject to certain additional requirements. Specifically, to participate in the NIJ compliance testing program, manufacturers of such armors will have to provide information that demonstrates that the model submitted for testing will maintain ballistic performance over its full warranty period. Manufacturers will be required to submit information concerning materials used in the construction of any armor submitted for testing.

NIJ will recommend that those who purchase new bullet-resistant body armor select body armor models that comply with the NIJ 2005 Interim Requirements for Bullet-Resistant Body Armor. A list of models that comply with the requirements will be made available at http://www.justnet.org.

NIJ will also encourage manufacturers to adopt a quality-management system to ensure the consistent construction and performance of NIJ-compliant armor over its warranty period. In the future, NIJ will issue advisories to the field regarding materials used in the construction of body armor that appear to create a risk of death or serious injury. Any body armor model that contains any material listed in such an advisory will be deemed no longer NIJ-compliant until the manufacturer submits satisfactory evidence that the model will maintain ballistic performance over its declared warranty period. NIJ will continue its research and evaluation program to determine what additional modifications to the requirements of NIJ's compliance testing program may be appropriate, to understand better the degradation mechanisms affecting existing or new ballistic materials, and to develop test methods for the ongoing performance of body armor.

NIJ continues to encourage public safety officers to wear their Zylon® - containing armor until it can be replaced. Even armor that may have degraded ballistic performance is better than no armor.

Appendix A. Complete Results of Phase I (Worst Case) P-BFS Test

Level IIA Armor, Compliant to NIJ-0101.03

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 1) 1st 0°	2nd 0°	30°	357 Mag (see note 2) 1st 0°	2nd 0°	30°	Result	Back Face Signature: 9 mm 1st 0°	2nd 0°	357 Mag 1st 0°	2nd 0°	Result
1	UZ016	Front	SCBA	ZYL-IIA 898101	All Zylon	July-2001	31	4	No	No	No	No	No	No	Pass	48	44	51	55	Fail
2	UZ021	Front	SCBA	ZYL-IIA 898101	All Zylon	September-2000	41	3	No	No	No	No	No	No	Pass	51	44	55	54	Fail
3	UZ028	Front	SCBA	ZYL-IIA 898101	All Zylon	March-1999	59	3	No	No	No	Yes	Yes	No	Fail	48	47	N/A	N/A	N/A

Level II Armor, Compliant to NIJ-0101.03

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 3) 1st 0°	2nd 0°	30°	357 Mag (see note 4) 1st 0°	2nd 0°	30°	Result	Back Face Signature: 9 mm 1st 0°	2nd 0°	357 Mag 1st 0°	2nd 0°	Result
1	UZ029	Front	SCBA	AZG-II 995120	Zylon Hybrid	June-2002	20	3	No	No	No	No	No	No	Pass	43	44	48	55	Fail
2	UZ003	Front	SCBA	ZYL-II 898101	All Zylon	September-2000	41	4	No	No	No	No	Yes	No	Fail	45	46	46	N/A	N/A
3	UZ015	Front	SCBA	ZYL-II 898101	All Zylon	July-1999	55	3	No	No	No	Yes	Yes	No	Fail	41	45	N/A	N/A	N/A
4	UZ020	Front	SCBA	ZYL-II 898101	All Zylon	June-2000	44	3	No	No	No	No	Yes	No	Fail	49	51	49	N/A	N/A
5	UZ024	Front	SCBA	ZYL-II 898101	All Zylon	July-1999	55	3	No	No	No	Yes	Yes	Yes	Fail	47	46	N/A	N/A	N/A

Level II Armor, Compliant to NIJ-0101.04

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 3) 1st 0°	2nd 0°	30°	357 Mag (see note 4) 1st 0°	2nd 0°	30°	Result	Back Face Signature: 9 mm 1st 0°	2nd 0°	357 Mag 1st 0°	2nd 0°	Result
1	UZ017	Front	PT Armor	PTZG2	Zylon Hybrid	April-2002	22	3	No	No	No	No	No	No	Pass	35	39	35	43	*Pass*
2	UZ027	Front	PT Armor	PTZG2	Zylon Hybrid	February-2002	24	2	No	No	No	No	No	No	Pass	37	37	40	45	Fail
3	UZ002	Front	SCBA	SMU-II+ 001221	All Zylon	September-2001	29	3	No	No	No	No	Yes	Yes	Fail	32	35	40	N/A	N/A
4	UZ018	Front	SCBA	SMU-II+ 001221	All Zylon	February-2003	12	2	No	No	No	No	Yes	No	Fail	34	37	43	N/A	N/A
5	UZ006	Front	ABA	XTX2-1	Zylon Hybrid	September-2003	9	2	No	No	No	No	No	No	Pass	35	32	40	58	Fail
6	UZ008	Front	ABA	XTX2-1	Zylon Hybrid	August-2002	22	3	No	No	No	Yes	No	No	Fail	35	38	N/A	76	N/A
7	UZ009	Front	ABA	XTX2-1	Zylon Hybrid	June-2002	24	3	No	No	No	Yes	Yes	No	Fail	33	57	N/A	N/A	N/A
8	UZ014	Front	ABA	XTX2-1	Zylon Hybrid	February-2003	12	3	No	No	No	No	No	No	Pass	36	35	46	46	Fail
9	UZ022	Front	ABA	XTX2-1	Zylon Hybrid	April-2002	22	3	No	No	No	No	Yes	No	Fail	36	33	40	N/A	N/A
10	UZ023	Front	ABA	XTZX2-1	Zylon Hybrid	#N/A	unknown	3	No	Yes	No	No	Yes	Yes	Fail	37	N/A	48	N/A	N/A
11	UZ007	Front	Gall's	ZL2-2	Zylon Hybrid	#N/A	unknown	2	No	No	No	No	No	No	Pass	30	36	42	42	*Pass*
12	UZ004	Front	PT Armor	ZX-2	Zylon Hybrid	February-2004	3	1	No	No	No	No	No	No	Pass	32	39	40	47	Fail
13	UZ005	Front	PT Armor	ZX-2	Zylon Hybrid	June-2003	11	3	No	No	No	No	No	No	Pass	32	43	51	58	Fail

Level IIIA Armor, Compliant to NIJ-0101.03

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 5) 1st 0°	2nd 0°	30°	44 Mag (see note 6) 1st 0°	2nd 0°	30°	Result	Back Face Signature: 9 mm 1st 0°	2nd 0°	44 Mag 1st 0°	2nd 0°	Result
1	UZ025	Front	SCBA	ZYL-IIIA 898101	All Zylon	August-2001	30	4	No	No	No	No	Yes	No	Fail	50	45	68	N/A	N/A

Level IIIA Armor, Compliant to NIJ-0101.04

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 5) 1st 0°	2nd 0°	30°	44 Mag (see note 6) 1st 0°	2nd 0°	30°	Result	Back Face Signature: 9 mm 1st 0°	2nd 0°	44 Mag 1st 0°	2nd 0°	Result
1	UZ030	Front	P.A.C.A.	04ZPG3A-1	Zylon Hybrid	July-2003	11	2	No	No	No	No	No	No	Pass	23	31	46	52	Fail
2	UZ031	Front	P.A.C.A.	04ZPG3A-1	Zylon Hybrid	February-2004	4	1	No	No	No	No	No	No	Pass	31	31	43	48	Fail
3	UZ010	Front	Point Blank	F13-5	Zylon Hybrid	January-2000	53	2	No	No	No	No	No	No	Pass	30	28	43	63	Fail
4	UZ011	Front	Point Blank	F13-5	Zylon Hybrid	#N/A	unknown	2	No	No	No	No	No	No	Pass	32	31	42	45	Fail
5	UZ019	Front	SCBA	SMU-IIIA+ FEM 109040	All Zylon	June-2003	8	2	No	No	No	No	No	No	Pass	39	43	56	55	Fail
6	UZ026	Front	Point Blank	ZL6	Zylon Hybrid	#N/A	unknown	2	No	No	No	No	No	No	Pass	39	35	43	52	Fail

Notes:
1) The 9 mm threats for level IIA armor are a 124 gr. 9 mm FMJ RN bullet with a velocity of 1090 (+50/-0) ft/s for NIJ 0101.03 armor and a velocity of 1120 (±30) ft/s for NIJ 0101.04 armor.
2) The magnum threats for level IIA armor are a 158 gr. 357 Magnum JSP bullet at 1250 (+50/-0) ft/s for NIJ 0101.03 armor and a 180 gr. 40 S&W FMJ bullet at 1055 (±30) ft/s for NIJ 0101.04 armor.
3) The 9 mm threats for level II armor are a 124 gr. 9 mm FMJ RN bullet with a velocity of 1175 (+50/-0) ft/s for NIJ 0101.03 armor and a velocity of 1205 (±30) ft/s for NIJ 0101.04 armor.
4) The magnum threats for level II armor are a 158 gr. 357 Magnum JSP bullet with a velocity of 1395 (+50/-0) ft/s for NIJ 0101.03 armor and a velocity of 1430 (±30) ft/s for NIJ 0101.04 armor.
5) The 9 mm threats for level IIIA armor are a 124 gr. 9 mm FMJ RN bullet with a velocity of 1400 (+50/-0) ft/s for NIJ 0101.03 armor and a velocity of 1430 (±30) ft/s for NIJ 0101.04 armor.
6) The magnum threats for level IIIA armor are a 240 gr. 44 Mag LSWCGC bullet at 1400 (+50/-0) ft/s for NIJ 0101.03 armor and a 240 gr. 44 Mag SJHP bullet at 1430 (±30) ft/s for NIJ 0101.04 armor.
7) The armor condition refers to a visual inspection. Condition 1 refers to armor that shows no visible signs of wear and is in new or "like new" condition. Condition 2 refers to armor that shows light to moderate signs of wear. Condition 3 refers to armor that shows significant signs of wear (daily use for extended period). Condition 4 refers to armor that shows signs of extreme wear or abuse.

Appendix B. Complete results of Phase I (Worst Case) Ballistic Limit and Tensile Testing

Level IIA Armor, Compliant to NIJ-0101.03					Ballistic Limit (V50) (see note 1)						Tensile Strength (see note 2)			
Sample	OLES ID Number	Manufacturer	Model Number	Material	NIJ Max Ref Vel (ft/s)	Compliance V50 (ft/s)	Armor V50 (ft/s)	V50 Diff. (ft/s)	V50 - Ref (ft/s)	Percent Decline[3]	New Yarn (GPa)	Vest Average (GPa)	Strength Loss (GPa)	Strength Loss (%)
1	UZ016	SCBA	ZYL-IIA 898101	All Zylon	1140	-	1350	-	210	-	4.78	2.20	2.59	54%
2	UZ021	SCBA	ZYL-IIA 898101	All Zylon	1140	-	1352	-	212	-	4.78	2.43	2.35	49%
3	UZ028	SCBA	ZYL-IIA 898101	All Zylon	1140	-	1169	-	29	-	4.78	1.87	2.91	61%

Level II Armor, Compliant to NIJ-0101.03					Ballistic Limit (V50) (see note 1)						Tensile Strength (see note 2)			
Sample	OLES ID Number	Manufacturer	Model Number	Material	NIJ Max Ref Vel (ft/s)	Compliance V50 (ft/s)	Armor V50 (ft/s)	V50 Diff. (ft/s)	V50 - Ref (ft/s)	Percent Decline[3]	New Yarn (GPa)	Vest Average (GPa)	Strength Loss (GPa)	Strength Loss (%)
1	UZ029	SCBA	AZG-II 995120	Zylon Hybrid	1225	-	1644	-	419	-	4.78	3.34	1.44	30%
2	UZ003	SCBA	ZYL-II 898101	All Zylon	1225	-	1438	-	213	-	4.78	2.18	2.60	54%
3	UZ015	SCBA	ZYL-II 898101	All Zylon	1225	-	1355	-	130	-	4.78	1.87	2.91	61%
4	UZ020	SCBA	ZYL-II 898101	All Zylon	1225	-	1363	-	138	-	4.78	1.98	2.80	59%
5	UZ024	SCBA	ZYL-II 898101	All Zylon	1225	-	1362	-	137	-	4.78	2.35	2.43	51%

Level II Armor, Compliant to NIJ-0101.04					Ballistic Limit (V50) (see note 1)						Tensile Strength (see note 2)			
Sample	OLES ID Number	Manufacturer	Model Number	Material	NIJ Max Ref Vel (ft/s)	Compliance V50 (ft/s)	Armor V50 (ft/s)	V50 Diff. (ft/s)	V50 - Ref (ft/s)	Percent Decline[3]	New Yarn (GPa)	Vest Average (GPa)	Strength Loss (GPa)	Strength Loss (%)
1	UZ017	PT Armor	PTZG2	Zylon Hybrid	1235	1590	1493	-97	258	27%	4.78	2.85	1.93	40%
2	UZ027	PT Armor	PTZG2	Zylon Hybrid	1235	1590	1531	-59	296	17%	4.78	2.82	1.97	41%
3	UZ002	SCBA	SMU-II+ 001221	All Zylon	1235	1703	1423	-280	188	60%	4.78	2.49	2.30	48%
4	UZ018	SCBA	SMU-II+ 001221	All Zylon	1235	1703	1490	-213	255	46%	4.78	3.08	1.70	36%
5	UZ006	ABA	XTX2-1	Zylon Hybrid	1235	1608	1498	-110	263	29%	4.78	3.82	0.97	20%
6	UZ008	ABA	XTX2-1	Zylon Hybrid	1235	1608	1477	-131	242	35%	4.78	3.34	1.44	30%
7	UZ009	ABA	XTX2-1	Zylon Hybrid	1235	1608	1451	-157	216	42%	4.78	2.72	2.06	43%
8	UZ014	ABA	XTX2-1	Zylon Hybrid	1235	1608	1417	-191	182	51%	4.78	3.09	1.70	35%
9	UZ022	ABA	XTX2-1	Zylon Hybrid	1235	1608	1519	-89	284	24%	4.78	3.36	1.43	30%
10	UZ023	ABA	XTZX2-1	Zylon Hybrid	1235	1554	1264	-290	29	91%	4.78	2.85	1.94	40%
11	UZ007	Gall's	ZL2-2	Zylon Hybrid	1235	1568	1474	-94	239	28%	4.78	4.26	0.52	11%
12	UZ004	PT Armor	ZX-2	Zylon Hybrid	1235	1543	1617	74	382	Increased	-	-	-	-
13	UZ005	PT Armor	ZX-2	Zylon Hybrid	1235	1543	1547	4	312	Increased	-	-	-	-

Level IIIA Armor, Compliant to NIJ-0101.03					Ballistic Limit (V50) (see note 1)						Tensile Strength (see note 2)			
Sample	OLES ID Number	Manufacturer	Model Number	Material	NIJ Max Ref Vel (ft/s)	Compliance V50 (ft/s)	Armor V50 (ft/s)	V50 Diff. (ft/s)	V50 - Ref (ft/s)	Percent Decline[3]	New Yarn (GPa)	Vest Average (GPa)	Strength Loss (GPa)	Strength Loss (%)
1	UZ025	SCBA	ZYL-IIIA 898101	All Zylon	1450	-	1457	-	7	-	4.78	2.22	2.56	54%

Level IIIA Armor, Compliant to NIJ-0101.04					Ballistic Limit (V50) (see note 1)						Tensile Strength (see note 2)			
Sample	OLES ID Number	Manufacturer	Model Number	Material	NIJ Max Ref Vel (ft/s)	Compliance V50 (ft/s)	Armor V50 (ft/s)	V50 Diff. (ft/s)	V50 - Ref (ft/s)	Percent Decline[3]	New Yarn (GPa)	Vest Average (GPa)	Strength Loss (GPa)	Strength Loss (%)
1	UZ030	P.A.C.A.	04ZPG3A-1	Zylon Hybrid	1460	1752	1679	-73	219	25%	-	-	-	-
2	UZ031	P.A.C.A.	04ZPG3A-1	Zylon Hybrid	1460	1752	1684	-68	224	23%	-	-	-	-
3	UZ010	Point Blank	F13-5	Zylon Hybrid	1460	1859	1766	-93	306	23%	-	-	-	-
4	UZ011	Point Blank	F13-5	Zylon Hybrid	1460	1859	1783	-76	323	19%	-	-	-	-
5	UZ019	SCBA	SMU-IIIA+ FEM 108040	All Zylon	1460	1863	1699	-164	239	41%	4.78	3.38	1.41	29%
6	UZ026	Point Blank	ZL6	Zylon Hybrid	1460	1684	1561	-123	101	55%	4.78	3.39	1.39	29%

Notes: 1) The ballistic limit tests were performed on the rear panels of each armor.

2) The tensile tests were performed on yarns extracted from the front panel of each armor.

3) The ballistic limit "Percent Decline" is calculated as the decline in the V50 value divided by the difference between the compliance V50 and the maximum NIJ reference velocity. Thus, a 100% V50 decline will correspond to a used armor V50 that has declined to the maximum NIJ reference velocity.

Appendix C. Results of Phase II P-BFS Testing

Level IIA Armor, Compliant to NIJ-0101.03

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 1) 1st 0°	9 mm 2nd 0°	9 mm 30°	357 Mag (see note 2) 1st 0°	357 Mag 2nd 0°	357 Mag 30°	Result	Back Face Signature: 9 mm 1st 0°	9 mm 2nd 0°	357 Mag 1st 0°	357 Mag 2nd 0°	Result
1	UZ035	Back	SCBA	AZG-IIA 896280	Zylon Hybrid	May-2000	61	4	Yes	Yes	Yes	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
2	UZ041	Front	SCBA	ZYL-IIA 898101	All Zylon	May-2000	61	4	Yes	No	Yes	No	No	No	Fail	N/A	66	58	57	N/A
3	UZ058	Front	SCBA	ZYL-IIA 898101	All Zylon	January-2000	65	4	No	Yes	No	No	No	No	Fail	50	N/A	66	58	N/A

Level IIA Armor, Compliant to NIJ-0101.04

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 1) 1st 0°	9 mm 2nd 0°	9 mm 30°	40 S&W (see note 2) 1st 0°	40 S&W 2nd 0°	40 S&W 30°	Result	Back Face Signature: 9 mm 1st 0°	9 mm 2nd 0°	40 S&W 1st 0°	40 S&W 2nd 0°	Result
1	UZ083	Back	First Choice	MSF1IIA	All Zylon	April-2003	26	3	No	No	Yes	No	No	No	Fail	39	42	50	44	N/A
2	UZ034	Front	SCBA	SMU-IIA +105130	All Zylon	June-2001	48	4	No	No	No	No	No	No	Pass	48	44	49	52	Fail
3	UZ056	Back	PACA	ZPG IIA	Zylon Hybrid	June-2001	48	4	Yes	Yes	Yes	No	No	No	Fail	N/A	N/A	60	45	N/A

Level II Armor, Compliant to NIJ-0101.03

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 3) 1st 0°	9 mm 2nd 0°	9 mm 30°	357 Mag (see note 4) 1st 0°	357 Mag 2nd 0°	357 Mag 30°	Result	Back Face Signature: 9 mm 1st 0°	9 mm 2nd 0°	357 Mag 1st 0°	357 Mag 2nd 0°	Result
1	UZ051	Front	SCBA	AZG-II 995120	Zylon Hybrid	November-2000	54	3	No	No	Yes	Yes	No	No	Fail	45	48	N/A	47	N/A
2	UZ052	Back	SCBA	AZG-II 995120	Zylon Hybrid	October-2001	43	4	-	Yes	Yes	-	Yes	Yes	Fail	-	N/A	-	N/A	N/A
3	UZ053	Front	SCBA	AZG-II 995120	Zylon Hybrid	August-2001	45	3	-	Yes	Yes	Yes	Yes	Yes	Fail	-	N/A	N/A	N/A	N/A
4	UZ074	Back	SCBA	AZG-II 995120	Zylon Hybrid	January-2003	27	3	Yes	Yes	Yes	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
5	UZ082	Back	SCBA	AZG-II 995120	Zylon Hybrid	July-2002	35	4	Yes	Yes	-	Yes	Yes	-	Fail	N/A	N/A	N/A	N/A	N/A
6	UZ092	Back	SCBA	AZG-II 995120	Zylon Hybrid	May-2002	37	3	Yes	Yes	Yes	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
7	UZ094	Front	SCBA	AZG-II 995120	Zylon Hybrid	July-2000	59	4	Yes	Yes	Yes	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
8	UZ095	Back	SCBA	AZG-II 995120	Zylon Hybrid	September-2000	56	4	Yes	Yes	Yes	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
9	UZ096	Back	SCBA	AZG-II 995120	Zylon Hybrid	September-2000	56	4	Yes	Yes	Yes	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
10	UZ097	Front	SCBA	AZG-II 995120	Zylon Hybrid	September-2000	56	4	Yes	Yes	Yes	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
11	UZ036	Back	First Choice	MF2000	All Zylon	July-2001	46	3	No	No	No	No	No	No	Pass	45	46	54	51	Fail
12	UZ042	Front	First Choice	MF2000	All Zylon	August-2001	45	3	No	No	No	No	No	No	Pass	47	47	61	49	Fail
13	UZ043	Front	First Choice	MF2000	All Zylon	August-2001	45	3	No	No	No	No	No	No	Pass	49	42	55	53	Fail
14	UZ059	Back	First Choice	MF2000	All Zylon	November-2001	42	3	No	No	No	No	No	No	Pass	41	-	68	55	Fail
15	UZ071	Back	First Choice	MF2000	All Zylon	August-2001	45	4	No	Yes	No	Yes	No	Yes	Fail	48	46	N/A	58	N/A
16	UZ072	Front	First Choice	MF2000	All Zylon	July-2000	58	3	No	No	No	No	Yes	Yes	Fail	50	48	50	N/A	N/A
17	UZ065	Back	PPI	Z-22	All Zylon	July-2001	46	2	No	No	No	Yes	No	No	Fail	38	38	N/A	54	N/A
18	UZ066	Front	PPI	Z-22	All Zylon	July-2001	46	2	No	No	No	No	Yes	Yes	Fail	42	37	53	N/A	N/A
19	UZ067	Front	PPI	Z-22	All Zylon	July-2001	46	2	No	No	No	Yes	Yes	Yes	Fail	39	40	N/A	N/A	N/A
20	UZ085	Front	PPI	Z-22	All Zylon	May-2001	49	3	No	No	No	Yes	Yes	No	Fail	49	38	N/A	N/A	N/A
21	UZ086	Front	PPI	Z-22	All Zylon	May-2001	49	3	No	No	No	Yes	No	No	Fail	42	36	N/A	53	N/A
22	UZ087	Back	PPI	Z-22	All Zylon	May-2001	48	3	Yes	No	Yes	No	Yes	Yes	Fail	N/A	35	50	N/A	N/A
23	UZ088	Back	PPI	Z-22	All Zylon	April-2001	50	3	No	No	No	No	Yes	No	Fail	41	30	47	N/A	N/A
24	UZ089	Front	PPI	Z-22	All Zylon	April-2001	49	3	No	No	No	No	No	Yes	Fail	35	41	53	-	N/A
25	UZ090	Back	PPI	Z-22	All Zylon	May-2001	49	2	No	Yes	No	No	No	No	Fail	36	N/A	53	60	N/A
26	UZ032	Front	SCBA	ZYL-II 898101	All Zylon	September-2000	56	2	No	No	No	No	No	No	Pass	49	45	65	60	Fail
27	UZ033	Back	SCBA	ZYL-II 898101	All Zylon	September-2000	56	2	No	No	No	No	No	No	Pass	46	47	52	55	Fail
28	UZ040	Front	SCBA	ZYL-II 898101	All Zylon	May-2000	60	4	No	No	No	No	Yes	No	Fail	49	43	62	N/A	N/A
29	UZ047	Front	SCBA	ZYL-II 898101	All Zylon	August-1999	69	4	No	No	No	No	No	No	Pass	51	44	66	-	Fail
30	UZ050	Back	SCBA	ZYL-II 898101	All Zylon	April-2000	61	3	No	No	No	Yes	No	Yes	Fail	44	42	N/A	54	N/A
31	UZ054	Front	SCBA	ZYL-II 898101	All Zylon	May-2000	60	4	No	No	No	Yes	No	No	Fail	47	48	N/A	56	N/A
32	UZ064	Back	SCBA	ZYL-II 898101	All Zylon	November-1999	66	2	No	No	No	No	No	No	Pass	47	-	55	55	Fail

Level II Armor, Compliant to NIJ-0101.04

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 3) 1st 0°	9 mm 2nd 0°	9 mm 30°	357 Mag (see note 4) 1st 0°	357 Mag 2nd 0°	357 Mag 30°	Result	Back Face Signature: 9 mm 1st 0°	9 mm 2nd 0°	357 Mag 1st 0°	357 Mag 2nd 0°	Result
1	UZ037	Back	Gator Hawk	GH-2-1023	Zylon Hybrid	July-2002	33	4	No	No	No	No	No	Yes	Fail	40	40	55	46	N/A
2	UZ091	Front	Gator Hawk	GH-2-1023	Zylon Hybrid	July-2002	34	4	No	No	No	No	No	No	Pass	40	42	52	45	Fail
3	UZ093	Back	Gator Hawk	GH-2-1023	Zylon Hybrid	September-2002	32	4	No	No	No	No	No	No	Pass	41	38	50	44	Fail
4	UZ045	Front	SCBA	SMU-II+001221	All Zylon	August-2002	33	3	No	No	No	No	No	No	Pass	47	35	53	54	Fail
5	UZ055	Front	SCBA	SMU-II+001221	All Zylon	January-2002	39	3	No	No	No	No	No	No	Pass	39	39	48	48	Fail
6	UZ061	Front	ABA	XTX2-1	Zylon Hybrid	May-2002	36	3	No	Yes	No	Yes	No	No	Fail	45	N/A	N/A	62	N/A
7	UZ068	Back	ABA	XTX2-1	Zylon Hybrid	June-2001	47	4	No	No	No	Yes	No	No	Fail	44	34	N/A	50	N/A
8	UZ073	Front	ABA	XTX2-1	Zylon Hybrid	March-2003	26	3	No	No	No	No	No	No	Pass	35	33	45	44	Fail
9	UZ078	Front	ABA	XTX2-1	Zylon Hybrid	December-2002	29	3	No	No	No	Yes	No	No	Fail	35	39	N/A	45	N/A
10	UZ038	Back	ABA	XTZX2-1	Zylon Hybrid	June-2001	47	2	No	No	No	Yes	Yes	No	Fail	43	44	N/A	N/A	N/A
11	UZ039	Back	ABA	XTZX2-1	Zylon Hybrid	June-2001	47	3	Yes	No	No	Yes	Yes	Yes	Fail	N/A	35	N/A	N/A	N/A
12	UZ081	Front	ABA	XTZX2-1	Zylon Hybrid	June-2003	23	4	Yes	No	Yes	Yes	Yes	-	Fail	N/A	49	N/A	N/A	N/A
13	UZ108	Back	ABA	XTZX2-1	Zylon Hybrid	#N/A	unknown	4	Yes	Yes	Yes	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
14	UZ110	Back	PACA	ZGII	Zylon Hybrid	January-2004	17	2	No	No	No	No	No	No	Pass	32	28	45	43	Fail
15	UZ062	Back	Point Blank	ZL5	Zylon Hybrid	#N/A	unknown	3	No	No	No	No	Yes	Yes	Fail	37	36	50	N/A	N/A
16	UZ084	Back	Point Blank	ZL5	Zylon Hybrid	#N/A	unknown	3	No	No	No	No	No	No	Pass	35	44	53	45	Fail
17	UZ109	Front	Point Blank	ZL5	Zylon Hybrid	#N/A	unknown	3	No	No	No	No	No	No	Pass	35	26	38	47	Fail

Level IIIA Armor, Compliant to NIJ-0101.03

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 5) 1st 0°	9 mm 2nd 0°	9 mm 30°	44 Mag (see note 6) 1st 0°	44 Mag 2nd 0°	44 Mag 30°	Result	Back Face Signature: 9 mm 1st 0°	9 mm 2nd 0°	44 Mag 1st 0°	44 Mag 2nd 0°	Result
1	UZ048	Front	SCBA	AZG-IIIA 896280	Zylon Hybrid	January-2002	41	4	Yes	Yes	Yes	No	Yes	No	Fail	N/A	N/A	91	N/A	N/A
2	UZ057	Back	SCBA	AZG-IIIA 896280	Zylon Hybrid	February-2000	64	4	No	No	No	No	No	No	Pass	40	38	48	48	Fail
3	UZ106	Front	SCBA	AZG-IIIA 896280	Zylon Hybrid	October-2000	56	3	No	No	No	No	No	No	Pass	44	42	53	49	Fail
4	UZ100	Back	Point Blank	F04-1	Zylon Hybrid	November-2000	55	4	No	No	No	No	No	No	Pass	27	24	40	40	*Pass*
5	UZ101	Front	Point Blank	F04-1	Zylon Hybrid	November-2000	55	4	No	No	No	No	No	No	Pass	30	29	45	36	Fail
6	UZ102	Front	Point Blank	F04-1	Zylon Hybrid	November-2000	55	3	No	No	No	No	No	No	Pass	29	27	44	43	*Pass*
7	UZ103	Back	Point Blank	F04-1	Zylon Hybrid	November-2000	55	3	No	No	No	No	No	No	Pass	30	22	38	47	Fail
8	UZ044	Front	SCBA	ZYL-IIIA 898101	All Zylon	July-1999	71	4	No	No	No	No	No	No	Pass	49	54	75	67	Fail
9	UZ104	Front	SCBA	ZYL-IIIA 898101	All Zylon	January-2000	65	4	No	Yes	No	No	Yes	No	Fail	43	N/A	70	N/A	N/A
10	UZ105	Back	SCBA	ZYL-IIIA 898101	All Zylon	September-1999	69	4	Yes	No	No	Yes	No	No	Fail	N/A	56	N/A	80	N/A

Level IIIA Armor, Compliant to NIJ-0101.04

Sample	OLES ID Number	Panel Tested	Manufacturer	Model Number	Material	Date of Issue / Manufacture	Age (months)	Armor Condition	Penetrations: 9 mm (see note 5) 1st 0°	9 mm 2nd 0°	9 mm 30°	44 Mag (see note 6) 1st 0°	44 Mag 2nd 0°	44 Mag 30°	Result	Back Face Signature: 9 mm 1st 0°	9 mm 2nd 0°	44 Mag 1st 0°	44 Mag 2nd 0°	Result
1	UZ107	Front	First Choice	MF733	Zylon Hybrid	June-2002	36	2	No	No	No	Yes	No	No	Fail	36	32	N/A	49	N/A
2	UZ060	Back	ABA	XTX3A-1	Zylon Hybrid	#N/A	unknown	4	Yes	Yes	Yes	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
3	UZ069	Front	ABA	XTX3A-1	Zylon Hybrid	September-2001	45	3	Yes	No	No	Yes	No	No	Fail	N/A	39	N/A	50	N/A
4	UZ080	Front	ABA	XTX3A-1	Zylon Hybrid	September-2001	45	4	Yes	Yes	No	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
5	UZ099	Back	ABA	XTX3A-1	Zylon Hybrid	October-2002	32	3	Yes	Yes	Yes	Yes	Yes	Yes	Fail	N/A	N/A	N/A	N/A	N/A
6	UZ046	Back	Point Blank	ZL6	Zylon Hybrid	#N/A	unknown	3	No	Yes	Yes	No	Yes	No	Fail	46	N/A	55	N/A	N/A
7	UZ053	Front	Point Blank	ZL6	Zylon Hybrid	#N/A	unknown	3	No	No	No	No	No	No	Pass	28	39	52	53	Fail
8	UZ070	Back	Point Blank	ZL6	Zylon Hybrid	#N/A	unknown	3	No	No	No	No	No	No	Pass	37	36	58	55	Fail
9	UZ079	Front	Point Blank	ZL6	Zylon Hybrid	#N/A	unknown	4	No	No	Yes	No	No	No	Fail	45	33	53	50	N/A
10	UZ098	Back	Point Blank	ZL6	Zylon Hybrid	#N/A	unknown	3	No	No	No	No	No	No	Pass	34	35	52	51	Fail

Notes:
1) The 9 mm threats for level IIA armor are a 124 gr. 9 mm FMJ RN bullet with a velocity of 1090 (+50/-0) ft/s for NIJ 0101.03 armor and a velocity of 1120 (±30) ft/s for NIJ 0101.04 armor.
2) The magnum threats for level IIA armor are a 158 gr. 357 Magnum JSP bullet at 1250 (+50/-0) ft/s for NIJ 0101.03 armor and a 180 gr. 40 S&W FMJ bullet at 1055 (±30) ft/s for NIJ 0101.04 armor.
3) The 9 mm threats for level II armor are a 124 gr. 9 mm FMJ RN bullet with a velocity of 1175 (+50/-0) ft/s for NIJ 0101.03 armor and a velocity of 1205 (±30) ft/s for NIJ 0101.04 armor.
4) The magnum threats for level II armor are a 158 gr. 357 Magnum JSP bullet with a velocity of 1395 (+50/-0) ft/s for NIJ 0101.03 armor and a velocity of 1430 (±30) ft/s for NIJ 0101.04 armor.
5) The 9 mm threats for level IIIA armor are a 124 gr. 9 mm FMJ RN bullet with a velocity of 1400 (+50/-0) ft/s for NIJ 0101.03 armor and a velocity of 1430 (±30) ft/s for NIJ 0101.04 armor.
6) The magnum threats for level IIIA armor are a 240 gr. 44 Mag LSWCGC bullet at 1400 (+50/-0) ft/s for NIJ 0101.03 armor and a 240 gr. 44 Mag SJHP bullet at 1430 (±30) ft/s for NIJ 0101.04 armor.
7) The armor condition refers to a visual inspection. Condition 1 refers to armor that shows no visible signs of wear and is in new or "like new" condition. Condition 2 refers to armor that shows light to moderate signs of wear. Condition 3 refers to armor that shows significant signs of wear (daily use for extended period). Condition 4 refers to armor that shows signs of extreme wear or abuse.

HIGHLIGHTS FROM THE WHITE HOUSE'S "NATIONAL STRATEGY FOR VICTORY IN IRAQ"

Political:

- Counter false propaganda and demonstrate to all Iraqis that they have a stake in a democratic nation.
- Invite groups willing to stop violent actions into the political process through expanding avenues of participation.
- Build stable national institutions and help integrate Iraq into the international community.

Security:

- Clear areas of enemy control by killing and capturing enemy fighters and denying them a haven.
- Hold areas freed of enemy influence and ensure they remain under control of the Iraqi government.
- Build Iraqi security forces and the capacity of local institutions to advance the rule of law.

Economic:

- Restore Iraq's infrastructure to meet the demands of a growing economy.
- Reform Iraq's economy so it can be self-sustaining in the future.
- Build the capacity of Iraqi institutions to maintain the infrastructure.

Troops:

- U.S. troop deployment probably will change over the next year, though this cannot be guaranteed.
- The U.S. military presence will be less visible but will remain lethal and decisive.
- Troops will return home when the mission to win the war is complete.

(1) TO DO - Examples of Intell on GTMO

McCain

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Why deny detainees access to the courts if you're so confident our procedures are sound and defensible?

> Wouldn't it enhance our credibility and prestige in the world to allow judicial review?

Doesn't holding detainees without charges indefinitely hurt our moral standing in the world? With our allies? With the Muslim community? Isn't this inconsistent with our effort to win hearts and minds?

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Are the reports true that you and others prevailed over the VP in agreeing to a deal with Sen. Graham?

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GTMO/AbuGharib/Torture Memos

Do you agree or disagree w/ the Bybee Memo that the torture statute only covers physical injuries that result in death or organ failure? Or psychological pain that results in the infliction of lasting harms like post traumatic stress disorder?

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X Pcouldn't be clearer

legal eft –

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>
> How many detainees have died in US custody during or as a result of interrogations? Are you willing to say "none"? Why not?

Have the aggressive interrogation techniques employed by the Admin yielded any valuable intelligence? Have they ever stopped a terrorist incident? Examples?

X ① ~~X~~ CS
② Klensy.
③ Tellym
Patrol –
Abu Ali,
Oregon –
④ Press R

Don't the experts in this field agree that torture doesn't yield useful intelligence? If so, why are we pushing the envelope in this area?

Why won't the USG release all of the photos of misconduct at Abu Gharib?

What assurances do you obtain before sending a detainee back to his home country? Do we just allow home governments to "do our torture for us"?

Black Sites

Do we use them?

What legal protections exist to ensure against torture or CID there?

Doesn't the use of such places – without any examination by courts, the ICRC, or others - undermine our moral authority in the war on terror? Doesn't it jeopardize our standing with allies? With the Muslim community?

Patriot Act

Why should we allow personal records from libraries, bookstores, doctor's offices, business, and other entities that are not connected to an international terrorist or spy to be obtained using either a secret order under the Foreign Intelligence Surveillance Act (FISA) or a "national security letter" (NSL) issued by an FBI official without any court oversight?

Why should we allow secret FISA orders and NSLs to bar a recipient from telling anyone (other than the recipient's lawyer) that records have been obtained? Isn't that a violation of the 1A?

How can we say that "sneak and peek" search warrants are appropriate even cases having nothing to do with terrorism?

Why should we make so many changes permanent, when the Admin keeps telling us we are winning the war on terrorism?

How can we endorse a death penalty provision even where the defendant had no intent to kill or to act in reckless disregard of human life (Sect 214)? Or reduce the number of jurors from 12? How do you square that with the 8A?

Padilla

Why did you wait so long to indict him?

Why didn't you indict him on the dirty bomb plot?

Isn't this -- and your speech -- a recognition that the criminal justice is the right way to go in combating terrorism at home? And that such a tactic can be quite successful?

Were you afraid of the Supreme Court review and just trying to hide from court scrutiny?

Why is the Administration generally so distrustful of courts reviewing its conduct in the War on Terror?

Iraq

What's the time table for withdrawal?

Why hasn't the Admin put in more troops?

What is "victory" in Iraq?

In your speech, you say we work well with our allies in the War on Terror. But why didn't we do a better job of working with our allies in the most important front – Iraq?

Defend the Admin's view on WMDs.

What are the true capabilities of the Iraqui police? Is DOJ doing anything to assist them? Same for Iraqui judiciary.

Miscellaneous

There were many raised threat alerts prior to the election, but few since then. What assurances do we have that they are not being used for political ends?

What is the status of the Rove investigation? Any comment on Libby's indictment? Is there a shakeup in the works at the WH?

Status of Abramoff investigation? Comment on Cunningham plea?

COUNCIL ON FOREIGN RELATIONS
General Department of Justice Q&As
December 1, 2005

I. NEW AND UPDATED Q&As

Nomination of Samuel Alito:

Q: In a 1985 memo, Judge Alito recommended that the federal government participate in *Thornburgh v. American College of Obstetricians and Gynecologists* in support of unconstitutional restrictions on a woman's right to choose. Doesn't this indicate that he would reverse *Roe v. Wade* if given the opportunity?

A: The best indication of Judge Alito's judicial philosophy is his fifteen years of well-regarded service as a judge on the court of appeals, which shows careful reasoning, measured decision-making, and respect for precedent. The *Thornburgh* memo clearly reflects the Reagan Administration's policy of opposing *Roe v. Wade*. That year, a White House press release made clear that President Reagan "believes that abortion should be prohibited except when the life of the mother is endangered." Judge Alito wrote as a government lawyer tasked with advancing the Administration's policy goals through participation in cases before the federal courts. The memo sheds no light on his approach to these issues as a judge or justice.

Supreme Court Abortion Case:

Q: What was the Department's position yesterday in the abortion case argued before the Supreme Court?

A: In previous cases the Court has not required every statute to contain an express health exception. The New Hampshire statute contained a sufficient life-of-the-mother exemption and was not required to contain an express health exception.

The challengers to the law have not demonstrated that health emergencies would preclude operation of the law in more than a small fraction of cases where the law applies.

The Court's decision in *Planned Parenthood v. Casey* did not alter the standard for facial challenges outside of the context of spousal-notification provisions.

Background: The Department of Justice was an amicus in the case of *Ayotte v. Planned Parenthood.* Most of our argument concerned the standards for a facial challenge to the law. The New Hampshire statute prohibits a physician from performing an abortion on an

unemancipated minor until 48 hours after a parent or guardian receives written notice. There is a judicial bypass provision—the minor is mature and can make an informed decision, or the bypass is in the girl's best interests.

Padilla—4th Circuit's Decision:

Q: What does the 4th Circuit's decision asking the government to submit briefs on Jose Padilla's detention status mean for the Justice Department's case? Isn't this a set back?

A: Obviously we will comply with the Court's order in this case.

If pushed: As I mentioned to the media last week when announcing the indictment of Mr. Padilla, our position is that Padilla's pending case questioning the government's authority to hold him as an enemy combatant is now moot and we are preparing our briefs to the 4th Circuit on that very issue.

Interrogation Techniques:

Q: Are interrogation techniques such as water boarding lawful from DOJ's perspective?

A: I am not going to address hypothetical scenarios or discuss specific techniques used by the intelligence community. What I can tell you is that the Administration policy is very clear. We do not support or condone using torture under any circumstances. There are no exceptions. In addition to the President's clear direction on this issue, we also have domestic laws and international treaties that prohibit us from engaging in any type of torture. When there is any hint or suggestion that someone acting on behalf of the United States has engaged in torture it is fully and promptly investigated. We have a zero tolerance policy for that kind of behavior.

Graham Legislation:

Q: Was the Department of Justice involved in the effort to strip habeas rights from detainees during the drafting of the Graham legislation?

A: The Department of Justice works with Congress on a number of issues on a regular basis, offering technical assistance to legislators. I'm not going to get into the specific conversations about the Administration's ongoing discussions with the Congress about various pieces of legislation on the Hill dealing with detainees.

Saddam Hussein Trial—Iraqi Special Tribunal:

Q: Why is there no international tribunal?

A: The U.N. Security Council never created an international ad hoc tribunal for Iraq, as it did

for Yugoslavia and Rwanda. Following the liberation of Iraq, the Iraqi Governing Council chose to create a domestic court, with international support, so that trained Iraqi judges and prosecutors could conduct fair and impartial tribunals against high-level members of the regime as a part of the national reconciliation process, and as a symbol that rule of law has returned to Iraq.

Q: How is the system structured?

A: Iraq uses the civil law system, which they derived from the Egyptian and French legal systems. The civil-law system is an Inquisitorial (non-adversarial) system, under which the prosecutor and defense counsel have limited roles. Instead, the Judge is a truth-seeker who gathers exculpatory and inculpatory evidence, questions witnesses and makes legal rulings, including guilt or innocence. There is no jury. Accordingly, the IST trials will look different than trials in the United States. You can expect to see a panel of trial judges reviewing the Investigative File (prepared by the Investigative Judges), calling and questioning witnesses, and making determinations. While the defendant can invoke the right to remain silent, under civil law this may be taken as a sign of guilt.

Q: Does the IST have the death penalty?

A: Yes. In article 24, the IST statute states that the penalties imposed by the IST shall be those prescribed by Iraqi law. As Iraqi criminal law authorizes the death penalty, this article incorporates that sanction into the IST.

Q: Are there international advisors for the IST judges?

A: The original IST statute required international advisors for the IST. By August 2005, no countries, international organizations or NGOs had provided any international advisors to the IST judges, and the Transitional National Assembly made this requirement optional when they revised the statute. An international fund is being established to help pay the costs of international advisors.

II. RECENT NEWS

CIA Black Sites:

Q: There have been recent reports that key al Qaeda suspects are being held in Eastern Europe and other secret facilities that exist around the world. Do you feel these facilities are necessary?

A: I'm not going to talk about specific intelligence activities. What I can reassure the American people is that this Administration is doing what we need to do to protect America from another domestic attack here in this country and against attacks against our allies. We have a patient and diabolical enemy intent on harming Americans. All of the tools we use to fight the war on terror are consistent with our legal obligations both domestically and internationally.

Q: Can you tell me if the Administration is considering changing the policy that allows these facilities to exist?

A: Again, I'm not going to talk about specific intelligence activities, either confirming or denying the existence of these kinds of activities. What I want to do again is reassure the American people that this President has directed that we do everything that we can do and should be doing to protect America but to do so in a way consistent with our legal obligations both domestically and internationally.

McCain Legislation:

Q: Why won't the Administration support the McCain legislation, which prohibits torture and cruel and degrading treatment of those in U.S. custody? The U.S. says that we don't support torture but at the same time the Administration is unwilling to support a law that would make that policy clear to the rest of the world. Why is that?

A: Dialogue about these new and important issues that now face us in a post 9-11 world is constructive. I want to point out that we cannot lose sight of the fact that we face a very patient, diabolical enemy who intends to harm us again. The attacks in London and Madrid and the recent arrests in Australia all point to an enemy intent on harming freedom loving people everywhere. We have been using every tool at our disposal to prevent another attack in this country and we have done so in a way that is consistent with our legal obligations abroad and in compliance with our own domestic laws. Different members of the Administration have stated repeatedly that the U.S. does not condone torture and when there is abuse that does occur those individuals will be held accountable for their illegal actions. The Administration has been very clear about this. I know there are different pieces of legislation that are currently being circulated that address different issues surrounding detainee policy but I think it is important to focus on the existing policy which is very clear: we take our legal obligations very seriously and this government will not stand for torture under any circumstance.

Guantanamo Detainees:

Q: Members of Congress have called for some kind of independent commission to look into the question of detainees, interrogation centers, and Guantanamo. Is this something you would be willing to support?

A: These cases of alleged abuse in Guantanamo are *not* the norm and are *not* indicative of the behavior of our troops.

- To assess detention activities, the Administration has conducted more than 10 major reviews, assessments, and investigations, which produced over 500 specific recommendations to improve operations, many of which have already been

implemented.

- In addition, there have been 24-hour inspections by the International Red Cross at Guantanamo.

We will continue to aggressively investigate credible allegations of prisoner abuse, to hold individuals accountable for wrongdoing, and to implement fixes to minimize the likelihood of future abuse.

Guantanamo—Geneva Convention:

Q: The Geneva Conventions apply to prisoners of war. Why won't the United States recognize the rights of the prisoners of war at Guantanamo?

A: Al Qaeda is a terrorist organization that has killed thousands of innocent people from many countries, and it is continually trying to find ways to keep killing innocent people. It is not a party to the Geneva Convention, and thus the Convention does not apply to al Qaeda.

The Convention creates requirements for POW status that al Qaeda and the Taliban don't meet: things such as fixed distinctive emblems or uniforms, a command organization, the carrying of arms openly, and other factors. The attacks of September 11th and the other terrorist acts al Qaeda has committed around the world targeted innocent civilians and are in flagrant defiance of the law of armed conflict.

President Bush has determined that while the Geneva Convention applies to Taliban detainees because Afghanistan is a signatory to the Convention, they're not POW's under the Convention because—like al Qaeda—they don't meet the Convention's own requirements for POW status.

Although it is difficult to speak to every type of hypothetical, generally speaking, prisoners captured in Iraq are covered by the Geneva Convention.

It is important to point out, however, that even in cases where the Convention does not apply, U.S. policy is to treat each and every detainee in our custody humanely.

Renditions:

Q: What is your official policy on the issue of renditions and their use?

A: At every step of the way, President Bush and this administration have made very clear that we abide by the laws of our land and the treaty obligations we have. We will not torture here in America, and we will not export torture. That is unacceptable to this President, and something that we will not tolerate. When we do extradite we seek assurances from those other countries that these individuals will be treated humanely and in many instances we follow up with these countries to ensure that is happening.

USA PATRIOT Act Reauthorization:

Q: **Privacy issues continue to concern the American public with relation to the USA PATRIOT Act, specifically regarding the use of National Security Letters, which allow the FBI to obtain a broad range of documents and records from libraries, business, and other entities while imposing a "nondisclosure" order on the recipient of the letter. Doesn't this practice violate the recipient's privacy as well as his First Amendment right to free speech?**

A: The FBI is not spying on ordinary Americans. To the contrary, National Security Letters (NSLs) are issued only when the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities.

- NSLs were not created by the PATRIOT Act. National Security Letters are an important law enforcement tool used to fight terrorists and espionage that have been around for decades.

- NSLs are a minimally intrusive preliminary investigative tool used to primarily check out tips and initial leads. In the post 9-11 world, the FBI must check all tips and leads—to do otherwise would be deeply irresponsible and could endanger the American people.

- NSLs allow the FBI to request that companies or individuals provide to the FBI certain narrow sets of records relating to electronic communications such as telephone subscription agreements, call records, or internet sign-on records. The information acquired through NSLs is extremely valuable to terrorism and espionage investigations, allowing the FBI to track the electronic communications of terrorists and spies without actually acquiring the content of that information.

- There has been some confusion out there regarding an individual's right to contest a NSL request and consult with an attorney. As I told Congress in April, the Department of Justice supports language that would clarify this misconception by making this implicit right to consult with an attorney, explicitly expressed in the revised bill.

- NSLs are subject to judicial review. If a recipient of an NSL chooses to contest the request, the FBI cannot compel that individual to comply. Only a federal judge can require an individual to comply with a NSL request.

Civil Rights Division—Washington Post:

Q: **A recent article in the Washington Post alleged that morale among career attorneys in the Civil Rights Division has plummeted, the division's productivity has suffered,**

and the pace of civil rights enforcement has slowed. How do you respond?

A: These accusations are empirically untrue. This Administration has continued the robust and vigorous enforcement of civil rights laws. Among our many accomplishments include:

- The Civil Rights Division has more than tripled the enforcement of our human trafficking cases.
- The Division filed more criminal civil rights cases last year than in any other year in the Division's history.
- In the past five years, the Division brought more cases to enforce section 203 of the Voting Rights Act than brought in the previous 25 years combined.
- This Administration has a 90 percent rate of success in the federal courts of appeals, as compared to just 60 percent during the previous administration. In other words, courts are four times less likely to reject our legal arguments than the ones filed in the previous administration.
- These accomplishments could not have been achieved without teamwork between career attorneys and political appointees. Everyday, members of the Civil Rights Division—both careers and politicals—work side by side as a unit to enforce the nation's civil rights laws. We will continue to work together to further build on these accomplishments.

Padilla—Enemy Combatant Questions:

Q: Is Mr. Padilla still an enemy combatant?

A: The President has authorized the transfer of Mr. Padilla from the control of the Department of Defense to the Department of Justice for the purpose of criminal proceedings. So, upon that transfer, Mr. Padilla will no longer be held as an enemy combatant and the Defense Department's authority to detain him under the President's June 9, 2002 order will cease.

Q: But is he still designated as an enemy combatant? Does this mean the designation was wrong?

A: His designation as enemy combatant in June 2002 is legally irrelevant to the charges returned by the Grand Jury in Florida, which were unsealed today. He will no longer be detained as an enemy combatant. He will be a defendant in the criminal justice system and stand in the same position as any other defendant in that system.

Q: What do you plan to do if Mr. Padilla is acquitted in the criminal case or given bail?

Are you going to return him to Department of Defense custody?

A: I am not going to comment on any hypothetical situations. We are fully confident in the strength of our case.

Padilla—Questions Regarding the Timing of Charges:

Q: Why are you charging Mr. Padilla now? Is the timing of this indictment designed to prevent Supreme Court review because you are afraid you may lose in that Court?

A: Prosecutors make decisions all the time as to when it is the appropriate time to charge defendants based upon a variety of factors, including careful consideration of national security interests. As I said in my statement, the President has made clear that we will utilize all of the tools available to us to protect Americans from acts of terrorists and these determinations are made on a case-by-case basis. We believe that, under the present circumstances, it is the appropriate time to charge this defendant in this case. I think it is important to note that Mr. Padilla is being added as a defendant to a pre-existing indictment that has been pending against his co-defendants, who are scheduled to go to trial in September 2006. We intend to ask the Court to set the same schedule for Mr. Padilla since he is now a defendant in that case.

On the issue of Supreme Court review, Mr. Padilla has filed a petition with the Court and we plan to oppose a grant of certiorari. In his habeas petition, the relief sought by Mr. Padilla was either to be released or charged in a criminal court. We intend to argue that, since he has been charged by a Grand Jury in criminal court, his petition is now moot and the Court should not grant review. The ultimate decision on this issue is obviously for the Court.

Padilla—Questions Regarding Post-November 2001 Conduct:

Q: Why haven't you charged Mr. Padilla with the "dirty bomb" plot or other conduct that was the basis for the enemy combatant designation?

A: In determining which charges to bring in terrorism cases, prosecutors must consider Many factors, including national security interests. Consistent with those interests and considerations, we have obtained an indictment against Mr. Padilla and his co-defendants that alleges a long-term conspiracy involving activities that span over an eight-year period—from October 1993 until November 2001. The charges returned by the Grand Jury are extremely serious and, if convicted, Mr. Padilla and his co-defendants face a maximum penalty of life imprisonment.

Q: Do you still stand by Mr. Comey's statements?

A: Mr. Comey's June 2004 statements regarding Mr. Padilla's designation as an enemy combatant are not relevant to the charges returned by the Grand Jury in Florida. We are

here to announce those charges today. As with all our cases, I am not going to comment on anything beyond the four corners of the indictment.

Q: Isn't it unfair to Mr. Padilla that the Government has for years labeled him as the "dirty bomber" and now he's not even charged with that plot so that he can defend those charges? How can he possibly get a fair trial? Didn't that press conference, with talk about dirty bomb plots, taint any jury pool?

A: Again, I am not going to comment beyond the four corners of the indictment. Of course, as with any criminal defendant, he is presumed innocent unless and until proven guilty of the charges. I fully expect that Mr. Padilla can and will receive a fair trial in our criminal justice system. Our courts are fully capable of handling any issues regarding pretrial publicity, as well as publicity during the trial.

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Don't the experts in this field agree that torture doesn't yield useful intelligence? If so, why are we pushing the envelope in this area?

Why won't the USG release all of the photos of misconduct at Abu Gharib?

What assurances do you obtain before sending a detainee back to his home country? Do we just allow home governments to "do our torture for us"?

Black Sites

Do we use them?

What legal protections exist to ensure against torture or CID there?

Doesn't the use of such places – without any examination by courts, the ICRC, or others - undermine our moral authority in the war on terror? Doesn't it jeopardize our standing with allies? With the Muslim community?

Patriot Act

Why should we allow personal records from libraries, bookstores, doctor's offices, business, and other entities that are not connected to an international terrorist or spy to be obtained using either a secret order under the Foreign Intelligence Surveillance Act (FISA) or a "national security letter" (NSL) issued by an FBI official without any court oversight?

Why should we allow secret FISA orders and NSLs to bar a recipient from telling anyone (other than the recipient's lawyer) that records have been obtained? Isn't that a violation of the 1A?

How can we say that "sneak and peek" search warrants are appropriate even cases having nothing to do with terrorism?

Why should we make so many changes permanent, when the Admin keeps telling us we are winning the war on terrorism?

How can we endorse a death penalty provision even where the defendant had no intent to kill or to act in reckless disregard of human life (Sect 214)? Or reduce the number of jurors from 12? How do you square that with the 8A?

Padilla

Why did you wait so long to indict him?

Why didn't you indict him on the dirty bomb plot?

Isn't this -- and your speech -- a recognition that the criminal justice is the right way to go in combating terrorism at home? And that such a tactic can be quite successful?

Were you afraid of the Supreme Court review and just trying to hide from court scrutiny?

Why is the Administration generally so distrustful of courts reviewing its conduct in the War on Terror?

Iraq

What's the time table for withdrawal?

Why hasn't the Admin put in more troops?

What is "victory" in Iraq?

In your speech, you say we work well with our allies in the War on Terror. But why didn't we do a better job of working with our allies in the most important front – Iraq?

Defend the Admin's view on WMDs.

What are the true capabilities of the Iraqui police? Is DOJ doing anything to assist them? Same for Iraqui judiciary.

Int'l Tribunal

Miscellaneous

There were many raised threat alerts prior to the election, but few since then. What assurances do we have that they are not being used for political ends?

What is the status of the Rove investigation? Any comment on Libby's indictment? Is there a shakeup in the works at the WH?

Status of Abramoff investigation? Comment on Cunningham plea?

SA 2524. Mr. GRAHAM (for himself, Mr. LEVIN, and Mr. KYL) proposed an amendment to amendment SA 2515 proposed by Mr. GRAHAM (for himself, Mr. KYL, Mr. CHAMBLISS, and Mr. CORNYN) to the bill S. 1042, to authorize appropriations for fiscal year 2006 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes; as follows:

In lieu of the matter proposed to be inserted, insert the following:

SEC. ___. REVIEW OF STATUS OF DETAINEES.

(a) *Submittal of Procedures for Status Review of Detainees at Guantanamo Bay, Cuba*.--Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the congressional defense committees, and to the Committees on the Judiciary of the Senate and the House of Representatives, a report setting forth the procedures of the Combatant Status Review Tribunals and the noticed Administrative Review Boards in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay.

(b) *Procedures*.--The procedures submitted to Congress pursuant to subsection (a) shall, with respect to proceedings beginning after the date of the submittal of such procedures under that subsection, ensure that--

(1) in making a determination of status of any detainee under such procedures, a Combatant Status Review Tribunal or Administrative Review Board may not consider statements derived from persons that, as determined by such Tribunal or Board, by the preponderance of the evidence, were obtained with undue coercion; and

(2) the Designated Civilian Official shall be an officer of the United States Government whose appointment to office was made by the President, by and with the advice and consent of the Senate.

(c) *Report on Modification of Procedures*.--The Secretary of Defense shall submit to the committees of Congress referred to in subsection (a) a report on any modification of the procedures submitted under subsection (a) not later than 60 days before the date on which such

modification goes into effect.

(d) *Judicial Review of Detention of Enemy Combatants*.--

(1) **IN GENERAL**.--Section 2241 of title 28, United States Code, is amended by adding at the end the following:

``(e) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien outside the United States (as that term is defined in section 101(a)(38) of the Immigration and Naturalization Act (8 U.S.C. 1101(a)(38)) who is detained by the Department of Defense at Guantanamo Bay, Cuba.".

(2) **REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION**.--

(A) **IN GENERAL**.--Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any decision of a Designated Civilian Official described in subsection (b)(2) that an alien is properly detained as an enemy combatant.

(B) **LIMITATION ON CLAIMS**.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien--

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) **SCOPE OF REVIEW**.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of--

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien applied the correct standards and was consistent with the procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor the

Government's evidence); and

(ii) whether subjecting an alien enemy combatant to such standards and procedures is consistent with the Constitution and laws of the United States.

(D) **TERMINATION ON RELEASE FROM CUSTODY.**--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

(3) **REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS.**--

(A) **IN GENERAL.**--Subject to subparagraphs (C) and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) **GRANT OF REVIEW.**--Review under this paragraph--

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(C) **LIMITATION ON APPEALS.**--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien--

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) **SCOPE OF REVIEW.**--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of

U. S. Department of Justice

Civil Division

Assistant Attorney General *Washington, D.C. 20530*

July 13, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 7/28/06

FROM: Peter D. Keisler
Assistant Attorney General
Civil Division

SUBJECT: Availability and Proposed Uses of the Civil Division's Unobligated Balances

As requested in your May 1, 2006, memorandum, I am submitting estimates of the unobligated prior year balances that are available for transfer from Civil Division accounts to the Department's Working Capital Fund and to the Automated Litigation Support (ALS) no-year account.[1] The Civil Division can transfer $11,580,000 to these accounts. Attachment 1 summarizes the amounts for each year.

The Civil Division seeks to apply these balances to address major Division and Department needs: $8,640,000 for the Spent Nuclear Fuel litigation, and $2,700,000 to invest in the next generation of telecommunications for the litigating divisions.

The Spent Nuclear Fuel litigation needs $8,640,000 for automated litigation support services. To date, over 66 suits have been filed by nuclear power utilities that are seeking damages for the government's failure to begin acceptance of spent nuclear fuel. Nuclear utility industry publications have estimated that claims for the first ten years of delay will exceed $50 billion by 2008. The litigation is extremely active, with six cases scheduled for trial through FY 2007. While the Department has consistently supported funding increases for this litigation, Congress has not appropriated the requested funding. Attachment 2 provides background on this requirement.

[1] The Department's annual appropriation allows for up to $10,000,000 in unobligated balances to remain available to the litigating divisions for litigation support contracts. The Department uses this provision to transfer these balances into an account ("the ALS No-Year Account") established for this purpose. Balances transferred to this account are then distributed to meet urgent, but unfunded, litigation support requirements. The column of the chart in Attachment 1 labeled "Remaining 'Capacity' of the ALS No-Year Account to Accept Funds" shows $10 million minus the amount already deposited to this account each fiscal year.

The $2,700,000 we are requesting for telecommunications will fund replacement networks as the current Metropolitan Area Network is phased out. The replacement networks will incorporate redundancy, as well as firewalls and intrusion detection technology to ensure security. We do not know exactly how much funding will be required or when it will be needed. However, we do know that the Civil Division and other litigating divisions will be migrating soon. The FY 2007 budget pending before Congress does not include funding for this requirement. Consequently, either the components will have to absorb the costs by taking cuts elsewhere, or alternative funding sources will need to be developed. The transfer we are proposing would provide such an alternative for Civil and the other divisions.

I would be happy to meet with you to discuss this subject.

Attachments

OASG CORRESPONDENCE ROUTING AND ACTION

From: Peter Keisler	Date: 07/13/2006	Due Date: ASAP	Workflow ID: WALKED-IN
Subject: Memo requesting the ASG's approval authorizing Availability and proposed uses of the Civil Division's Unobligated Balances			
Reviewer: Lily Swenson		Due Back for Processing to Exec Sec: ASAP	
Instructions: **Please review and provide written comments.**			
From: **Lily Swenson**	To: **Neil Gorsuch**		Date: 7/24/06
Comments: I don't have reason to disagree with the proposed uses but we can discussed appropriately.			
From: **Neil Gorsuch**	To: **Robert McCallum**		Date:
Comments:			

1039/43

U. S. Department of Justice

Civil Division

Assistant Attorney General *Washington, D.C. 20530*

July 25, 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ACTING ASSOCIATE ATTORNEY GENERAL 8/2/06

FROM: Peter D. Keisler
Assistant Attorney General

SUBJECT: Yang Rong, et al. v. Liaoning Province, No. 05-7030 (D.C. Cir.)

PURPOSE: To inform His Excellency Wu Aiying, Minister of Justice of the People's Republic of China (PRC) about a favorable decision in a case about which the Minister had previously inquired.

TIMETABLE: As soon as possible.

SYNOPSIS: Letter to the PRC Minister describing prior correspondence between the Attorney General and the Minister about the Yang Rong case and informing the Minister of the D.C. Circuit's decision, which is favorable to China.

DISCUSSION: N/A

RECOMMENDATION: Respectfully request that the Attorney General sign the attached letter.

APPROVE: _____

DISAPPROVE: _____

OTHER: _____

Concurring components:
None

Non-concurring components:
None

Attachment

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

His Excellency
Wu Aiying
Minister of Justice of the People's Republic of China
Beijing

Dear Mr. Minister:

I write to inform you of the court of appeals' decision in the case of Yang Rong v. Liaoning Province, No. 05-7030 (D.C. Cir.), a case about which we have previously corresponded. The court's decision is favorable to the Chinese Government.

You previously wrote to me to express the Chinese Government's position in the Yang Rong case and to ask the United States to consider filing a statement of interest in that case. I responded to your letter on May 15, 2006, explaining that, as a procedural matter, it would be inappropriate for the United States to file a statement of interest, because the parties had already filed briefs and presented oral argument and were awaiting the court of appeals' decision. I also explained that, after careful consideration of the matter, the Department of State advised us that it would be inappropriate for the United States to file a statement of interest at that time.

On July 7, 2006, the court of appeals issued an opinion affirming the district court's dismissal of Yang Rong's suit against Liaoning Province. The court decided that the Chinese Government is immune from suit in this case under the Foreign Sovereign Immunities Act, a United States law providing foreign sovereigns immunity from suit in the United States unless the case falls under one of the limited exceptions stated in the law. Enclosed is a copy of the court of appeals' decision for your review.

Under the United States' legal system, it is possible for a plaintiff to seek further review of such a decision. However, the court of appeals' decision is a substantial victory for China's position.

I hope that this information is helpful to your understanding of this matter, and I look forward to future cooperation between China and the United States on issues of mutual concern.

Sincerely,

Alberto R. Gonzales
Attorney General

Enclosure

OASG CORRESPONDENCE ROUTING AND ACTION

From: Peter Keisler	Date: 7/28/2006	Due Date: 8/01/2006	Workflow ID: 1039143

Subject: Memo requesting the AG's approval of and signature on the attached letter to His Excellency Wu Aiying, Minister of Justice of the People's Republic of China, describing prior correspondence between the AG and the Minister about the case entitled, Yang Rong, et al. V. Liaoning province, No. 05-7030 (D.C. Cir.), and informing the Minister of the D.C. Circuit's decision, which is favorable to China.

Review: Lily Fu Swenson	Due Back for processing to Exec Secy: **8/1/2006**

Instructions: **Please review and provide written comments.**

From: **Lily Fu Swenson**	To: **Neil M. Gorsuch**	Date:

Comments:

From:	To: **Neil M. Gorsuch**	Date:

Comments:

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/25/2006 **WORKFLOW ID:** 1039143
DATE RECEIVED: 07/27/2006 **DUE DATE:** 08/01/2006

FROM: The Honorable Peter D. Keisler
Assistant Attorney General
Civil Division
Department of Justice
Washington, DC 20530-0001

TO: AG

MAIL TYPE: Action Memorandum

SUBJECT: Memo requesting the AG's approval of and signature on the attached letter to His Excellency Wu Aiying, Minister of Justice of the People's Republic of China, describing prior correspondence between the AG and the Minister about the case entitled, Yang Rong, et al. v. Liaoning province, No. 05-7030 (D.C. Cir.), and informing the Minister of the D.C. Circuit's decision, which is favorable to China. See WF 968019.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
07/27/2006	For ASG initialing on Action Memorandum. Return to ES for forwarding to the DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

U. S. Department of Justice

Civil Division

Assistant Attorney General *Washington, D.C. 20530*

July 25, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ACTING ASSOCIATE ATTORNEY GENERAL 8/2/06

FROM: Peter D. Keisler PDK
Assistant Attorney General

SUBJECT: Letter to David S. Addington, Chief of Staff to the Vice President, Regarding the Legal Status of the Vice Presidency

PURPOSE: To respond to David Addington's letter of May 12, 2006, addressed to the Deputy Attorney General (DAG), regarding the legal status of the Vice Presidency.

TIMETABLE: As soon as possible.

SYNOPSIS: David Addington wrote to the DAG, regarding communications with the Department of Justice, to assist the Department and, through the work of the Department, the Federal courts, in ensuring that the legal status of the Vice Presidency is reflected accurately in documents filed in the courts.

DISCUSSION: The response assures David Addington that in the rare cases in which the legal status of the Vice Presidency is at issue, the Department's court pleadings will accurately describe the Vice presidency's legal status.

RECOMMENDATION: It is respectfully requested the DAG sign the attached response.

APPROVE: _____

DISAPPROVE: _____

OTHER: _____

Attachment

Concurring Components:
None

Nonconcurring Components:
None

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

The Honorable David S. Addington
Chief of Staff to the Vice President
of the United States
Washington, D.C. 20501

Dear Mr. Addington:

Thank you for your letter of May 12, 2006, regarding the legal status of the Vice Presidency. Having reviewed your letter and the attached memorandum, we will ensure that, in the rare cases in which the legal status of the Vice Presidency is at issue, the Department's court pleadings accurately describe the Vice Presidency's legal status.

Please do not hesitate to contact me should you have further questions on this or any other issue.

Sincerely,

Paul J. McNulty
Deputy Attorney General

OASG CORRESPONDENCE ROUTING AND ACTION

From: Peter Keisler	Date: 7/28/2006	Due Date: 8/01/2006	Workflow ID: /003435

Subject: In response to the AG's memo dated 5/4/2006, regarding communications with DOJ, writing to assist the Department and through the work of the Department, federal courts, in ensuring that the legal status of the Vice Presidency is reflected accurately in documents filed in the courts. Encloses a paper that will assist the Department in eliminating erroneous references to the Vice Presidency as part of the executive branch, part of the "Executive Office of the President," part of the "White House," as an "agency," or as under Presidential direction.

Review: Lily Fu Swenson	Due Back for processing to Exec Secy: **8/1/2006**

Instructions: **Please review and provide written comments.**

From: **Lily Fu Swenson**	To: **Neil M. Gorsuch**	Date:

Comments:

From:	To: **Neil M. Gorsuch**	Date:

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 05/12/2006 **WORKFLOW ID:** 1003435
DATE RECEIVED: 05/15/2006 **DUE DATE:** 08/01/2006

FROM: The Honorable David S. Addington
Chief of Staff and Counsel
Office of the Vice President
Washington, DC 20501

TO: DAG

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: (Fax rec'd from ODAG) In response to the AG's memo dated 5/4/2006, regarding communications with DOJ, writing to assist the Department and, through the work of the Department, federal courts, in ensuring that the legal status of the Vice Presidency is reflected accurately in documents filed in the courts. Encloses a paper that will assist the Department in eliminating erroneous references to the Vice Presidency as part of the executive branch, part of the "Executive Office of the President," part of the "White House," as an "agency," or as under Presidential direction. See WF 998258.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
07/27/2006	For ASG initialing on Action Memorandum. Return to ES for forwarding to the DAG. Office of the Associate Attorney General

INFO COMPONENT: OAG, ODAG, OASG, OLC

COMMENTS: 7/27/2006: CIV submitted action memo to the DAG dated 7/25/06 w/ltr for DAG signature.
7/14/2006: Per CIV request copy of incoming letter forwarded to ATR, CRM, CRT, EOUSA, ENRD and TAX for information only.
5/22/2006: Original rec'd in ES and forwarded to DAG files.

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

1036505

U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

July 21, 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 8/2/06

FROM: Sue Ellen Wooldridge
Assistant Attorney General

SUBJECT: Acceptance of Concurrent Legislative Jurisdiction at Bureau of Prisons Facility in Devens, Massachusetts

PURPOSE: To obtain the signature of Attorney General Gonzales

TIMETABLE: Review and signature without delay

SYNOPSIS: The Attorney General should accept concurrent criminal legislative jurisdiction, on behalf of the United States and from the Commonwealth of Massachusetts over the land comprising the Federal Medical Center Devens. Acceptance of concurrent legislative jurisdiction will allow the Federal Government to enforce certain federal laws that apply only within areas under the United States' legislative jurisdiction, without displacing state enforcement authorities.

DISCUSSION: The Bureau of Prisons (Bureau) desires to acquire concurrent criminal and civil legislative jurisdiction over the site of the Federal Medical Center at Devens (FMC Devens). The Commonwealth recently approved cession of concurrent jurisdiction to the United States over FMC Devens. Under federal law, this cession does not take effect until accepted by the Attorney General.

This memorandum recommends that the Attorney General accept concurrent legislative jurisdiction on behalf of the United States for the site.

RECOMMENDATION: I recommend that you sign the enclosed letter to Governor Romney of Massachusetts, accepting concurrent jurisdiction for the site of FMC Devens.

LEGAL BACKGROUND

Article I, Section 8, Clause 17, of the United States Constitution authorizes the federal government to exercise jurisdiction over lands it acquires within a state. Clause 17 provides: "The Congress shall have power * * * to exercise exclusive Legislation in all Cases" over "all Places purchased by the consent of the Legislature of the State in which the Same shall be" for forts, docks, and "other needful buildings." This Clause authorizes the United States to exercise either exclusive legislative jurisdiction (displacing state authority) or concurrent legislative jurisdiction (establishing concurrent federal and state authority) over federal property, where state consent has been given. See James v. Dravo Contracting Co., 302 U.S. 134, 148 (1937).

Certain acts violate federal criminal law wherever they are committed and, therefore, are uniformly subject to federal prosecution. However, other acts do not violate federal criminal law unless they are committed in areas within the special maritime and territorial jurisdiction of the United States, including areas over which the United States has acquired legislative jurisdiction pursuant to Clause 17. See 18 U.S.C. § 7. Laws that apply only in areas of federal legislative jurisdiction include: 18 U.S.C. §§ 81 (arson); 113 (assaults); 114 (maiming); 117 (domestic assault by habitual offender); 661 (theft); 662 (receiving stolen property); 1111 (murder); 1112 (manslaughter); 1113 (attempt to commit murder or manslaughter); 1201 (kidnaping); 1363 (destruction of property); 1801 (video voyeurism); and 2111 (robbery). Where Congress has not specifically criminalized particular conduct, the Assimilative Crimes Act, 18 U.S.C. § 13, makes it a federal crime to commit any act that would be punishable under the criminal laws of the relevant state.

The Bureau of Prisons routinely seeks concurrent legislative jurisdiction at federal correctional institutions to ensure that the United States can prosecute conduct, especially inmate conduct, that violates such statutes. The Bureau typically seeks concurrent, rather than exclusive, jurisdiction so that the United States will have a choice whether to prosecute a particular crime or to leave the prosecution to state authorities. State cession of concurrent jurisdiction allows the United States to enforce all federal criminal laws, without displacing state enforcement authorities.

FMC Devens is an administrative facility housing male offenders requiring specialized or long-term medical or mental health care. FMC Devens also has a satellite camp housing minimum security male inmates. The lands comprising FMC Devens were formerly part of Devens Army Base. Administrative control of this portion of the Devens Army Base was transferred by the Army to the Bureau in 1997. The Bureau is now seeking to establish concurrent federal legislative jurisdiction over offenses occurring at FMC Devens, with the concurrence of the Criminal Division of the Department of Justice. The Criminal Division agrees that federal authorities should have jurisdiction over any offenses committed by inmates at FMC Devens because state and local authorities often decline to address non-federal offenses that occur on the site.

Consent by the state is a prerequisite to the federal government's acquisition of jurisdiction under Article I, Section 8, Clause 17. See James v. Dravo Contracting Co., 302 U.S. at 147, 148. Cession by a state of legislative jurisdiction is not effective until an authorized federal officer accepts the jurisdiction. See 40 U.S.C. § 3112, formerly 40 U.S.C. § 255. Only the U.S. Attorney General is authorized to accept legislative jurisdiction on behalf of the Bureau.

MASSACHUSETTS' CESSION OF CONCURRENT LEGISLATIVE JURISDICTION

The Bureau of Prisons began efforts to acquire concurrent legislative jurisdiction over the land in Harvard, Massachusetts that comprises FMC Fort Devens in 1998. The effort was unusually difficult and lengthy. Massachusetts ultimately ceded concurrent criminal legislative jurisdiction over that land to the United States by an act of the Massachusetts legislature of December 27, 2004. See Chapter 481 of the Acts of 2004. This was

subsequently signed into law by the Governor of Massachusetts on January 6, 2005. (These lands are described in Exhibit A to the attached acceptance letter.)

CONCLUSION AND RECOMMENDATION:

Acceptance of concurrent legislative jurisdiction at the FMC Devens site would allow the United States authority to enforce and prosecute certain federal laws, as well as other, non-federal offenses, without displacing state authority.

The Bureau considers it a priority to obtain concurrent jurisdiction over FMC Devens by acceptance at the earliest possible date, to avert the risk that the United States may lack jurisdiction to prosecute offenses that may occur prior to acceptance.

Should you have any questions regarding this matter, please have your staff contact Justin Smith, of the Environment & Natural Resources Division's Law and Policy Section, at 514-0750, or George Younger, of the Federal Bureau of Prisons' Office of General Counsel, at 353-4595.

Attachment

OASG CORRESPONDENCE ROUTING AND ACTION

From: Sue Ellen Wooldridge	Date: 07/28/2006	Due Date: 8/02/2006	Workflow ID: 1036505

Subject: Memo requesting the AG's signature on the attached letter to Governor of Massachusetts Mitt Romney, regarding acceptance of concurrent legislative jurisdiction at the BOP facility in Devens, MA.

Review: **Jeffrey Senger**	Due Back for processing to Exec Secy: **8/02/2006**

Instructions: **Please review and provide written comments.**

From: **Jeffrey Senger**	To: **Neil M. Gorsuch**	Date: 7/28/06

Comments:

Attached letter for AG signature accepting concurrent jurisdiction over Massachusetts BOP facility to permit enforcement of certain federal laws. Looks fine.

Jeff

From: **Neil M. Gorsuch**	To: ~~**Robert D. McCallum, Jr.**~~	Date:

Comments:

Office of the Attorney General
Washington, D.C.

The Honorable Mitt Romney
Governor of the Commonwealth of Massachusetts
Boston, MA 02133

Dear Governor Romney:

On behalf of the United States, pursuant to 40 U.S.C. § 3112 (formerly 40 U.S.C. § 255), I accept concurrent legislative jurisdiction over the lands described in Exhibit A (formerly part of Devens Army Base and now comprising the Federal Medical Center Devens) from the Commonwealth of Massachusetts, as provided in Chapter 481 of the Acts of 2004, approved on January 6, 2005. Administrative control of this federal property was transferred by the Army to the Department of Justice, Federal Bureau of Prisons, in 1997.

It is deemed highly desirable and in the interests of sound administration of federal penal institutions that the United States have concurrent jurisdiction over this property. While the Massachusetts session law referred to above cedes such jurisdiction, federal law requires a specific acceptance on behalf of the United States, which this letter provides. See 40 U.S.C. § 3112. This acceptance of cession of concurrent jurisdiction from the Commonwealth of Massachusetts to the United States is effective as of the above date.

Please execute the acknowledgment of receipt of this letter in duplicate and return one original to: Justin Smith, United States Department of Justice, Environment and Natural Resources Division, Law and Policy Section, P.O. Box 4390, Washington, DC 22044-4390. Should you need further information, please have your staff contact Mr. Smith at (202) 514-0750.

I appreciate your assistance.

Sincerely,

Alberto R. Gonzales
Attorney General

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/21/2006 **WORKFLOW ID:** 1036505
DATE RECEIVED: 07/21/2006 **DUE DATE:** 08/02/2006

FROM: The Honorable Sue Ellen Wooldridge
Assistant Attorney General
Environment and Natural Resources Division
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

TO: AG

MAIL TYPE: Action Memorandum

SUBJECT: Memo requesting the AG's signature on the attached letter to Governor of Massachusetts Mitt Romney, regarding acceptance of concurrent legislative jurisdiction at the BOP facility in Devens, MA.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
07/28/2006	For ASG initialing on Action Memorandum. Return to ES for forwarding to the DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS: 7/28/2006: ENRD submitted a revised pkg.

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

1036504

U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

July 21, 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE Acting ASSOCIATE ATTORNEY GENERAL NMG 8/2/06

FROM: Sue Ellen Wooldridge
Assistant Attorney General

SUBJECT: Acceptance of Concurrent Legislative Jurisdiction at Bureau of Prisons Facilities in California

PURPOSE: To obtain the signature of Attorney General Gonzales

TIMETABLE: Review and signature without delay

SYNOPSIS: The Attorney General should accept concurrent criminal legislative jurisdiction, on behalf of the United States and from the State of California over the lands comprising the United States Penitentiary at Atwater, the former Federal Prison Camp at Boron, the Metropolitan Detention Center at Los Angeles, the Correctional Institution at Taft, and the Federal Correctional Institution at Mendota. Acceptance of concurrent legislative jurisdiction will allow the Federal Government to enforce certain federal laws that apply only within areas under the United States' legislative jurisdiction, without displacing state enforcement authorities.

DISCUSSION: The Bureau of Prisons (Bureau) desires to renew concurrent criminal legislative jurisdiction over the site of the United States Penitentiary at Atwater (USP Atwater), the former Federal Prison Camp at Boron (FPC Boron), the Metropolitan

Detention Center at Los Angeles (MDC Los Angeles), and the Correctional Institution at Taft (CI Taft), and acquire concurrent criminal legislative jurisdiction over the site of the Federal Correctional Institution at Mendota (FCI Mendota).

At the Environment Division's request, the State recently renewed cession of concurrent criminal jurisdiction to the United States over the first four sites, and ceded concurrent criminal jurisdiction to the United States over FCI Mendota. Under federal law, these cessions do not take effect until (1) accepted by the Attorney General and (2) the cession documents have been recorded in the County land records where the respective lands are located. This memorandum recommends that the Attorney General accept concurrent legislative jurisdiction on behalf of the United States for the sites.

RECOMMENDATION: I recommend that you sign the enclosed letter to the Chairman of the California State Lands Commission, accepting concurrent criminal jurisdiction for the sites of USP Atwater, FPC Boron, MDC Los Angeles, CI Taft, and FCI Mendota.

LEGAL BACKGROUND

Article I, Section 8, Clause 17, of the United States Constitution authorizes the federal government to exercise jurisdiction over lands it acquires within a state. Clause 17 provides: "The Congress shall have power * * * to exercise exclusive Legislation in all Cases" over "all Places purchased by the consent of the Legislature of the State in which the Same shall be" for forts, docks, and "other needful buildings." This Clause authorizes the United States to exercise either exclusive legislative jurisdiction (displacing state authority) or concurrent legislative jurisdiction (establishing concurrent federal and state authority) over federal property, where state consent has been given. See James v. Dravo Contracting Co., 302 U.S. 134, 148 (1937).

Certain acts violate federal criminal law wherever they are

committed and, therefore, are uniformly subject to federal prosecution. However, other acts do not violate federal criminal law unless they are committed in areas within the special maritime and territorial jurisdiction of the United States, including areas over which the United States has acquired legislative jurisdiction pursuant to Clause 17. See 18 U.S.C. § 7. Laws that apply only in areas of federal legislative jurisdiction include: 18 U.S.C. §§ 81 (arson); 113 (assaults); 114 (maiming); 117 (domestic assault by habitual offender); 661 (theft); 662 (receiving stolen property); 1111 (murder); 1112 (manslaughter); 1113 (attempt to commit murder or manslaughter); 1201 (kidnaping); 1363 (destruction of property); 1801 (video voyeurism); and 2111 (robbery). Where Congress has not specifically criminalized particular conduct, the Assimilative Crimes Act, 18 U.S.C. § 13, makes it a federal crime to commit any act that would be punishable under the criminal laws of the relevant state.

The Bureau of Prisons routinely seeks concurrent legislative jurisdiction at federal correctional institutions to ensure that the United States can prosecute conduct, especially inmate conduct, that violates such statutes. The Bureau typically seeks concurrent, rather than exclusive, jurisdiction so that the United States will have a choice whether to prosecute a particular crime or to leave the prosecution to state authorities. State cession of concurrent jurisdiction allows the United States to enforce all federal criminal laws, without displacing state enforcement authorities.

Consent by the state is a prerequisite to the federal government's acquisition of jurisdiction under Article I, Section 8, Clause 17. See James v. Dravo Contracting Co., 302 U.S. at 147, 148. Cession by a state of legislative jurisdiction is not effective until an authorized federal officer accepts the jurisdiction. See 40 U.S.C. § 3112, formerly 40 U.S.C. § 255. Only the U.S. Attorney General is authorized to accept legislative jurisdiction on behalf of the Bureau.

CALIFORNIA'S CESSION OF CONCURRENT LEGISLATIVE JURISDICTION

California law authorizes the California State Lands Commission to cede concurrent criminal legislative jurisdiction to the United States for periods not to exceed five years. See Cal. Gov't Code § 126(e). On September 17, 2001, the Commission

approved the cession of concurrent criminal legislative jurisdiction to the United States over the lands comprising FPC Boron, CI Taft, MDC Los Angeles, and USP Atwater. (These lands are described in Exhibit A to the attached acceptance letter.) On April 17, 2006, the Commission approved the renewed cession of concurrent criminal legislative jurisdiction over these sites, as well as the cession of concurrent criminal legislative jurisdiction over the land comprising FCI Mendota.

California law sets certain conditions for the transfer of jurisdiction. Of relevance here, it provides that the State "reserves jurisdiction over the land, water, and use of water with full power to control and regulate the acquisition, use, control, and distribution of water" and that the state "exempts and reserves * * * to the state all deposits of minerals." Cal. Gov't Code §§ 126(g), (h). In the past, the United States has accepted legislative jurisdiction notwithstanding these provisions. Approximately 10 years ago, staff counsel for the California State Lands Commission provided the Department of Justice with a legal analysis of these reservations, based on available legislative history. The Commission's counsel concluded:

> It is my opinion that these [reservations] should be read to apply only to those situations where the State of California has conveyed fee title to the United States. * * * they should not be considered conditions precedent to the transfer of legislative jurisdiction. There is nothing to suggest that the Legislature intended that the United States convey its water rights or mineral estates as a condition for a cession. Nor is there anything to suggest that this is or ever was the Commission's administrative practice.

Letter from James R. Frey to Michael E. Wall (May 3, 1996) (Exhibit B to the attached acceptance letter). The acceptance letter would confirm our understanding that these state-law reservations do not require the United States to convey any water rights or mineral estates as a condition of this cession.

CONCLUSION:

Acceptance of concurrent legislative jurisdiction at the site of five Bureau of Prison sites would allow the United States authority to enforce certain federal laws at these five sites, without displacing state authority.

This matter is time sensitive because federal concurrent criminal legislative jurisdiction over the lands comprising FPC Boron, CI Taft, MDC Los Angeles, and USP Atwater will lapse in October, 2006, pursuant to the sunset provision in Cal. Gov't Code § 126(e). Should jurisdiction lapse, the United States cannot enforce certain federal laws, including the Assimilative Crimes Act, 18 U.S.C. § 13, at the facilities.

Should you have any questions regarding this matter, please have your staff contact Justin Smith, of the Environment & Natural Resources Division's Law and Policy Section, at 514-0750, or George Younger, of the Federal Bureau of Prisons' Office of General Counsel, at 353-4595.

Attachment

Office of the Attorney General
Washington, D.C.

Mr. Steve Westly
Chairman
California State Lands Commission
100 Howe Avenue, Suite 100 South
Sacramento, CA 95825-8202

Dear Chairman Westly:

On April 17, 2006, acting pursuant to Cal. Gov't Code § 126, the California State Lands Commission (Commission) approved the cession of concurrent criminal legislative jurisdiction to the United States over the lands comprising the United States Penitentiary at Atwater; the former Federal Prison Camp at Boron; the Metropolitan Detention Center at Los Angeles; the Correctional Institution (also previously known as the Federal Correctional Institution) at Taft; and the Federal Correctional Institution at Mendota.

On behalf of the United States pursuant to 40 U.S.C. § 3112, I accept concurrent criminal legislative jurisdiction over the specified lands. (See Exhibits A1– A5, attached.) My acceptance shall take effect upon recording of certified copies of the cession documents of the Commission in the office of the county recorder of each county where the lands are situated.

The United States understands that Cal. Gov't Code § 126 does not require the United States to convey any water rights or mineral estate as a condition of this cession. This understanding conforms to the 1996 interpretation of section 126 provided by counsel to the California State Lands Commission.

Please execute the acknowledgment of receipt of this letter in duplicate and return one original to: Justin Smith, United States Department of Justice, Environment & Natural Resources Division, Law and Policy Section, P.O. Box 4390, Washington, D.C. 20044-4390. Should you need any further information, please have your staff contact Mr. Smith at (202) 514-0570.

I appreciate your assistance.

Sincerely,

Alberto R. Gonzales
Attorney General

OASG CORRESPONDENCE ROUTING AND ACTION

From: Sue Ellen Wooldridge	Date: 07/28/2006	Due Date: 8/02/2006	Workflow ID: 1036504

Subject: Memo requesting the AG's signature on duplicate copies of a letter to Steve Westly, Chairman of the California State Lands Commission, regarding acceptance of concurrent legislative jurisdiction at the BOP facilities in California.

Review: **Jeffrey Senger**	**Due Back for processing to Exec Secy: 8/02/2006**

Instructions: **Please review and provide written comments.**

From: **Jeffrey Senger**	To: **Neil M. Gorsuch**	Date: 7/28/06

Comments:

This is a letter for AG signature accepting concurrent jurisdiction over California BOP facilities, which will allow enforcement of certain federal laws there. Looks fine.

JSH

From: **Neil M. Gorsuch**	To: ~~**Robert D. McCallum, Jr.**~~	Date:

Comments:

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/21/2006 **WORKFLOW ID:** 1036504
DATE RECEIVED: 07/21/2006 **DUE DATE:** 08/02/2006

FROM: The Honorable Sue Ellen Wooldridge
Assistant Attorney General
Environment and Natural Resources Division
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

TO: AG

MAIL TYPE: Action Memorandum

SUBJECT: Memo requesting the AG's signature on duplicate copies of a letter to Steve Westly, Chairman of the California State Lands Commission, regarding acceptance of concurrent legislative jurisdiction at the BOP facilities in California.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
07/28/2006	For ASG initialing on Action Memorandum. Return to ES for forwarding to the DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS: 7/28/2006: ENRD submitted a revised pkg.

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

1041341

U.S. Department of Justice

Washington, D.C. 20530

August 1, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

THROUGH: Neil M. Gorsuch NMG 8/2/06
Acting Associate Attorney General

FROM: Lee J. Lofthus
Acting Assistant Attorney General
for Administration

SUBJECT: Senior Executive Service (SES) Bonus and Pay Adjustment Policy

PURPOSE: To obtain your approval on SES performance bonus and pay adjustment policy and to issue guidance to Components

TIMETABLE: As soon as possible.

DISCUSSION: This is to request your approval to issue SES operating guidance to Component Performance Review Boards (PRB) including the Department's 2006 performance bonus and pay adjustment policy.

In addition, this is to request approval to limit the Department's total performance bonus pool to 7 percent of career SES pay (statutory limitation is 10 percent) and limit the total number of career bonuses to 50 percent of the career executives (the 2005 government-wide average was 66.5 percent versus 53.5 percent for the Department of Justice).

Upon your approval, the Justice Management Division's Personnel Staff will issue implementing guidance which will include bonus and merit-based salary adjustment ranges based on performance rating levels. Lastly, all bonus and pay recommendations will be submitted to you for approval after being reviewed by the Senior Executive Resources Board.

RECOMMENDATION: I recommend that you sign the attached memorandum to Heads of Department Components.

ASAG:

Approve: _____ Concurring Components: None

Disapprove: _____ Nonconcurring Components: None

Other: _____

DAG:

Approve: _____ Concurring Components: None

Disapprove: _____ Nonconcurring Components: None

Other: _____

Attachment

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 08/01/2006 **WORKFLOW ID:** 1041341
DATE RECEIVED: 08/01/2006 **DUE DATE:** 08/07/2006

FROM: Mr. Lee J. Lofthus
Acting Assistant Attorney General for Administration
Justice Management Division
950 Pennsylvania Avenue, NW, Room 1112
Washington, DC 20530

TO: DAG

MAIL TYPE: Action Memorandum

SUBJECT: Memo requesting the DAG's signature on the attached memo for Heads of Department Components regarding the 2006 Senior Executive Service Bonus and Pay Adjustment Policy. (J1036840)

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
08/01/2006	For ASG initialing on Action Memorandum. Return to ES for forwarding to the DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Kim Tolson: 202-514-8588

OASG CORRESPONDENCE ROUTING AND ACTION

From: Lee Lofthus	Date: 8/1/2006	Due Date: 8/7/2006	Workflow ID: 1041341
Subject: Memo requesting the DAG's signature on the attached memo for Heads of Department Components regarding the 2006 Senior Executive Service Bonus and Pay Adjustment Policy.			
Reviewer:		Due Back for Processing to Exec Sec: 8/6/2006	
Instructions: **Please review and provide written comments.**			
From:	To: **Neil Gorsuch**		Date:
Comments:			
From:	To: **Neil Gorsuch**		Date:
Comments:			

U.S. Department of Justice 1037819

Office of Justice Programs

Office of the Assistant Attorney General

Washington, D.C. 20531

JUL 25 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ACTING ASSOCIATE ATTORNEY GENERAL 8/3/06

FROM: Regina B. Schofield
Assistant Attorney General
Office of Justice Programs

SUBJECT: Conference Attendance and Participation

PURPOSE: To request that the Attorney General invite the President to provide remarks at the Human Trafficking Conference.

DATE: October 3-5, 2006

LOCATION: New Orleans, LA

TIMETABLE: As soon as possible.

SYYNOPSIS: Everyday, adults and children experience terrible offenses as human traffickers exploit them in countless ways. To help fight this modern form of slavery, the U.S. Department of Justice's Office of Justice Programs will host its second Human Trafficking Conference. The conference will bring together a diverse audience of researchers, law enforcement officers, victim advocates, justice professionals, and faith-based and community providers to discuss the complex issues surrounding human trafficking, and then collaborate on strategies to help reduce and prevent the crime in the future.

EVENT CONTACT: Laura Keehner, Senior Policy Advisor
Office of Justice Programs
202-307-5933
Laura.Keehner@usdoj.gov

RECOMMENDATION: It is recommended that the Attorney General invite the President to provide remarks at the Human Trafficking Conference. It is recommended that the Office of the Attorney General work with the Office of Presidential Scheduling to identify a time during the three-day conference that would be convenient for the President to speak.

APPROVE: _____

DISAPPROVE: _____

OTHER: _____

DATE: _____

Attachment

OASG CORRESPONDENCE ROUTING AND ACTION

EXPEDITE (SPECIAL) EXPEDITE

From: Regina Schofield	Date: 8/2/2006	Due Date: 8/7/2006	Workflow ID: 1037819

Subject: Memo requesting the AG's approval and signature on the attached letter inviting the President to attend and provide remarks at the Human Trafficking Conference being held on 10/3-10/5/2006 in New Orleans, LA. States that this conference will bring together a diverse audience of researchers, law enforcement officers, victim advocates, justice professionals, and faith-based and community providers to discuss the complex issues surrounding human trafficking and then collaborate on strategies to help reduce and prevent the crime in the future.

Reviewer:	Due Back for Processing to Exec Sec: 8/6/2006

Instructions: **Please review and provide written comments.**

From: Andi Bottner	To: **Neil Gorsuch**	Date:

Comments: looks great! 8/2/06

From:	To: **Neil Gorsuch**	Date:

Comments:

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

SPECIAL

DATE OF DOCUMENT: 07/25/2006
DATE RECEIVED: 07/25/2006
WORKFLOW ID: 1037819
DUE DATE: 08/07/2006

FROM: The Honorable Regina B. Schofield
Assistant Attorney General
Office of Justice Programs
U.S. Department of Justice

Washington, DC 20531-0001

TO: AG

MAIL TYPE: Action Memorandum

SUBJECT: Memo requesting the AG's approval and signature on the attached letter inviting the President to attend and provide remarks at the Human Trafficking Conference being held on 10/3-10/5/2006 in New Orleans, LA. States that this conference will bring together a diverse audience of researchers, law enforcement officers, victim advocates, justice professionals, and faith-based and community providers to discuss the complex issues surrounding human trafficking, and them collaborate on strategies to help reduce and prevent the crime in the future.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
08/02/2006	For ASG initialing on Action Memorandum. Return to ES for forwarding to the DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS: 8/2/2006: OJP submitted a revised pkg.7/28/2006: Per OASG, pkg returned to OJP for edits.

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

SPECIAL

1039/43

U. S. Department of Justice

Civil Division

Assistant Attorney General *Washington, D.C. 20530*

July 25, 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ACTING ASSOCIATE ATTORNEY GENERAL 8/2/06

FROM: Peter D. Keisler
Assistant Attorney General

SUBJECT: Yang Rong, et al. v. Liaoning Province, No. 05-7030 (D.C. Cir.)

PURPOSE: To inform His Excellency Wu Aiying, Minister of Justice of the People's Republic of China (PRC) about a favorable decision in a case about which the Minister had previously inquired.

TIMETABLE: As soon as possible.

SYNOPSIS: Letter to the PRC Minister describing prior correspondence between the Attorney General and the Minister about the Yang Rong case and informing the Minister of the D.C. Circuit's decision, which is favorable to China.

DISCUSSION: N/A

RECOMMENDATION: Respectfully request that the Attorney General sign the attached letter.

APPROVE: _____

DISAPPROVE: _____

OTHER: _____

Concurring components:
None

Non-concurring components:
None

Attachment

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

His Excellency
Wu Aiying
Minister of Justice of the People's Republic of China
Beijing

Dear Mr. Minister:

I write to inform you of the court of appeals' decision in the case of Yang Rong v. Liaoning Province, No. 05-7030 (D.C. Cir.), a case about which we have previously corresponded. The court's decision is favorable to the Chinese Government.

You previously wrote to me to express the Chinese Government's position in the Yang Rong case and to ask the United States to consider filing a statement of interest in that case. I responded to your letter on May 15, 2006, explaining that, as a procedural matter, it would be inappropriate for the United States to file a statement of interest, because the parties had already filed briefs and presented oral argument and were awaiting the court of appeals' decision. I also explained that, after careful consideration of the matter, the Department of State advised us that it would be inappropriate for the United States to file a statement of interest at that time.

On July 7, 2006, the court of appeals issued an opinion affirming the district court's dismissal of Yang Rong's suit against Liaoning Province. The court decided that the Chinese Government is immune from suit in this case under the Foreign Sovereign Immunities Act, a United States law providing foreign sovereigns immunity from suit in the United States unless the case falls under one of the limited exceptions stated in the law. Enclosed is a copy of the court of appeals' decision for your review.

Under the United States' legal system, it is possible for a plaintiff to seek further review of such a decision. However, the court of appeals' decision is a substantial victory for China's position.

I hope that this information is helpful to your understanding of this matter, and I look forward to future cooperation between China and the United States on issues of mutual concern.

Sincerely,

Alberto R. Gonzales
Attorney General

Enclosure

OASG CORRESPONDENCE ROUTING AND ACTION

From: Peter Keisler	Date: 7/28/2006	Due Date: 8/01/2006	Workflow ID: 1039143

Subject: Memo requesting the AG's approval of and signature on the attached letter to His Excellency Wu Aiying, Minister of Justice of the People's Republic of China, describing prior correspondence between the AG and the Minister about the case entitled, Yang Rong, et al. V. Liaoning province, No. 05-7030 (D.C. Cir.), and informing the Minister of the D.C. Circuit's decision, which is favorable to China.

Review: Lily Fu Swenson	Due Back for processing to Exec Secy: **8/1/2006**

Instructions: **Please review and provide written comments.**

From: **Lily Fu Swenson**	To: **Neil M. Gorsuch**	Date:

Comments:

From:	To: **Neil M. Gorsuch**	Date:

Comments:

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/25/2006 **WORKFLOW ID:** 1039143
DATE RECEIVED: 07/27/2006 **DUE DATE:** 08/01/2006

FROM: The Honorable Peter D. Keisler
Assistant Attorney General
Civil Division
Department of Justice
Washington, DC 20530-0001

TO: AG

MAIL TYPE: Action Memorandum

SUBJECT: Memo requesting the AG's approval of and signature on the attached letter to His Excellency Wu Aiying, Minister of Justice of the People's Republic of China, describing prior correspondence between the AG and the Minister about the case entitled, Yang Rong, et al. v. Liaoning province, No. 05-7030 (D.C. Cir.), and informing the Minister of the D.C. Circuit's decision, which is favorable to China. See WF 968019.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
07/27/2006	For ASG initialing on Action Memorandum. Return to ES for forwarding to the DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

U. S. Department of Justice

Civil Division

Assistant Attorney General *Washington, D.C. 20530*

July 13, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 7/28/06

FROM: Peter D. Keisler
Assistant Attorney General
Civil Division

SUBJECT: Availability and Proposed Uses of the Civil Division's Unobligated Balances

As requested in your May 1, 2006, memorandum, I am submitting estimates of the unobligated prior year balances that are available for transfer from Civil Division accounts to the Department's Working Capital Fund and to the Automated Litigation Support (ALS) no-year account.[1] The Civil Division can transfer $11,580,000 to these accounts. Attachment 1 summarizes the amounts for each year.

The Civil Division seeks to apply these balances to address major Division and Department needs: $8,640,000 for the Spent Nuclear Fuel litigation, and $2,700,000 to invest in the next generation of telecommunications for the litigating divisions.

The Spent Nuclear Fuel litigation needs $8,640,000 for automated litigation support services. To date, over 66 suits have been filed by nuclear power utilities that are seeking damages for the government's failure to begin acceptance of spent nuclear fuel. Nuclear utility industry publications have estimated that claims for the first ten years of delay will exceed $50 billion by 2008. The litigation is extremely active, with six cases scheduled for trial through FY 2007. While the Department has consistently supported funding increases for this litigation, Congress has not appropriated the requested funding. Attachment 2 provides background on this requirement.

[1] The Department's annual appropriation allows for up to $10,000,000 in unobligated balances to remain available to the litigating divisions for litigation support contracts. The Department uses this provision to transfer these balances into an account ("the ALS No-Year Account") established for this purpose. Balances transferred to this account are then distributed to meet urgent, but unfunded, litigation support requirements. The column of the chart in Attachment 1 labeled "Remaining 'Capacity' of the ALS No-Year Account to Accept Funds" shows $10 million minus the amount already deposited to this account each fiscal year.

The $2,700,000 we are requesting for telecommunications will fund replacement networks as the current Metropolitan Area Network is phased out. The replacement networks will incorporate redundancy, as well as firewalls and intrusion detection technology to ensure security. We do not know exactly how much funding will be required or when it will be needed. However, we do know that the Civil Division and other litigating divisions will be migrating soon. The FY 2007 budget pending before Congress does not include funding for this requirement. Consequently, either the components will have to absorb the costs by taking cuts elsewhere, or alternative funding sources will need to be developed. The transfer we are proposing would provide such an alternative for Civil and the other divisions.

I would be happy to meet with you to discuss this subject.

Attachments

OASG CORRESPONDENCE ROUTING AND ACTION

From: Peter Keisler	Date: 07/13/2006	Due Date: ASAP	Workflow ID: WALKED-IN
Subject: Memo requesting the ASG's approval authorizing Availability and proposed uses of the Civil Division's Unobligated Balances			
Reviewer: Lily Swenson		Due Back for Processing to Exec Sec: ASAP	
Instructions: **Please review and provide written comments.**			

From: **Lily Swenson**	To: **Neil Gorsuch**	Date: 7/24/06

Comments: I don't have reason to disagree with the proposed uses but we can discussed appropriately.

From: **Neil Gorsuch**	To: **Robert McCallum**	Date:

Comments:

U. S. Department of Justice

Civil Division

Assistant Attorney General *Washington, D.C. 20530*

July 25, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ACTING ASSOCIATE ATTORNEY GENERAL 8/2/06

FROM: Peter D. Keisler PDK
Assistant Attorney General

SUBJECT: Letter to David S. Addington, Chief of Staff to the Vice President, Regarding the Legal Status of the Vice Presidency

PURPOSE: To respond to David Addington's letter of May 12, 2006, addressed to the Deputy Attorney General (DAG), regarding the legal status of the Vice Presidency.

TIMETABLE: As soon as possible.

SYNOPSIS: David Addington wrote to the DAG, regarding communications with the Department of Justice, to assist the Department and, through the work of the Department, the Federal courts, in ensuring that the legal status of the Vice Presidency is reflected accurately in documents filed in the courts.

DISCUSSION: The response assures David Addington that in the rare cases in which the legal status of the Vice Presidency is at issue, the Department's court pleadings will accurately describe the Vice presidency's legal status.

RECOMMENDATION: It is respectfully requested the DAG sign the attached response.

APPROVE: _____

DISAPPROVE: _____

OTHER: _____

Attachment

Concurring Components:
None

Nonconcurring Components:
None

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

The Honorable David S. Addington
Chief of Staff to the Vice President
of the United States
Washington, D.C. 20501

Dear Mr. Addington:

Thank you for your letter of May 12, 2006, regarding the legal status of the Vice Presidency. Having reviewed your letter and the attached memorandum, we will ensure that, in the rare cases in which the legal status of the Vice Presidency is at issue, the Department's court pleadings accurately describe the Vice Presidency's legal status.

Please do not hesitate to contact me should you have further questions on this or any other issue.

Sincerely,

Paul J. McNulty
Deputy Attorney General

OASG CORRESPONDENCE ROUTING AND ACTION

From: Peter Keisler	Date: 7/28/2006	Due Date: 8/01/2006	Workflow ID: 1003435

Subject: In response to the AG's memo dated 5/4/2006, regarding communications with DOJ, writing to assist the Department and through the work of the Department, federal courts, in ensuring that the legal status of the Vice Presidency is reflected accurately in documents filed in the courts. Encloses a paper that will assist the Department in eliminating erroneous references to the Vice Presidency as part of the executive branch, part of the "Executive Office of the President," part of the "White House," as an "agency," or as under Presidential direction.

Review: Lily Fu Swenson	Due Back for processing to Exec Secy: **8/1/2006**

Instructions: **Please review and provide written comments.**

From: **Lily Fu Swenson**	To: **Neil M. Gorsuch**	Date:

Comments:

From:	To: **Neil M. Gorsuch**	Date:

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 05/12/2006 **WORKFLOW ID:** 1003435
DATE RECEIVED: 05/15/2006 **DUE DATE:** 08/01/2006

FROM: The Honorable David S. Addington
Chief of Staff and Counsel
Office of the Vice President
Washington, DC 20501

TO: DAG

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: (Fax rec'd from ODAG) In response to the AG's memo dated 5/4/2006, regarding communications with DOJ, writing to assist the Department and, through the work of the Department, federal courts, in ensuring that the legal status of the Vice Presidency is reflected accurately in documents filed in the courts. Encloses a paper that will assist the Department in eliminating erroneous references to the Vice Presidency as part of the executive branch, part of the "Executive Office of the President," part of the "White House," as an "agency," or as under Presidential direction. See WF 998258.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
07/27/2006	For ASG initialing on Action Memorandum. Return to ES for forwarding to the DAG. Office of the Associate Attorney General

INFO COMPONENT: OAG, ODAG, OASG, OLC

COMMENTS: 7/27/2006: CIV submitted action memo to the DAG dated 7/25/06 w/ltr for DAG signature.
7/14/2006: Per CIV request copy of incoming letter forwarded to ATR, CRM, CRT, EOUSA, ENRD and TAX for information only.
5/22/2006: Original rec'd in ES and forwarded to DAG files.

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

The Forgotten Goal of Civil Justice: A Foundation for Common Sense in Daily Life

by Philip K. Howard

The debate over civil justice in recent decades has focused on its fairness. Tort reformers complain of "lawsuit abuse" and "judicial hell-holes."[1] Defenders of the current system talk of the need to protect the little guy against corporate abuses, and extol the jury system as "Democracy in Action."[2]

In this paper I argue that civil justice has a broader goal than fairness: to provide a foundation for reasonable choices in a free society. The main defect in the current system is not that juries are unfair or that there is an avalanche of litigation -- about which there is sharp disagreement[3] -- but that law does not offer predictable guidelines of who can sue for what. The system of justice offers recourse not only against abusive and negligent conduct, but also against

---

[1] *See* American Tort Reform Association, *Judicial Hellholes: 2004*, December 15, 2004, available at http://www.atra.org/reports/hellholes/report.pdf.

[2] Senator John Edwards, "Juries: Democracy in Action," *Newsweek*, December 15, 2003, p. 53.

[3] *See* Marc S. Galanter, *The Day After the Litigation Explosion*, 46 Md. L. Rev. 3, 4 (1986); *See also*, John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 Cornell L. Rev. 990 (1995), Arthur R. Miller, *Maybe Light at the End of the Tunnel: is the Litigation Explosion Imploding?*, 61 Def. Couns. J. 378 (1994), Marc S. Galanter, *News From Nowhere: The Debased Debate on Civil Justice*, 71 Denv. U. L. Rev. 77 (1993), Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641 (1987). For descriptions of the increase in litigation see Walter Olson, The Litigation Explosion: What Happened When America Unleashed the Lawsuit (1991); Brian J. Ostrom, Neal B. Kauder, and Robert C. LaFountain, eds., *Examining the Work of State Courts, 2002: A National Perspective from the Court Statistics Project* (National Center for State Courts, 2003) (All civil claims increased 23% between 1987 and 2001. Tort claims, a subset of civil claims, declined 9% since 1992 because traffic claims, which make up the bulk of tort claims, declined 14% during that period. The decline in traffic claims is attributable to the rise of no-fault insurance and other reforms designed to reduce the volume of those claims. Between 1975 and 2002, all tort claims increased a total of 38%, including the 9% decrease since 1992.)

conduct that most people consider reasonable. Civil justice tolerates, and arguably encourages, inconsistent verdicts for similar disputes. The law offers few guidelines on standards of care or on the potential exposure when there is a dispute.

Civil justice has changed markedly in 40 years.[4] These changes can be traced in part to a shift in judicial philosophy: whatever authority judges believed they held withered with the rise of the "legal process" movement in the 1960s, in which their role was reconceived as one of a neutral referee.[5] The effect was not to achieve neutrality, however, but to leave a vacuum. That vacuum has been filled by an ever-broadening range of private legal claims and threats, giving rise to a lawsuit culture in which ordinary interaction is now weighed down by legal considerations.

The main harm to society is not the total cost of verdicts, but that Americans no longer feel free to act reasonably. Legal fear has infected the culture. Paranoid doctors focus on avoiding lawsuits.[6] Recreational activities are cancelled.[7] Teachers have trouble maintaining

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[4] *See* Philip K. Howard, The Collapse of the Common Good at 3-70 (2001); *See also* George L. Priest, *The Culture of Modern Tort Law*, 34 Val. U. L. Rev. 573 (2000) (discussion of the recent changes in tort law), George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Legal Stud. 461 (1985) , Lawrence Friedman, Total Justice (1985)

[5] *See* Charles E. Wyzanski, Jr., *Equal Justice Through Law*, 47 Tulane L. Rev. 951, 959 (1973) (Representative of the prevailing opinion in the 1970s, Federal judge Wyzanski stated "Choosing among values is much too important a business for judges to do the choosing. That is something the citizens must keep for themselves"), Michael Sandel, Democracy's Discontent: America in Search of a Public Philosophy 77 (1996) (Describing that the point of justice became to "respect people's freedom to choose their own values."); *See also* Eric Foner, The Story of American Freedom 293 (1998) (Describing "a massive redefinition of freedom as a rejection of all authority", a contributing factor to the doctrinal shift).

[6] See e.g. David M. Studdert, Michelle M. Mello, William M. Sage, et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293 J. Am. Med. Ass'n 2609 (2005); Louis Harris and Associates, *Fear of Litigation Study: The Impact on Medicine*, New York, NY: Common Good (2002), available at http://cgood.org/assets/attachments/57.pdf.

[7] See e.g. Louv, Richard, *Last Child in the Woods: Saving Our Children from Nature-Deficit Disorder* (Algonquin Books) April 15, 2005; "More Green, Less Screen," Interview with Richard Louv, *People Magazine*, June 13, 2005; "For All Who Have Never Climbed a Tree," Marilyn Gardner, *Christian Science Monitor*, May 24, 2005; "Nature

order.[8] Volunteerism is chilled.[9] Because of legal threats, and fear of possible claims, common institutions such as hospitals and schools are increasingly difficult to manage.[10]

Deficit," Kevin O'Connor, *Rutland Herald*, May 1, 2005; "Playtime is Over," *Dallas Morning News*, March 3, 2005; "Old Rockets Fate is Up in the Air," Doug Grow, *Minneapolis Star Tribune*, November 29, 2004 ("[S]wings don't reach the sky as they once did. Slides, too, have changed in height and slope. Teeter-totters are gone."); "Playground Safety Left Up to Schools," Bob Kasarda, *The Northwest Indiana Times*, September 24, 2004 ("The wooden equipment that was popular a couple of decades ago has been replaced by a variety of low-lying metal equipment covered in rubber. ... Slides are now shorter and covered, gaps in the equipment have been narrowed to prevent children from placing their heads into openings and all swings have been removed."); "Cannonball!" Field Maloney, *The New Yorker*, August 30, 2004 ("After a golden age in the seventies--a decadent, late-Roman last hurrah--the American pool has suffered a gradual decline: thanks, for the most part, to concerns about safety and liability, diving boards have been removed and deep ends undeepened. At municipal pools across the country, the once-ubiquitous one-metre springboard has become an endangered species; and the three-metre high dive--the T. rex of the community pool--is now virtually extinct."); "Recess Gets Regulated," Sandy Louey, *Sacramento Bee*, August 22, 2004; "Extreme Cheerleading: How Schools Grapple with New Risks," Kris Axtman, *Christian Science Monitor*, June 24, 2004.

[8] See Arum, Richard, *Judging School* Discipline (Harvard, 2003); Public Agenda, "Teaching Interrupted: Do Discipline Policies in Today's Public Schools Foster the Common Good?" New York, NY: Common Good (May 2004), available at http://cgood.org/assets/attachments/22.pdf; Public Agenda, "'I'm Calling My Lawyer': How Litigation, Due Process and Other Regulatory Requirements Are Affecting Public Education," New York, NY: Common Good (November 1, 2003), available at http://cgood.org/assets/attachments/96.pdf.

[9] See e.g. "$17 Million Verdict Has Many Concerned," Derrick Nunnally, *Milwaukee Journal-Sentinel*, February 23, 2005; "Charity Case," Philip K. Howard, *The Wall Street Journal*, March 17, 2005; "Teams Offer Help on Parks," Rachel Gordon, *San Francisco Chronicle*, April 29, 2005 (The City of San Francisco is afraid to use volunteers to help fix softball fields because of "liability concerns—liability concerns—what happens if someone throws out their back patching the gopher holes in the outfield and decides to sue the city?"); "County Tells Bicyclist Thanks, but Stop Plowing Trail," Garrett Ordower, *Daily Herald (IL)*, February 21, 2004. On doctors volunteering, see e.g. Kapp, Marshall B., *Our Hands Are Tied: Legal Tension and Medical Ethics* (Westport: Auburn House, 1998), p. 43 ("Other examples of fear of malpractice litigation include 'physicians failing to stop and render aid in emergency situations despite the existence of Good Samaritan statutes in every jurisdiction that immunize physicians against liability, and the fact that no physician in the United States has ever been successfully sued for rendering emergency aid as a Good Samaritan."); "Report: Aid Needed for Clinics," Kerra L. Bolton, *The Asheville Citizen-Times*, April 27, 2005; "Paving the Way for Good Samaritans," Andy Miller, *The Atlanta Journal-Constitution*, March 12, 2005.

[10] For hospitals see e.g., Louis Harris and Associates, *Fear of Litigation Study: The Impact on Medicine*, New York, NY: Common Good (2002), available at http://cgood.org/assets/attachments/57.pdf; Linda T. Kohn, Janet Corrigan, et al., eds., *To Err is Human: Building a Safer Health System* (Washington, DC: National Academy Press, 2000) p. 43, http://www.nap.edu/books/0309068371/html/ ("Patient safety is also hindered through the liability system and the threat of malpractice, which discourages the disclosure of errors. The discoverability of data under legal proceedings encourages silence about errors committed or observed. Most errors and safety issues go undetected and unreported, both externally and within health care organizations."); "Two-Thirds of Emergency Departments Report On-call Specialty Coverage Problems," American College of Emergency Physicians, *Press Release*, September 28, 2004; "Emergency Departments Face Shortage of Specialty Care," Mary Ellen Schneider, *eObGyn News*, June 16, 2005 ("Obstetricians are among the specialists who are reluctant to take call because of the liability risks involved. ... Even if physicians are compensated for taking call, it's not enough to cover the related malpractice

The solution I propose is not to set arbitrary limits on lawsuits but to shift responsibility back to judges to decide, as a matter of law, the boundaries of reasonable claims. To re-instill the public trust in civil justice, judges need to provide people with a sense of who can sue for what.

The authority of judges to assert social norms, although rarely discussed today, is well-established in common law jurisprudence, and was the central theme of those we hold up as lions of the common law, such as Oliver Wendell Holmes, Jr. and Benjamin Cardozo. [11]

The question of what should be decided by a judge versus a jury, in truth, did not matter much until recent decades. Under prevailing social mores, it didn't occur to people to sue for ordinary accidents or workplace disagreements. But now that perception has radically changed: any disagreement or accident is a potential lawsuit.

The need to reassert judicial authority is not a matter of abstract preference for a particular judicial philosophy. The need to reassert judicial authority is profoundly practical: Because Americans no longer trust civil justice, they have lost their freedom to make reasonable daily choices.

Civil Justice as the Foundation for Reasonable Choices

insurance costs. The risks incurred far exceed any payment provided."). For schools see e.g., Public Agenda, "Teaching Interrupted: Do Discipline Policies in Today's Public Schools Foster the Common Good?" New York, NY: Common Good (May 2004), available at http://cgood.org/assets/attachments/22.pdf; Louis Harris and Associates, "Evaluating Attitudes Toward the Threat of Legal Challenges in Public Schools," New York, NY: Common Good (March 10, 2004), available at http://cgood.org/assets/attachments/11.pdf; Public Agenda, "'I'm Calling My Lawyer': How Litigation, Due Process and Other Regulatory Requirements Are Affecting Public Education," New York, NY: Common Good (November 1, 2003), available at http://cgood.org/assets/attachments/96.pdf; Common Good, "The Effects of Law on Public Schools," Washington, DC, compiled for a forum entitled "Is Law Undermining Public Education?" (November 5, 2003), available at http://cgood.org/assets/attachments/10.pdf; Arum, Richard, *Judging School Discipline* (Harvard, January 2003) ; Gerald Grant, *The World We Created at Hamilton High* (Harvard, April 1998).

[11] See, Oliver Wendell Holmes, Jr., The Path of Law, 10 Harv. L. Rev. 457 (1897). *Quoted* at nt. 69; Benjamin Cardozo, The Nature of Judicial Process 134 (Yale University Press 1921). "What really matters is this, that the judge is under a duty... to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience."

Civil justice is conceived today primarily as a dispute resolution mechanism. But civil justice also has a broader goal -- as the foundation for reasonable choices in a free society. Holmes stated that, "the first requirement of a sound body of law" is to uphold reasonable community norms. [12]

Derek Bok, former Harvard President and Law School Dean, observed that lawsuits "often have their greatest effect on people who are neither parties to the litigation nor even aware that it is going on." [13] The news last year that someone received a large verdict in a sledding accident had the natural effect of causing other towns to declare that they no would no longer permit winter sports on town property. [14] No court, however, made a ruling that sledding is an unreasonable risk. Who is representing the interests of the citizens who want to enjoy winter sports?

Law is considered the foundation of a free society not because it seeks to maximize possible legal claims -- as one observer noted, "America did not sue its way to greatness" [15] -- but because it sets forth legal guideposts defining the scope of our freedom. People feel free to interact reasonably with others because the system of law will put criminals in

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[12] *Quoted in* Howard, *supra* note ___ at 54 (2001)

[13] Derek Bok, *Law and Its Discontents: A Critical Look at Our Legal System*, 37th Annual Benjamin N. Cardozo Lecture, November 9, 1982, reprinted in *The Record*, January/February 1983, at 21. See Prosser and Keeton on *The Law of Torts* (5th ed. 1984): [T]he twentieth century has brought an increasing realization of the fact that the interests of society in general may be involved in disputes in which the parties are private litigants."

[14] See "Town's Downhill Pastime May Face an Uphill Fight," Patrick Healy, *The New York Times*, April 26, 2004; "Sledders Are Finding it Tough to Hit the Slopes," Christine Schiavo, *Philadelphia Inquirer*, January 26, 2005; "Where Sledders Head," Mark Shaffer, *Arizona Republic*, January 9, 2005; "This Winter, Sledders Finding it a Tough Go," David Rattigan, *Boston Globe*, January 6, 2005; "Citing Risk, Golf Clubs Look to Ban Sledding," Emily Sweeney and Douglas Belkin," Boston Globe, January 2, 2005; "Column: Liability, Litigation Make Sled Tracks Disappear," Taylor Armerding, *Gloucester Daily Times*, December 28, 2004.

[15] Discussion with Daniel Popeo, President, Washington Legal Foundation.

jail, enforce contracts by their terms, and require a negligent person to compensate the person injured. Civil law protects the good as well as prosecutes the bad: citizens in a free society should be confident that if they act reasonably, their freedom to do so will be defended. As long as you act within those guideposts, you are free: free to follow your instincts simply because you choose to.[16] "The end of law," John Locke said, "is not to abolish or restrain, but to preserve freedom."[17]

Today, at least in areas such as tort law, America's civil justice system is not providing these guideposts of right and wrong. There exists a widespread perception, generally accurate, that any injured or angry person can haul another person into court over any accident or disagreement and put that claim to a jury. There is also a perception that the amounts for which people may sue, if not unlimited, are subject to amorphous guidelines and few limits.

Current legal orthodoxy is that the availability of a lawsuit encourages people to act reasonably. Indeed, by making people potentially liable for their negligence, law provides incentives for reasonable conduct. What people seem to have forgotten is that the converse is also true: Allow lawsuits against reasonable behavior and pretty soon people no longer feel free

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[16] Prosser and Keeton note that an essential aspect of freedom is being free from "restraint and ...undue consideration for the interests and claims of others." See Prosser and Keeton, supra:

> Individuals have many interests for which they claim protection from the law, and which the law will recognize as worthy of protection...Individuals wish to be secure in their persons against harm and interference, not only as to their physical integrity, but as to their freedom to move about and their peace of mind. They want food and clothing, homes and land and goods, money, automobiles and entertainment, and they want to be secure and free from disturbance in the right to have these things, or to acquire them if they can. They want freedom to work and deal with others, and protection against interference with their private lives, their family relations, and their honor and reputation. They are concerned with freedom of thought and action, with opportunities for economic gain, and with pleasant and advantageous relations with others. The catalogue of their interests might be as long as the list of legitimate human desires; and not the least of them is the desire to do what they please without restraint and without undue consideration for the interests and claims of others.

[17] John Locke, Second Treatise of Civil Government § 57 (Peter Laslett ed., 1967)(1690).

to act reasonably.

An "open season" conception of justice has enormous appeal if people are thinking of getting back at others or looking for comfort in blaming others, but it also has infected daily interaction in society with distrust. People understand, as Professor Robert Kagan observed, that easy justice "can be used against the trustworthy, too. An equal opportunity weapon, it can be invoked by the misguided, the mendacious, and the malevolent, as well as by the mistreated."[18]

The ultimate test of a system of justice, Justice Cardozo suggested, is how people feel about it.[19] By that standard, civil justice is not only a failure, but is actively tearing at the fabric of our society.

Distrust of Justice and Social Decline

In almost every area of social interaction, Americans no longer feel free to act reasonably. The effects of this distrust have been subject of extensive studies in healthcare, which have concluded that the legal system is a prime contributor to the crisis of cost and quality. Doctors and nurses no longer feel comfortable acting on their best judgment or being candid with each other.

- It is the ubiquitous practice of physicians to order tests that they do not believe are medically necessary, driving up the costs of healthcare.[20] In a 2002 Harris Poll,

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[18] *See* Robert A. Kagan, Adversarial Legalism: The American Way of Law (2003)

[19] *See* Benjamin Cardozo, The Nature of Judicial Process 89 (Yale University Press 1921). Asserting that justice is, "not what I believe to be right. It is what I may reasonably believe that some other man of normal intellect and conscience might reasonably look upon as right."; *See also,* Archibald Cox, The Role of the Supreme Court in American Government 110 (New York: Oxford University Press, 1976), Observing that, for law to be effective, it "must meet the needs of men and match their ethical sensibilities."

[20] Health care expenditures per person are projected to reach $6,477 per person in 2005. Sager, Alan and Deborah Socolar, "Health Costs Absorb One Quarter of Economic Growth, 2000-2005," Boston University School of Public Health: Health Reform Program Data Brief No. 8, February 9, 2005, pp. 11, 14, available at

78% of physicians admitted ordering unnecessary tests and 94% said that other physicians did.[21] A recent survey in Pennsylvania found that 93% reported practicing defensive medicine, and 92% reported ordering unneeded tests and diagnostic procedures and making unnecessary referrals.[22] Defenders of this practice say that more tests mean better healthcare, but 45 million Americans lack health insurance in part because individuals and small businesses cannot afford healthcare premiums that have skyrocketed.[23]

- The Institute of Medicine has concluded that "patient safety is also hindered through the liability system and the threat of malpractice."[24] Doctors are scared to be candid with each other, leading to unnecessary and often tragic errors. They avoid using email because it leaves a written record. They are reluctant to admit fault even in cases of near misses, where no harm is done to the patient.
- The legal system makes it difficult to hold bad doctors accountable. Doctors who

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http://dcc2.bumc.bu.edu/hs/Health. U.S. spending per person is "just over" double that of persons in Canada, France, Germany, Italy, Japan, and the United Kingdom.The United States spends a greater percent of gross domestic product on health care than any other major industrialized nation. American healthcare now costs almost twice as much as that in other Western countries. In 2001, the United States spent 14.1 percent of the GDP on health care. This translates to $1.4 trillion, up 8.7 percent from 2000. ("Highlights from Health Tables and Chartbook," Health, United States 2003, National Center for Health Statistics, Centers for Disease Control, http://www.cdc.gov/nchs/products/pubs/pubd/hus/highlits.pdf.) More tests do not correlate positively with better outcomes. See "Should You Be Tested for Cancer___"

[21] Louis Harris and Associates, *Fear of Litigation Study: The Impact on Medicine*, New York, NY: Common Good (2002), available at http://cgood.org/assets/attachments/57.pdf

[22] David M. Studdert, Michelle M. Mello, William M. Sage, et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293 J. Am. Med. Ass'n 2609 (2005)

[23] U.S. Census Bureau, "Income, Poverty, and Health Insurance Coverage in the United States: 2003," August 2004, http://www.census.gov/prod/2004pubs/p60-226.pdf

[24] Linda T. Kohn, Janet Corrigan, et al., eds., *To Err is Human: Building a Safer Health System* (Washington, DC: National Academy Press, 2000) p. 43, http://www.nap.edu/books/0309068371/html/

make mistakes can drag out litigation for years, often compelling an unfair settlement. Inept doctors often successfully avoid efforts to revoke their licenses by hiring a lawyer and threatening to sue for defamation.

Distrust of the legal system has transformed public schools. Teachers struggle to maintain order in the classroom because they face threats of being dragged into hearings. The degradation of the school culture, as described by Prof. Richard Arum in his book, *Judging School Discipline*, is linked to requirements to "prove" the correctness of decisions in an adversarial proceeding.[25] The disrespect accorded teachers is shocking. Polls and focus groups show that educators will do almost anything to avoid the unpleasantness of legal hearings. In America today, teachers will not put an arm around a crying child for fear of being sued for an unwanted sexual touching.

Recreation has been transformed. Playgrounds have been stripped of anything athletic—for example, jungle gyms and seesaws. Playgrounds are so boring, according to some experts, that no child over the age of four wants to go in them.[26] I was on a panel convened by

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[25] *See generally* Arum *supra* note ___; *See also* Public Agenda, "Teaching Interrupted: Do Discipline Policies in Today's Public Schools Foster the Common Good?" New York, NY: Common Good (May 2004), available at http://cgood.org/assets/attachments/22.pdf; Public Agenda, "'I'm Calling My Lawyer': How Litigation, Due Process and Other Regulatory Requirements Are Affecting Public Education," New York, NY: Common Good (November 1, 2003), available at http://cgood.org/assets/attachments/96.pdf .

[26] See e.g., Howard *supra* note ___ at 3-4 ("The new equipment is so boring, according to Lauri Macmillan Johnson, a professor of landscape architecture at the University of Arizona, that children make up dangerous games, like crashing into the equipment with their bicycles."); "More Green, Less Screen," *People Magazine,* June 13, 2005 (Child and nature advocate Richard Louv says playgrounds are "being designed to avoid lawsuits, so many of them are quite boring to kids."); "Playtime is Over," *Dallas Morning News*, March 3, 2005; "Old Rockets Fate is Up in the Air," Doug Grow, *Minneapolis Star Tribune*, November 29, 2004 ("[S]wings don't reach the sky as they once did. Slides, too, have changed in height and slope. Teeter-totters are gone."); "Playground Safety Left Up to Schools," Bob Kasarda, *The Northwest Indiana Times*, September 24, 2004 ("The wooden equipment that was popular a couple of decades ago has been replaced by a variety of low-lying metal equipment covered in rubber. ... Slides are now shorter and covered, gaps in the equipment have been narrowed to prevent children from placing their heads into openings and all swings have been removed.").

Health Secretary Tommy Thompson in 2002, at which a group of experts concluded that re-instilling a culture of physical fitness was essential in order to address the surge in childhood obesity. Forty years ago, JFK's President's Council on Youth Fitness, with the same goal, called for installing monkey bars and other athletic equipment in playgrounds. Now, because of fear of liability, they've largely been ripped out.

Many other ordinary aspects of growing-up have disappeared. Lakes were closed to swimming as the word got out that you might get sued. Field trips are cancelled.[27] 'Recently, a school in Brooklyn had their beach day near Coney Island—the children were prohibited from going in the water for fear that someone might be liable if there were an accident.[28] A new book, Last Child in the Woods, addresses the cost to society when children lose the experience of spontaneous play and exploration.[29]

Business life has been transformed in many ways. "Foreign businessmen express amazement," Derek Bok observed, at "a system that exposes the entrepreneur to legal challenge so easily and on so many fronts, a system that lends itself so readily to harassment, obstruction, and delay." It is the regular practice of firms, including my own law firm, not to give references for fear of liability. Last year, a nurse admitted to killing 42 people in a string of hospitals in New Jersey and Pennsylvania. He was recognized as a troubled and ineffective nurse and would soon be fired, but would get rehired at another hospital because no one would give him a bad

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[27] See e.g. "Safety Always an Issue on School Trips," Martha Irvine, *The Associated Press*, June 11, 2005; "Dealing with the Dresden Deficit a Challenge," Lynne Jeter, *Mississippi Business Journal*, March 7, 2005 ("[S]ome schools were not taking as many field trips due to discipline problems or liability concerns."); Gerald S. Cohen, "Schools Cancel Field Trips — Fear of Suits, *San Francisco Chronicle*, August 30, 1989.

[28] Conversation with Franklin Stone.

[29] Louv, Richard (Algonquin Books) April 15, 2005

reference. As one hospital administrator admitted, "we're prevented from telling one another what we know out of fear, quite frankly, of being sued."[30]

Symptoms of the distrust of justice are all around us. Warning labels are found on virtually every product. Billions of coffee cups contain the helpful legend "Caution: Contents are Hot." A recent winner of the annual "wacky warning" contest was a 5-inch fishing lure with the following legend: "Harmful if Swallowed."[31] The warnings cost little or nothing, apologists say. But that's not correct either. When every product has a warning, the effect is a version of the child crying wolf -- consumers are less likely to pay attention to the warnings that really matter.

In almost all areas of social interaction -- hospitals, schools, recreation, child-rearing activities, even churches and synagogues -- Americans no longer feel comfortable acting on their reasonable judgment. The reason, polls confirm, is distrust of American Justice. A new Harris Poll, commissioned for this conference, found the following:

- 76% of Americans strongly or somewhat agree that people have become so fearful of frivolous lawsuits that they are discouraged from performing normal activities. [32]
- 83% of Americans strongly or somewhat agree that the system of justice makes it too easy to make invalid claims. [33]
- 94% strongly or somewhat agree that there is a tendency for people to threaten legal action when something goes wrong.[34]

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[30] "Hospitals Didn't Share Records of a Nurse Accused in Killings," Richard Perez-Pena, *The New York Times*, December 17, 2003; see also "Would You Hire this Man?," *Christian Science Monitor*, March 1, 2004

[31] M-LAW, "Past Winners of M-Law's 'Wacky Warning Label' Contest," http://www.mlaw.org/wwl/pastwinners.html

[32] Louis Harris and Associates, *Public Attitudes Toward the Civil Justice System*, New York, NY: Common Good (2005)

[33] *Id.*

[34] *Id.*

— 16% trust the legal system if someone makes a baseless claim against them.[35]

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The lack of confidence in civil justice is echoed in numerous other polls.[36]

Defenders of our system of justice say that Americans are irrational, and that the crisis has been manufactured (i) by irresponsible media that makes headlines of occasional rogue jury verdicts and (ii) by a calculated scare campaign of tort reformers. It's correct that the media emphasizes anything that might shock or titillate the public.[37] This bad habit has been observed in the media since colonial days, and, in the land of the First Amendment, it is hard to know what to do about it. It is correct also that reformers have gone of the stump to tell the public that the litigation system is unfair.[38] Probably the biggest promoters of "jackpot justice," however, are

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[35] *Id.*

[36] In a 1999 public opinion survey commissioned by the National Center for State Courts, for example, only 23% of the respondents had a great deal of trust in the court system. American courts were ranked below most institutions. Only the media and the state legislature were ranked worse. *See* Stephen S. Meinhold & David W. Neubauer, *Exploring Attitudes About the Litigation Explosion*, 22 Just. Sys. J. 105 (2001); Indiana University Public Opinion Laboratory, *How the Public Views the State Courts: a 1999 National Survey*, Williamsburg, VA: National Center for State Courts & The Hearst Corporation, presented at the National Conference on Public Trust and Confidence in the Justice System (1999); David Neubauer & Stephen S. Meinhold, *Too Quick to Sue? Public Perceptions of the Litigation Explosion*, 16:3 Just. Sys. J. 1 (1994); Gary A. Hengstler, *The Public Perception of Lawyers: ABA Poll*, 79-SEP A.B.A. J. 60 (1993); Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 Law & Soc'y Rev. 85 (1992); Tom R. Tyler, Why People Obey the Law (1990); Louis Harris and Associates, *Public Attitudes Toward the Civil Justice System and Tort Law Reform*, Hartford, CT: Aetna Life and Casualty Company (1987); Darlene Walker et al., *Contact and Support: An Empirical Assessment of Public Attitudes Toward the Police and the Courts*, 51 N.C. L. Rev. 44 (1972-1973)

[37] *Cf.* James Fallows, *Why Americans Hate the Media*, The Atlantic Monthly, Feb. 1996 (criticism of the media's tendency to sensationalize), H. L. Mencken, A Gang of Pecksniffs: and Other Comments on Newspaper Publishers, Editors, and Reporters (1975)

[38] See e.g.; American Tort Reform Association (ATRA), "About" ATRA website at http://www.atra.org/about/ ("Some astonishing decisions come out of the courts these days. Hundreds of millions in punitive damages piled on top of relatively minor actual damages. Meritless cases settled because defendants fear the outcome of an emotion-filled jury trial or a lawless court. That's why the [ATRA] leads the fight for a better civil justice system--one that's fair, efficient and predictable," says ATRA President Sherman Joyce.); U.S. Chamber of Commerce Institute for Legal Reform (ILR), "About ILR—Who We Are," ILR website at

the plaintiffs' lawyers. One need only look through the Yellow Pages, or look at billboards, or listen to AM radio, to be barraged by lawyer advertisements encouraging Americans to believe that they can sue for anything.[39] The unavoidable message of those ads is that you might be on the receiving end of one of those lawsuits.

The data on the amount of litigation and the trend in verdicts are notoriously unreliable because fewer than 3% of all cases ever get resolved at trial, and the overwhelming number of claims are settled or disposed of in some other way.[40] Legal threats don't show up in the numbers at all. The best data appear to confirm that the amounts awarded by juries have increased and that the number of claims—at least of certain types— is also up.[41]

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http://www.instituteforlegalreform.com/about/index.html ("Many plaintiffs' lawyers are exploiting flaws in our legal system in search of jackpot justice."). See also Common Good, "Is the Legal System Broken?" *The New York Times* and *The Washington Post*, December 26, 2005 ("[S]tandards today are changeable from jury to jury. With uncertain legal boundaries, it seems that anyone can sue for almost anything. ... Reform must restore reliability to law.")

[39] A full 77 pages (pp. 535-612) of the 2004-2005 District of Columbia yellow pages is devoted to lawyer advertisements, many with provocative headings like "Whoever said justice had to be fair?", "Injured? Get the money you deserve", and "Millions Recovered". Lawyers do not limit themselves to ads in print; see, for example, a current (June, 2005) ad campaign targeting Washington, D.C. metro riders and internet surfers; available at www.milkmakesmesick.org

[40] Patrick E. Higginbotham, *So Why do we Call them Trial Courts?*, 55 SMU L. Rev. 1405, 1408 (2002) (Noting that although the number of federal civil cases filed rose by 152% between 1970 and 1999, that the number of claims reaching the jury fell by 20%, leaving only 3% of all claims reaching a jury).

[41] *Id. at* 1408., Brian J. Ostrom, Neal B. Kauder, and Robert C. LaFountain, eds., *Examining the Work of State Courts, 2002: A National Perspective from the Court Statistics Project* (National Center for State Courts, 2003) (All civil claims increased 23% between 1987 and 2001. Tort claims (a subset of civil claims) declined 9% since 1992 because traffic claims (which make up the bulk of tort claims) declined 14% during that period. The decline in traffic claims is attributable to the rise of no-fault insurance and other reforms designed to reduce the volume of those claims. Between 1975 and 2002, all tort claims increased a total of 38% (including the 9% decrease since 1992).); Stuart Taylor Jr. and Evan Thomas, "Civil Wars," *Newsweek*, December 13, 2003, p. 48 (Mean jury awards now exceed $1.2 million, up from approximately $600,000 in 1996); Seth A. Seabury, Nicholas M. Pace, and Robert T. Reville, "Forty Years of Civil Jury Verdicts," *Journal of Empirical Legal Studies* Vol. 1 (March 2004), available at http://www.blackwell-synergy.com/links/doi/10.1111/j.1740-1461.2004.00001.x/abs/?cookieSet=1 (Average jury awards tend to be highly variable from year to year, making it difficult to distinguish trends over relatively short periods of time. We use the longest time series of data on jury verdicts ever assembled: 40 years of data on tort cases in San Francisco County, CA and Cook County, IL collected by the RAND Institute for Civil Justice. We find that while there has been a substantial increase in the average award amount in real dollars, much of this trend is

As a matter of probabilities, however, the odds of being sued and then losing before a jury are remote for most Americans.[42] Studies also indicate that, in most cases, juries tend to do a reasonable job.[43] But there is contrary evidence – especially in tragic circumstances, such as a child injured in an accident or a baby born with birth defects, studies show that juries tend to award huge sums irrespective of fault.[44] ""

Arguing about probabilities of being sued does not take into account the reality of human nature. To feel free to act on their reasonable judgment, people seem to need clarity[45] --

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explained by changes in the mix of cases, particularly a decreasing fraction of automobile cases and an increase in medical malpractice. Claimed economic losses, in particular claimed medical losses, also explain a great deal of the increase. Although there appears to be some unexplained growth in awards for certain types of cases, this growth is cancelled out on average by declines in awards in other types of cases); On medical malpractice specifically, see Physician Insurers Association of America, *PIAA Claim Trend Analysis: 2003 ed.* (2004), cited in American Medical Association, "Medical Liability Reform—NOW," June 14, 2005, available at http://www.ama-assn.org/ama1/pub/upload/mm/-1/mlrnowjune142005.pdf (The median medical liability jury award in medical liability cases nearly doubled from 1997 to 2003, increasing from $157,000 to $300,000. The average award increased from $347,134 in 1997 to $430,727 in 2002. The growth in settlements has mirrored that of jury awards. Median and average settlements increased from $100,000 to $200,000, and from $212,861 to $322,544 between 1997 and 2002, respectively.); Jury Verdict Research, "Medical Malpractice Jury Award Median Up Slightly," Press Release, April 1, 2004, available at http://www.juryverdictresearch.com/Press_Room/Press_releases/Verdict_study/verdict_study8.html (Median award in medical malpractice cases was $1,010858 in 2002, up from $473,055 in 1996.)

[42] The chances of being sued are significant for physicians in certain specialties: [facts]

[43] *Cf.,* Thomas Munsterman, *How Judges View Civil Juries,* 48 Depaul L. Rev. 247, 249-253 (1998).

[44]In birth-injury cases, juries sided with plaintiffs 60% of the time in 2002, up 34 percent from two years earlier. The median award for childbirth-negligence cases in 2002 was $2.2 million. (Jury Verdict Research, cited in "Doctors Spell Out Risks of Childbirth on Consent Forms," Carol M. Ostrom, *The Seattle Times*, August 9, 2004.) When all malpractice claims are considered, however, plaintiffs win just 1% at trial and lose 4% at trial—with the remaining 95% being settled, dropped or dismissed. (Presentation of Lawrence E. Smarr , Physicians Insurers Association of America, to American College of Surgeons, June 23, 2003, at http://www.facs.org/about/chapters/smarr.pdf.) In large counties in 2001, plaintiffs prevailed in 27 percent of medical malpractice cases. (Bureau of Justice Statistics, "Civil Trial Cases and Verdicts in Large Counties, 2001," April 2004, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc01.pdf.) The median award for all malpractice cases was $425,000 in 2001. (Bureau of Justice Statistics, "Medical Malpractice Trials and Verdicts in Large Counties, 2001," April 2004, p. 1, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/mmtvlc01.pdf) On the correlation between the adverse events, negligence and jury awards, a study of malpractice claims published in the *New England Journal of Medicine* found "no association between the occurrence of an adverse event due to negligence or an adverse event of any type and payment. ... Among the malpractice claims we studied, the severity of the patient's disability, not the occurrence of an adverse event or an adverse event due to negligence, was predictive of payment to the plaintiff." (Troyen A.

for example, that the system of justice will affirmatively protect them if a baseless claim is brought. In the face of uncertainty, individuals often give disproportionate weight to risk—Nobel laueate Daniel Kahneman famously explained this phenomenon as the "overweighting of low probabilities," which helps explain why people think about sharks before swimming in the ocean, even though chances of being attacked are negligible.[46]

Being sued also is not likely, but horrifying and unpredictable, and there are many more potential plaintiffs in our immediate daily lives than there are sharks. Many doctors say that they view every patient as a potential plaintiff. Once people learn that someone was exposed to a lawsuit for some ordinary life activity, that activity becomes a risk to avoid.[47] I could find no court that held that a seesaw was unreasonably dangerous, or that putting suntan lotion on children would subject you to liability, but Americans now understand that one injured or disappointed person can unilaterally drag you through a legal process for years. Nothing could be easier, when something goes wrong, than to come up with a theory of what someone might have done differently.

"An act is illegal," Professor Donald Black once observed, "if it is vulnerable to

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Brennan, M.D., J.D., M.P.H., Colin M. Sox, B.A., and Helen R. Burstin, M.D., M.P.H., "Relation between Negligent Adverse Events and the Outcomes of Medical Malpractice Litigation," *The New England Journal of Medicine*, Volume 335: 1963-1967, December 26, 1996, Number 26, available at http://content.nejm.org/cgi/content/short/335/26/1963.)

[45] Indeed, researchers have found that people value "decorum, fairness, and *finality* in decision-making". David B. Rottman, *Public Perceptions of the State Courts: A Primer*, 15:3 Ct. Manager 1, 3 (2000) (emphasis added).

[46] Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk,* 47 Econometrics 263, 263 (1979). *See also* Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 Nw. U. L. Rev. 1295 (2003) (discussing the widespread fear and panic resulting from sniper killings in the Washington, D.C. area in the fall of 2002, even though the statistical probability of falling victim to the snipers was quite low

[47] Chief Justice Warren Burger noted almost twenty years ago a "litigation neurosis" developing in "otherwise normal, well-adjusted people". Chief Justice Warren E. Burger, *Isn't There a Bettter Way?*, 68 A.B.A. J. 275 (1982)

legal action." [48] By that standard almost any accident or dispute today is illegal. That's why people are fearful.

Getting Beyond Tort Reform

The debate over "tort reform" in the last two decades has focused not on the effectiveness of justice as the foundation for reasonable daily choices, but whether civil justice achieves fairness in particular cases.[49] As Derek Bok noted 20 years ago, there is a tendency to concentrate on the "plight of individual litigants and ignore[] the effects on the system as a whole."[50]

Tort reformers talk about the "lawsuit lottery," and point to jurisdictions that are notoriously tilted toward claimants and characterize them as "judicial hell-holes" and "magic jurisdictions" where plaintiffs' lawyers can bring baseless or excessive claims with a high probability of success.[51] The focus throughout is fairness. "Is it fair to get a couple of million dollars from a restaurant because you spilled a cup of hot coffee on yourself?"[52] As the Chamber of Commerce asks on its website, "How fair are your courts?"[53]

Actual reform proposals have not questioned the basic functioning of the system,

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[48] Donald J. Black, The Mobilization of Law, 2 J. Legal Studies 125,131 n.24 (1973).

[49] Those engaged in the current tort reform debate would do well to heed Geoffrey Hazard's advice that "In all law reform it is important to be circumspect about the nature and magnitude of the problems to which reform is to be addressed." Geoffrey C. Hazard, Jr., *Individual Justice in a Bureaucratic World*, 7 Tul. J. Int'l & Comp. L. 73 (1999). To properly tackle the problems in the current system, it is important to take a broader view of the effect of civil justice on society.

[50] Bok, *supra* note ____ at 27.

[51] American Tort Reform Association, *supra* note 1.

[52] "Politicians, pundits, and industry leaders replayed endless variations on [this] theme summarized by the national Chamber of Commerce." Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 Duke L.J. 447, 454 (2004) (citing Ralph Nader & Wesley J. Smith, No Contest: Corporate Lawyers and the Perversion of Justice in America 267 (1996)).

however. As Professor Robert Kagan put it, tort reform has only "nibbled at the edges."[54] Indeed, many tort reformers have gone out of their way to suggest that the problem can be fixed with a few tweaks: "all it takes is a few of those magic jurisdictions to distort the whole system,"[55] said a representative of the National Association of Manufacturers. "A minor change in procedures—the class action bill now pending before Congress—can make that impossible by driving those kinds of mass claims into federal court."[56] (That legislation—the Class Action Fairness Act of 2005—was passed earlier this year.)

The medical profession has thrown its energy into an effort to "cap" non-economic damages at $250,000. If ever enacted, this would certainly moderate malpractice insurance premiums. But most doctors acknowledge that "caps" do little to alleviate the extreme distrust that doctors harbor towards the system. For example, limiting damages awarded for pain and suffering is of little help to an obstetrician who could not have caused a baby's birth defects but is nonetheless found liable for millions of dollars of "economic" damages representing a lifetime of care.[57]

Where tort reformers see the system as rigged by trial lawyers, opponents of

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[53] See the main page of the U.S. Chamber of Commerce's Institute for Legal Reform (as viewed on June 21, 2005) at http://www.instituteforlegalreform.com/

[54] Robert A. Kagan, *How Much do Conservative Tort Tales Matter? On Haltom and McCann's Distorting the Law.* 33 (6/25/05) (*Unpublished manuscript)*

[55] Wallstreet Week with Fortune, Scruggs/Baroody Debate, aired Jan. 28, 2005, *available at* http://www.pbs.org/wsw/tvprogram/20050128.html.

[56] That class action legislation was passed earlier this year. *Id. [CITATION]*

[57] No tort reform of which I am aware address the reliability of justice. A majority of states have passed laws that limit defendant's exposure in personal injury actions; for example, by limiting non-economic damages or joint and several liability. But these citizens in take states still seem to distrust the system of justice.

reform portray tort reformers as special interests trying to rig the system their way. Joanne Doroshow, a founder of the Center for Justice and Democracy, put it this way: "there has been an increase in efforts to eviscerate the civil justice system and make sure corporations do not get sued for anything they do wrong." [58]

Opponents of tort reform also focus on fairness, which they define as the right to have every case decided by a jury. Robert S. Peck, the head of the Center for Constitutional Litigation, extols the virtues of modern civil justice this way:

> There, an individual, neither wealthy nor well-connected, can haul a huge multinational conglomerate into court and hold it accountable for its wrongful and harmful actions.[59]

"I trust the jury system and I trust the American people and their common sense," as trial lawyer Richard Scruggs put it, "far more than the National Association of Manufacturers to protect the American public."[60]

The impact of justice on the workings of a society is only touched on tangentially. Plaintiffs' lawyers often assert that lawsuits serve a "regulatory function," but when the results vary from case to case, it's hard to find the regulatory rule.[61]

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[58] Justice For all: Speaking Truth to Power, 40-JUL Trial 20 (2004).

[59] Robert S. Peck, *Tort Reform's Threat to an Independent Judiciary*, 33 Rutgers L.J. 835, 838 (2002).

[60] Wallstreet Week with Fortune, Scruggs/Baroody Debate, aired Jan. 28, 2005, *available at* http://www.pbs.org/wsw/tvprogram/20050128.html. The populist rhetoric by trial lawyers about "trust the American people" doesn't seem quite accurate. As Walter Olson recounts in vivid detail in "The Rule of Lawyers" (Truman Talley/St. Martin's 2003) entrepreneurial lawyers practice discrimination overtly; manuals explain that Mexican Americans are "passive" and "Orientals tend to go along with the majority." The plaintiff lawyers use focus groups to figure out which juries would be most sympathetic to their arguments. In the silicone breast implant cases, for example, they discovered that blue collar men who like big bosoms would be most likely, out of guilt, to return verdicts for the plaintiffs. cite.

[61] The trial lawyers seem to assume,,contrary to substantial evidence, that the more exposure to liability, the better people will behave. Cites to health care studies, note __supra.

The focus on fairness has proved unproductive on many levels. In any given case, the question of fairness can easily be argued either way. Take the McDonald's hot coffee case, the poster child of "lawsuit abuse." There, an elderly woman was badly burned when she put her coffee cup between her legs, and it spilled as her daughter drove away from the drive-through window. That's her fault, it's easy to say. On the other hand, McDonald's coffee was brewed - 20 degrees hotter than other restaurants. Why should the drive-in window sell coffee that's so hot? Why not, aren't drivers grown up?

Arguing about fairness quickly turns into a version of a playground spat. Tort reformers talk about the need to limit frivolous lawsuits. Who can be against that? Defenders of the system talk about protecting the little guy against corporate wrongdoers. Who can be against that?

Any functional system of civil justice, of course, should accomplish both goals: it should reliably get rid of frivolous lawsuits, and it should also effectively protect the little guy against a corporate wrongdoer. What's missing in the debate is any coherent vision of how a system of justice should work.

The Responsibility of Judges vs. Juries.

> *Ad questionem facti non respondent judices . . .*
> "Judges do not answer questions of fact..."
>
> *...ad questionem juris non respondent juratores.*
> "...jurors do not answer questions of law."
>
> Sir Edward Coke, Commentary on Littleton 460 (J. H. Thomas ed., 1818).

Just as both sides to the tort reform debate have focused on fairness rather than the broader effects of civil justice on society, so too have they assumed that juries, not judges, have

the responsibility of deciding whether conduct constitutes negligence or an unreasonable risk. Under current judicial orthodoxy, judges believe they should lean over backwards to put every case to a jury. One standard often quoted is *Conley v. Gibson*, 355 U.S. 41 (1957) admonishing lower courts not to dismiss any claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to recover."[62]

Any effort at legal reform is routinely resisted as trespassing on the constitutional right of trial by jury. But the role of the civil jury is generally misunderstood and, to the public, probably confused with the jury's role in criminal cases. In criminal prosecutions, juries play a critical role as our protection against the abuses of government power. Juries are our defense against state coercion: no one can be convicted to jail unless a jury decides they're guilty. But in a civil case, where citizens can use the justice system as an offensive weapon, the role of the jury depends upon whether the issues should be determined as a matter of law or as a matter of disputed fact.

The Seventh Amendment, which states that the "right of trial by jury shall be preserved," underscores this fact-law distinction. It defines the civil jury right as applying to "suits in common law" and ends by saying that "no fact tried by a jury shall be otherwise reexamined...than according to the rules of the common law."[63] Judges declare the standards of law that affect all of society; juries find disputed facts in the particular case.[64]

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[62] Conley v. Gibson, 355 U.S. 41, 45 (1957).

[63] U.S. Const. amend. VII. "In suits in common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

[64] Arthur Miller, *The Pretrial Rush to Judgment: are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1083 (2003). (Positing that an issue that "involves the resolution of principles generally applicable to a class of cases" is a question of law for the judge). *See also* Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 Green Bag 367 (1999)

While most lawyers assume today that the Seventh Amendment is an automatic pass to the jury, what constituted a "suit at common law" in 1791 was sharply limited. There was no cause of action for negligence, for example, until judges in the 19th century made rulings creating this new cause of action. Some issues -- say, interpretation of a statute -- are clearly law. Others are clearly issues of fact: "credibility determinations, the weighing of evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."[65]

Determining whether someone acted reasonably involves mixed questions of law and fact. Any claim for negligence, for example, usually involves what is reasonable conduct in the circumstances. The almost universal practice in tort cases is to give the claim to the jury. One study found that courts show "extreme vigilance against treading on contested fact issues or mixes questions of law and fact - even arguable ones - reserving them for evidentiary hearings . . .. This was especially true in cases applying indeterminate legal standards, such as reasonableness."[66] Most courts do not even pay attention to the question of what should be decided as a matter of fact or law.

> There has been ... a strong tendency to let all issues go to the jury without discriminating among them. Judges may see this not only as conventional, but also as convenient, because it reduces judicial effort and the risk of reversal.[67]

The general practice of American courts is summed up by a sign that once hung over the federal

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(Commenting that "Marshall the judge seems memorable for his insistence that the courts deal only and impartially with questions of law")

[65] Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986)

[66] Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 Marq. L. Rev. 141, 147 (2000), *Quoted* in Miller, *supra* nt. 50 at 1027.

[67] Schwarzer, Hirsch & Barrans, *supra* note 41, at 460.

courtroom door in New Orleans: "No spitting. No summary judgment."[68]

There is a different tradition of civil justice, however, that, at least in tort law, would dramatically increase the responsibility of judges. In this tradition, articulated most notably by Oliver Wendell Holmes, Jr., the overriding goal of civil justice is to provide guidance and protection to society as a whole. Instead of acting as referees over a neutral process, judges have the obligation to make rulings of law on legal duty and standards of care. Whether seesaws are a reasonable risk would be determined by the judge as a matter of law.

This approach has been largely lost to our generation and, to most, probably seems like heresy. But the jurists that we hold up as our leading common law thinkers considered this an essential responsibility of judges. To Holmes, what constitutes reasonable conduct was a question that required a ruling of law:

> Negligence ... [is] a standard of conduct, a standard we hold the parties bound to know before-hand, and which in theory is always the same fact and not a matter dependent upon the whim of a particular jury nor the eloquence of the particular advocate.[69]

Benjamin Cardozo devoted his famous lectures in 1923 to the importance of this type of "judicial legislation":

> The judge is under a duty...to maintain a relation between law and morals, between precepts of jurisprudence and those of reason and good conscience. "it is the function of courts to keep doctrines up to date with the *mores* by continued restatement...This is judicial legislation, and the judge legislates at his peril. Nevertheless, it is the necessity and duty of such legislation that gives to judicial office its highest honor; and no brave and honest judge shirks the duty or fears the peril."[70]

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[68] Steven A. Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 6 Rev. Litig. 263, 264 (1987).

[69] Oliver Wendell Holmes, Jr., *Law in Science and Science in Law,* 12 Harvard L. Rev. 443, 458 (1899)

[70] Cardozo *Supra,* note 3 at 133-135.

Chief Justice Roger Traynor of the California Supreme Court, a famous liberal innovator -- he created the doctrine of strict liability for manufacturers whose products fail[71] -- emphasized the need for judges to declare rulings even in the simplest accident, and not leave standards to the "oscillating verdicts of juries."[72] When a woman hit her head on an angled ceiling while walking down a staircase, Traynor insisted that the judge determine whether it was an unreasonable hazard; in that case, "the danger is so apparent that visitors could reasonably be expected to notice it."[73]

Judges in tort claims today assume that they lack this power, but they need only look to commercial law to see the philosophy in action. In commercial law, the focus is predictability and efficiency. It is a well-established principle that judges, not juries, have the obligation to interpret standard language of contracts.[74] The Uniform Commercial Code was a legislative effort to achieve consistency.[75] Its core concepts, including ones that look very much

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[71] *See* Escola v. Coca-Cola Bottling Co. of Fresno, 24 Cal.2d 453 (1944).

[72] *Quoted* in G. Edward White, Tort Law in America, 185 (Oxford University Press 1980).

[73] *Id.* at 190-191.

[74] *See e.g.* Joseph M. Perillo, *Comments on William Whitford's Paper on the Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 Wis. L. Rev. 965, 965 (2001) (Explaining the limited instances in which juries interpret contracts: "Courts which follow the more traditional approach permit the jury to determine the proper interpretation of a contract only if the judge without the aid of parol evidence deems the contract to be ambiguous and parol evidence is then admitted to clarify the parties' intentions. A wider role is permitted by courts that follow the Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co., approach, which essentially allows the court to hear parol evidence to determine whether the writing is susceptible to more than one interpretation. If the court finds that the writing is susceptible to more than one interpretation, and parol evidence is admitted in the hearing of the jury, the jury is charged with determining the meaning of the writing"); *Cf.* Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 Tex. L. Rev. 1581 (2005) (Stating that "contract interpretation is, of course, a judicial staple."), The Hon. Justice Michael Kirby AC CMG, *Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts*, 24 Statute L. Rev. 95 (2003) (Observing that a large part of the work of judges is composed of interpreting contracts and statutes); *But see* William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 Wis. L. Rev. 931 (2001) (Stating that a significant proportion of cases involving contract interpretation are actually decided by juries).

[75] U.C.C. § 1-102(2)(c) (one of the main purposes of the U.C.C. is "to make uniform the law among the various jurisdictions.")

like those of tort, including reasonableness, are often decided as a matter of law in situations where the fact patterns are likely to be repeated. America's system of commercial law, generally considered the most consistent and predictable in the world, is the bedrock of America's economic strength.

The Supreme Court in recent years has begun to emphasize the goal of legal consistency. Several important decisions, for example, emphasized the desirability of judges using summary judgment to make rulings as a matter of law. In *Celotex v. Caltrett*, a wrongful death asbestos case, the court starkly shifted direction from the presumption that summary dismissal should be avoided if there was a "scintilla of evidence."[76] Thus,

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." (quoting Fed. Rules Civ. Proc. 1.)[77]

In *Markman v. Westview Instruments*, Justice Souter explained the importance of consistency in patent cases:

> "...we see the importance of uniformity in the treatment of a given patent as an independent reason to allocate all issues of construction to the court. As we noted in *General Elec. Co. v. Wabash Appliance Corp.*, "[t]he limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public."[78]

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[76] *Supra* note 42 at 251. "Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority [referring to Celotex and Matsushita 516 U.S. 367] have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."

[77] Celotex v. Caltrett, 477 U.S. 317, 327 (1986).

What discourages economic energy, Justice Souter cautioned, was a legal system that created a "zone of uncertainty:"

> "[A] zone of uncertainty which enterprise and experimentation may enter only at the risk of infringement claims would discourage invention only a little less than unequivocal foreclosure of the field," *United Carbon Co. v. Binney & Smith Co.*, 317 U.S. 228, 236, 63 S.Ct. 165, 170, 87 L.Ed. 232 (1942), and "[t]he public [would] be deprived of rights supposed to belong to it, without being clearly told what it is that limits these rights."" *Merrill v. Yeomans*, 94 U.S. 568, 573, 24 L.Ed. 235 (1877).[79]

In *Cooper v. Leatherman*, the court held that the boundaries of punitive damages should be decided as a matter of law: ""Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself.""[80]

In *State Farm v. Campbell*, the Court went further on punitive damages, suggesting clear guidelines so that claims of punitive damages could not be used to extort settlements.[81]

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose..[82]

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[78] Markman v. Westview Instruments, 570 U.S. 370, 390 (1996).

[79] *Id.*

[80] Cooper Industries Inc. v. Leatherman Tool Group, 532 U.S. 424, 436 (2001), *Quoting* Justice Breyer in BMW of N. Am. v. Gore, 517 U.S. 559, 587.

[81] For further discussion of the value of punitive damages in the context of tort law, see E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 Ala. L. Rev. 1053 (1989)

[82] State Farm Mut. Auto Ins. Co. v. Campbell 538 U.S. 408, 416-17 (2003). *Citations omitted.*

In *Daubert v. Merrell Dow*, the court shifted the responsibility of what constitutes credible expert testimony from jury to judge:

> ...the Rules of Evidence -- especially Rule 702 -- do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.[83]

Professor Arthur Miller, in a thorough article on the history of the fact-law distinction, is critical of what he sees as this new trend to make decisions as a matter of law on summary judgment. His main point, it seems, is that judges should not be allowed to draw on their values:

> Judges are human, and their personal sense of whether a plaintiffs' claim seems "implausible" can subconsciously infiltrate even the most careful analysis.[84]

The idea of "result-oriented" decisions based on considerations of policy strikes Professor Miller as basically unlawful because "lower courts may curtail litigants' access to trials - and obviously a jury - through arbitrary, result-oriented, or efficiency-motivated determinants at the pretrial motion stage."[85]

At bottom, Professor Miller trusts juries more than judges. But Holmes and Cardozo did not necessarily think that judges are wiser than juries. Their point is that juries can't make consistent rulings. Juries have no authority make rulings at all. Every case is a blank slate.

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[83] Daubert v. Merrell Dow Pharms., 509 U.S. 579, 597 (Note that Federal Rule 702 was modified in Dec. 2000, and now reads: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case," thereby essentially codifying Daubert.)

[84] *Supra* note 50 at 1071.

[85] *Id* at 1076.

The idea that juries are "Democracy in Action,." a kind of mini-election with decisions made on an ad hoc basis, has populist appeal. But the effect is that civil law offers no predictability or guidance.

It is correct that, in making rulings of law, judges will necessarily have to draw on their sense of community values. Cardozo agreed that a judge can never "eliminate altogether the personal measure of the interpreter," but explained that society can't function without a ruling by someone:

> You may say there is no assurance that judges will interpret the mores of their day more wisely and truly than other men. I am not disposed to deny this, but in my view it is quite beside the point. The point is rather that this power of interpretation must be lodged somewhere...[86]

"The basic moral principle, acknowledged by every legal system we know anything about," Yale Professor Eugene Rostow once observed, "is that similar cases should be decided alike."[87] To accomplish that goal, judges must take the responsibility to draw the boundaries of reasonable lawsuits.

Restoring Reliability to Civil Justice:

Times have changed.

In many ways, the changes have been for the better. The shift in legal philosophy that began in the 1960s opened doors for broad segments of society. In our efforts to avoid abuses of authority, however, we undermined the authority needed to make common choices to run the institutions of society, including the system of civil justice.

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[86] Cardozo *Supra* nt. 9 at 136. (*Quoted* in Philip K. Howard, The Collapse of the Common Good 67-68 (2001)

[87] *Quoted in* Ken Greenwalt, *The Enduring Significance of Neutral Principles*, 78 Colum. L. Rev. 982, 1001, nt. 65 (1978).

We have created a society obsessed with law. Legal threat, once a rare event in anyone's life, is now commonplace. A recent Public Agency survey found that 78% of middle and high-school teachers in American had been threatened by their students with possible violation of their legal rights.[88] The debate over civil justice cannot take place by putting a magnifying glass over a particular dispute. Arguments about fairness, or homilies about the common sense of juries,[89] do nothing to confront the reality that legal fear has become a defining feature of our culture.

Other countries are beginning to have a similar problem of legal fear (perhaps influenced by American culture) and are proposing solutions. British Prime Minister Tony Blair recently gave a speech pointing to how fear of possible lawsuits has resulted in counterproductive behavior in England: "something is seriously awry when teachers feel unable to take children on school trips, for fear of being sued" or when a town "remove[d] hanging baskets for fear that they might fall on someone's head, even though no such accident has occurred in the 18 years they had been hanging there."[90]

The problem in the UK occurs not because of erratic juries -- the UK long ago abolished juries in most civil cases[91]-- but because judges are not focusing on the social policy

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[88] Public Agenda, "Teaching Interrupted: Do Discipline Policies in Today's Public Schools Foster the Common Good?" New York, NY: Common Good (May 2004), available at http://cgood.org/assets/attachments/22.pdf

[89] "People who are entrusted to choose the leader of the free world are capable of weighing evidence in a courtroom—and they do, every day across America. I found again and again that they take their service seriously, and follow the law even when the law is at odds with what they personally believe." John Edwards *supra* nt. 2, "One suspects that some judges are simply selling the good faith and collective wisdom of juries short." Arthur Miller, *supra* nt. 67 at 1024.; *See e.g.*, R.R. Co. v. Stout, 84 U.S. 657, 664 (1874).

[90] Tony Blair, British Prime Minister, Remarks at the Institute of Public Policy Research (May 26, 2005) *available at* http://www.number-10.gov.uk/output/page7562.asp.

[91] Stephen Adler, The Jury: Trial and Error in the American Courtroom xv-xvi (Random House 1994). (Noting that while Britain technically maintains a jury system, only 1 percent of civil trials are decided before a jury).

implications of allowing certain claims. In an important decision in 2003, the Appellate Committee of the House of Lords took this issue on, and discussed the responsibility of judges to consider policy when deciding whether to permit claims.[92]

The case before the House of Lords could have been picked from many courts in America. On a hot day in the Cheshire region of England, a 18 year-old named John Tomlinson went for a swim in the lake of a local park.[93] Racing into the water from the beach, he dived too sharply and broke his neck on the sandy bottom. He was paralyzed for life.[94]

Mr. Tomlinson sued the Cheshire County Council for not doing more to protect against the accident. The Council, he discovered, knew about the risk. There were three or four near drownings every year. "No swimming" signs had been posted and widely ignored for over a decade. The popularity of the park—more than 160,000 visitors every year—made effective policing almost impossible. Fearful of liability, the Cheshire Council had decided to close off the lake by dumping mud on the beaches and planting reeds. But before the reeds could be planted Mr. Tomlinson had his accident. The Cheshire Council should have acted sooner, as his lawyer argued, to prevent "luring people into a deathtrap"[95] and to protect against a "siren sound strong enough to turn stout men's hearts."[96] The lower court accepted this argument because the County obviously knew the danger.

The Law Lords took the appeal and ordered the case to be dismissed. The lead

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[92]Tomlinson v. Congleton BC, [2003] UKHL 47.

[93] *Id.* at [2].

[94] *Id.* at [3].

[95] *Id.* at [28].

[96] *Id.*

opinion by Lord Hoffmann declared that whether a claim should be allowed hinged not just on whether an accident is foreseeable, but "also the social value of the activity which gave rise to the risk."[97] Permitting Mr. Tomlinson's claim, the Law Lords held, means that hundreds of thousands of people would not be able to enjoy the park: "[T]here is an important question of freedom at stake. It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty."[98]

The County's ineffective effort to prevent swimming, instead of establishing negligence, the Lords held, demonstrated how a misguided conception of justice hurts the public. "Does the law require that all trees be cut down," Lord Hobhouse asked, "because some youth may climb them and fall?"[99] Lord Scott added, "Of course there is some risk of accidents.... But that is no reason for imposing a grey and dull safety regime on everyone."[100]

The Tomlinson decision exposes the forgotten goal in American justice. Judges have lost sight that lawsuits concern not only the particular parties to the dispute, but everyone in society.[101] The mere possibility of a lawsuit changes people's behavior.

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[97] *Id.* at [34].

[98] *Id.* at [46].

[99] *Id.* at [81].

[100] *Id.* at [94].

[101] In recent years, several state Supreme Courts have emphasized the importance of public policy in making rulings of law in tort cases. In a case involving a mugging on a town beach at night, the California Supreme Court ruled that the town should not be liable because, imposing tort liability "admonishes against any use of the property whatever, thus effectively closing the area." Hayes v. State of California, 11 Cal. 3d. 469, 473 (1974). The California Supreme Court also dismissed a claim that a touch football participant was too rough because "imposition of legal liability for such conduct might well alter fundamentally, the nature of the sport." Knight v. Jewett, 3 Cal. 4th 296, 319 (1992). *See* generally Stephen D. Sugarman, *Judges as Tort Law Unmakers: Recent California Experience with "New" Torts*, 49 Depaul L. Rev. 455, 461 (1999). The New Jersey Supreme Court recently held that an accident involving

Protecting the freedom of everyone in society requires a basic shift in responsibility. Judges must delineate the boundaries of claims that implicate social policy. Judges must act as gatekeepers, as Holmes and Cardozo advocated, giving legal substance to general standards.[102]

This shift in responsibility is intended to accomplish two goals. It will spawn a body of legal opinions on standards of care and scope of duty that will begin to establish the contours of reasonable dispute. Most citizens don't eagerly await judicial slip opinions, of course, to learn how to behave. The more immediate benefit will be that the public will know that judges now see it as their job affirmatively to defend reasonable conduct.

The rule of thumb for when a legal ruling is needed should probably be this: if allowing a claim (or defense) to proceed to a jury would affect people not in the courtroom, by chilling their reasonable choices, then the judge should make a ruling of law as to the contours of the claim. Are the risks inherent in a public lake ones that society should take? Avoiding this ruling is not neutral. Not ruling, in effect, is a decision to close the lake. It doesn't matter if the jury finds no liability, because the next jury may feel differently.

Shifting this responsibility to judges to make these rulings does not implicate

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2 toddlers at a block party should be dismissed because, otherwise, people would stop having block parties.

[102] *See* Sheldon M. Novick, *The Collected Works of Justice Holmes*, Vol. 3, Holmes, *The Common Law*, 1881 at 109-304 (University of Chicago Press 1995) "...when standards of conduct are left to the jury, it is a temporary surrender of a judicial function which may be resumed at any moment in any case when the court feels competent to do so. Were this not so the almost universal acceptance of the first proposition in this Lecture, that the general foundation of liability for unintentional wrongs is conduct different from that of a prudent man under the circumstances, would leave all our rights and duties throughout a great part of the law to the necessarily more or less accidental feelings of the jury."; Cardozo, Supra nt. 9 at 106. "It is the customary morality of right-minded men and women which he is to enforce by his decree. A jurisprudence that is not constantly brought into relation to objective or external standards incurs the risk of denigrating into what the Germans call "Die Gerfuhlsjurisprudenz," a jurisprudence of mere sentiment or feeling."; *Supra* nt. 103.; *But see,* Stephen B. Presser, *The Development and Application of Common Law*, 8 Tex. Rev. L. & Pol. 291 (2004) (discussing the importance of following prior doctrine, criticizing Holmes, and admonishing judges who "make it up as they go along")

serious concerns of judicial authority, at least if we accept that judges in civil cases are empowered to make rulings of law based on legal policy considerations. The precedents are numerous and several state supreme courts have begun to limit tort claims on this basis.[103] Nor is there any obvious need for procedural tools other than those that already exist, such as summary judgment.[104]

But it will take years of important judicial rulings, even from the Supreme Court, to effect a change in the way most courts handle cases.[105] The power of inertia is always underestimated, and the Supreme Court has learned many times that doctrinal shift does not necessarily occur because it says it should.

Legislation would send a clearer signal. Prime Minister Blair recently announced that he will propose a new Compensation Bill that will "clarify the existing law on negligence to make clear that there is no liability in negligence for untoward incidents that could not be avoided by taking reasonable care or exercising reasonable skill."[106] Such a bill, Prime Minister Blair proposed, "will send a strong signal and...reduce risk-averse behavior by providing reassurance to those who may be concerned about possible litigation, such as volunteers, teachers

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[103] *See,* Cooper v. Leatherman *Supra* nt. 84; Markman v. Westview *Supra* nt. 79; State Farm v. Campell, *Supra* nt. 84; Hayes v. State of California and Knight v. Jewett *Supra* nt. 103.

[104] Fed. R. Civ. P., 56(c). "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."; *See also,* Fed. R. Civ. P. 50, Fed. R. Civ. P. 12(b)(6), Fed. R. Civ. P. 16(1).

[105] One example is the recognition by courts of a journalistic privilege akin to those acknowledged for lawyers, doctors, and psychologists. Although the Supreme Court ostensibly rejected such a privilege in Branzburg v. Hayes, 408 U.S. 665 (1972), there remains disagreement among lower courts, with some following the dissenting opinions filed in the case (recognizing a privilege) and others following Justice Powell's concurrence (narrow interpretation of the holding, privilege should be recognized in some cases).

[106] Blair, *supra* note ___.

and local authorities."[107]

The significance of the proposed legislation in the UK will probably not be to provide clear legislative answers, but to shift the goal of civil justice.[108] Instead of focusing only on fairness and foreseeability in a particular case, judges will likely be called upon to make rulings, as both Holmes and Lord Hoffmann suggested, based on "considerations of social advantage."[109]

Legislation to restore judicial authority in America could be in the form of a general principle, along the following lines:

> Judges shall take the responsibility of drawing the boundaries of reasonable dispute as a matter of law, applying common law principles and statutory guidelines. In making these rulings, judges should consider the impact of allowing such claims (or defenses) on the conduct of broader society.

Legislation could also address specific areas of crisis. Congress has already introduced a bill to authorize pilot projects for administrative health courts, with hearings in the Senate expected over the summer.[110]

Law is a conservative institution, as it should be. The shift towards judicial responsibility will only occur after leaders of bench and bar, exercising their considerable powers

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[107] *Id.*

[108] Judicial interpretation of traditional concepts like reasonableness seems inevitable--no statute or rulebook can account for the infinite range of possible accidents.

[109] Holmes, *Supra* nt. 4. "I think that judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often claimed aversion to deal with such considerations is simply to leave the very ground and foundations of judgments inarticulate, and often unconscious..."

[110] Cite to Enzi bill A broad coalition of healthcare providers, patient advocates and consumer groups has come together behind the bill, cites, and Common Good is in a joint venture with the Harvard School of Public Health to design the system.

of skepticism, reach their own understanding of why this change is essential. Some of the concerns, however, can be predicted.

All citizens are entitled to their day in court, many will observe. I would go further: the courthouse doors should never be barred, even to frivolous claims. The pertinent question is how far the claim goes, i.e., whether it is subject to dismissal by motion with a legal ruling.[111] What I advocate is not taking away the right to sue, but giving substance to the right to sue.

Conservatives may object that this is "judicial activism." But there is a difference between a judge assuming legislative functions, such as taking control of a school system, and a judge dismissing an unreasonable private claim. A kind of defensive activism, where judges act as gatekeepers, is essential to keep private parties from using justice unilaterally to undermine the freedom of others in society.

The main concern, I suspect, will focus on what is called "the right to sue." The mischief caused by civil justice in the last 40 years has sustained itself so long, in my view, because of a false assumption about the nature of civil justice. Pretty much everyone seems to believe there is a constitutional right to sue for almost everything.

Suing is not an act of freedom, however. The rights of freedom that our founders gave us, such as freedom of speech, were rights *against* state power. Suing *invokes* the state's coercive power against another private citizen--if you lose, the marshal may come and take your home away. Suing is just like indicting someone, except that it is an indictment for money. We would never tolerate a prosecutor bringing a baseless charge. Nor would we allow a prosecutor

[111] Sanctions footnote

to threaten the death penalty for a misdemeanor.[112] That would be using state power for extortion. Why, then, do we tolerate allowing self-interested private parties to invoke legal power for whatever they want against other free citizens?

An "open season" philosophy of justice does not enhance our constitutional rights. The point of freedom is almost exactly the opposite--that we can live our lives without being cowed by state power. When private parties use the threat of state power for their private benefit, without any moderating judicial authority, justice becomes a tool for extortion.

Holmes famously defined law as "The prophecies of what the courts will do in fact."[113] Today in America, in areas such as tort law, no one has any idea of what a court will do. What that means, I submit, is that in these areas Americans have lost the protection of law. That's why legal fear in America has reached epidemic proportions.

Shifting the responsibility to draw the boundaries of claims to judges is a major doctrinal change, comparable in scope to the shifts that occurred in the 1960s. But the shift must be bold to restore public trust. Distrust of law has corroded legitimate authority, as is apparent from any tour of the daily functioning of America's common institutions. Sooner or later, as Derek Bok observed, "our legal system [must] empower someone to keep watch and make sure that the process as a whole is meeting the needs of those whom it purportedly serves."[114]

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[113] Holmes, *Supra* note 4; *See, eg.,* Cardozo, *Supra* nt. 4 at 112. "One of the most fundamental social interests is that law shall be uniform and impartial."

[114] Bok, *supra* note___ at 23.

How Adversarial Legalism Affects Behavior

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Common Good -- AEI-Brookings Conference on "Lawsuits and Liberty"
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Law and lawsuits are *supposed* to affect behavior. They are supposed to constrain my liberty when I might exercise it ways that could harm you – so that you can exercise your liberty more freely. A problem arises when laws and legal processes *unduly* restrict my liberty. My argument in this paper is that American legal and regulatory processes generate high levels of legal uncertainty, so that its difficult for those subject to regulation and liability to be sure of the boundary between justifiable and unjustifiable use of their liberty. And that has socially costly, negative effects.

One way to demonstrate that is to look at American legal processes in comparative perspective. I collect comparative socio-legal studies, which provide perspective on what is distinctive about the American way of law, and on what alternative ways of law seem to be feasible. By socio-legal studies I mean systematic, often ethnographic, empirical studies of legal and regulatory processes as they actually operate. In the past 15 years, there has been a wealth of such studies, each comparing how the US and another rich democracy deal with a specific legal or policy challenge, such as adjudicating civil lawsuits, compensating individuals injured in motor vehicle accidents or sick from asbestos exposure, regulating workplace safety or nursing homes, or cleaning up old hazardous waste sites. These studies have resulted in two recurrent findings.

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[1] Professor of Poltical Science and Law, University of California, Berkeley. This paper on draws on research reported in Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, 2001) and Robert A. Kagan & Lee Axelrad, eds., *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism* (University of California, Press, 2000). References supporting the material in this paper can be found in those works.

I. American Legal Distinctiveness: Adversarial Legalism

One recurrent finding concerns the substantive similarity of laws in wealthy democracies. For example, the basic national norms for many areas of regulation – environmental protection, product safety, workplace safety & health, civil rights, consumer protection -- tend to be surprisingly similar. That is, in the U.S. and other economically advanced democracies basically regulate the same air and water pollutants, establishing similar maximum emission levels, or similar "best available control technologies. Product liability standards in the EU resemble those established by American courts. National rules and reserve requirements concerning bank safety and soundness are similar.

The second recurrent finding , however, is that in terms of the forms of law and modes of implementation and adjudication, the United States employs a unique *legal or regulatory style.* Repeatedly, comparative studies find that the relevant *American* legal or regulatory process, compared to foreign counterpart, has eight distinctive features:

(1) more complex and detailed bodies of rules;

(2) more frequent recourse to formal legal methods of implementing policy and resolving disputes;

(3) more adversarial and expensive forms of legal contestation;

(4) more punitive legal sanctions (including larger civil damage awards);

(5) more frequent judicial review, revision, and delay of administrative decision-making; and

(6) more legal uncertainty, malleability, and unpredictability.

(7) more political controversy about legal rules and institutions and processes

(8) More legal uncertainty and instability

Adversarial legalism is my term that I have used to summarize those features of the American legal and regulatory style.

II. The "Regulatory Encounters" Project: Greater Legal Uncertainty in the U.S

In latter half of 1990s, I organized my own comparative study, entailing ten case studies, each of which examined a specific multinational corporation that conducts parallel business operation in the United States and in at least one other rich democracy and was subject to similar legal or regulatory regime in each country. One case study, for example, focused on a large e.g. motor vehicle manufacturer, and its application for an air pollution permit when it sought to expand two plants in the U.S. and two Germany. Another examined a chemical company's experience in seeking and defending a patent for the same new process in the U.S., Japan and the EU. Third concerned a large pharmaceutical company's legal obligations in assessing environmental damage and cleaning up similarly-contaminated industrial sites in the US, Great Britain, and The Netherlands. Put another way, in this project, which resulted in the book *Regulatory Encounters*,my fellow researchers and I used each multinational corporation as an observation post for viewing the legal characteristics of the different national regimes. The findings can be summarized as follows:

1. Compared to legal and regulatory regimes in Germany, Japan, Netherland, and Great Britain, American legal and regulatory rules and processes usually were not experienced as significantly more stringent.

2. But the American legal rules were experienced as *more prescriptive and detailed; yet*

3. American legal and regulatory regimes were experienced as *more legally unpredictable, confusing.* That is, they generated more legal uncertainty for the enterprises subject to those regimes. The reasons arose from the following two findings.

4. The American legal and regulatory regimes generally were experienced to be more organizationally complex, more inconsistent, , and changeable. Enterprises had to deal with different bodies of legal and regulatory rules from state and federal governments, which often had different partisan-political leanings, and which often amended rules and policies following elections that resulted in partisan change. In addition, enterprises confronted often- unclear legal risks embodied in liability law, which also was experienced as more complex and changeable than laws it had to deal with in other countries.

5. American regulatory officials were experienced as more defensive and legalistic than their counterparts in other countries, more reluctant to work things out informally, more reluctant to make judgments without demanding more information, more tests, more certifications.

6. Regulatory and legal enforcement in the United States usually were experienced as *more legalistic and punitive.* Civil case damages and regulatory penalties both are much larger in the U.S. than elsewhere, and more readily invoked. The combination of greater legal uncertainty and much more severe legal penalties made American legal and regulatory regimes more threatening.

7. The regulatory and legal regimes in the United States generally were ***much more costly*** to comply with. (I will elaborate on this point below).

8. *Similar outcomes.* Despite the greater detail and punitiveness of American law, the multinational corporations in our case studies generally did not provide demonstrably higher levels of protection for customers, workers, or neighbors than they did in their operations in other rich democracies, where regulators employed less legalistic and adversarial methods.

III. The Costs of American Legal Uncertainty for Multinational Corporations

Let me elaborate on the "extra" costs attributable to American adversarial legalism that emerged from the comparisons with the companies' experience in other wealthy democracies. These extra costs were of three kinds: (a) much larger direct expenditures on **lawyers and legal processes** ; (b) much larger **"accountability costs,"**

by which I mean the costs of determining one's legal obligations and proving that one has complied with them (including expenditures on consultants, studies, reporting, paperwork); and (c) greater **opportunity costs, stemming from longer** legal and regulatory delays.

a. Legal Services. Officials in multinational enterprises often mentioned that their company spends far more money on legal services in its American operations than in its parallel operations in other countries, put together. American subsidiaries consult lawyers more often and longer on a wider range of matters, ranging from selecting pollution control equipment to managing problem personnel and conducting sales transactions. They do so, project researchers repeatedly were told, because (1) American law is generally more complex, changeable, and difficult to master, and (2) the legal sanctions for being wrong are generally much higher.

For example, one case study involved a multinational pharmaceutical company that sought to implement identical personnel policies in all its branches and subsidiaries. Yet when it decided to terminate individual employees in the U.S., it consulted its attorneys earlier, more frequently, and in more depth than when terminating employees in Canada. That is because in one recent year in which the company's experience was studied in depth, almost 23 percent of "forced separations" of employees in the United States resulted in a lawsuit against the company, compared to 7 percent of forced separations in Canada - even though Canadian substantive law protecting employees against arbitrary dismissal is more comprehensive than is American law.

A company we called "Credit Corp" is a multinational bank, with credit card divisions in the U.S. and Germany. But in contrast to Credit Corp's American operations, the German division does not have to maintain separate in-house counsel's offices to deal with litigation management, consumer bankruptcy, and debtors' counterclaims. And unlike its U.S. counterpart, the German division does not feel obliged to provide ongoing, intensive legal training for collection agents. The reason lies in the greater complexity of American debtor protection laws and the much greater complexity and

delay associated with pursuing debt collection cases in American courts, as compared to German courts.

A corporate general counsel in the U.S. office of a multinational chemical firm told us that in the company's U.S. subsidiary -- in contrast to its European corporate parent -- a wide variety of documents are routinely reviewed by the legal department. One stimulus to this procedure was a lawsuit for breach of contract in which a drawing made by a company sales representative was held, much to the company's surprise, to have been evidence of a contract. The suit cost the company roughly $500,000 in damages and $500,000 in disputing and lawyering costs. Now, the lawyer said, "Half of our salesmen are scared to death to do anything without consulting a lawyer." The U.S. subsidiary employs six specially-trained nonlawyers who spend at least half their time fielding legal questions that salespeople routinely ask about sales contracts. To further avoid legal problems, the corporate attorney added, "When European people [from the parent firm] come over here, we have to forbid them from talking or writing letters to anyone."

Most shockingly, Welles and Engel found that Waste Corp (Chapter 5) spent a staggering $15 million on legal services in the course of its efforts to obtain approval for a municipal solid waste landfill in California; for over ten years, the company had approximately seven lawyers on retainer, busy addressing, inter alia, two major administrative appeals and three extended lawsuits. .... In England, by contrast, the company retained two lawyers, part-time, for an eight year process that also included at least one administrative appeal; its legal costs there were about $137,000. And in The Netherlands, despite having undergone two administrative appeals, the company didn't have to retain lawyers at all (since lawyers are not required in administrative appeals) and spent "less than $50,000" on legal services.

b. Accountability Costs. The cross-national differences in accountability costs are symbolized most strikingly by the huge volume of *supporting evidence* companies must supply to regulators in the U.S. in order to demonstrate that the firm has met legal standards. Consider the experience of "D Corp" when it notified regulatory authorities in

the U.S., England, and The Netherlands that it had discovered solvents which had leaked from deteriorating underground tanks and pipes. In each jurisdiction, D Corp embarked on discussions with regulators concerning further soil and groundwater testing and remediation. The American regulators, however, demanded far more comprehensive analysis, more voluminous documentation, and more costly reports.

D Corp corporate regulatory compliance group officials said that documents submitted to American regulators for such contaminated sites typically fill a four-drawer filing cabinet, compared to a foot of depth in a single file drawer to the other countries. And behind each additional 10 pages of documentation, they emphasized, lie scores of hours which company officers must devote to research, testing, measurement, analysis, and preparation and checking of draft reports. All in all, D Corp officials estimated that "extra" studies, submissions and negotiations with U.S. regulators added $8 to $10 million to the costs of designing the cleanup plan for the two sites in the U.S. (out of total costs per site of an estimated $22 million), whereas the "extra" regulatory accountability costs for comparable site investigations and cleanup planning in the U.K. and The Netherlands were negligible.

As of the time of our study, remediation efforts in England and The Netherlands were well under way. But in the American sites, action remained on hold while the firm waited to learn if officials considered the company's analysis sufficient. In this case, therefore, the additional demands of the U.S. regulatory regime confirmed the maxim that when pushed too far, *accountability* (proving one has done the right thing) can displace *responsibility* (doing the right thing).

c. Opportunity Costs. According to an environmental consultant with a great deal of cross-national experience, because the regulatory permitting process for an industrial project in the U.S. entails a great deal more legal formality, organizational complexity, and documentation than in Western Europe, "It takes less time overseas. The cost for initial studies is less. We are not required to accumulate as much information. In Europe [the time from application to permit averages] one third less."

Consider, for example, the study in *Regulatory Encounters* of the U.S. and the German permit system for ensuring that changes in motor vehicle factory production and

painting processes do not result in increased air pollution or obnoxious odors. Regulatory officials in both countries required Ford Motor Corporation to install similar pollution control technologies and to build higher exhaust stacks to diffuse odors. But for two factories in Western Germany, the time from permit application to approval took 5 months and 17 months, respectively; for Ford's plants in Minnesota and New Jersey alike, it took over four years.

IV. Legal Uncertainty and the American Tort System

In direct regulation by government agencies in the U.S. , the primary risk to liberty arises from the characteristic overinclusiveness of prescriptive, prophylactic regulatory rules – that is, rules that require specific precautionary actions by all regulated entities, even if the risk of harm in a particular case is remote.

Tort law ***seems*** to differ in that it is invoked only when harm has actually occurred. But tort law doesn't prescribe specific precautionary measures. It simply says, 'be careful?" Or "be ***really*** careful, or else!". But that, at least in the U.S., poses a risk to liberty because of **(a)** the ***uncertainty*** of what behavior will result in liability, **(b)** the fear that being wrong will result in a very expensive litigation process and potentially enormous money damages. Legal uncertainty + fearsomeness = defensive medicine in many kinds of activities.

This becomes even more clear when one looks at the American tort system in comparative perspective. For example, here's a passage from my book *Adversarial Legalism* (pp. 126-28) that summarizes a comparative study by sociolegal researchers from the Netherlands:

> In the 1970s and 1980s, the rate of asbestos-related diseases among Dutch workers was five to ten times as high as in the United States. Dutch law authorizes tort claims against employers. [But] as of 1991, [when] ... 200,000 asbestos-based tort cases had been filed in the U.S (and Johns Mansville had already been driven to bankruptcy), fewer than *ten* suits had been filed in The Netherlands. The primary reason ... [is that under Dutch social insurance programs] disabled Dutch workers are entitled to all needed medical care and

> lifelong benefits equal to 70 or 80 percent of their lost earnings, *without having to prove an employer or product manufacturer did anything wrong.*

So as in most other countries, there is much less incentive in the Netherlands to bring tort cases, and much more legal certainty for both for injured persons and defendants. Tort damages are much lower, first of all, because the Dutch tort victim, who gets medical care and earnings replacement from social insurance, basically can sue only for non-economic damages.

Secondly, the Netherlands, like most other democracies, deal with *non-economic damages* (what we call damages for "pain and suffering" and the like) very differently. Those damages are decided by a judge, according to specific rules, and they are more moderate than damages in US tort law – sort of like American worker compensation systems. As a result, the outcomes are so predictable that injured people often don't need to hire (and share their recovery with) a lawyer.

Contrast that with American tort law, where the calculation of non-economic damages is left to the discretion of a jury, which doesn't know about comparable decisions in other cases, and doesn't have to articulate and defend the reasons for its verdict, and whose decisions are by and large unreviewable. So noneconomic damages in the U.S. tend to be several times higher than actual out of pocket damages. And that creates much greater incentives to sue. [So while the substantive norms of product liability and medical malpractice are similar in the US and Europe, the rates of such litigation are enormously greater in America.

Because of the vagueness of the American law of damages and use of juries, damage awards for similar cases in the American tort law system are quite variable and harder to predict. Because the lawyer-driven, jury-trial oriented American litigation process is so much more expensive, and threatening than civil litigation in Western Europe, over 90 percent of cases are settled before verdict – which makes it even harder to predict what outcomes will be. Research shows that lawyers' estimates are often

wrong. And research shows that businessmen, physicians, and other potential defendants vastly overestimate the likelihood of being sued, the likelihood of losing, and the severity of average jury verdicts.

Sociolegal research also indicates that American adversarial legalism is a truly terrible method for compensating victims of personal injuries or illnesses and their families. Its very inefficient, incomplete, erratic, and often unjust, as compared to systems that rely more on social insurance or well-run court systems organized in accordance with bureaucratic legalism.

What About Deterrence? Would substituting social insurance for tort liability make our society more dangerous? The other thing tort law is supposed to be good for, despite its weaknesses as a system for compensating injuries, is deterrence. The threat of liability presumably has regulatory effects – some defensive medicine is good. The threat of tort liability presumably makes corporations more careful in testing and designing products, and in maintaining machinery and sanitary standards, and in warning consumers about risks.

On June 14, a Wall St Journal article spelled how American anesthesiologists, in response to rising malpractice premiums, have adopted and disseminated innovative precautions that have resulted in a huge decline in patient deaths due to anesthesia.[2]

Political scientist Charles Epp interviewed a sample of city managers in the Midwest about tort liability. They complained about the resources their municipal

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[2] Over the past two decades, patient deaths due to anesthesia have declined to one death per 200,000 to 300,000 cases from one for every 5,000 cases, according to studies compiled by the Institute of Medicine, an arm of the National Academies, a leading scientific advisory body.

Malpractice payments involving the nation's 30,000 anesthesiologists are down, too, and anesthesiologists typically pay some of the smallest malpractice premiums around

Joseph T. Hallinan, *Heal Thyself: Once Seen as Risky, One Group of Doctors Changes Its Ways* Anesthesiologists Now Offer Model of How to Improve Safety, Lower Premiums Surgeons Are Following Suit. THE WALL STREET JOURNAL *June 21, 2005; Page A1*

governments had to devote to defense of civil lawsuits, but they acknowledged that to ward off liability, their cities engaged in more systematic checks of road conditions and playground equipment, instituted more training for police and other employees who deal with the public, and acted more rapidly to weed out "problem officers." One of them said:

> The biggest changes for the better in this city have come as a result of lawsuits or threatened lawsuits, not as a result of political changes in the council or anything else. The courts have done a far better job than politics of improving our policies.

Another said:

> The rights of citizens and employees are far better protected as a result--and only as result of litigation, not other changes. And the safety of our citizens in better protected. Remember all that training and inspection I mentioned? It makes a difference. Our roads and streets are safer, our playgrounds are safer, our whole operation is safer.

On the other hand, the evidence on how pervasive these positive regulatory effects are is extremely incomplete. There are lots of ways in which the deterrence effects in practice are muted – especially by liability insurance and the uncertainty and delayed effect of tort liability. And we don't know how much the threat of tort liability adds to the pressures for responsible behavior that come from direct governmental regulation and market forces and professional ethics.

It surely is not clear that the level of negligence or heedlessness in providing goods and services is greater in Canada and Western Europe, where the threat of tort liability is vastly lower, than it is in the US. The issue (AL p.144) is whether tort law's positive effects on safety are too mixed, uncertain, and scattered to justify retention of an adversarial system that fails to provide just and reliable compensation, generates large economic costs, alienates people from the legal system, spends huge amounts on lawyers, and in some sectors of society, as Philip Howard's paper will show, inhibits socially useful activity.

Common Good, AEI-Brookings, National Constitution Center
Conference on "Lawsuits and Liberty"

THE ADMINISTRATIVE ADVANTAGE IN CIVIL PROCEDURE: TORT REFORM THROUGH CONSISTENT AND INTELLIGENT POLICIES APPLIED BY ADMINISTRATIVE TRIBUNALS

E. Donald Elliott[1]

--- Substantive law is "secreted in the interstices of procedure"[2]

Most of the energy that has gone into "tort reform" in the United States to date has been misdirected. The features that create frivolous, abusive litigation in the U.S. are largely institutional and procedural in nature.[3] They inhere in the incentives created by our judicial institutions and procedures, and yet most of the energy of reformers to date has gone into modest reforms in substantive tort law – such as caps on punitive damages or on pain and suffering. These reforms may be symbolically satisfying to their proponents, but they leave untouched the basic institutions of our civil justice system and the perverse incentives that they create. Indeed, this misguided focus on changing substantive law is arguably even built into the generally-accepted term "tort reform," which seems to presume that the basic institutional and procedural structure of tort litigation should remain unchanged and that a few reforms of substantive tort law will be sufficient to deal with any problems.

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[1] Professor (adj) of Law, Yale Law School and Georgetown University Law Center; Partner, Willkie Farr & Gallagher LLP, Washington, DC.
[2] Henry Maine, Dissertations on Early Law and Custom 389 (1883).
[3] Richard A. Posner, *The Economics of Justice* (1981); Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration 2 J.LEGAL Stud. 399 (1972); E. Donald Elliott, Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence, 69 BOSTON U. L. REV. 487 (1989).

One notable exception is the work of Professor John Langbein. In 1985, Professor Langbein wrote a much-cited article called "The German Advantage in Civil Procedure."[4] Langbein reviewed several salient aspect of German civil procedure including professional judges, the absence of juries and contingent fees, and greater use of independent experts and concluded that these procedural "advantages" contributed to the German system of civil litigation functioning better than the U.S. civil litigation system.

In the twenty years since Langbein wrote, however, there have been only a few modest efforts to address any of the underlying procedural and institutional aspects of U.S. civil litigation that he identified.[5] Ironically, our constitutional law and legal traditions, which are sometimes instruments of change in other areas, are one of the key impediments to modernizing the institutional and procedural aspects of our civil litigation system. Constitutional law as well as the even broader "unwritten constitution" of our legal traditions make it difficult to adopt innovations for processing damage claims that have proven successful elsewhere. Many of the problematic features of adversary civil litigation before courts and juries are so deeply ingrained into our constitutional law and legal traditions that it would be virtually impossible to change them. While the issue of whether constitutional law should "change with the times" is increasingly controversial in every area, the constitutional law relating to civil procedure is remarkably backward-looking and static. The avowed purpose of the 7th Amendment, for example, is to

[4] John Langbein, The German Advantage in Civil Procedure, 52 U.CHI.L.REV. 823 (1985).
[5] One exception (in which the author was personally involved) was the effort to increase the use of independent experts recommended by professional societies which was recommended first by the Carnegie Commission for Science, Technology and Government and then picked up and implemented as a pilot program by the American Association for the Advancement of Science.

"preserve" unchanged the functions of the civil jury as they existed at common law as understood in 1791. More generally, when an innovation in civil litigation is challenged on procedural due process grounds, courts generally look backward to our history and traditions to determine whether it is constitutional. And even if a reform to the civil litigation system might conceivably be upheld in court against a formal constitutional challenge, there is an even broader "unwritten constitution" of political support that renders it virtually impossible to conceive of any legislature making material changes to the way that civil litigation is traditionally conducted before courts and juries.[6] Even relatively recent innovations such as broad civil discovery have proved very difficult to curtail once implemented.

There is, however, an alternative route by which American law could conceivably address some of more problematic aspects of the ways that we currently do civil litigation. That is through the legal fiction that "administrative tribunals" are not "courts."[7] Throughout our history, one of the main reasons for replacing traditional adversary civil litigation before courts and juries with administrative remedies before non-court courts (*a.k.a.* "quasi-judicial" administrative tribunals) is an enhanced ability by lawmakers to re-design the institutional and procedural features of the tribunals that apply the law as well as to change substantive law. One useful definition of an "administrative

[6] See, e.g. Peter Schuck, How to Respond to the Problems of the Civil Jury, 77 JUDICATURE 236, 239 (1994)("The politics of jury reform are daunting. Virtually all of the important groups with stakes in the system of civil litigation favor retaining the jury. Trial lawyers' veneration of the jury is almost religious in its fervor, and their missionary zeal appears to have won many converts among the general public. When queried about the value of the jury, judges almost invariably praise it.")

[7] For a general argument about the role of legal fictions in promoting legal change, see Lon Fuller, Legal Fictions (1969).

agency" is an institution of government that is not a court or legislature but is created and designed by statute.[8] Whereas the institutional aspects of "courts" are relatively fixed by constitutional law and tradition, administrative tribunals are by definition plastic and capable of being designed in many different forms. Administrative agencies are not one thing, but come in a dizzying variety of shape and sizes, with different institutional arrangements and procedures designed by statute or regulation to fit the particular task at hand. Indeed, the key defining feature of administrative institutions is that they are not "courts," and therefore their features can be custom-designed in ways that are not permissible for courts. Virtually every procedural innovation identified by Langbein, including professional judges, the elimination of juries and the enhanced role for independent expertise, currently exists in America, but in litigation before "administrative tribunals" rather than before "courts."

As a consequence, a major trend in U.S. civil law during the 20th century has been, and will continue to be, the removal of certain subject matter areas of law in which institutional features of litigation before traditional courts have proved particularly troublesome from the traditional litigation system and the substitution of alternative remedies before administrative tribunals in their place. This long-term trend to substitute administrative remedies for common law litigation has occurred in the past with regulation of workplace safety, labor relations, securities regulation and environmental pollution, and is likely to occur next with exposure to toxic substances such as asbestos,

[8] *Compare* Administrative Procedure Act, 5 U.S.C. §551(1), which defines an "agency" as "each authority of the Government of the United States, ... but does not include the Congress; the courts of the United States" and other exceptions not relevant here.

and then in medical malpractice and product liability. Medical malpractice, product liability and mass toxic tort litigation are particularly good candidates for "The *Administrative* Advantage in Civil Procedure" because defining a consistent and intelligent standard of care is particularly important in these fields. Administrative law offers particular advantages when implementing a consistent standard of care across a large number of claims is important, and administrative bodies are also particularly good at up-dating a technical standard of care based on expertise and experience – or what I call an "intelligent" standard of care, because it learns over time.

It is impossible in a short article to discuss all of the institutional and procedural features of U.S. civil litigation that might be improved in administrative forums. In what follows I will therefore attempt to illustrate "The Administrative Advantage in Civil Procedure" with one specific illustration: the claim by some reformers, including Phillip Howard, that verdicts by civil juries are unpredictable and inconsistent. In what follows, I will briefly outline the claim that civil jury verdicts with regard to the standard of care in medical malpractice cases are unpredictable and inconsistent, and then explain why this tendency is difficult to correct in the context of ordinary civil litigation before courts but much easier to address before administrative tribunals. Examples of such administrative tribunals would include the administrative "health courts" proposed by Common Good for medical malpractice reform[9] or the administrative compensation system for asbestos

[9] For more details, see Common Good, An Urgent Call for Special Health Courts, http://cgood.org/brochure-hcare-4.html

The essence of the Common Good proposal is as follows: "Health courts would have judges dedicated full-time to resolving healthcare disputes. The judges would make written rulings in every case to provide guidance on proper standards of care. Their rulings would set precedents on which both patients and doctors could rely. As with similar administrative courts that exist in other areas of law—for tax

proposed in S.852 (the so-called FAIR Act), which recently was voted out of committee in the Senate.[10]

The purpose of this paper is not to defend the specifics of these reform proposals as either necessary or sufficient, a task that has been performed elsewhere by others.[11] (It should be acknowledged, however, that the author was an early advocate of administrative compensation funds like the asbestos proposal[12] and serves as a consultant to Common Good.) Rather, the point of the present paper is that most if not all of the

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disputes, workers' compensation, and vaccine liability, among others—there would be no juries. To assure uniformity and predictability, each ruling could be appealed to a new Medical Appellate Court." *Ibid.*

Other features of the Common Good proposal are:

"Full-Time Judges.
The hallmark of the health courts would be full-time judges, dedicated solely to addressing healthcare cases. The judges would be appointed through a nonpartisan screening commission.
Neutral Experts.
Those judges would be able to choose from a panel of experts in each area of medicine, avoiding the dueling "hired gun" experts that confuse and prolong disputes today.
Speedy Proceedings; Lower Costs.
Most cases would be resolved within months. Except in exceptional cases, legal fees would be held to 20 percent, reducing current costs by almost half.
Liberalized Recovery for Injured Patients.
Once a mistake is verified, recovery would be automatic without the need to prove precisely how it happened.
Damages.
Patients would be reimbursed for all of their medical costs and lost income, plus a fixed sum that would be pre-determined according to a schedule addressing specific types of injuries. The schedule would be established by a panel of experts and updated periodically to reflect changing costs."

[10] The text of the FAIR Act as reported out by the Senate Judiciary Committee is available at http://documents.nam.org/IS/S852asreportedfromcmte061705.pdf The bill is 393 pages in length, so it is impossible to summarize its provisions in detail here. For present purposes, one pertinent feature is that the bill would replace case-by-case litigation in asbestos cases with "tiers" developed by a combination of statute and administrative rulemaking for determining both compensation payments to claimants and payments by defendants into the system.

[11] See. e.g. Nancy Udell and David Kendall, Health Courts: Fair and Reliable Justice for Injured Patients, *Progressive Policy Institute Report* (Feb. 17, 2005). *See also* David M. Studdert, Michelle M. Mello, and Troyen A. Brennan, Medical Malpractice, 350 New England J. Med. 283 (Jan. 15, 2004).

[12] E. Donald Elliott, Goal Analysis vs. Institutional Analysis of Toxic Compensation Systems, 73 GEORGETOWN L. J. 1357 (1985); E. Donald Elliott, Why Courts? Comment on Robinson, 14 J. LEGAL STUD. 799 (1985).

reforms in these proposals cannot be accomplished within the existing court-based litigation system, but can be implemented through administrative tribunals.

II.

In a 2003 op-ed in The New York Times, Phillip K. Howard succinctly stated the case that existing court procedures in medical malpractice cases create a highly undesirable element of unpredictability.[13] Howard argues that "Studies about jury awards in health care confirm what every doctor fears – and every victim should fear: justice is random."[14] He goes on to argue that "in a civil case, where citizens can use the justice system as an offensive weapon, the most important social value is predictability."[15] Howard's proposed solution (about which we will have more to say later) is that judges, not juries should decide the standard of care:

> "Creating a reliable system of medical justice, however, requires changing one aspect of the system that is so ingrained it is hardly even part of the debate: the jury. Expert judges, not juries, must decide what is a valid claim. ... The role of juries in civil cases is to decide disputed facts, like whether someone is telling the truth. It is not to declare standards of care that affect society as a whole."[16]

Proponents of asbestos reform make similar claims: that verdicts in asbestos cases are inherently capricious, and as a result, some people who are not really sick get huge windfalls, while others who are much sicker get little or nothing.[17] One of the major

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[13] Phillip K. Howard, The Best Course of Treatment, The New York Times (July 21, 2003).
[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid.*
17 Statement of Sen. Arlen Specter Introducing S.852, Congressional Record, April 19,2005 p. S3905 et seq. http://thomas.loc.gov/cgi-bin/query/D?r109:6:./temp/~r109iBZptj:e87725: ("All of us are mindful of

justifications advanced for the pending bills to replace traditional tort litigation in asbestos cases with an administrative compensation system is that it would give greater predictability and horizontal fairness to both claimants and defendants than the current system of case-by-case litigation.

Speaking more generally, Yale Law School Professor Peter H. Schuck has identified as one of the recurrent "major objections" to the civil jury to be the contention that jury verdicts are inherently unpredictable and produce a "noisy" or unclear liability signal:

> "These objections do not claim that juries are biased or prone to error, but rather than jury decisions by their very nature emit liability signals that are confusing, inconsistent, and arbitrary. In this view, the jury's signals convey little useful information about actual legal norms. Coupled with the largely unregulated, generous system of damage awards, jury decisions generate widespread uncertainty, anxiety, and risk avoidance."[18]

Defenders of the civil jury do not generally deny that juries "march to a different drummer," but argue instead that juries are able to reflect a number of situational and community norms that are not always fully captured in the formal law. For example, in a 1988 article, Professor E. Donald Elliott stated that toxic tort cases are "morality plays" rather than based on a strict application of law and science.[19] While this statement was intended as descriptive rather than normative or prescriptive, it has been strongly criticized as countenancing the right of juries to decide toxic tort cases based on factors

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the very substantial factor when a claimant gives up a constitutional right to jury trial, but in a program structured largely along lines of workmen's compensation, it is our conclusion that it is a fair exchange. When you find that there are many people who are suffering deadly ailments from asbestos , mesothelioma and other deadly injuries, who are not being compensated, this is a way to compensate those individuals whose companies have gone bankrupt.").

[18] Schuck, *supra* note 6, at p.236.

[19] E. Donald Elliott, The Future of Toxic Torts: Of Chemophobia, Risk as a Compensable Injury and Hybrid Compensation Systems, 25 HOUSTON L. REV. 781 (July, 1988).

that would be considered irrelevant as a matter of formal law.[20] Similarly, then-professor, now-judge Guido Calabresi and his co-author, Professor Phillip Bobbitt, glory in the ability of a civil jury, which they call an "aresponsible agency," to decide cases without giving any reasons for its decision, particularly in certain categories of cases involving what they call "tragic choices" in which they believe that it is desirable for society to violate in practice the norms that it nonetheless affirms in theory.[21]

III.

In contrast to the civil jury, which is either praised or condemned for its inconsistency, inscrutability and unpredictability, consistency of application and transparency in giving reasons for outcomes are two of the most highly-valued norms for administrative tribunals. As Justice Scalia recently wrote for a unanimous Supreme Court, "It is hard to imagine a more violent breach of [the requirement of reasoned decision-making by administrative tribunals] than applying a rule of primary conduct ... which is in fact different than the rule or standard formally announced."[22] Indeed, a central focus of judicial review of decisions by administrative tribunals is to police against "arbitrary and capricious" decisions that do not treat like cases alike or are not adequately justified.[23] Administrative tribunals must generally follow strict rules requiring them to state reasons for their decisions, and if they apply a different rule of

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[20] Jeffrey Bossert Clark, Colloquium: Junk Science, the Courts, and the Regulatory State, http://www.fed-soc.org/Publications/practicegroupnewsletters/environmentallaw/el020105.htm (reporting comments of Professor David Bernstein that the remarks quoted above are "particularly irksome" because "Redefining our public morality" "is a bit much to ask of our tort system").

[21] G. CALABRESI & P. BOBBITT, TRAGIC CHOICES (1976).

[22] *Allentown Mack Sales and Service Inc. v. NLRB*, 522 U.S. 359 (1998).

[23] See 5 U.S.C. §706(a)(2)(under federal Administrative Procedure Act, courts set aside administrative decisions found to be "arbitrary" or "capricious.")

decision in one case that they do in another, they must state a rational basis for the difference in treatment or provide a reasoned basis for changing the rule that will be applied in future cases.[24] In administrative law, "There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case."[25]

Administrative law also provides a useful conceptual resource for dealing with standard of care issues that is generally lacking in civil litigation: the concept of a generic "policy." Court generally deploy only two conceptual categories to describe the allocation of roles between judges and juries: questions of "law," and questions of "fact." Everything has to be one or the other. But before an administrative tribunal, there is an important third category: called "policy."[26] A "policy" is not a fixed requirement established by law, nor is it a "fact" that may change from case to case; rather, a "policy" is a contingent or prudential judgment that must be applied consistently while it remains in effect but may be changed from time to time in the light of experience. The standard of care in a medical malpractice case, or the showing required to qualify for compensating persons exposed to asbestos, are good examples of "policies," that are neither purely matters of law nor purely matters of fact.

Administrative agencies make policy in a variety of ways, including generic notice-

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[24] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co,* 463 U.S. 29 (1983); *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe RR,* 284 U.S. 370 (1932).

[25] *Marriott In-Flite Servs. Div. v. NLRB,* 417 F.2d 563, 566 (5th Cir. 1969); *Shell Oil Co. v. FERC,* 664 F.2d 79, 83 (5th Cir. 1981); *Shaw's Supermarkets, Inc. v. NLRB,* 884 F.2d 34, 37 (1st Cir. 1989); *Roadway Express, Inc. v. NLRB,* 647 F.2d 415, 419 (4th Cir. 1981); *Basic Media, Ltd. v. FCC,* 559 F.2d 830, 833 (D.C. Cir. 1977); *Marco Sales Co. v. FTC,* 453 F.2d 1, 7 (2d Cir. 1971).

[26] See State Farm, *supra* note 24.

and-comment rules, guidance documents and announcing rules of decision through case-by-case litigation.[27] However, the strong trend in administrative law since the early 1970's is to constrain case-by-case litigation of "facts" by developing generic "policies" through rulemaking that reflect the agency's general expertise as to how individual cases should be treated. The intellectual leader in promoting the use of rulemaking to reduce arbitrariness and promote consistency was Professor Kenneth Culp Davis, who spent most of his career at the University of Chicago Law School.[28] Uniform generic policies are then applied in individual cases, but can change and evolve in the light of experience. A good example is the Social Security medical disability grid regulations that were upheld by a unanimous Supreme Court in *Heckler v. Campbell*, 461 U.S. 458 (1983). Confronted with an unacceptable diversity of results in similar cases, the Reagan Administration first attempted to achieve a greater uniformity through management controls and a "Quality Assurance Program," but this approach was challenged in court as infringing on the independence of Administrative Law Judges, who varied widely in how they decided cases.[29] That approach having proven inadequate, the Administration then promulgated a generic rule setting specific, relatively objective criteria for when a person is or is not considered "disabled."

In 1999, the Social Security disability system provided $51 billion in payments to 6.5 million beneficiaries at an administrative cost of $1.5 billion, or about 3%,[30] which

[27] See generally Peter Strauss, The Rulemaking Continuum, 41 DUKE L.J. 1463 (1992).
[28] See, e.g. Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry (1970).
[29] See *Nash v. Bowen*, 869 F.2d 675 (2d Cir. 1989).
[30] Peter L. Strauss, Todd. D. Rakoff and Cynthia R. Farina, Gellhorn and Byse's Administrative Law: Cases and Comments 384 (Foundation Press 10th ed, 2003).

compares very favorably with the transaction costs of the torts system which run as high as 50% in some studies. The system generates about 600,000 disputed claims a year, and 200,000 appeals to the Appeals Council. "The volume of Appeals Council decisions precludes the development of any "common law" of administrative review; rather, if the review process uncovers needs for new policy or clarification, that policy or clarification is supplied by regulation or similar directives to all decisionmakers in the system."[31] Thus, policy decisions across the system are supplied not by a common law process of deciding appeals, but by relatively specific generic rules of policy that are developed by experts and apply across the system until updated in the light of experience.

Many other administrative systems also use a process of generic rulemaking based on expert policy decisions to guide and constrain the issues to be decided in individual adjudicatory hearings. For example, at one time, the Food and Drug Administration decided on a case by case basis in adjudicatory hearings on individual new drug application whether the particular scientific studies presented were adequate to prove safety and efficacy, and those judgments were both time-consuming and frequently litigated. Beginning in the late 1960's, however, FDA promulgated generic policy standards for what constitutes "well-controlled clinical studies" and in a precedent-setting decision in 1973, the Supreme Court ruled that generic policymaking by the agency could constrain the issues in individual adjudicatory hearings.[32] Or to pick another example, when the Environmental Protection Agency holds hearings on cleaning up an individual

[31] *Ibid.*, p. 385.
[32] *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973)(FDA generic rulemaking eliminates factual issues for adjudicatory hearing).

Superfund site, the assessment of risks by the decisionmaker is guided and constrained by a detailed generic rule called the "National Contingency Plan" which outlines EPA's policies and procedures for how a site should be cleaned up.[33]

Questions of standard of care that are currently decided by a case by case basis by juries in the tort system could be regulated and made more uniform by generic policies promulgated at the administrative level and updated from time to time in the light of experience.[34] In fact, the pending asbestos trust legislation would utilize administrative rulemaking to determine the levels of contributions by defendants into the system, and also to set criteria to determine levels of payouts, within broad ranges set by the legislature,.

Generic policy judgments are not only applied relatively consistently by administrative agencies, but they can also be designed to be intelligent, in the sense that procedures can be designed to bring technical expertise to bear, to analyze collateral consequences and to update policies in the light of experience. These complex multi-faceted technical issues of regulatory policy are currently made in a haphazard, uncoordinated and inept fashion in the distorting context of individual claims by injured people by lay juries that do not understand (and often prohibited from even hearing evidence about) the broader implications of their decisions. That is because these issues are incorrectly conceived to be "questions of fact," when in truth they are neither questions of law for a judge nor questions of fact for a jury, but rather they are questions

[33] 40 CFR - Part 300, 47 Fed.Reg 31180 (July 6, 1982), amended, 55 Fed. Reg. 8666 (1990). See also
[34] See E. Donald Elliott, Re-Inventing Defenses/Enforcing Standards: The Next Stage of the Tort Revolution?, 23 RUTGERS L. REV. 1069 (1991)(The Pfizer Distinguished Lecture in Tort Law)(advocating expert standards of care set administratively to give greater predictability to tort system).

of regulatory *policy* (a conceptual category that is sadly missing from traditional judicial thinking about tort law, but is alive and well in administrative law). As policy questions, they should be made in a more centralized way by more specialized institutions that can weigh the pro's and con's of proposed policy decisions in a more systematic way after due deliberation and consideration of relevant technical expertise (such as costs and benefits, substitution risks and incentive effects). Moreover, institutions making important decisions of regulatory and compensation policy should be designed to study the actual results of particular policies over time and to change them in the light of experience.[35] The current tort system of case-by-case litigation before lay judges and juries has none of these features, in large part because it is incapable of separating the regulatory policy decisions from the compensation decisions in cases brought by individual claimants who are often suffering and are therefore sympathetic.[36]

IV.

It would be difficult, if not impossible, for Constitutional reasons to bring greater predictability to jury verdicts involving the standard of care. Unlike administrative law, which uses three conceptual categories (law, fact and policy), the 7th Amendment has been construed as creating only two realms, "law" and "fact," and traditionally questions of the standard of care have been seen as falling on the "fact" side of the line.

The fundamental purpose of the 7th Amendment, according to an unbroken line of

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[35] E. Donald Elliott, Re-Inventing Defenses/Enforcing Standards: The Next Stage of the Tort Revolution?, 23 RUTGERS L. REV. 1069 (1991)(The Pfizer Distinguished Lecture in Tort Law).

[36] *Cf.* Peter Schuck, The New Ideology of Tort Law, THE PUBLIC INTEREST, No. 92, Summer, 1988, p. 93, 94. ("In tort law, however, courts almost always have the last word, and that word has usually been compensate.")

Supreme Court cases, is to preserve inviolate the allocation of issues of "law" to the judge and of "fact" to the jury as those concepts existed and were applied in 1791. The 7th Amendment has for its primary purposes the preservation of "the common law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court." [37]

The question of whether the meaning of our Constitution should evolve and change with the times is, of course, one of the central, enduring controversies in Constitutional law and judicial philosophy. Almost uniquely, however, the specific content of established 7th Amendment law is to "preserve," unchanged and unchanging, the allocation of responsibilities between judge and jury as they existed in 1791. In other words, the content of the rule of decision that the Supreme Court has traditionally applied in construing the 7th Amendment is explicitly historical: how were these allocations of responsibility made in 1791? "Those matters which were tried to a jury in England in 1791 are to be so tried today and those matters which, as in equity, were tried to a judge in England in 1791 are to be so tried today...."[38]

It is well-established under a long line of Supreme Court's cases under the Jones Act and elsewhere that under the 7th Amendment, the issue of the reasonableness of

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[37] Congressional Research Service, The Constitution of the United States of America: Analysis and Interpretation p.1232 (Lester S. Jayson, ed., 1978), *citing Baltimore & Carolina Line. v. Redman*, 295 U.S. 654, 657 (1935); *Walker v. New Mexico & S.P.R. Co.*, 105 U.S. 593, 596 (1897).

[38] *Ibid.*, p.1233, *citing* Parsons v. Bedford, 3 Pet. (28 U.S. 433, 446-447 (1830); Slocum v. New York Life Ins. Co., 228 U.S. 377-78 (1913); Baltimore & Carolina Line. v. Redman, 295 U.S. 654, 657 (1935); Dimick v. Schiedt, 293 U.S. 474, 476 (1935). p.1233.

conduct is considered an issue of "fact" that (1) is constitutionally required to be decided by a jury and (2) cannot be re-examined by a judge or appellate court – provided of course that there is at least some minimal evidence upon which a jury could reasonably base a finding of liability. A good example is *International Co. v. Nederl. Amerik*, 393 U.S. 74 (1968), a unanimous *per curiam* decision of the Supreme Court. In that case, the evidence showed that a longshoreman had remained below decks where carbon monoxide was building up because a supervisor had promised to turn on the ship's ventilating system. As explained by the Supreme Court, "The Court of Appeals said that the hatch boss should have ceased work when he first learned that the ship's ventilating system was not operating, despite the officer's promise to turn on the system. Alternatively, he should have used the stevedore's blowers, which had been left on the pier, to ventilate the hold. The jury, however, in response to a special interrogatory, found that the stevedore had acted reasonably in continuing to work for a brief period in reliance on the officer's promise. We cannot agree with the Court of Appeals that the stevedore acted unreasonably as a matter of law. *Under the Seventh Amendment, that issue should have been left to the jury's determination.*"[39]

One can of course distinguish the level of precaution taken against carbon monoxide poisoning on a ship from the level of care that a surgeon uses in conducting an operation, or a physician uses in prescribing a drug with known side effects, but the courts have generally held that the question of whether particular conduct is reasonable under all the circumstances is prototypically a question of fact for the jury, not a question

[39] 393 U.S. at p.75.

of law for the court.

To be sure, judges could conceivably become more aggressive in granting directed verdicts or judgments n.o.v. on the grounds that the facts would not permit a reasonable jury to find the defendant liable, but this is likely to be of only marginal benefit in improving the consistency of jury verdicts. In the first place, the capacity of non-specialized judges without medical training to second-guess juries on technical questions can easily be over-rated; without expert guidance, how is a lay judge to say that a jury verdict on standard of care is "unreasonable"? A more promising approach might be for the judge to rely on a neutral expert, or panels of neutral experts.[40] But while these approaches may be marginal improvements, they are inherently case-specific and *ad hoc* and therefore do not capture and build intelligence in the system over time in the way that development of administrative policy guidance does.

It is of course theoretically possible to imagine that any existing body of legal doctrine might be abandoned or re-worked by the Supreme Court. But absent an outright repeal of the language of the 7th Amendment, it seems exceedingly unlikely that the Court will abandon its historical approach to determining the allocation of responsibilities between judge and jury in civil case. The most promising development that might persuade the Supreme Court to re-think the role of the civil jury in determining the standard of care is historical research showing that in actuality, some standard of care

[40] E. Donald Elliott, Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence, 69 BOSTON U. L. REV. 487 (1989). *See also* the Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2005/01/tort_reformposn_1.html (January 23, 2005)("An alternative, mentioned in one comment and already in force in a number of states, is to require the malpractice plaintiff before suing to submit his claim to a panel of physicians, whose findings, if unanimous, are admissible in court should the claim result in a lawsuit.")

issues were decided historically at common law by judges rather than juries. For example, the Court's "reasoning" in one of its most recent 7th Amendment cases consisted of the following: "After the adoption of the Seventh Amendment, federal courts followed this English common law in treating the civil penalty suit as a particular type of an action in debt, requiring a jury trial. See, e. g., United States v. Mundell, 27 F. Cas. 23 (No. 15,834) (CC Va. 1795)."[41] Absent new historical research, however, it seems unlikely that that Supreme Court will abandon its well-established and often-reiterated jurisprudence that standard of care issues are prototypical issues of "fact" for the jury, not issues of "law" for the judge.

The clear trend throughout the last half century has been to expand, rather than contract the role of the jury. For example, in 1970 when the Supreme Court was presented with the question of the role of juries in stockholders derivative actions, to which the closest historical analogy was a suit in equity in which no jury was required, the Court nonetheless held that a jury was required under the 7th Amendment if similar issues could have been raised in jury cases.[42] Moreover, in a series of cases, the Court held that the right to a jury trial cannot be abridged by trying factual issues first in an equitable proceeding and then using collateral estoppel to preclude re-litigation in a subsequent proceeding at law.[43] And in what is perhaps the most far-reaching precedent expanding the role of the common law jury, in 1974, the court held in *Curtis v. Loether*, 415 U.S. 189 (1974), that even new statutory causes of action that clearly did not exist in

[41] *Tull v. United States*, 481 U.S. 412, 418 (1987).
[42] *Ross v. Bernhard*, 396 U.S. 531 (1970).
[43] *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477 (1962).

1791 also required jury trials if the relief sought could be analogized to that available historically in common law causes of action.[44] This holding was followed again in *Tull v. United States*, 481 U.S. 412 (1987), although a ray of light may have emerged in that the Court held that a jury was required only for the liability phase of a Clean Water Act enforcement action, not to determine relief. The Supreme Court recently reiterated these principles again in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), holding that a suit for money damages under ERISA is not equitable relief, but "at law," and therefore requires a jury. In short, the clear trend in 7th Amendment jurisprudence for the last century has not been to constrain but to expand the role of civil juries.

While it is true that the 7th Amendment is not "incorporated" as binding on the states through the 14th Amendment, nonetheless jury trials are guaranteed in similar if not identical terms in virtually all 50 state constitutions. There is no perceptible trend at the state level to re-allocate standard of care issues to judges rather than juries, and any movement to do so would confront similar problems at the level of state constitutional law.

It would require a major abandonment of the Supreme Court's 7th Amendment jurisprudence, and analogous bodies of law at the state level, to hold that questions of negligence or standard of care are questions of law for the court, rather than questions of fact for the jury.

V.

[44] *Curtis v. Loether*, 415 U.S. 189, 193 (1974).

One reason that American constitutional law has been able to permit itself the luxury of preserving "inviolate" the right to a civil jury as it existed in 1791 is that there is an escape valve by which Congress may re-assign many, if not most, controversies to a non-jury forum if it so chooses. As discussed above, a broad right to a civil jury trial attaches even to new statutory causes of action unknown at common law if, *but only if,* Congress chooses to create rights enforceable in a traditional court by a damage action (or other "legal" relief). But Congress also has the alternative option of creating new statutory schemes to replace traditional ones and making them enforceable through *administrative* tribunals that do not utilize juries instead of courts – at least if the nature of the right in question is deemed "public" rather than "private"[45] (a distinction of some complexity, which is discussed in more detail below).

A major trend in U.S. law over the last century is for many areas of law that were traditionally the province of common law courts and juries to be re-assigned to administrative mechanisms. For example, the Occupational Safety and Health Act now regulates issues of safety in the workplace that were formerly the subject of common law suits, and the Supreme Court has specifically upheld non-jury OSHA proceedings against a claim that they violate the 7th Amendment.[46] In the same way that in a previous generation, both state and federal governments replaced a system of private lawsuits in courts over workplace injuries with a comprehensive administrative schemes of workers compensation laws,[47] a comprehensive administrative scheme could be designed today for

[45] *Crowell v. Benson*, 285 U.S. 22 (1932).
[46] *Atlas Roofing Co., Inc. v. OSHA*, 430 U.S. (1977).
[47] See, e.g. *New York Central RR v. White*, 243 U.S. 188, 200 (1917); *Arizona Employers' Liability Cases*, 250 U.S. 400, 419-422 (1919).

re-adjusting remedies for those suffering injuries during medical treatment, or from defective products or exposure to toxic substances such as asbestos, to replace litigation before traditional courts. For example, Common Good has proposed a system of administrative "health courts" at either the state or federal level.[48] While not entirely free from doubt, federal administrative tribunals to adjudicate medical malpractice cases would probably be constitutional (at least if one assumes that Congress has the right under the Commerce Clause to regulate medical malpractice litigation because its involves economic activity that is "in" and "affects" interstate commerce, an independent issue of some complexity which is outside the scope of this paper[49]).

Assuming that Congress has the power to regulate medical malpractice litigation under the Commerce Clause, Congress could probably replace litigation before traditional courts and lay juries with a comprehensive administrative system for dealing with medical injuries, including expert administrative tribunals without juries. It should be emphasized, however, that the result would be heavily dependent upon the specific provisions of a particular statutory scheme, including whether it was a comprehensive package of reforms of the medical care delivery safety system and whether it included

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[48] See *supra* note 9.

[49] The power of the federal government to legislate under the Commerce Clause on subjects such as medical malpractice is no longer as clear as it seemed only a few years ago. *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). In *Morrison*, the Court invalidated a federal criminal statute punishing violence against women. Even though conceding that there was evidence that violence against women did have an effect on commerce, the Court nonetheless held that what it characterized as an "incidental effect" on commerce does not justify the federal government in regulating areas that have "traditionally" been regulated by the states. On the other hand, the recent "medical marijuana" case would seem to support federal legislation to regulate the safety of medical care, in part because it is economic activity. *Gonzales v. Raich*, 545 U. S. -- (No. 03–1454 June 6, 2005).

benefits for injured parties as well as defendants.

There are two separate federal constitutional issues that would be raised by assigning malpractice claims to an administrative agency (or to a specialized Article I court, which would raise essentially the same constitutional issues): (1) an argument that the statute impermissibly assigns a "judicial" function to a tribunal that does not comply with Article III requirements, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and (2) an argument that the administrative tribunals violate 7th Amendment rights to a jury trial. *Atlas Roofing Co., Inc. v. OSHA*, 430 U.S. (1977).

In the modern analysis, both questions turn on whether the Supreme Court would characterize the reforms as involving "public" or "private" rights. An early case, *Crowell v. Benson*, 285 U.S. 22 (1932), held that "private rights" "that is, of the liability of one individual to another under the law as defined" must be reserved to Article III courts. Although never over-ruled, subsequent cases have significantly eroded the bright-line, conceptual test for "private rights" seemingly laid down in *Crowell*. In the Supreme Court's most recent venture into the thicket of distinguishing "private" and "public" rights, the Court wrote:

> "whether the 7th Amendment confers .. a right to a jury trial in the face of Congress's decision to assign adjudication of that action to a non-Article III tribunal [turns on the public/private rights distinction]. Congress may only deny trials by jury in actions at law ... in cases where 'public rights' are litigated. ... [t]he federal Government need not be a party for a case to revolve around public rights. *The crucial question ... is whether Congress ... has created a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.*" *Granfinanciera SA v. Paul C. Nordberg, Creditor Trustee*, 492 U.S. 33 (1989)(emphasis supplied).

Another recent case opined that the issue is not so much whether the affected

rights are conceptualized as "private" or "public," but rather whether the re-assignment of certain categories of cases to administrative tribunals would undermine the traditional role of the federal courts in our scheme of government.[50] It seems unlikely that many federal judges view hearing medical malpractice cases under their diversity jurisdiction as central to preserving the role of the federal courts in our constitutional order.

Perhaps the decision that is most analogous to medical malpractice is *Thomas v. Union Carbide Agricultural Prod. Co.*, 473 U.S. 568 (1985). There as part of a comprehensive re-working of the federal pesticide law (FIFRA), Congress provided for "me too" registrations of pesticides based on private test data developed by other manufacturers and set up a scheme of compulsory arbitration by the EPA of the value of data. Union Carbide sued, claiming that its right to sue under state law for violations of its common law trade secrets was a prototypical "private right" that could not be re-assigned to an administrative scheme under *Crowell*. The Supreme Court rejected the claim in an opinion by Justice O'Connor (also the author of *Schor, supra*):

> "[T]he right created by FIFRA is not a purely 'private' right, but bears many of the characteristics of a 'public' right. Use of a registrant's data to support a follow-on registration serves a public purpose as in integral part of a program safeguarding public health. Congress has the power, under Article I, to authorize an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing an Article III adjudication."

Like the state law claim for violation of trade secrets at issue in *Thomas*, medical malpractice claims should not be viewed in isolation, but rather as part of a

[50] *Commodity Futures Trading Comm. v. Schor*, 478 U.S. 833 (1986)("the congressional scheme does not impermissibly intrude on the province of the judiciary" because "limited CFTC jurisdiction over a narrow class of common law claims as an incident of CFTC's primary and unchallenged adjudicative function does not create a substantial threat to the separation of powers.")

comprehensive and intertwined system for funding medical care and regulating patient safety.

To be sure, the examples of formerly-private common law rights that have re-assigned to administrative tribunals without juries in *Schor* and *Thomas* are much narrower than reform of medical malpractice law. Moreover, participation in both of the regulatory programs upheld in *Schor* and *Thomas* was arguably "voluntary." Certainly the case for the constitutionality of administrative "health courts" would be stronger if patients were given the option of opting into a voluntary pilot program which included an administrative system for processing medical injury claims as well as other features.

Many traditionalists will assert that tort claims for medical malpractice are prototypical "private rights" that have historically been assigned to courts and juries and cannot be changed under *Crowell*. However, a statutory scheme that creates federal administrative tribunals for adjudicating medical malpractice claims would be probably upheld if the administrative tribunals were part of a comprehensive regulatory scheme for reforming the medical care system, particularly if the system were limited at least initially to Medicare or Medicaid recipients where the federal interest in reform is strongest. The system would also be more likely to be upheld if it were part of a comprehensive package of reforms including other measures to improve the quality and safety of the medical care delivery system, such as enhanced disclosure, and "experienced-based" mechanisms to monitor and improve patient safety.

Similarly, while the constitutionality of substituting a federal trust fund administered in part through administrative rulemaking for case-by-case litigation of

asbestos cases in state courts is also not entirely free from doubt, if the system is enacted, most of it will also probably be upheld.

It seems unlikely that today's Supreme Court believes that the "traditional role of the federal courts in our scheme of government" (to quote the test from *Schor, supra*) is to adjudicate private claims for damages between individuals. While these claims were admittedly once conceived as prototypical "private rights" to which *Crowell* applied and forever guaranteed a judicial forum, the public policy consequences are increasingly apparent to litigation which has a major effect of regulating important economic activity. The power of government to regulate has typically followed from the perception that an activity that was formerly thought of solely private has important externalities or public consequences.[51] Mass torts and medical malpractice litigation are no different, and ultimately Congress will not be found to lack power to address the problems of frivolous litigation any more than it has lacked the power to deal with other serious economic and social problems in the past.

VI.

It is regrettable that most American lawyers are either "court people" or 'agency people" but not both. The American "civil justice system" actually consists of both courts and administrative tribunals and it is important to bring both sets of tools to bear as we consider strategies for civil justice reform. This paper has argued that there are distinctive advantages to administrative as opposed to judicial tribunals for developing and applying consistent and intelligent standards of care.

[51] *Cf. Munn v. Illinois*, 94 U.S. 113 (1876)(rates charged by a grain elevator [private property] may be regulated because "affected with a public interest").

How Did We Get Here? What Litigation Was, What It is Now, What It Might Be

By Stephen B. Presser[1]

Introduction: Law and Litigation on a Pernicious Precipice

In America, litigation is now a multi-billion dollar business.[2] This country has more lawyers as a percentage of the population than any other – a fact which is now notorious[3] – but less well understood is that our current civil justice system is not at all the way it used to be. We hardly blink at multi-billion dollar verdicts in class actions against corporations, and it is now common place for state attorneys general to seek million or billion dollar settlements against whole industries, an undertaking that New York Attorney General Spitzer, for example, has perfected to a high art. The suggestion that I will make here is that this is a departure from our heritage, and a marked change in

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[2] See, e.g. http://www.insurancejournal.com/news/national/2004/09/13/45775.htm: "Today, the average family of four pays a $3,236 annual "tort tax," a cost added to the price of products and services needed to cover the costs of litigation. No other industrialized country reportedly pays more as a percentage of its Gross Domestic Product." (American Tort Reform Association's estimate, quoted on September 13, 2004). With the United States Population estimated at about 300, 000,000, this would work out to be 242.7 Billion dollars.

[3] See, e.g., http://www.answers.com/topic/lawyer:

> The United States Department of Labor's Bureau of Labor Statistics estimates that in 2001, there were 490,000 practicing lawyers in the U.S.
> It is frequently said that there are more lawyers per capita in the US than in any other country in the world.. . . .

the perception of what civil justice was supposed to be all about. Our English common law heritage was that lawsuits were supposed to be about settling intractable disputes between private parties about private rights, but the lawsuit, and particularly the class action, has now become more of an effort for wholesale vindication of purported constitutional or statutory policies.[4]

Our boast used to be that ours was a government of laws not men,[5] but the prejudices of particular litigants, the cooperation of complacent judges, and the misunderstandings of regulators and legislators have undermined what we used to have. Instead of a government of laws designed to protect the property and civil rights of individual citizens we may now have institutionalized lawsuit oppression and redistribution through the civil justice system. Instead of a civil justice system concerned with the preservation of individual liberty, and, in particular the liberty of entrepreneurs who furthered the economic well-being of society, we now have a civil justice system in which entrepreneurial actors can never be certain that they can avoid ending up as defendants in unpredictable lawsuits.[6]

How we got to the pernicious precipice on which we now stand is not an easy

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[4] For the classic piece discovering a change in the conception of litigation in the twentieth century, see Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1282,1284 (1976) (Contrasting the traditional view of lawsuits as settling private rights with the recent conception of lawsuits as policy-vindicating devices.) See also William Wiecek, The Lost World of Classical Legal Thought: Law and Ideology in America 1886-1937 8 (1998) ("In nineteenth-century law . . . the individual was the exclusive focus of concern in legal, moral, and political reasoning. Lawyers of the time did not think of society as a congeries of groups, which is the assumption of interest-group pluralism that dominates twentieth-century political analysis.")

[5] See, e.g. John Marshall's famous opinion in Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.")

[6] On this lawsuit unpredictability, see, e.g. Philip Howard, The Death of Common Sense: How Law is Suffocating America (1996), and, on related developments in criminal law see, e.g. Gene Healy, ed., Go Directly to Jail: The Criminalization of Almost Everything (2004).

thing to discern, as it happened slowly and almost imperceptively as a part of a broader cultural change. Having no monarchy, no aristocracy, and no established church, we Americans have had only our law to bind us together, and, from the beginning, as Toqueville famously observed, the law was a vulgar tongue in this country.[7] Legislation and enlightened judges were early relied on to transform our English common law heritage into a body of doctrines and rules suitable for a young republic,[8] and the constitutional system of checks and balances, federalism, and judicial review in particular were supposed to ensure that the work of legislatures and trial courts did not undermine the protection of life, liberty, and property for which our revolution was fought and our Constitution ratified.[9] It does not go too far to say that the American Revolution ought to be conceived of as Englishmen fighting Englishmen for the rights of Englishmen, for the preservation of the rule of law and the English Common Law's protection of individuals against arbitrary power. The post-revolutionary institutions, and, in particular the federal Constitution ratified in 1789 had as its aim the preservation of the rule of law in general, and of individual liberty and private ownership of property in particular.[10]

Somehow, however, in the second half of the Twentieth Century, these checks and balances, that system of federalism, and the institution of judicial review came loose from their original moorings. The federal government, which had been set up as a means of

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[7] I Alexis de Toqueville, Democracy in America (1840, Reeve, tr.) , Chapter 31 ("The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that the whole people contracts the habits and the tastes of the magistrate.")

[8] See, e.g. William Nelson, The Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society 1760-1830 (1975).

[9] Probably the best introduction to understanding this conception of the federal constitution is Gordon Wood, The Creation of the American Republic 1776-1787 (reprint ed. 1998).

[10] See generally, Wood, supra, and for a recent brief treatment of this theme see, e.g. John Philllip Reid, Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries (2004).

protecting the rights of Americans, began instead seriously to encroach on them. It had been the early theory of the framers that the state and local governments ought to be the primary regulators, since the notion was that the government closest to the people would be most responsive to it.[11] From the fourth decade of the twentieth century, however, the administrative agencies spawned in the New Deal, and the federal courts combined to set national policy in a manner that began more seriously to restrict what state and local governments could do, and which rendered private property and individual liberty more precarious.

Expansively interpreting the Fourteenth Amendment and the bill of Rights, the federal courts decided that state legislatures had failed substantially to deliver justice to all, and the federal legislature, federal agencies,[12] and the federal courts subsequently emerged as major policy-makers for the nation.[13] Simultaneously, a significant part of the

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[11] See, e.g. the Tenth Amendment, which provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," giving rise to the notion that the federal government is one of limited and enumerated powers, reserving the others to the state and local governments, those closest to the people. The idea that the government closest to the people was best appears to have been early associated with Jeffersonian Republicans, but most recently it has been embraced by the modern Republican party. See e.g. the remarks of Senator Fred Thompson, made on May 3, 1995:

> I would remind many of my Republican brethren that we ran for office and were elected last year on the basis of our strong belief that the government that is closest to the people is the best government; that Washington does not always know best; that more responsibility should be given to the States because that is where most of the creative ideas and innovations are happening. Whether it be unfunded mandates, welfare reform, or regulations that are strangling productivity, we took the stand that the States and local government should have a greater say about how people's lives are going to be run, and the Federal government less.

141 CONG. REC. S6047 (1995). Quoted in Robert M. Ackerman, "Tort Law and Federalism: Whatever Happened to Devolution?," 14 Yale L. & Pol'y Rev. 429, n.4 (1996).

[12] On the manner in which federal agencies and their regulations can stifle American business, see, e.g. Philip Howard, The Death of Common Sense: How Law is Suffocating America (1994).

[13] There are dozens of works telling the tale of what the federal courts have done since the New Deal to change the nature of the allocation of legal powers among the local, state, and federal governments. My own attempt is Stephen B. Presser, Recapturing the Constitution: Race, Religion, and Abortion Reconsidered (1994). See also Stephen B. Presser & Jamil S. Zainaldin, Law and Jurisprudence in American History (5th ed. 2003).

legal profession, which had formerly seen its role primarily as the preservers of property and the guardians of the civil rights of the citizenry now tended to become advocates against those running publicly-held corporations. Taking advantage of the contingency fee system unavailable in other industrialized nations, plaintiffs' lawyers proceeded to transform the nature of litigation.[14] In order to understand the magnitude of the change it is important to understand what litigation once was, and what it might perhaps once again become.

What Litigation Once Was

Litigation as we now know it did not exist in our colonial past nor in our mother country. It is true that seeking redress through the courts is as old as the beginnings of British North America. The Massachusetts body of liberties agreed to by the colonists of Massachusetts Bay in 1641 provided that there was a "right of every citizen with a grievance to have some court adjudicate it," but the focus was very much on the individual rights of citizens,[15] and not on any group of similarly situated litigants. The

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[14] Walter Olson, The Litigation Explosion 38 (1991) (indicating that contingency fees first arose as a means of ensuring that worthy and impecunious plaintiffs might still be able to gain redress, but that eventually contingency fees encouraged litigation that might well be meritless, but was driven by the possibility that lawyers might make more money.)

[15] To similar effect see III William Blackstone, commentaries on the Laws of England 2 (1768) ("The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined, and wrongs prohibited."), and Id, at 23 "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, but suit or action at law, whenever that right is invaded." See also the Massachusetts Constitution of 1780, Declaration of Rights, Article XI, "Every subject of the Commonwealth ought to find a certain remedy by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character. He ought to obtain right and justice freely, and without being obliged to purchase it; compleatly, and without any denial; promptly, and without delay; conformably to the laws."

common law, our English heritage of following precedents previously laid down, evolved a system of "common law" pleading whereby causes of action were clearly defined, and each one had a designated "writ" that would begin proceedings, and each one had particular pleadings that were to be filed as the proceedings were contested and litigated. It was a maxim that for every wrong there was a remedy at law, but the truth was that there were a myriad of matters that simply were outside the court system. Acts of God, inevitable accidents, sickness, death, and many other matters simply did not give rise to private causes of action. If one's case did not fit in the narrow definitions of trespass, trespass on the case, trover, replevin, assumpsit or the rest, one was simply out of luck.

Rather than seeking to eliminate this specialized system of redress for some, but clearly not all grievances, Americans as diverse as Alexander Hamilton, Thomas Jefferson, Joseph Story, and Abraham Lincoln all praised the wisdom of the common law and wished to preserve it for America, although abandoning the elements of the common law that sustained the English Aristocracy and Monarchy. Those parts of the common law that dealt with what we would now call contracts, property, torts, and civil rights, however, were preserved entire and intact. Thus, in a famous passage in Thomas Jefferson's Notes on Virginia, he reports that when, in 1776, he was assigned the task of suggesting revisions to the law of the new state of Virginia, he wanted to abolish slavery, to diminish the number of crimes that were punished capitally, and to set up an hierarchical public school system, but he wanted to preserve wholesale these parts of the common law of contracts, property, torts, and civil rights[16] (although he objected to the

[16] Jefferson describes these as "The Common law of England, by which is meant, that part of the English law which was anterior to the date of the oldest statutes extant," which Jefferson stated was "the basis" of the 1776 revisal of the laws of Virginia. Thomas Jefferson, Notes on the State of Virginia (1781), excerpted

English practice of wearing of wigs in court).

It probably does not go too far to say that the old common law system of pleading, through specialized writs and arcane practices, because it required the assistance of lawyers, was designed to preserve and protect that class, and the obfuscatory character of common law pleading led some Americans even to suggest that lawyers ought not to be a necessary class in our republic.[17] Nevertheless, common law pleading, in some form, persisted until the first third of the twentieth century. One suspects that not only did common law pleading protect and advance the interest of lawyers, but this specialized system, by raising the costs of litigation, and by narrowing the bases for it, actually discouraged going to court. It was originally a mainstay of the Anglo-American legal culture that one should try one's best to resolve disputes out of court, that litigation was something of an evil, [18] and that it ought to be resorted to only if all other means failed. A litigious society was a fractured society, and many Americans valued community enough to erect roadblocks to discourage recourse to the courts. Common law pleading was a part of that, as were the old common law doctrines of champerty and maintenance that punished lawyers who actively stirred up litigation.[19] Indeed, Sir William Blackstone, the greatest Eighteenth Century commentator on the English Common Law, railed against those who promoted litigation, seeking to bargain for what we would now label

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in Stephen B. Presser and Jamil S. Zainaldin, Law and Jurisprudence in American History 123 (5th ed. 2003).

[17] The most famous such assertion is Honestus [pseud. of Benjamin Austin], Observations on the Pernicious Practice of the Law (Boston, 1819), reprinted in 13 Am. J. Legal Hist. 241 (1969) (Arguing that lawyers are simply not a "necessary order" in a republic.)

[18] See, e.g. Olson, supra note __, at 2, where he observes that litigation in America was originally seen as an evil.

[19] Olson, supra note ___ , at 17 observes that "ambulance chasing," was punished by a 1-3 year jail term as late as 1954.

contingency fees, calling them "the pests of civil society, that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels."[20]

One of America's greatest lawyer-presidents made a similar point when he wrote, in an apparently undelivered law lecture, that good lawyers should

> [d]iscourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.
>
> Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife, and put money in his pocket? A moral tone ought to be infused into the profession which should drive such men out of it.[21]

Code Pleading and Other Changes in Litigation

Somehow all of that began to change in the twentieth century, if not before. As early as the middle of the nineteenth century David Dudley Field (the lawyer who founded the first modern great law firm, Sherman and Sterling) successfully convinced New York legislators to replace the system of common law pleading with "code pleading."[22] This was a simplified procedure, dictated by statute rather than the common

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[20] IV William Blackstone, Commentaries on the Laws of England 135-136 (1769), discussing champerty, "being a bargain with a plaintiff or defendant . . . to divide the land or other matter sued for between them, if they prevail at law," as a species of "maintenance," "an offence [that consists of] officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it."

[21] From a document fragment dated July 1, 1850 by Lincoln's White House secretaries and later biographers, John Nicolay and John Hay, available on the web at http://www.hatwhite.com/lincoln.html.

law, whereby litigants were no longer bound by the forms of action, but could much more simply state their cases and reply to their adversary's charges. The Field Code of Civil Procedure was adopted in whole or in part in twenty-four other states (and also in England and Ireland),[23] but common law pleading lingered well into the twentieth century, and, oddly enough, was still being taught to first-year law students in one civil procedure classes at Harvard in the fall of 1968.[24]

By 1937, however, the pressure to do away with common law pleading was irresistible, and in that year rules were promulgated for the federal courts that obliterated the writ system.[25] These new federal rules, or something like them, were soon adopted by many state courts as well, and the foundation for what Walter Olson has called "the litigation explosion"[26] was beginning to be erected. The notion that lawyers shouldn't encourage litigation was dealt a fatal blow by two key decisions, Bates v. State Bar of Arizona (1977),[27] in which the United States Supreme Court, in an opinion by justice Blackmun, who apparently wanted to encourage lawsuits and deplored the "underutilization" of lawyers' services,[28] held that the First Amendment protected lawyers "commercial speech" rights to advertise the availability and price of routine legal

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[22] On Field see, e.g. Henry M. Field, The Life of David Dudley Field (Originally published 1898, reprint ed. 1995), Alison Reppy, ed. David Dudley Field: Centenary Essays Celebrating One Hundred Years of Legal Reform (1949), Daun Van Ee, David Dudley Field and the Reconstruction of the Law (1986).

[23] David Ray Papke, "Codification," in Kermit L. Hall, et.al. eds., The Oxford Companion to American Law 121 (2002).

[24] I know, it was mine, and taught by the great evidence scholar James Chadbourne. His method was to compare the common law forms of action to code pleading and to the federal rules of civil procedure. Contrary to what is implicitly argued in this essay, Chadbourne thought code pleading was a huge advance for the law.

[25] See generally, Stephen N. Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective," 135 U. PA. L. REV. 909 (1987).

[26] Walter Olson, The Litigation Explosion: What Happened When America Unleashed the Lawsuit (1991).

[27] 433 U.S. 350.

[28] Olson, supra note ___, at 29.

services, and Zauderer v. Office of Disciplinary Counsel (1985)[29], in which the Court permitted lawyers to solicit specific legal business against particular manufacturing defendants.[30]

Decisions such as Bates and Zauderer, and the increased availability of class actions, created a situation in which it was open season on assorted purported corporate wrongdoers. Litigation, in effect, became a pro-active means of redistribution, if not class warfare. With the rise of "public interest" lawfirms, or private or publicly-funded "legal aid" clinics, groups of lawyers were subsidized not by their potential clients, but by taxpayer or charitable contributions, and, as a result, even more litigation against particularly unfavored corporate or institutional defendants became possible.[31] Lawyers, rather than clients often came to control and encourage litigation. Blackstone and the old common lawyers would have been horrified.

Cultural Change led to Litigation Change

The changes in the nature of litigation undoubtedly were part of much broader cultural changes in this country, cultural changes which accelerated during the sixties and seventies. The story is a familiar one to those of us who lived through it, but since Americans tend to have little appreciation for their history, even their recent history, it

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[29] 471 U.S. 626.

[30] See generally Olson, supra note ___, at 21, 23-24.

[31] Cf. Chayes, supra note ___, at 1291, observing that the class action "responds to the proliferation of more or less well-organized groups in our society and the tendency to perceive interests as group interest, at least in very important aspects." See, to similar effect, Olson, supra note ___, at 52-53, concluding that lawsuits were originally understood to be a dispute between two private citizens over private rights, but came to be understood as a tool to liberate people whose rights had been taken away, and to prevent such rights from being taken away in the future.

may not be amiss to review some of those developments. Probably as a result of the deeply unpopular Vietnam conflict and the nearly contemporaneous Watergate affair (which still captures the imagination of many, as the recent revelation of "Deep Throat" shows) most Americans, and certainly most of what we now call the "mainstream media," appear to have come to believe that government could not be trusted, and that this was also true generally of large purportedly impersonal corporations. Perhaps as a result of the culture becoming increasingly dominated by the "baby boom" generation, and because that generation was characterized by much less religious and civic commitment than prior generations, and by a rather hedonistic individualism, it is not surprising that the law and legal institutions changed as well. As Americans searched for "self-actualization," as the conservative aspects of the legal profession which discouraged litigation began to erode, and as "public interest" law firms arose to become, as it were, professional plaintiffs, the law itself was eventually dramatically altered.

In particular, it became more and more difficult to argue that those who suffered any kind of harm, especially from use of commercially-manufactured products, were not entitled to compensation from the corporations who manufactured those items. Thus it was that "strict products liability" replaced negligence as the basis for manufacturer's liability to consumers, tenants became more easily able to look to landlords for any injury suffered by renters, and consumers found it easier to escape from contracts by arguing that businesses had taken "unconscionable" advantage of them.[32]

In the nineteenth century, in a period dominated by a culture of self-sacrifice and religious obligation, it may have been believed that limiting the liability of active

[32] For these developments See generally, Presser and Zainaldin, supra note ___, Chapter VII.

individuals and organizations eventually redounded to the benefit of all, and by limiting such liability there would be more investment in productive enterprise, which would eventually result in greater overall wealth for the citizenry.[33] These were the days of "laissez-faire" when law and lawyers apparently believed that it was best to leave entrepreneurs substantially alone, and to let the market rather than the state or federal governments regulate enterprise.[34] New private law doctrines, however, seemed to have been spawned by a legal culture that favored regulation over acquiescence, and redistribution over private enterprise.

These private law developments, principally in the state courts, were the analogues of the public law developments, primarily in the federal courts, which also signaled major cultural change. Thus the Warren Court struck down school prayer and bible riding in the public schools in the states, mandated an end to racial segregation, declared that population was the only permissible basis for elections to either branches of the state legislature (even though the United States Senate itself furnished a glaring argument to the contrary), and dictated the reformation of state criminal procedure in order to prevent police abuse of criminal defendants, many of whom were believed to be members of disadvantaged minorities. Much of this was accomplished through the work of organizations formed at least in part to promote litigation, such as the American Civil Liberties Union (ACLU), and the National Association for the Advancement of Colored

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[33] For some classic accounts of the story of how Nineteenth Century American law favored the active individual and limited his or her liability, see, e.g. Roscoe Pound, The Formative Era of American Law (1938), James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States (1956) , Morton J. Horwitz, The Transformation of American Law, 1780-1860 (1977).

[34] For some important studies of this period see Morton J. Horwitz, The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy (1994); Arnold M. Paul, Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench 1887-1895 (Peter Smith ed., 1965); William M. Wiecek, The Lost World of Classical Legal Though: Law and Ideology in America 1886-1937 (1998).

People (NAACP). Litigation, formerly a tool of last resort for individuals, now became a first choice method of social transformation for groups. None of this is necessarily to suggest that many or most of these individual decisions did not advance the cause of justice in their particular cases, but, taken together they contributed to a culture in which many more actors were subject to lawsuits, and in which bureaucracy could (even unintentionally) stifle enterprise.[35]

Where We Are Now

The last few years have seen the culmination of many of these efforts in even more daring judicial decisions, such as those that have found prohibitions in the Constitution against restricting abortions[36] and against punishing consensual homosexual acts,[37] or those that have read the Fourteenth Amendment to require mandatory busing of students to achieve racial balance in the schools,[38] or to permit affirmative action on the basis of race, at least in college and graduate school admissions.[39] All of these were

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[35] For the manner in which adherence to regulations promulgated by state and federal bureaucrats paralyze entrepreneurs, see generally Philip Howard, The Death of Common Sense: How Law is Suffocating America (1995), and for further evidence that the current lawsuit culture has lost its way, see Philip Howard: The Collapse of the Common Good: How America's Lawsuit Culture Undermines our Freedom (2001).

[36] See, e.g. Roe v. Wade, 410 U.S. 113 (1973) (Finding a Fourteenth Amendment right for women to terminate pregnancies, particularly in the first trimester of pregnancy), Planned Parenthood v. Casey, 505 US 833 (1992) (Redifining the constitution's protection for abortions in a manner that prohibited regulations which impose an "undue burden" on a woman's right to terminate pregnancy), Stenberg v. Carhart, 530 US 914 (2000) (In effect removing all abortion regulation, even as to "partial birth" abortions, which did not allow abortions to preserve the "health" of the mother.)

[37] Lawrence and Garner v. Texas. 539 US 558 (2003).

[38] Swann v. Charlotte-Mecklenburg Bd. of Ed. 402 US 1 (1971).

[39] Grutter v. Bollinger, 123 S. Ct. 2325 (2003) and Gratz v. Bollinger, 123 S. Ct. 2411 (2003), read together indicated that while racial quotas were impermissible, considering race as one of many factors used to achieve "diversity" in the classroom was permissible. This was widely perceived as a green light for affirmative action based on race in college and law school admissions. For a critique of the decisions see, e.g. Stephen B. Presser, "A conservative comment on Professor Crump," 56

United States Supreme Court decisions, but dramatic decisions in the state courts, such as that of the Supreme Judicial Court of Massachusetts which found in the Massachusetts state constitution a right to gay marriage,[40] were similar in spirit. In the Massachusetts gay marriage case, in fact, the Court relied heavily on the so-called "mystery passage" from one of the United States Supreme Court's abortion decisions, which stated that "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the state."[41] A more naïve or more extreme statement of hedonistic individualism would be difficult to articulate, and it summed up in few words the legal ethos of the age.

Again, however, it should be noted that the wisdom of the policies favoring abortion, the legalization of consensual homosexual acts, or gay marriage are not the issue addressed here. Instead it is the attitude of the Supreme Court that it should be the ultimate authority on these matters, guided by the philosophy encapsulated in the "mystery passage," and by a sense that it should authoritatively expand and alter the meaning of the Constitution in order to keep it in tune with the times. The mystery passage's philosophy leads to a view of society in which there is little common purpose, and an invitation to litigate against all traditional practices, instead of leaving matters to be worked out on a state-by-state basis through the emergence of a consensus among the people.

The reforms of Rule 23 which led to the class action as we know it were

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Fla. L. Rev. 789-817 (2004) (Arguing the arbitrariness and disingenuousness of these decisions).

[40] Goodridge v. Dept. of Public Health, 798 NE2d 941 (Mass. 2003).

[41] Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

undoubtedly instituted because of a belief that an approach to litigation that enabled groups that had formerly been the subject of discrimination to join in seeking remedies would result in a more just society. Unfortunately, because of all the other cultural factors suggested here, the net effect of current class action practice may be to produce more harm than good.

Once the restrictive characteristics of the forms of action had been abandoned, and once an individualistic philosophy of the kind expressed in the mystery passage had taken hold, it might have been expected that a plethora of new causes of action would be created, and it was only a matter of time before the lawsuit as political tool could come into being. All that was needed was the abandonment of traditional institutional and cultural restraints on litigating.

This came when the individualistic philosophy of the mystery passage, for most purposes, obliterated an older Athenian or Judeo-Christian ethos, still dominant in the Nineteenth Century, which understood reversals of fortune or accidental bereavement as occasions for spiritual growth, rather than opportunities for seeking redress in the courts. As the federal courts continued to render decisions which all but obliterated the legitimacy of religious expressions in the public square,[42] the restraining character of religion eroded, and the "litigation explosion" occurred.

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[42] See, e.g., Lee v. Weisman. 505 US 577 (1992) (Holding, by a 5-4 majority, that middle-school graduations could not include a prayer delivered by a clergyman selected by the school), Santa Fe Independent School Dist. v. Doe. 530 US 290 (2000) (Prohibiting, in a 6-3 ruling, school-endorsed student-led prayer at high school football games. Chief Justice William H. Rehnquist, in his dissenting opinion, joined by Justices Antonin Scalia and Clarence Thomas, observed that "even more disturbing than its holding is the tone of the Court's opinion; it bristles with hostility to all things religious in public life. Neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause, when it is recalled that George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God." 530 U.S., at 318.

And thus we have the current situation where plaintiffs' lawyers, in effect, manufacture classes suffering injury, often in an effort to seek settlements for their "nuisance value," rather than actually to recover compensation for purported victims. Similarly, as indicated earlier, we have state attorneys general pursuing actions against whole industries, as has been done, for example, against the tobacco industry, seeking to enhance state revenues through spectacular recoveries, or, as New York Attorney General Eliot Spitzer has done against the Insurance and Mutual Fund industries, to reinforce his political standing and solidify a possible bit for higher office (or so his critics suggest).[43] In short, litigation conceived as a remedy for the redress of individual grievances has become a political device to be used by ambitious office-holders as well as an instrument of intimidation by ambitious private lawyers.

Some Ameliorative Efforts

There have been some successes in reigning in the bringing of lawsuits and the

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[43]Attorney General Spitzer recently lost a high-profile case brought against a former Bank of America Corporation broker whom Spitzer accused of improperly trading mutual funds. The Wall Street Journal observed:

> The acquittal is a high-profile setback for Mr. Spitzer, who has made a name for himself while largely avoiding the courtroom. He has extracted multi-million dollar settlements from corporate defendants, forced executives to resign and launched sweeping changes of practices on Wall Street and in the mutual fund and insurance industries. Buoyed by his victories and the cheers of supporters, Mr. Spitzer has announced plans to run for governor in 2006.
>
> But critics have complained that he uses tough and headline-grabing tactics to damage businesses, charges he vigorously disputes. . . .

Kara Scannell and Arden Dale, Sihpol Verdict Deals a Blow to Spitzer: In Crucial Courtroom Test, Jury Spurns Prosecutors on Claims of Criminal Acts, The Wall Street Journal, Friday June 10, 2005, page A1. For another fine description of Spitzer and his tactics, see, e.g. Daniel Gross, Eliot Spitzer: How New York's attorney general became the most powerful man on Wall Street, Slate, October 21, 2004, http://slate.msn.com/id/2108509/.

activities of professional plaintiffs in the securities fraud area, in medical malpractice awards, and in other areas of civil justice reform, but there are still difficulties unique to the American legal system at the moment, and utterly unknown to the common law.

The most prominent of these has already been mentioned; the ability of plaintiffs' lawyers to take on cases on a contingent fee basis, and to advertise for clients, thus generating litigation on their own. Another is that we have not yet adopted the English "loser pays" rule, requiring that successful litigants have their counsel fees reimbursed by the unsuccessful party. Still another difficulty is our extraordinary system of pre-trial discovery, in which depositions, interrogatories, requests for document production, and other means of obtaining evidence from adversaries can easily run the costs of litigation for large publicly-held corporations into the millions, and can serve as powerful incentives to settle even meritless cases.

The United States Supreme Court, and some state legislatures have begun to take steps to reduce the colossal punitive damage verdicts we have seen in recent years,[44] but these efforts, especially by the state legislatures have sometimes been frustrated by state courts.[45] For the time being it is likely that the possibility of colossal punitive damages will continue to threaten corporate defendants, and, when the threat of punitive damages is combined with adverse inferences to be drawn from a failure to produce items for discovery, as recently occurred in the Morgan Stanley case,[46] it can be understood what a

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[44] See, e.g. BMW of North America v. Gore, 517 U.S. 559 (1996) (Holding that excessive punitive damages can amount to a violation of due process).

[45] See, e.g., State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St.3d 451 (1999), and Best v. Taylor Machine Works, 179 Ill. 2d 267, 689 NE2d 1057 (1997), in which the Supreme Courts of Ohio and Illinois, respectively, overturned legislative civil justice reform efforts on the basis of questionable interpretations of their states' constitutions.

[46] The Supreme Court does seem to have begun to understand that adverse inferences because of failures to produce may have gone too far, or at least this is one interpretation of the recent decision the Arthur

distance we have traveled from the time when litigation was about compensation, and compensation to individuals, not punishment of purported corporate miscreants.

Conclusion: What Ought to be Done

The organization that has sponsored this conference, Common Good, is devoted to reminding us of what our American ancestors understood, that social problems can be exacerbated rather than ameliorated by excessive litigation. As Philip Howard has recently demonstrated, for example, the encouragement of litigation by school children and their parents has resulted in a situation where order simply cannot be maintained in the classroom – where it is necessary to bring in the police to handcuff and cart away young miscreants lest some teacher be sued for an attempt physically to restrain an unruly child.[47] The lack of order in classrooms, of course, impedes their educational mission, and while encouraging litigation against educators was suppose to improve education, it has had the opposite effect.

Similarly, to the extent that class action litigation against corporations, along with its attendant evils of contingency fees, excessive discovery expenses, the threat of punitive damages, the capricious behavior of juries, and the bringing of class-action lawsuits with the aim of settlement for their nuisance value,[48] continues, the competitive

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Andersen case, where a unanimous court threw out a criminal prosecution based on jury instructions which condemned a possibly lawful document destruction policy.

[47] Phillip K. Howard, "Class War," The Wall Street Journal, Page A12, May 24, 2005.

[48] As one of the leading civil procedure scholars, my colleague Martin Redish has observed "Though on its face the class action appears to be nothing more than an elaborate procedural joinder device, in recent years it has become the focal point of much political and legal debate. Courts have noted 'the intense presser to settle' caused by the very filing of a class action, while others believe the procedure amounts to 'judicial blackmail.'" Martin H. Redish, "Class Actions and the Democratic Difficulty: Rethinking the Intersection

position of American corporations in the global economy will be undermined, and those who depend on such corporations for their livelihood, employees, creditors, consumers and stockholders will suffer. There will continue to be a few spectacular winners in the "lawsuit lottery," but most Americans may be worse, rather than better off.

Congress may have begun to travel the appropriate road to recovery with the recent reform regarding class actions,[49] but this has yet to be tested in the courts, and other Congressional measures, such as Sarbanes-Oxley, suggest that our legislators may still be imposing measures whose costs far exceed their benefits.[50] One recent estimate "puts investors' loss in stock value on passage of that act at around $1.4 trillion, an

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of Private Litigation and Public Goals," 2003 The University of Chicago Legal Forum 71. (footnotes omitted). Redish does go on to observe, however, that "Those who take a more positive view of the class action consider it to be an effective means of policing corporate behavior and an assurance that injured victims will be compensated in the most efficient manner." Id. (footnote omitted). Redish's own view is that current class action practice is inconsistent with popular sovereignty, or "the essential democratic precepts of accountability and representation." Id., at 137.

[49] The Class Action Fairness Act of 2005, which passed the House in a 279-149 vote and the Senate by a vote of 72-26, would move lawsuits seeking over $5 million, and thus "shift most large class-action lawsuits involving parties from different states to federal courts." The goal of the measure is to lessen the perceived arbitrary behavior of state court judges and juries. See generally William Branigin, "Congress Changes Class Action Rules," Washington Post, February 17, 2005. The new law does not, however, prevent the bringing of any class actions in federal courts, nor did it have any retroactive effect. In addition to shifting some class action lawsuits to federal courts the new law also should have the effect of reducing the recovery of counsel's contingency fees in class action litigation that results in coupons being distributed to members of the class. The contingency fees are to be figured on the basis of the value of the coupons redeemed rather than on the aggregate value of the coupons issued. "The Class Action Fairness Act was drafted and ultimately passed into law in response to a growing belief that class action lawsuits were nothing but vehicles for attorney abuse and large fees." Ruth Bahe-Jachna, Frank Citera and Collin Williams, "GT Alert:New Federal Legislation: The Class Action Fairness Act of 2005 (March 2005), available on the web at http://www.gtlaw.com/pub/alerts/2005/0302.asp.

[50] For this line of criticism against Sarbanes/Oxley see, e.g. Thomas J. Donohue, "Opening Keynote Address," Securities Industry Association, March 3, 2005, http://www.uschamber.com/press/speeches/2005/050303tjd_securities.htm ("When CEOs spend more time on regulatory compliance than they do strategizing, expanding, developing new product lines, and hiring new workers, the pendulum has swung too far . . .When qualified and responsible board directors are resigning their posts for fear of being held liable for a bad outcome, the pendulum has swung too far. . . When board members become overly concerned with protecting themselves and have less time and incentive to aggressively pursue the interests of the company and its shareholders, the pendulum has swung too far."), and Henry Manne, "Life After Donaldson," Wall Street Journal, June 6, 2005, Page A10 (Decrying the former Chairman of the SEC's championing of strick enforcement of Sarbanes/Oxley "in spite of mounting evidence that it is costly beyond any conceivable benefits.")

expensive bit of retribution for a few multi-million dollar defalcations."[51] There is no denying that transparency in American entrepreneurial activity is a worthy goal, and the disclosure mandated by our securities laws and the efforts of the SEC and the courts to ferret out and punish securities fraud are certainly laudable. Nevertheless, it is time for intelligent leaders in and out of the Congress boldly to seek to change not only the pernicious practices and rules that have encouraged lawsuit abuse, but perhaps the very culture that has spawned them.[52]

As indicated above, there was a time when lawsuits were discouraged, and when the legal rules clearly favored the American active entrepreneur. There has always been some uncertainty to American law, dictated by its need simultaneously to implement popular sovereignty, economic development, restraints on arbitrary power, and the securing of a maximum amount of freedom from government regulation.[53] Before the middle of the twentieth century our legal and cultural regime discouraged litigation, and entrepreneurs had the freedom successfully to develop our economy to the point where it became the envy of the world.

That economy still flourishes, but it now does so in a climate in which no entrepreneur, and perhaps no American can be confident that he or she will not find themselves the subject of a lawsuit brought by a disgruntled competitor, an ambitious

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[51] Manne, supra note ___, referring to "The most widely discussed of these new estimates, a careful and scholarly work by Ivy Xiying Zhang of the University of Rochester."

[52] See, to similar effect, Redish, supra note ___, who argues that "it is important to keep in mind a central fact often ignored in modern procedural scholarship: the class action was never designed to serve as a free-standing legal device for the purpose of 'doing justice,' nor is it a mechanism intended to serve as a roving policeman of corporate misdeeds or as a mechanism by which to redistribute wealth." 2003 The University of Chicago Legal Forum, at 74.

[53] On these four aims as dominating American law, see generally, Stephen B. Presser, "Legal History" or The History of Law: A Primer on Bringing the Law's Past into the Present, 35 Vanderbilt Law Review 849 (1982).

politician, or misguided government regulators. Surely at some point this climate will discourage the kinds of activities that Americans must engage in if we are to remain competitive in an increasingly-global economy. It is time for a change. We Americans tend to believe that one can't turn back the clock, but, as C.S. Lewis reminded us, when the clock fails to give you the correct time, that is precisely the move one should make.[54] If we really do want to alter a culture in which entrepreneurial actors and ordinary Americans, instead of being protected by law may too often end up its victims, there are lessons we could surely learn from our past.

[54] see C.S. LEWIS, We have Cause to Be Uneasy, in MERE CHRISTIANITY (1952), excerpted in THE ESSENTIAL C.S. LEWIS 309 (Lyle W. Dorset er., 1988) ("First, as to putting the clock back. Would you think I was joking if I said that you can put a clock back, and that if the clock is wrong it is often a very sensible thing to do? But I would rather get away from that whole idea of clocks. We all want progress. But progress means getting nearer to the place where you want to be. And if your have taken a wrong turning, then to go forward does not get you any nearer. If you are on the wrong road, progress means doing an about-turn and walking back to the right road . . . .").

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Research and policy analysis in civil justice reform area

AETNA

Hartford, Connecticut 1982-1997

Vice President and Chief of Staff to General Counsel 1994-97

Provided staff support to general counsel, Zoë Baird, on matters such as general department management, board activities, and special projects..

Vice President and head of Civil Justice Reform Project 1994-97
Assistant Vice President and head of Civil Justice Reform Project 1986-93

Managed multifaceted program to reform the liability system through legislative reform, judicial education, research and policy development, procedural reform, and public education.

Manager and Director, Public Policy Issues Analysis Department 1982-86

Authored numerous documents analyzing a range of insurance issues such as: compensating for asbestos injuries, Superfund, occupational disease claims in the workers compensation system, auto nofault, medical malpractice alternative compensation systems, risk assessment, etc.

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Yale University School of Management
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Vassar College
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BA, General Honors and Departmental Honors in psychology, 1978

PROFESSIONAL ACTIVITIES

Federalist Society: Litigation Section, Executive Committee member, 1999 to present
and National Practitioners Advisory Council, 2002 to present

National Judicial College Advisory Board 1993-present

American Tort Reform Association board 1993- present

Civil Justice Reform Group
vice chair of Steering Committee 1994-97

National Chamber Litigation Center board 1992-1999
chair 1995-97

American Bar Association Litigation Section Task Force on the State
of the Justice System 1994-96

American Bar Association Long Range Planning Group on Civil Justice
System Improvements 1994-95

Insurance Advisory Committee to the Institute for Civil Justice, RAND, 1983-97
chair 1992-93

American Board of Trial Advocates. Cost and Delay Reduction Seminar
co chair 1993

University of Iowa College of Law, Advisory Panel on Compensatory
and Punitive Damages 1992-93

American Bar Association/Brookings Institution Symposium on the Civil Jury; Advisory Committee
1991-92

Brookings Institution Task Force on Civil Justice Reform
1989

SELECTED PUBLICATIONS

"Enhancing Juror Effectiveness: An Insurer's Perspective"
Law and Contemporary Problems, Duke Law School, Volume 52, Autumn 1989

Guest editor with The Hon. William W. Schwarzer and Roger C. Herdman, M.D., "Forging a Truce Between Science and Justice," Courts, Health, Science & the Law, Georgetown University Medical & Law Centers, Volume 1, Spring 1991

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"Price Colluder, Esq" Forbes Magazine p.34, July 23, 2001

"Lead Paint Perversion" Washington Times, November 25,2002

Common Good, AEI-Brookings, National Constitution Center Conference on "Lawsuits and Liberty"

THE ADMINISTRATIVE ADVANTAGE IN CIVIL PROCEDURE: TORT REFORM THROUGH CONSISTENT AND INTELLIGENT POLICIES APPLIED BY ADMINISTRATIVE TRIBUNALS

E. Donald Elliott[1]

--- Substantive law is "secreted in the interstices of procedure"[2]

Most of the energy that has gone into "tort reform" in the United States to date has been misdirected. The features that create frivolous, abusive litigation in the U.S. are largely institutional and procedural in nature.[3] They inhere in the incentives created by our judicial institutions and procedures, and yet most of the energy of reformers to date has gone into modest reforms in substantive tort law – such as caps on punitive damages or on pain and suffering. These reforms may be symbolically satisfying to their proponents, but they leave untouched the basic institutions of our civil justice system and the perverse incentives that they create. Indeed, this misguided focus on changing substantive law is arguably even built into the generally-accepted term "tort reform," which seems to presume that the basic institutional and procedural structure of tort litigation should remain unchanged and that a few reforms of substantive tort law will be sufficient to deal with any problems.

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[2] Henry Maine, Dissertations on Early Law and Custom 389 (1883).

[3] Richard A. Posner, *The Economics of Justice* (1981); Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration 2 J.LEGAL Stud. 399 (1972); E. Donald Elliott, Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence, 69 BOSTON U. L. REV. 487 (1989).

One notable exception is the work of Professor John Langbein. In 1985, Professor Langbein wrote a much-cited article called "The German Advantage in Civil Procedure."[4] Langbein reviewed several salient aspect of German civil procedure including professional judges, the absence of juries and contingent fees, and greater use of independent experts and concluded that these procedural "advantages" contributed to the German system of civil litigation functioning better than the U.S. civil litigation system.

In the twenty years since Langbein wrote, however, there have been only a few modest efforts to address any of the underlying procedural and institutional aspects of U.S. civil litigation that he identified.[5] Ironically, our constitutional law and legal traditions, which are sometimes instruments of change in other areas, are one of the key impediments to modernizing the institutional and procedural aspects of our civil litigation system. Constitutional law as well as the even broader "unwritten constitution" of our legal traditions make it difficult to adopt innovations for processing damage claims that have proven successful elsewhere. Many of the problematic features of adversary civil litigation before courts and juries are so deeply ingrained into our constitutional law and legal traditions that it would be virtually impossible to change them. While the issue of whether constitutional law should "change with the times" is increasingly controversial in every area, the constitutional law relating to civil procedure is remarkably backward-looking and static. The avowed purpose of the 7th Amendment, for example, is to

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[4] John Langbein, The German Advantage in Civil Procedure, 52 U.CHI.L.REV. 823 (1985).

[5] One exception (in which the author was personally involved) was the effort to increase the use of independent experts recommended by professional societies which was recommended first by the Carnegie Commission for Science, Technology and Government and then picked up and implemented as a pilot program by the American Association for the Advancement of Science.

"preserve" unchanged the functions of the civil jury as they existed at common law as understood in 1791. More generally, when an innovation in civil litigation is challenged on procedural due process grounds, courts generally look backward to our history and traditions to determine whether it is constitutional. And even if a reform to the civil litigation system might conceivably be upheld in court against a formal constitutional challenge, there is an even broader "unwritten constitution" of political support that renders it virtually impossible to conceive of any legislature making material changes to the way that civil litigation is traditionally conducted before courts and juries.[6] Even relatively recent innovations such as broad civil discovery have proved very difficult to curtail once implemented.

There is, however, an alternative route by which American law could conceivably address some of more problematic aspects of the ways that we currently do civil litigation. That is through the legal fiction that "administrative tribunals" are not "courts."[7] Throughout our history, one of the main reasons for replacing traditional adversary civil litigation before courts and juries with administrative remedies before non-court courts (*a.k.a.* "quasi-judicial" administrative tribunals) is an enhanced ability by lawmakers to re-design the institutional and procedural features of the tribunals that apply the law as well as to change substantive law. One useful definition of an "administrative agency" is an institution of government that is not a court or legislature

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[6] See, e.g. Peter Schuck, How to Respond to the Problems of the Civil Jury, 77 JUDICATURE 236, 239 (1994)("The politics of jury reform are daunting. Virtually all of the important groups with stakes in the system of civil litigation favor retaining the jury. Trial lawyers' veneration of the jury is almost religious in its fervor, and their missionary zeal appears to have won many converts among the general public. When queried about the value of the jury, judges almost invariably praise it.")

[7] For a general argument about the role of legal fictions in promoting legal change, see Lon Fuller, Legal Fictions (1969).

but is created and designed by statute.[8] Whereas the institutional aspects of "courts" are relatively fixed by constitutional law and tradition, administrative tribunals are by definition plastic and capable of being designed in many different forms. Administrative agencies are not one thing, but come in a dizzying variety of shape and sizes, with different institutional arrangements and procedures designed by statute or regulation to fit the particular task at hand. Indeed, the key defining feature of administrative institutions is that they are not "courts," and therefore their features can be custom-designed in ways that are not permissible for courts. Virtually every procedural innovation identified by Langbein, including professional judges, the elimination of juries and the enhanced role for independent expertise, currently exists in America, but in litigation before "administrative tribunals" rather than before "courts."

As a consequence, a major trend in U.S. civil law during the 20th century has been, and will continue to be, the removal of certain subject matter areas of law in which institutional features of litigation before traditional courts have proved particularly troublesome from the traditional litigation system and the substitution of alternative remedies before administrative tribunals in their place. This long-term trend to substitute administrative remedies for common law litigation has occurred in the past with regulation of workplace safety, labor relations, securities regulation and environmental pollution, and is likely to occur next with exposure to toxic substances such as asbestos, and then in medical malpractice and product liability. Medical malpractice, product liability and mass toxic tort litigation are particularly good candidates for "The

[8] *Compare* Administrative Procedure Act, 5 U.S.C. §551(1), which defines an "agency" as "each authority of the Government of the United States, ... but does not include the Congress; the courts of the United States" and other exceptions not relevant here.

Administrative Advantage in Civil Procedure" because defining a consistent and intelligent standard of care is particularly important in these fields. Administrative law offers particular advantages when implementing a consistent standard of care across a large number of claims is important, and administrative bodies are also particularly good at up-dating a technical standard of care based on expertise and experience – or what I call an "intelligent" standard of care, because it learns over time.

It is impossible in a short article to discuss all of the institutional and procedural features of U.S. civil litigation that might be improved in administrative forums. In what follows I will therefore attempt to illustrate "The Administrative Advantage in Civil Procedure" with one specific illustration: the claim by some reformers, including Phillip Howard, that verdicts by civil juries are unpredictable and inconsistent. In what follows, I will briefly outline the claim that civil jury verdicts with regard to the standard of care in medical malpractice cases are unpredictable and inconsistent, and then explain why this tendency is difficult to correct in the context of ordinary civil litigation before courts but much easier to address before administrative tribunals. Examples of such administrative tribunals would include the administrative "health courts" proposed by Common Good for medical malpractice reform[9] or the administrative compensation

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[9] For more details, see Common Good, An Urgent Call for Special Health Courts, http://cgood.org/brochure-hcare-4.html

The essence of the Common Good proposal is as follows: "Health courts would have judges dedicated full-time to resolving healthcare disputes. The judges would make written rulings in every case to provide guidance on proper standards of care. Their rulings would set precedents on which both patients and doctors could rely. As with similar administrative courts that exist in other areas of law—for tax disputes, workers' compensation, and vaccine liability, among others—there would be no juries. To assure uniformity and predictability, each ruling could be appealed to a new Medical Appellate Court." *Ibid.*

Other features of the Common Good proposal are:

"Full-Time Judges.
The hallmark of the health courts would be full-time judges, dedicated solely to addressing healthcare cases. The judges would be appointed through a nonpartisan

system for asbestos proposed in S.852 (the so-called FAIR Act), which recently was voted out of committee in the Senate.[10]

The purpose of this paper is not to defend the specifics of these reform proposals as either necessary or sufficient, a task that has been performed elsewhere by others.[11] (It should be acknowledged, however, that the author was an early advocate of administrative compensation funds like the asbestos proposal[12] and serves as a consultant to Common Good.) Rather, the point of the present paper is that most if not all of the reforms in these proposals cannot be accomplished within the existing court-based litigation system, but can be implemented through administrative tribunals.

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screening commission.
Neutral Experts.
Those judges would be able to choose from a panel of experts in each area of medicine, avoiding the dueling "hired gun" experts that confuse and prolong disputes today.
Speedy Proceedings; Lower Costs.
Most cases would be resolved within months. Except in exceptional cases, legal fees would be held to 20 percent, reducing current costs by almost half.
Liberalized Recovery for Injured Patients.
Once a mistake is verified, recovery would be automatic without the need to prove precisely how it happened.
Damages.
Patients would be reimbursed for all of their medical costs and lost income, plus a fixed sum that would be pre-determined according to a schedule addressing specific types of injuries. The schedule would be established by a panel of experts and updated periodically to reflect changing costs."

[10] The text of the FAIR Act as reported out by the Senate Judiciary Committee is available at http://documents.nam.org/IS/S852asreportedfromcmte061705.pdf The bill is 393 pages in length, so it is impossible to summarize its provisions in detail here. For present purposes, one pertinent feature is that the bill would replace case-by-case litigation in asbestos cases with "tiers" developed by a combination of statute and administrative rulemaking for determining both compensation payments to claimants and payments by defendants into the system.

[11] See. e.g. Nancy Udell and David Kendall, Health Courts: Fair and Reliable Justice for Injured Patients, *Progressive Policy Institute Report* (Feb. 17, 2005). *See also* David M. Studdert, Michelle M. Mello, and Troyen A. Brennan, Medical Malpractice, 350 New England J. Med. 283 (Jan. 15, 2004).

[12] E. Donald Elliott, Goal Analysis vs. Institutional Analysis of Toxic Compensation Systems, 73 GEORGETOWN L. J. 1357 (1985); E. Donald Elliott, Why Courts? Comment on Robinson, 14 J. LEGAL STUD. 799 (1985).

II.

In a 2003 op-ed in The New York Times, Phillip K. Howard succinctly stated the case that existing court procedures in medical malpractice cases create a highly undesirable element of unpredictability.[13] Howard argues that "Studies about jury awards in health care confirm what every doctor fears – and every victim should fear: justice is random."[14] He goes on to argue that "in a civil case, where citizens can use the justice system as an offensive weapon, the most important social value is predictability."[15] Howard's proposed solution (about which we will have more to say later) is that judges, not juries should decide the standard of care:

> "Creating a reliable system of medical justice, however, requires changing one aspect of the system that is so ingrained it is hardly even part of the debate: the jury. Expert judges, not juries, must decide what is a valid claim. ... The role of juries in civil cases is to decide disputed facts, like whether someone is telling the truth. It is not to declare standards of care that affect society as a whole."[16]

Proponents of asbestos reform make similar claims: that verdicts in asbestos cases are inherently capricious, and as a result, some people who are not really sick get huge windfalls, while others who are much sicker get little or nothing.[17] One of the major justifications advanced for the pending bills to replace traditional tort litigation in asbestos cases with an administrative compensation system is that it would give greater

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[13] Phillip K. Howard, The Best Course of Treatment, The New York Times (July 21, 2003).
[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid.*
17 Statement of Sen. Arlen Specter Introducing S.852, Congressional Record, April 19,2005 p. S3905 et seq. http://thomas.loc.gov/cgi-bin/query/D?r109:6:./temp/~r109iBZptj:e87725: ("All of us are mindful of the very substantial factor when a claimant gives up a constitutional right to jury trial, but in a program structured largely along lines of workmen's compensation, it is our conclusion that it is a fair exchange. When you find that there are many people who are suffering deadly ailments from asbestos , mesothelioma and other deadly injuries, who are not being compensated, this is a way to compensate those individuals whose companies have gone bankrupt.").

predictability and horizontal fairness to both claimants and defendants than the current system of case-by-case litigation.

Speaking more generally, Yale Law School Professor Peter H. Schuck has identified as one of the recurrent "major objections" to the civil jury to be the contention that jury verdicts are inherently unpredictable and produce a "noisy" or unclear liability signal:

> "These objections do not claim that juries are biased or prone to error, but rather than jury decisions by their very nature emit liability signals that are confusing, inconsistent, and arbitrary. In this view, the jury's signals convey little useful information about actual legal norms. Coupled with the largely unregulated, generous system of damage awards, jury decisions generate widespread uncertainty, anxiety, and risk avoidance."[18]

Defenders of the civil jury do not generally deny that juries "march to a different drummer," but argue instead that juries are able to reflect a number of situational and community norms that are not always fully captured in the formal law. For example, in a 1988 article, Professor E. Donald Elliott stated that toxic tort cases are "morality plays" rather than based on a strict application of law and science.[19] While this statement was intended as descriptive rather than normative or prescriptive, it has been strongly criticized as countenancing the right of juries to decide toxic tort cases based on factors that would be considered irrelevant as a matter of formal law.[20] Similarly, then-professor, now-judge Guido Calabresi and his co-author, Professor Phillip Bobbitt, glory in the ability of a civil jury, which they call an "aresponsible agency," to decide cases

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[18] Schuck, *supra* note 6, at p.236.
[19] E. Donald Elliott, The Future of Toxic Torts: Of Chemophobia, Risk as a Compensable Injury and Hybrid Compensation Systems, 25 HOUSTON L. REV. 781 (July, 1988).
[20] Jeffrey Bossert Clark, Colloquium: Junk Science, the Courts, and the Regulatory State, http://www.fed-soc.org/Publications/practicegroupnewsletters/environmentallaw/el020105.htm (reporting comments of Professor David Bernstein that the remarks quoted above are "particularly irksome" because "Redefining our public morality" "is a bit much to ask of our tort system").

without giving any reasons for its decision, particularly in certain categories of cases involving what they call "tragic choices" in which they believe that it is desirable for society to violate in practice the norms that it nonetheless affirms in theory. [21]

III.

In contrast to the civil jury, which is either praised or condemned for its inconsistency, inscrutability and unpredictability, consistency of application and transparency in giving reasons for outcomes are two of the most highly-valued norms for administrative tribunals. As Justice Scalia recently wrote for a unanimous Supreme Court, "It is hard to imagine a more violent breach of [the requirement of reasoned decision-making by administrative tribunals] than applying a rule of primary conduct ... which is in fact different than the rule or standard formally announced."[22] Indeed, a central focus of judicial review of decisions by administrative tribunals is to police against "arbitrary and capricious" decisions that do not treat like cases alike or are not adequately justified.[23] Administrative tribunals must generally follow strict rules requiring them to state reasons for their decisions, and if they apply a different rule of decision in one case that they do in another, they must state a rational basis for the difference in treatment or provide a reasoned basis for changing the rule that will be applied in future cases.[24] In administrative law, "There may not be a rule for Monday,

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[21] G. CALABRESI & P. BOBBITT, TRAGIC CHOICES (1976).
[22] *Allentown Mack Sales and Service Inc. v. NLRB*, 522 U.S. 359 (1998).
[23] See 5 U.S.C. §706(a)(2)(under federal Administrative Procedure Act, courts set aside administrative decisions found to be "arbitrary" or "capricious.")
[24] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co,* 463 U.S. 29 (1983); *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe RR*, 284 U.S. 370 (1932).

another for Tuesday, a rule for general application, but denied outright in a specific case."[25]

Administrative law also provides a useful conceptual resource for dealing with standard of care issues that is generally lacking in civil litigation: the concept of a generic "policy." Court generally deploy only two conceptual categories to describe the allocation of roles between judges and juries: questions of "law," and questions of "fact." Everything has to be one or the other. But before an administrative tribunal, there is an important third category: called "policy."[26] A "policy" is not a fixed requirement established by law, nor is it a "fact" that may change from case to case; rather, a "policy" is a contingent or prudential judgment that must be applied consistently while it remains in effect but may be changed from time to time in the light of experience. The standard of care in a medical malpractice case, or the showing required to qualify for compensating persons exposed to asbestos, are good examples of "policies," that are neither purely matters of law nor purely matters of fact.

Administrative agencies make policy in a variety of ways, including generic notice-and-comment rules, guidance documents and announcing rules of decision through case-by-case litigation.[27] However, the strong trend in administrative law since the early 1970's is to constrain case-by-case litigation of "facts" by developing generic "policies" through rulemaking that reflect the agency's general expertise as to how individual cases should be treated. The intellectual leader in promoting the use of rulemaking to reduce

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[25] *Marriott In-Flite Servs. Div. v. NLRB,* 417 F.2d 563, 566 (5th Cir. 1969); *Shell Oil Co. v. FERC,* 664 F.2d 79, 83 (5th Cir. 1981); *Shaw's Supermarkets, Inc. v. NLRB,* 884 F.2d 34, 37 (1st Cir. 1989); *Roadway Express, Inc. v. NLRB,* 647 F.2d 415, 419 (4th Cir. 1981); *Basic Media, Ltd. v. FCC,* 559 F.2d 830, 833 (D.C. Cir. 1977); *Marco Sales Co. v. FTC,* 453 F.2d 1, 7 (2d Cir. 1971).

[26] See State Farm, *supra* note 24.

[27] See generally Peter Strauss, The Rulemaking Continuum, 41 DUKE L.J. 1463 (1992).

arbitrariness and promote consistency was Professor Kenneth Culp Davis, who spent most of his career at the University of Chicago Law School.[28] Uniform generic policies are then applied in individual cases, but can change and evolve in the light of experience. A good example is the Social Security medical disability grid regulations that were upheld by a unanimous Supreme Court in *Heckler v. Campbell*, 461 U.S. 458 (1983). Confronted with an unacceptable diversity of results in similar cases, the Reagan Administration first attempted to achieve a greater uniformity through management controls and a "Quality Assurance Program," but this approach was challenged in court as infringing on the independence of Administrative Law Judges, who varied widely in how they decided cases.[29] That approach having proven inadequate, the Administration then promulgated a generic rule setting specific, relatively objective criteria for when a person is or is not considered "disabled."

In 1999, the Social Security disability system provided $51 billion in payments to 6.5 million beneficiaries at an administrative cost of $1.5 billion, or about 3%,[30] which compares very favorably with the transaction costs of the torts system which run as high as 50% in some studies. The system generates about 600,000 disputed claims a year, and 200,000 appeals to the Appeals Council. "The volume of Appeals Council decisions precludes the development of any "common law" of administrative review; rather, if the review process uncovers needs for new policy or clarification, that policy or clarification is supplied by regulation or similar directives to all decisionmakers in the system."[31]

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[28] See, e.g. Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry (1970).
[29] See *Nash v. Bowen*, 869 F.2d 675 (2d Cir. 1989).
[30] Peter L. Strauss, Todd. D. Rakoff and Cynthia R. Farina, Gellhorn and Byse's Administrative Law: Cases and Comments 384 (Foundation Press 10th ed, 2003).
[31] *Ibid.*, p. 385.

Thus, policy decisions across the system are supplied not by a common law process of deciding appeals, but by relatively specific generic rules of policy that are developed by experts and apply across the system until updated in the light of experience.

Many other administrative systems also use a process of generic rulemaking based on expert policy decisions to guide and constrain the issues to be decided in individual adjudicatory hearings. For example, at one time, the Food and Drug Administration decided on a case by case basis in adjudicatory hearings on individual new drug application whether the particular scientific studies presented were adequate to prove safety and efficacy, and those judgments were both time-consuming and frequently litigated. Beginning in the late 1960's, however, FDA promulgated generic policy standards for what constitutes "well-controlled clinical studies" and in a precedent-setting decision in 1973, the Supreme Court ruled that generic policymaking by the agency could constrain the issues in individual adjudicatory hearings.[32] Or to pick another example, when the Environmental Protection Agency holds hearings on cleaning up an individual Superfund site, the assessment of risks by the decisionmaker is guided and constrained by a detailed generic rule called the "National Contingency Plan" which outlines EPA's policies and procedures for how a site should be cleaned up.[33]

Questions of standard of care that are currently decided by a case by case basis by juries in the tort system could be regulated and made more uniform by generic policies promulgated at the administrative level and updated from time to time in the light of

[32] *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973)(FDA generic rulemaking eliminates factual issues for adjudicatory hearing).
[33] 40 CFR - Part 300, 47 Fed.Reg 31180 (July 6, 1982), amended, 55 Fed. Reg. 8666 (1990). See also

experience.[34] In fact, the pending asbestos trust legislation would utilize administrative rulemaking to determine the levels of contributions by defendants into the system, and also to set criteria to determine levels of payouts, within broad ranges set by the legislature,.

Generic policy judgments are not only applied relatively consistently by administrative agencies, but they can also be designed to be intelligent, in the sense that procedures can be designed to bring technical expertise to bear, to analyze collateral consequences and to update policies in the light of experience. These complex multi-faceted technical issues of regulatory policy are currently made in a haphazard, uncoordinated and inept fashion in the distorting context of individual claims by injured people by lay juries that do not understand (and often prohibited from even hearing evidence about) the broader implications of their decisions. That is because these issues are incorrectly conceived to be "questions of fact," when in truth they are neither questions of law for a judge nor questions of fact for a jury, but rather they are questions of regulatory *policy* (a conceptual category that is sadly missing from traditional judicial thinking about tort law, but is alive and well in administrative law). As policy questions, they should be made in a more centralized way by more specialized institutions that can weigh the pro's and con's of proposed policy decisions in a more systematic way after due deliberation and consideration of relevant technical expertise (such as costs and benefits, substitution risks and incentive effects). Moreover, institutions making important decisions of regulatory and compensation policy should be designed to study

[34] See E. Donald Elliott, Re-Inventing Defenses/Enforcing Standards: The Next Stage of the Tort Revolution?, 23 RUTGERS L. REV. 1069 (1991)(The Pfizer Distinguished Lecture in Tort Law)(advocating expert standards of care set administratively to give greater predictability to tort system).

the actual results of particular policies over time and to change them in the light of experience.[35] The current tort system of case-by-case litigation before lay judges and juries has none of these features, in large part because it is incapable of separating the regulatory policy decisions from the compensation decisions in cases brought by individual claimants who are often suffering and are therefore sympathetic.[36]

IV.

It would be difficult, if not impossible, for Constitutional reasons to bring greater predictability to jury verdicts involving the standard of care. Unlike administrative law, which uses three conceptual categories (law, fact and policy), the 7th Amendment has been construed as creating only two realms, "law" and "fact," and traditionally questions of the standard of care have been seen as falling on the "fact" side of the line.

The fundamental purpose of the 7th Amendment, according to an unbroken line of Supreme Court cases, is to preserve inviolate the allocation of issues of "law" to the judge and of "fact" to the jury as those concepts existed and were applied in 1791. The 7th Amendment has for its primary purposes the preservation of "the common law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are resolved by the court and

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[35] E. Donald Elliott, Re-Inventing Defenses/Enforcing Standards: The Next Stage of the Tort Revolution?, 23 RUTGERS L. REV. 1069 (1991)(The Pfizer Distinguished Lecture in Tort Law).

[36] *Cf.* Peter Schuck, The New Ideology of Tort Law, THE PUBLIC INTEREST, No. 92, Summer, 1988, p. 93, 94. ("In tort law, however, courts almost always have the last word, and that word has usually been compensate.")

issues of fact are to be determined by the jury under appropriate instructions by the court." [37]

The question of whether the meaning of our Constitution should evolve and change with the times is, of course, one of the central, enduring controversies in Constitutional law and judicial philosophy. Almost uniquely, however, the specific content of established 7th Amendment law is to "preserve," unchanged and unchanging, the allocation of responsibilities between judge and jury as they existed in 1791. In other words, the content of the rule of decision that the Supreme Court has traditionally applied in construing the 7th Amendment is explicitly historical: how were these allocations of responsibility made in 1791? "Those matters which were tried to a jury in England in 1791 are to be so tried today and those matters which, as in equity, were tried to a judge in England in 1791 are to be so tried today...."[38]

It is well-established under a long line of Supreme Court's cases under the Jones Act and elsewhere that under the 7th Amendment, the issue of the reasonableness of conduct is considered an issue of "fact" that (1) is constitutionally required to be decided by a jury and (2) cannot be re-examined by a judge or appellate court – provided of course that there is at least some minimal evidence upon which a jury could reasonably base a finding of liability. A good example is *International Co. v. Nederl. Amerik*, 393 U.S. 74 (1968), a unanimous *per curiam* decision of the Supreme Court. In that case, the

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[37] Congressional Research Service, The Constitution of the United States of America: Analysis and Interpretation p.1232 (Lester S. Jayson, ed., 1978), *citing Baltimore & Carolina Line. v. Redman*, 295 U.S. 654, 657 (1935); *Walker v. New Mexico & S.P.R. Co.*, 105 U.S. 593, 596 (1897).

[38] *Ibid.*, p.1233, *citing* Parsons v. Bedford, 3 Pet. (28 U.S. 433, 446-447 (1830); Slocum v. New York Life Ins. Co., 228 U.S. 377-78 (1913); Baltimore & Carolina Line. v. Redman, 295 U.S. 654, 657 (1935); Dimick v. Schiedt, 293 U.S. 474, 476 (1935). p.1233.

evidence showed that a longshoreman had remained below decks where carbon monoxide was building up because a supervisor had promised to turn on the ship's ventilating system. As explained by the Supreme Court, "The Court of Appeals said that the hatch boss should have ceased work when he first learned that the ship's ventilating system was not operating, despite the officer's promise to turn on the system. Alternatively, he should have used the stevedore's blowers, which had been left on the pier, to ventilate the hold. The jury, however, in response to a special interrogatory, found that the stevedore had acted reasonably in continuing to work for a brief period in reliance on the officer's promise. We cannot agree with the Court of Appeals that the stevedore acted unreasonably as a matter of law. *Under the Seventh Amendment, that issue should have been left to the jury's determination.*"[39]

One can of course distinguish the level of precaution taken against carbon monoxide poisoning on a ship from the level of care that a surgeon uses in conducting an operation, or a physician uses in prescribing a drug with known side effects, but the courts have generally held that the question of whether particular conduct is reasonable under all the circumstances is prototypically a question of fact for the jury, not a question of law for the court.

To be sure, judges could conceivably become more aggressive in granting directed verdicts or judgments n.o.v. on the grounds that the facts would not permit a reasonable jury to find the defendant liable, but this is likely to be of only marginal benefit in improving the consistency of jury verdicts. In the first place, the capacity of non-specialized judges without medical training to second-guess juries on technical

[39] 393 U.S. at p.75.

questions can easily be over-rated; without expert guidance, how is a lay judge to say that a jury verdict on standard of care is "unreasonable"? A more promising approach might be for the judge to rely on a neutral expert, or panels of neutral experts.[40] But while these approaches may be marginal improvements, they are inherently case-specific and *ad hoc* and therefore do not capture and build intelligence in the system over time in the way that development of administrative policy guidance does.

It is of course theoretically possible to imagine that any existing body of legal doctrine might be abandoned or re-worked by the Supreme Court. But absent an outright repeal of the language of the 7th Amendment, it seems exceedingly unlikely that the Court will abandon its historical approach to determining the allocation of responsibilities between judge and jury in civil case. The most promising development that might persuade the Supreme Court to re-think the role of the civil jury in determining the standard of care is historical research showing that in actuality, some standard of care issues were decided historically at common law by judges rather than juries. For example, the Court's "reasoning" in one of its most recent 7th Amendment cases consisted of the following: "After the adoption of the Seventh Amendment, federal courts followed this English common law in treating the civil penalty suit as a particular type of an action in debt, requiring a jury trial. See, e. g., United States v. Mundell, 27 F. Cas. 23 (No. 15,834) (CC Va. 1795)."[41] Absent new historical research, however, it seems

[40] E. Donald Elliott, Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence, 69 BOSTON U. L. REV. 487 (1989). *See also* the Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2005/01/tort_reformposn_1.html (January 23, 2005)("An alternative, mentioned in one comment and already in force in a number of states, is to require the malpractice plaintiff before suing to submit his claim to a panel of physicians, whose findings, if unanimous, are admissible in court should the claim result in a lawsuit.")

[41] *Tull v. United States*, 481 U.S. 412, 418 (1987).

unlikely that that Supreme Court will abandon its well-established and often-reiterated jurisprudence that standard of care issues are prototypical issues of "fact" for the jury, not issues of "law" for the judge.

The clear trend throughout the last half century has been to expand, rather than contract the role of the jury. For example, in 1970 when the Supreme Court was presented with the question of the role of juries in stockholders derivative actions, to which the closest historical analogy was a suit in equity in which no jury was required, the Court nonetheless held that a jury was required under the 7th Amendment if similar issues could have been raised in jury cases.[42] Moreover, in a series of cases, the Court held that the right to a jury trial cannot be abridged by trying factual issues first in an equitable proceeding and then using collateral estoppel to preclude re-litigation in a subsequent proceeding at law.[43] And in what is perhaps the most far-reaching precedent expanding the role of the common law jury, in 1974, the court held in *Curtis v. Loether*, 415 U.S. 189 (1974), that even new statutory causes of action that clearly did not exist in 1791 also required jury trials if the relief sought could be analogized to that available historically in common law causes of action.[44] This holding was followed again in *Tull v. United States*, 481 U.S. 412 (1987), although a ray of light may have emerged in that the Court held that a jury was required only for the liability phase of a Clean Water Act enforcement action, not to determine relief. The Supreme Court recently reiterated these principles again in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), holding that a suit for money damages under ERISA is not equitable relief, but

[42] *Ross v. Bernhard*, 396 U.S. 531 (1970).
[43] *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477 (1962).
[44] *Curtis v. Loether*, 415 U.S. 189, 193 (1974).

"at law," and therefore requires a jury. In short, the clear trend in 7th Amendment jurisprudence for the last century has not been to constrain but to expand the role of civil juries.

While it is true that the 7th Amendment is not "incorporated" as binding on the states through the 14th Amendment, nonetheless jury trials are guaranteed in similar if not identical terms in virtually all 50 state constitutions. There is no perceptible trend at the state level to re-allocate standard of care issues to judges rather than juries, and any movement to do so would confront similar problems at the level of state constitutional law.

It would require a major abandonment of the Supreme Court's 7th Amendment jurisprudence, and analogous bodies of law at the state level, to hold that questions of negligence or standard of care are questions of law for the court, rather than questions of fact for the jury.

V.

One reason that American constitutional law has been able to permit itself the luxury of preserving "inviolate" the right to a civil jury as it existed in 1791 is that there is an escape valve by which Congress may re-assign many, if not most, controversies to a non-jury forum if it so chooses. As discussed above, a broad right to a civil jury trial attaches even to new statutory causes of action unknown at common law if, *but only if,* Congress chooses to create rights enforceable in a traditional court by a damage action (or other "legal" relief). But Congress also has the alternative option of creating new statutory schemes to replace traditional ones and making them enforceable through *administrative* tribunals that do not utilize juries instead of courts – at least if the nature

of the right in question is deemed "public" rather than "private"[45] (a distinction of some complexity, which is discussed in more detail below).

A major trend in U.S. law over the last century is for many areas of law that were traditionally the province of common law courts and juries to be re-assigned to administrative mechanisms. For example, the Occupational Safety and Health Act now regulates issues of safety in the workplace that were formerly the subject of common law suits, and the Supreme Court has specifically upheld non-jury OSHA proceedings against a claim that they violate the 7th Amendment.[46] In the same way that in a previous generation, both state and federal governments replaced a system of private lawsuits in courts over workplace injuries with a comprehensive administrative schemes of workers compensation laws,[47] a comprehensive administrative scheme could be designed today for re-adjusting remedies for those suffering injuries during medical treatment, or from defective products or exposure to toxic substances such as asbestos, to replace litigation before traditional courts. For example, Common Good has proposed a system of administrative "health courts" at either the state or federal level.[48] While not entirely free from doubt, federal administrative tribunals to adjudicate medical malpractice cases would probably be constitutional (at least if one assumes that Congress has the right under the Commerce Clause to regulate medical malpractice litigation because its

[45] *Crowell v. Benson*, 285 U.S. 22 (1932).
[46] *Atlas Roofing Co., Inc. v. OSHA*, 430 U.S. (1977).
[47] See, e.g. *New York Central RR v. White*, 243 U.S. 188, 200 (1917); *Arizona Employers' Liability Cases*, 250 U.S. 400, 419-422 (1919).
[48] See *supra* note 9.

involves economic activity that is "in" and "affects" interstate commerce, an independent issue of some complexity which is outside the scope of this paper[49]).

Assuming that Congress has the power to regulate medical malpractice litigation under the Commerce Clause, Congress could probably replace litigation before traditional courts and lay juries with a comprehensive administrative system for dealing with medical injuries, including expert administrative tribunals without juries. It should be emphasized, however, that the result would be heavily dependent upon the specific provisions of a particular statutory scheme, including whether it was a comprehensive package of reforms of the medical care delivery safety system and whether it included benefits for injured parties as well as defendants.

There are two separate federal constitutional issues that would be raised by assigning malpractice claims to an administrative agency (or to a specialized Article I court, which would raise essentially the same constitutional issues): (1) an argument that the statute impermissibly assigns a "judicial" function to a tribunal that does not comply with Article III requirements, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and (2) an argument that the administrative tribunals violate 7th Amendment rights to a jury trial. *Atlas Roofing Co., Inc. v. OSHA*, 430 U.S. (1977).

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[49] The power of the federal government to legislate under the Commerce Clause on subjects such as medical malpractice is no longer as clear as it seemed only a few years ago. *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). In *Morrison*, the Court invalidated a federal criminal statute punishing violence against women. Even though conceding that there was evidence that violence against women did have an effect on commerce, the Court nonetheless held that what it characterized as an "incidental effect" on commerce does not justify the federal government in regulating areas that have "traditionally" been regulated by the states. On the other hand, the recent "medical marijuana" case would seem to support federal legislation to regulate the safety of medical care, in part because it is economic activity. *Gonzales v. Raich*, 545 U. S. -- (No. 03–1454 June 6, 2005).

In the modern analysis, both questions turn on whether the Supreme Court would characterize the reforms as involving "public" or "private" rights. An early case, *Crowell v. Benson*, 285 U.S. 22 (1932), held that "private rights" "that is, of the liability of one individual to another under the law as defined" must be reserved to Article III courts. Although never over-ruled, subsequent cases have significantly eroded the bright-line, conceptual test for "private rights" seemingly laid down in *Crowell*. In the Supreme Court's most recent venture into the thicket of distinguishing "private" and "public" rights, the Court wrote:

> "whether the 7th Amendment confers .. a right to a jury trial in the face of Congress's decision to assign adjudication of that action to a non-Article III tribunal [turns on the public/private rights distinction]. Congress may only deny trials by jury in actions at law ... in cases where 'public rights' are litigated. ... [t]he federal Government need not be a party for a case to revolve around public rights. *The crucial question ... is whether Congress ... has created a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.*" *Granfinanciera SA v. Paul C. Nordberg, Creditor Trustee*, 492 U.S. 33 (1989)(emphasis supplied).

Another recent case opined that the issue is not so much whether the affected rights are conceptualized as "private" or "public," but rather whether the re-assignment of certain categories of cases to administrative tribunals would undermine the traditional role of the federal courts in our scheme of government.[50] It seems unlikely that many federal judges view hearing medical malpractice cases under their diversity jurisdiction as central to preserving the role of the federal courts in our constitutional order.

Perhaps the decision that is most analogous to medical malpractice is *Thomas v. Union Carbide Agricultural Prod. Co.*, 473 U.S. 568 (1985). There as part of a

[50] *Commodity Futures Trading Comm. v. Schor*, 478 U.S. 833 (1986)("the congressional scheme does not impermissibly intrude on the province of the judiciary" because "limited CFTC jurisdiction over a narrow class of common law claims as an incident of CFTC's primary and unchallenged adjudicative function does not create a substantial threat to the separation of powers.")

comprehensive re-working of the federal pesticide law (FIFRA), Congress provided for "me too" registrations of pesticides based on private test data developed by other manufacturers and set up a scheme of compulsory arbitration by the EPA of the value of data. Union Carbide sued, claiming that its right to sue under state law for violations of its common law trade secrets was a prototypical "private right" that could not be re-assigned to an administrative scheme under *Crowell*. The Supreme Court rejected the claim in an opinion by Justice O'Connor (also the author of *Schor, supra*):

> "[T]he right created by FIFRA is not a purely 'private' right, but bears many of the characteristics of a 'public' right. Use of a registrant's data to support a follow-on registration serves a public purpose as in integral part of a program safeguarding public health. Congress has the power, under Article I, to authorize an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing an Article III adjudication."

Like the state law claim for violation of trade secrets at issue in *Thomas*, medical malpractice claims should not be viewed in isolation, but rather as part of a comprehensive and intertwined system for funding medical care and regulating patient safety.

To be sure, the examples of formerly-private common law rights that have re-assigned to administrative tribunals without juries in *Schor* and *Thomas* are much narrower than reform of medical malpractice law. Moreover, participation in both of the regulatory programs upheld in *Schor* and *Thomas* was arguably "voluntary." Certainly the case for the constitutionality of administrative "health courts" would be stronger if patients were given the option of opting into a voluntary pilot program which included an administrative system for processing medical injury claims as well as other features.

Many traditionalists will assert that tort claims for medical malpractice are prototypical "private rights" that have historically been assigned to courts and juries and

cannot be changed under *Crowell*. However, a statutory scheme that creates federal administrative tribunals for adjudicating medical malpractice claims would be probably upheld if the administrative tribunals were part of a comprehensive regulatory scheme for reforming the medical care system, particularly if the system were limited at least initially to Medicare or Medicaid recipients where the federal interest in reform is strongest. The system would also be more likely to be upheld if it were part of a comprehensive package of reforms including other measures to improve the quality and safety of the medical care delivery system, such as enhanced disclosure, and "experienced-based" mechanisms to monitor and improve patient safety.

Similarly, while the constitutionality of substituting a federal trust fund administered in part through administrative rulemaking for case-by-case litigation of asbestos cases in state courts is also not entirely free from doubt, if the system is enacted, most of it will also probably be upheld.

It seems unlikely that today's Supreme Court believes that the "traditional role of the federal courts in our scheme of government" (to quote the test from *Schor, supra*) is to adjudicate private claims for damages between individuals. While these claims were admittedly once conceived as prototypical "private rights" to which *Crowell* applied and forever guaranteed a judicial forum, the public policy consequences are increasingly apparent to litigation which has a major effect of regulating important economic activity. The power of government to regulate has typically followed from the perception that an activity that was formerly thought of solely private has important externalities or public

consequences.[51] Mass torts and medical malpractice litigation are no different, and ultimately Congress will not be found to lack power to address the problems of frivolous litigation any more than it has lacked the power to deal with other serious economic and social problems in the past.

VI.

It is regrettable that most American lawyers are either "court people" or 'agency people" but not both. The American "civil justice system" actually consists of both courts and administrative tribunals and it is important to bring both sets of tools to bear as we consider strategies for civil justice reform. This paper has argued that there are distinctive advantages to administrative as opposed to judicial tribunals for developing and applying consistent and intelligent standards of care.

[51] *Cf. Munn v. Illinois*, 94 U.S. 113 (1876)(rates charged by a grain elevator [private property] may be regulated because "affected with a public interest").

DRAFT 5: NOT FOR PUBLICATION

The Forgotten Goal of Civil Justice: A Foundation for Common Sense in Daily Life

by Philip K. Howard

The debate over civil justice in recent decades has focused on its fairness. Tort reformers complain of "lawsuit abuse" and "judicial hell-holes."[1] Defenders of the current system talk of the need to protect the little guy against corporate abuses, and extol the jury system as "Democracy in Action."[2]

In this paper I argue that civil justice has a broader goal than fairness: to provide a foundation for reasonable choices in a free society. The main defect in the current system is not that juries are unfair or that there is an avalanche of litigation -- about which there is sharp disagreement[3] -- but that law does not offer predictable guidelines of who can sue for what. The system of justice offers recourse not only against abusive and negligent conduct, but also against conduct that most people consider reasonable. Civil justice tolerates, and arguably encourages,

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[1] *See* American Tort Reform Association, *Judicial Hellholes: 2004*, December 15, 2004, available at http://www.atra.org/reports/hellholes/report.pdf.

[2] Senator John Edwards, "Juries: Democracy in Action," *Newsweek*, December 15, 2003, p. 53.

[3] *See* Marc S. Galanter, *The Day After the Litigation Explosion*, 46 Md. L. Rev. 3, 4 (1986); *See also*, John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 Cornell L. Rev. 990 (1995), Arthur R. Miller, *Maybe Light at the End of the Tunnel: is the Litigation Explosion Imploding?*, 61 Def. Couns. J. 378 (1994), Marc S. Galanter, *News From Nowhere: The Debased Debate on Civil Justice*, 71 Denv. U. L. Rev. 77 (1993), Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641 (1987). For descriptions of the increase in litigation see Walter Olson, The Litigation Explosion: What Happened When America Unleashed the Lawsuit (1991); Brian J. Ostrom, Neal B. Kauder, and Robert C. LaFountain, eds., *Examining the Work of State Courts, 2002: A National Perspective from the Court Statistics Project* (National Center for State Courts, 2003) (All civil claims increased 23% between 1987 and 2001. Tort claims, a subset of civil claims, declined 9% since 1992 because traffic claims, which make up the bulk of tort claims, declined 14% during that period. The decline in traffic claims is attributable to the rise of no-fault insurance and other reforms designed to reduce the volume of those claims. Between 1975 and 2002, all tort claims increased a total of 38%, including the 9% decrease since 1992.)

inconsistent verdicts for similar disputes. The law offers few guidelines on standards of care or on the potential exposure when there is a dispute.

Civil justice has changed markedly in the last 40 years.[4] These changes can be traced in part to a shift in judicial philosophy: whatever authority judges believed they held withered with the rise of the "legal process" movement in the 1960s, in which their role was reconceived as one of a neutral referee.[5] The effect was not to achieve neutrality, however, but to leave a vacuum. That vacuum has been filled by an ever-broadening range of private legal claims and threats, giving rise to a lawsuit culture in which ordinary interaction is now weighed down by legal considerations.

The main harm to society is not the total cost of verdicts, but that Americans no longer feel free to act reasonably. Legal fear has infected the culture. Paranoid doctors focus on avoiding lawsuits.[6] Recreational activities are cancelled.[7] Teachers have trouble maintaining

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[4] *See* PHILIP K. HOWARD, THE COLLAPSE OF THE COMMON GOOD at 3-70 (2001); *See also* George L. Priest, *The Culture of Modern Tort Law*, 34 VAL. U. L. REV. 573 (2000) (discussion of the recent changes in tort law), George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985) , LAWRENCE FRIEDMAN, TOTAL JUSTICE (1985)

[5] *See* Charles E. Wyzanski, Jr., *Equal Justice Through Law*, 47 TULANE L. REV. 951, 959 (1973) (Representative of the prevailing opinion in the 1970s, Federal judge Wyzanski stated "Choosing among values is much too important a business for judges to do the choosing. That is something the citizens must keep for themselves"), MICHAEL SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 77 (1996) (Describing that the point of justice became to "respect people's freedom to choose their own values."); *See also* ERIC FONER, THE STORY OF AMERICAN FREEDOM 293 (1998) (Describing "a massive redefinition of freedom as a rejection of all authority", a contributing factor to the doctrinal shift).

[6] See e.g. David M. Studdert, Michelle M. Mello, William M. Sage, et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293 J. AM. MED. ASS'N 2609 (2005); Louis Harris and Associates, *Fear of Litigation Study: The Impact on Medicine*, New York, NY: Common Good (2002), available at http://cgood.org/assets/attachments/57.pdf.

[7] See e.g. Louv, Richard, *Last Child in the Woods: Saving Our Children from Nature-Deficit Disorder* (Algonquin Books) April 15, 2005; "More Green, Less Screen," Interview with Richard Louv, *People Magazine*, June 13, 2005; "For All Who Have Never Climbed a Tree," Marilyn Gardner, *Christian Science Monitor*, May 24, 2005; "Nature Deficit," Kevin O'Connor, *Rutland Herald*, May 1, 2005; "Playtime is Over," *Dallas Morning News*, March 3, 2005; "Old Rockets Fate is Up in the Air," Doug Grow, *Minneapolis Star Tribune*, November 29, 2004 ("[S]wings don't (continued...)

order.[8] Volunteerism is chilled.[9] Because of legal threats, and fear of possible claims, common institutions such as hospitals and schools are increasingly difficult to manage.[10]

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reach the sky as they once did. Slides, too, have changed in height and slope. Teeter-totters are gone."); "Playground Safety Left Up to Schools," Bob Kasarda, *The Northwest Indiana Times*, September 24, 2004 ("The wooden equipment that was popular a couple of decades ago has been replaced by a variety of low-lying metal equipment covered in rubber. ... Slides are now shorter and covered, gaps in the equipment have been narrowed to prevent children from placing their heads into openings and all swings have been removed."); "Cannonball!" Field Maloney, *The New Yorker*, August 30, 2004 ("After a golden age in the seventies--a decadent, late-Roman last hurrah--the American pool has suffered a gradual decline: thanks, for the most part, to concerns about safety and liability, diving boards have been removed and deep ends undeepened. At municipal pools across the country, the once-ubiquitous one-metre springboard has become an endangered species; and the three-metre high dive--the T. rex of the community pool--is now virtually extinct."); "Recess Gets Regulated," Sandy Louey, *Sacramento Bee*, August 22, 2004; "Extreme Cheerleading: How Schools Grapple with New Risks," Kris Axtman, *Christian Science Monitor*, June 24, 2004.

[8] See Arum, Richard, *Judging School* Discipline (Harvard, 2003); Public Agenda, "Teaching Interrupted: Do Discipline Policies in Today's Public Schools Foster the Common Good?" New York, NY: Common Good (May 2004), available at http://cgood.org/assets/attachments/22.pdf; Public Agenda, "'I'm Calling My Lawyer': How Litigation, Due Process and Other Regulatory Requirements Are Affecting Public Education," New York, NY: Common Good (November 1, 2003), available at http://cgood.org/assets/attachments/96.pdf.

[9] See e.g. "$17 Million Verdict Has Many Concerned," Derrick Nunnally, *Milwaukee Journal-Sentinel*, February 23, 2005; "Charity Case," Philip K. Howard, *The Wall Street Journal*, March 17, 2005; "Teams Offer Help on Parks," Rachel Gordon, *San Francisco Chronicle*, April 29, 2005 (The City of San Francisco is afraid to use volunteers to help fix softball fields because of "liability concerns—liability concerns—what happens if someone throws out their back patching the gopher holes in the outfield and decides to sue the city?"); "County Tells Bicyclist Thanks, but Stop Plowing Trail," Garrett Ordower, *Daily Herald (IL)*, February 21, 2004. On doctors volunteering, see e.g. Kapp, Marshall B., *Our Hands Are Tied: Legal Tension and Medical Ethics* (Westport: Auburn House, 1998), p. 43 ("Other examples of fear of malpractice litigation include 'physicians failing to stop and render aid in emergency situations despite the existence of Good Samaritan statutes in every jurisdiction that immunize physicians against liability, and the fact that no physician in the United States has ever been successfully sued for rendering emergency aid as a Good Samaritan."); "Report: Aid Needed for Clinics," Kerra L. Bolton, *The Asheville Citizen-Times*, April 27, 2005; "Paving the Way for Good Samaritans," Andy Miller, *The Atlanta Journal-Constitution*, March 12, 2005.

[10] For hospitals see e.g., Louis Harris and Associates, *Fear of Litigation Study: The Impact on Medicine*, New York, NY: Common Good (2002), available at http://cgood.org/assets/attachments/57.pdf; Linda T. Kohn, Janet Corrigan, et al., eds., *To Err is Human: Building a Safer Health System* (Washington, DC: National Academy Press, 2000) p. 43, http://www.nap.edu/books/0309068371/html/ ("Patient safety is also hindered through the liability system and the threat of malpractice, which discourages the disclosure of errors. The discoverability of data under legal proceedings encourages silence about errors committed or observed. Most errors and safety issues go undetected and unreported, both externally and within health care organizations."); "Two-Thirds of Emergency Departments Report On-call Specialty Coverage Problems," American College of Emergency Physicians, *Press Release*, September 28, 2004; "Emergency Departments Face Shortage of Specialty Care," Mary Ellen Schneider, *eObGyn News*, June 16, 2005 ("Obstetricians are among the specialists who are reluctant to take call because of the liability risks involved. ... Even if physicians are compensated for taking call, it's not enough to cover the related malpractice insurance costs. The risks incurred far exceed any payment provided."). For schools see e.g., Public (continued...)

The solution I propose is not to set arbitrary limits on lawsuits but to shift responsibility back to judges to decide, as a matter of law, the boundaries of reasonable claims. To re-instill the public trust in civil justice, judges need to provide people with a sense of who can sue for what.

The authority of judges to assert social norms, although rarely discussed today, is well-established in common law jurisprudence, and was the central theme of those we hold up as lions of the common law, such as Oliver Wendell Holmes, Jr. and Benjamin Cardozo. [11]

The question of what should be decided by a judge versus a jury, in truth, did not matter much until recent decades. Under prevailing social mores, it didn't occur to people to sue for ordinary accidents or workplace disagreements. But now that perception has radically changed: any disagreement or accident is a potential lawsuit.

The need to reassert judicial authority is not a matter of abstract preference for a particular judicial philosophy. The need to reassert judicial authority is profoundly practical: Because Americans no longer trust civil justice, they have lost their freedom to make reasonable daily choices.

Agenda, "Teaching Interrupted: Do Discipline Policies in Today's Public Schools Foster the Common Good?" New York, NY: Common Good (May 2004), available at http://cgood.org/assets/attachments/22.pdf; Louis Harris and Associates, "Evaluating Attitudes Toward the Threat of Legal Challenges in Public Schools," New York, NY: Common Good (March 10, 2004), available at http://cgood.org/assets/attachments/11.pdf; Public Agenda, "'I'm Calling My Lawyer': How Litigation, Due Process and Other Regulatory Requirements Are Affecting Public Education," New York, NY: Common Good (November 1, 2003), available at http://cgood.org/assets/attachments/96.pdf; Common Good, "The Effects of Law on Public Schools," Washington, DC, compiled for a forum entitled "Is Law Undermining Public Education?" (November 5, 2003), available at http://cgood.org/assets/attachments/10.pdf; Arum, Richard, *Judging School Discipline* (Harvard, January 2003) ; Gerald Grant, *The World We Created at Hamilton High* (Harvard, April 1998).

[11] See, Oliver Wendell Holmes, Jr., The Path of Law, 10 HARV. L. REV. 457 (1897). *Quoted* at nt. 69; BENJAMIN CARDOZO, THE NATURE OF JUDICIAL PROCESS 134 (Yale University Press 1921). "What really matters is this, that the judge is under a duty... to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience."

Civil Justice as the Foundation for Reasonable Choices

Civil justice is conceived today primarily as a dispute resolution mechanism. But civil justice also has a broader goal -- as the foundation for reasonable choices in a free society. Holmes stated that, "the first requirement of a sound body of law" is to uphold reasonable community norms. [12]

Derek Bok, former Harvard President and Law School Dean, observed that lawsuits "often have their greatest effect on people who are neither parties to the litigation nor even aware that it is going on." [13] The news last year that someone received a large verdict in a sledding accident had the natural effect of causing other towns to declare that they no would no longer permit winter sports on town property. [14] No court, however, made a ruling that sledding is an unreasonable risk. Who is representing the interests of the citizens who want to enjoy winter sports?

Law is considered the foundation of a free society not because it seeks to maximize possible legal claims -- as one observer noted, "America did not sue its way to greatness" [15] -- but because it sets forth legal guideposts defining the scope of our freedom. People feel free to interact reasonably with others because the system of law will put criminals in

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[12] *Quoted in* HOWARD, *supra* note ___ at 54 (2001)

[13] Derek Bok, *Law and Its Discontents: A Critical Look at Our Legal System*, 37th Annual Benjamin N. Cardozo Lecture, November 9, 1982, reprinted in *The Record*, January/February 1983, at 21. See Prosser and Keeton on *The Law of Torts* (5th ed. 1984): [T]he twentieth century has brought an increasing realization of the fact that the interests of society in general may be involved in disputes in which the parties are private litigants."

[14] See "Town's Downhill Pastime May Face an Uphill Fight," Patrick Healy, *The New York Times*, April 26, 2004; "Sledders Are Finding it Tough to Hit the Slopes," Christine Schiavo, *Philadelphia Inquirer*, January 26, 2005; "Where Sledders Head," Mark Shaffer, *Arizona Republic*, January 9, 2005; "This Winter, Sledders Finding it a Tough Go," David Rattigan, *Boston Globe*, January 6, 2005; "Citing Risk, Golf Clubs Look to Ban Sledding," Emily Sweeney and Douglas Belkin," Boston Globe, January 2, 2005; "Column: Liability, Litigation Make Sled Tracks Disappear," Taylor Armerding, *Gloucester Daily Times*, December 28, 2004.

[15] Discussion with Daniel Popeo, President, Washington Legal Foundation.

jail, enforce contracts by their terms, and require a negligent person to compensate the person injured. Civil law protects the good as well as prosecutes the bad: citizens in a free society should be confident that if they act reasonably, their freedom to do so will be defended. As long as you act within those guideposts, you are free: free to follow your instincts simply because you choose to.[16] "The end of law," John Locke said, "is not to abolish or restrain, but to preserve freedom."[17]

Today, at least in areas such as tort law, America's civil justice system is not providing these guideposts of right and wrong. There exists a widespread perception, generally accurate, that any injured or angry person can haul another person into court over any accident or disagreement and put that claim to a jury. There is also a perception that the amounts for which people may sue, if not unlimited, are subject to amorphous guidelines and few limits.

Current legal orthodoxy is that the availability of a lawsuit encourages people to act reasonably. Indeed, by making people potentially liable for their negligence, law provides incentives for reasonable conduct. What people seem to have forgotten is that the converse is

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[16] Prosser and Keeton note that an essential aspect of freedom is being free from "restraint and ...undue consideration for the interests and claims of others." See Prosser and Keeton, supra:

> Individuals have many interests for which they claim protection from the law, and which the law will recognize as worthy of protection...Individuals wish to be secure in their persons against harm and interference, not only as to their physical integrity, but as to their freedom to move about and their peace of mind. They want food and clothing, homes and land and goods, money, automobiles and entertainment, and they want to be secure and free from disturbance in the right to have these things, or to acquire them if they can. They want freedom to work and deal with others, and protection against interference with their private lives, their family relations, and their honor and reputation. They are concerned with freedom of thought and action, with opportunities for economic gain, and with pleasant and advantageous relations with others. The catalogue of their interests might be as long as the list of legitimate human desires; and not the least of them is the desire to do what they please without restraint and without undue consideration for the interests and claims of others.

[17] JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 57 (Peter Laslett ed., 1967)(1690).

also true: Allow lawsuits against reasonable behavior and pretty soon people no longer feel free to act reasonably.

An "open season" conception of justice has enormous appeal if people are thinking of getting back at others or looking for comfort in blaming others, but it also has infected daily interaction in society with distrust. People understand, as Professor Robert Kagan observed, that easy justice "can be used against the trustworthy, too. An equal opportunity weapon, it can be invoked by the misguided, the mendacious, and the malevolent, as well as by the mistreated."[18]

The ultimate test of a system of justice, Justice Cardozo suggested, is how people feel about it.[19] By that standard, civil justice is not only a failure, but is actively tearing at the fabric of our society.

Distrust of Justice and Social Decline

In almost every area of social interaction, Americans no longer feel free to act reasonably. The effects of this distrust have been the subject of extensive studies in healthcare, which have concluded that the legal system is a prime contributor to the crisis of cost and quality. Doctors and nurses no longer feel comfortable acting on their best judgment or being candid with each other.

- It is the ubiquitous practice of physicians to order tests that they do not believe are medically necessary, driving up the costs of healthcare.[20] In a 2002 Harris Poll,

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[18] *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2003)

[19] *See* BENJAMIN CARDOZO, THE NATURE OF JUDICIAL PROCESS 89 (Yale University Press 1921). Asserting that justice is, "not what I believe to be right. It is what I may reasonably believe that some other man of normal intellect and conscience might reasonably look upon as right."; *See also,* ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 110 (New York: Oxford University Press, 1976), Observing that, for law to be effective, it "must meet the needs of men and match their ethical sensibilities."

78% of physicians admitted ordering unnecessary tests and 94% said that other physicians did.[21] A recent survey in Pennsylvania found that 93% reported practicing defensive medicine, and 92% reported ordering unneeded tests and diagnostic procedures and making unnecessary referrals.[22] Defenders of this practice say that more tests mean better healthcare, but 45 million Americans lack health insurance in part because individuals and small businesses cannot afford healthcare premiums that have skyrocketed.[23]

- The Institute of Medicine has concluded that "patient safety is also hindered through the liability system and the threat of malpractice."[24] Doctors are scared to be candid with each other, leading to unnecessary and often tragic errors. They avoid using e-mail because it leaves a written record. They are reluctant to admit fault even in cases of near misses, where no harm is done to the patient.

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[20] Health care expenditures per person are projected to reach $6,477 per person in 2005. Sager, Alan and Deborah Socolar, "Health Costs Absorb One Quarter of Economic Growth, 2000-2005," Boston University School of Public Health: Health Reform Program Data Brief No. 8, February 9, 2005, pp. 11, 14, available at http://dcc2.bumc.bu.edu/hs/Health. U.S. spending per person is "just over" double that of persons in Canada, France, Germany, Italy, Japan, and the United Kingdom.The United States spends a greater percent of gross domestic product on health care than any other major industrialized nation. American healthcare now costs almost twice as much as that in other Western countries. In 2001, the United States spent 14.1 percent of the GDP on health care. This translates to $1.4 trillion, up 8.7 percent from 2000. ("Highlights from Health Tables and Chartbook," Health, United States 2003, National Center for Health Statistics, Centers for Disease Control, http://www.cdc.gov/nchs/products/pubs/pubd/hus/highlits.pdf.) More tests do not correlate positively with better outcomes. See "Should You Be Tested for Cancer___"

[21] Louis Harris and Associates, *Fear of Litigation Study: The Impact on Medicine*, New York, NY: Common Good (2002), available at http://cgood.org/assets/attachments/57.pdf

[22] David M. Studdert, Michelle M. Mello, William M. Sage, et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293 J. AM. MED. ASS'N 2609 (2005)

[23] U.S. Census Bureau, "Income, Poverty, and Health Insurance Coverage in the United States: 2003," August 2004, http://www.census.gov/prod/2004pubs/p60-226.pdf

[24] Linda T. Kohn, Janet Corrigan, et al., eds., *To Err is Human: Building a Safer Health System* (Washington, DC: National Academy Press, 2000) p. 43, http://www.nap.edu/books/0309068371/html/

- The legal system makes it difficult to hold bad doctors accountable. Doctors who make mistakes can drag out litigation for years, often compelling an unfair settlement. Inept doctors often successfully avoid efforts to revoke their licenses by hiring a lawyer and threatening to sue for defamation.

Distrust of the legal system has transformed public schools. Teachers struggle to maintain order in the classroom because they face threats of being dragged into hearings. The degradation of the school culture, as described by Prof. Richard Arum in his book, *Judging School Discipline*, is linked to requirements to "prove" the correctness of decisions in an adversarial proceeding.[25] The disrespect accorded teachers is shocking. Polls and focus groups show that educators will do almost anything to avoid the unpleasantness of legal hearings. In America today, teachers will not put an arm around a crying child for fear of being sued for an unwanted sexual touching.

Recreation has been transformed. Playgrounds have been stripped of anything athletic—for example, jungle gyms and seesaws. Playgrounds are so boring, according to some experts, that no child over the age of four wants to go in them. [26] I was on a panel convened by

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[25] *See generally* ARUM *supra* note ___; *See also* Public Agenda, "Teaching Interrupted: Do Discipline Policies in Today's Public Schools Foster the Common Good?" New York, NY: Common Good (May 2004), available at http://cgood.org/assets/attachments/22.pdf; Public Agenda, "'I'm Calling My Lawyer': How Litigation, Due Process and Other Regulatory Requirements Are Affecting Public Education," New York, NY: Common Good (November 1, 2003), available at http://cgood.org/assets/attachments/96.pdf .

[26] See e.g., HOWARD *supra* note ___ at 3-4 ("The new equipment is so boring, according to Lauri Macmillan Johnson, a professor of landscape architecture at the University of Arizona, that children make up dangerous games, like crashing into the equipment with their bicycles."); "More Green, Less Screen," *People Magazine*, June 13, 2005 (Child and nature advocate Richard Louv says playgrounds are "being designed to avoid lawsuits, so many of them are quite boring to kids."); "Playtime is Over," *Dallas Morning News*, March 3, 2005; "Old Rockets Fate is Up in the Air," Doug Grow, *Minneapolis Star Tribune*, November 29, 2004 ("[S]wings don't reach the sky as they once did. Slides, too, have changed in height and slope. Teeter-totters are gone."); "Playground Safety Left Up to Schools," Bob Kasarda, *The Northwest Indiana Times*, September 24, 2004 ("The wooden equipment that was popular a couple of decades ago has been replaced by a variety of low-lying metal equipment covered in rubber. ... (continued...)

Health Secretary Tommy Thompson in 2002, at which a group of experts concluded that re-instilling a culture of physical fitness was essential in order to address the surge in childhood obesity. Forty years ago, JFK's President's Council on Youth Fitness, with the same goal, called for installing monkey bars and other athletic equipment in playgrounds. Now, because of fear of liability, they've largely been ripped out.

Many other ordinary aspects of growing-up have disappeared. Lakes were closed to swimming as the word got out that you might get sued. Field trips are cancelled.[27] 'Recently, a school in Brooklyn had their beach day near Coney Island—the children were prohibited from going in the water for fear that someone might be liable if there were an accident.[28] A new book, Last Child in the Woods, addresses the cost to society when children lose the experience of spontaneous play and exploration.[29]

Business life has been transformed in many ways. "Foreign businessmen express amazement," Derek Bok observed, at "a system that exposes the entrepreneur to legal challenge so easily and on so many fronts, a system that lends itself so readily to harassment, obstruction, and delay." It is the regular practice of firms, including my own law firm, not to give references for fear of liability. Last year, a nurse admitted to killing 42 people in a string of hospitals in New Jersey and Pennsylvania. He was recognized as a troubled and ineffective nurse and would

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Slides are now shorter and covered, gaps in the equipment have been narrowed to prevent children from placing their heads into openings and all swings have been removed.").

[27] See e.g. "Safety Always an Issue on School Trips," Martha Irvine, *The Associated Press*, June 11, 2005; "Dealing with the Dresden Deficit a Challenge," Lynne Jeter, *Mississippi Business Journal*, March 7, 2005 ("[S]ome schools were not taking as many field trips due to discipline problems or liability concerns."); Gerald S. Cohen, "Schools Cancel Field Trips — Fear of Suits, *San Francisco Chronicle*, August 30, 1989.

[28] Conversation with Franklin Stone.

[29] Louv, Richard (Algonquin Books) April 15, 2005

soon be fired, but would get rehired at another hospital because no one would give him a bad reference. As one hospital administrator admitted, "we're prevented from telling one another what we know out of fear, quite frankly, of being sued." [30]

Symptoms of the distrust of justice are all around us. Warning labels are found on virtually every product. Billions of coffee cups contain the helpful legend "Caution: Contents are Hot." A recent winner of the annual "wacky warning" contest was a 5-inch fishing lure with the following legend: "Harmful if Swallowed."[31] The warnings cost little or nothing, apologists say. But that's not correct either. When every product has a warning, the effect is a version of the child crying wolf -- consumers are less likely to pay attention to the warnings that really matter.

In almost all areas of social interaction -- hospitals, schools, recreation, child-rearing activities, even churches and synagogues -- Americans no longer feel comfortable acting on their reasonable judgment. The reason, polls confirm, is distrust of American Justice. A new Harris Poll, commissioned for this conference, found the following:

- 76% of Americans strongly or somewhat agree that people have become so fearful of frivolous lawsuits that they are discouraged from performing normal activities. [32]
- 83% of Americans strongly or somewhat agree that the system of justice makes it too easy to make invalid claims. [33]

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[30] "Hospitals Didn't Share Records of a Nurse Accused in Killings," Richard Perez-Pena, *The New York Times*, December 17, 2003; see also "Would You Hire this Man?," *Christian Science Monitor*, March 1, 2004

[31] M-LAW, "Past Winners of M-Law's 'Wacky Warning Label' Contest," http://www.mlaw.org/wwl/pastwinners.html

[32] Louis Harris and Associates, *Public Attitudes Toward the Civil Justice System*, New York, NY: Common Good (2005)

[33] *Id.*

— 94% strongly or somewhat agree that there is a tendency for people to threaten legal action when something goes wrong.[34]

— 16% trust the legal system if someone makes a baseless claim against them.[35]

The lack of confidence in civil justice is echoed in numerous other polls.[36]

Defenders of our system of justice say that Americans are irrational, and that the crisis has been manufactured (i) by irresponsible media that makes headlines of occasional rogue jury verdicts and (ii) by a calculated scare campaign of tort reformers. It's correct that the media emphasizes anything that might shock or titillate the public.[37] This bad habit has been observed in the media since colonial days, and, in the land of the First Amendment, it is hard to know what to do about it. It is correct also that reformers have gone of the stump to tell the public that the litigation system is unfair.[38] Probably the biggest promoters of "jackpot justice," however, are

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[34] *Id.*

[35] *Id.*

[36] In a 1999 public opinion survey commissioned by the National Center for State Courts, for example, only 23% of the respondents had a great deal of trust in the court system. American courts were ranked below most institutions. Only the media and the state legislature were ranked worse. *See* Stephen S. Meinhold & David W. Neubauer, *Exploring Attitudes About the Litigation Explosion*, 22 JUST. SYS. J. 105 (2001); Indiana University Public Opinion Laboratory, *How the Public Views the State Courts: a 1999 National Survey*, Williamsburg, VA: National Center for State Courts & The Hearst Corporation, presented at the National Conference on Public Trust and Confidence in the Justice System (1999); David Neubauer & Stephen S. Meinhold, *Too Quick to Sue? Public Perceptions of the Litigation Explosion*, 16:3 JUST. SYS. J. 1 (1994); Gary A. Hengstler, *The Public Perception of Lawyers: ABA Poll*, 79-SEP A.B.A. J. 60 (1993); Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC'Y REV. 85 (1992); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); Louis Harris and Associates, *Public Attitudes Toward the Civil Justice System and Tort Law Reform*, Hartford, CT: Aetna Life and Casualty Company (1987); Darlene Walker et al., *Contact and Support: An Empirical Assessment of Public Attitudes Toward the Police and the Courts*, 51 N.C. L. REV. 44 (1972-1973)

[37] *Cf.* James Fallows, *Why Americans Hate the Media*, THE ATLANTIC MONTHLY, Feb. 1996 (criticism of the media's tendency to sensationalize), H. L. MENCKEN, A GANG OF PECKSNIFFS: AND OTHER COMMENTS ON NEWSPAPER PUBLISHERS, EDITORS, AND REPORTERS (1975)

[38] See e.g.; American Tort Reform Association (ATRA), "About" ATRA website at http://www.atra.org/about/ ("Some astonishing decisions come out of the courts these days. Hundreds of millions in punitive damages piled on top of relatively minor actual damages. Meritless cases settled because defendants fear the outcome of an emotion-

(continued...)

the plaintiffs'lawyers. One need only look through the Yellow Pages, or look at billboards, or listen to AM radio, to be barraged by lawyer advertisements encouraging Americans to believe that they can sue for anything.[39] The unavoidable message of those ads is that you might be on the receiving end of one of those lawsuits.

The data on the amount of litigation and the trend in verdicts are notoriously unreliable because fewer than 3% of all cases ever get resolved at trial, and the overwhelming number of claims are settled or disposed of in some other way.[40] Legal threats don't show up in the numbers at all. The best data appear to confirm that the amounts awarded by juries have increased and that the number of claims—at least of certain types— is also up.[41]

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filled jury trial or a lawless court. That's why the [ATRA] leads the fight for a better civil justice system--one that's fair, efficient and predictable," says ATRA President Sherman Joyce.); U.S. Chamber of Commerce Institute for Legal Reform (ILR), "About ILR—Who We Are," ILR website at http://www.instituteforlegalreform.com/about/index.html ("Many plaintiffs' lawyers are exploiting flaws in our legal system in search of jackpot justice."). See also Common Good, "Is the Legal System Broken?" *The New York Times* and *The Washington Post*, December 26, 2005 ("[S]tandards today are changeable from jury to jury. With uncertain legal boundaries, it seems that anyone can sue for almost anything. ... Reform must restore reliability to law.")

[39] A full 77 pages (pp. 535-612) of the 2004-2005 District of Columbia yellow pages are devoted to lawyer advertisements, many with provocative headings like "Whoever said justice had to be fair?", "Injured? Get the money you deserve", and "Millions Recovered". Lawyers do not limit themselves to ads in print; see, for example, a current (June, 2005) ad campaign targeting Washington, D.C. metro riders and internet surfers; available at www.milkmakesmesick.org

[40] Patrick E. Higginbotham, *So Why do we Call them Trial Courts?*, 55 SMU L. Rev. 1405, 1408 (2002) (Noting that although the number of federal civil cases filed rose by 152% between 1970 and 1999, that the number of claims reaching the jury fell by 20%, leaving only 3% of all claims reaching a jury).

[41] *Id. at* 1408., Brian J. Ostrom, Neal B. Kauder, and Robert C. LaFountain, eds., *Examining the Work of State Courts, 2002: A National Perspective from the Court Statistics Project* (National Center for State Courts, 2003) (All civil claims increased 23% between 1987 and 2001. Tort claims (a subset of civil claims) declined 9% since 1992 because traffic claims (which make up the bulk of tort claims) declined 14% during that period. The decline in traffic claims is attributable to the rise of no-fault insurance and other reforms designed to reduce the volume of those claims. Between 1975 and 2002, all tort claims increased a total of 38% (including the 9% decrease since 1992).); Stuart Taylor Jr. and Evan Thomas, "Civil Wars," *Newsweek*, December 13, 2003, p. 48 (Mean jury awards now exceed $1.2 million, up from approximately $600,000 in 1996); Seth A. Seabury, Nicholas M. Pace, and Robert T. Reville, "Forty Years of Civil Jury Verdicts," *Journal of Empirical Legal Studies* Vol. 1 (March 2004), available at http://www.blackwell-synergy.com/links/doi/10.1111/j.1740-1461.2004.00001.x/abs/?cookieSet=1 (Average jury (continued...)

As a matter of probabilities, however, the odds of being sued and then losing before a jury are remote for most Americans.[42] Studies also indicate that, in most cases, juries tend to do a reasonable job.[43] But there is contrary evidence –in tragic circumstances, such as a child injured in an accident or a baby born with birth defects, studies show that juries tend to award huge sums irrespective of fault.[44]

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awards tend to be highly variable from year to year, making it difficult to distinguish trends over relatively short periods of time. We use the longest time series of data on jury verdicts ever assembled: 40 years of data on tort cases in San Francisco County, CA and Cook County, IL collected by the RAND Institute for Civil Justice. We find that while there has been a substantial increase in the average award amount in real dollars, much of this trend is explained by changes in the mix of cases, particularly a decreasing fraction of automobile cases and an increase in medical malpractice. Claimed economic losses, in particular claimed medical losses, also explain a great deal of the increase. Although there appears to be some unexplained growth in awards for certain types of cases, this growth is cancelled out on average by declines in awards in other types of cases); On medical malpractice specifically, see Physician Insurers Association of America, *PIAA Claim Trend Analysis: 2003 ed.* (2004), cited in American Medical Association, "Medical Liability Reform—NOW," June 14, 2005, available at http://www.ama-assn.org/ama1/pub/upload/mm/-1/mlrnowjune142005.pdf (The median medical liability jury award in medical liability cases nearly doubled from 1997 to 2003, increasing from $157,000 to $300,000. The average award increased from $347,134 in 1997 to $430,727 in 2002. The growth in settlements has mirrored that of jury awards. Median and average settlements increased from $100,000 to $200,000, and from $212,861 to $322,544 between 1997 and 2002, respectively.); Jury Verdict Research, "Medical Malpractice Jury Award Median Up Slightly," Press Release, April 1, 2004, available at http://www.juryverdictresearch.com/Press_Room/Press_releases/Verdict_study/verdict_study8.html (Median award in medical malpractice cases was $1,010858 in 2002, up from $473,055 in 1996.)

[42] The chances of being sued are significant for physicians in certain specialties: [facts]

[43] *Cf.*, Thomas Munsterman, *How Judges View Civil Juries,* 48 Depaul L. Rev. 247, 249-253 (1998).

[44] In birth-injury cases, juries sided with plaintiffs 60% of the time in 2002, up 34 percent from two years earlier. The median award for childbirth-negligence cases in 2002 was $2.2 million. (Jury Verdict Research, cited in "Doctors Spell Out Risks of Childbirth on Consent Forms," Carol M. Ostrom, *The Seattle Times*, August 9, 2004.) When all malpractice claims are considered, however, plaintiffs win just 1% at trial and lose 4% at trial—with the remaining 95% being settled, dropped or dismissed. (Presentation of Lawrence E. Smarr , Physicians Insurers Association of America, to American College of Surgeons, June 23, 2003, at http://www.facs.org/about/chapters/smarr.pdf.) In large counties in 2001, plaintiffs prevailed in 27 percent of medical malpractice cases. (Bureau of Justice Statistics, "Civil Trial Cases and Verdicts in Large Counties, 2001," April 2004, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc01.pdf.) The median award for all malpractice cases was $425,000 in 2001. (Bureau of Justice Statistics, "Medical Malpractice Trials and Verdicts in Large Counties, 2001," April 2004, p. 1, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/mmtvlc01.pdf) On the correlation between the adverse events, negligence and jury awards, a study of malpractice claims published in the *New England Journal of Medicine* found "no association between the occurrence of an adverse event due to negligence or an adverse event of any type and payment. ... Among the malpractice claims we studied, the severity (continued...)

Arguing about probabilities of being sued does not take into account the reality of human nature. To feel free to act on their reasonable judgment, people seem to need clarity[45] -- for example, that the system of justice will affirmatively protect them if a baseless claim is brought. In the face of uncertainty, individuals often give disproportionate weight to risk—Nobel laureate Daniel Kahneman famously explained this phenomenon as the "overweighting of low probabilities," which helps explain why people think about sharks before swimming in the ocean, even though chances of being attacked are negligible.[46]

Being sued also is also an unlikely but horrifying event, and there are many more potential plaintiffs in our daily lives than there are sharks. Many doctors say that they view every patient as a potential plaintiff. Nothing could be easier, when something goes wrong, than to come up with a theory of what someone might have done differently. Once people learn that someone was exposed to a lawsuit for some ordinary life activity, that activity becomes a risk to avoid.[47] I could find no court that held that a seesaw was unreasonably dangerous, or that putting suntan lotion on children at camp would subject you to liability, but those are endangered

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of the patient's disability, not the occurrence of an adverse event or an adverse event due to negligence, was predictive of payment to the plaintiff." (Troyen A. Brennan, M.D., J.D., M.P.H., Colin M. Sox, B.A., and Helen R. Burstin, M.D., M.P.H., "Relation between Negligent Adverse Events and the Outcomes of Medical Malpractice Litigation," *The New England Journal of Medicine*, Volume 335: 1963-1967, December 26, 1996, Number 26, available at http://content.nejm.org/cgi/content/short/335/26/1963.)

[45] Indeed, researchers have found that people value "decorum, fairness, and *finality* in decision-making". David B. Rottman, *Public Perceptions of the State Courts: A Primer*, 15:3 CT. MANAGER 1, 3 (2000) (emphasis added).

[46] Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICS 263, 263 (1979). *See also* Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 Nw. U. L. Rev. 1295 (2003) (discussing the widespread fear and panic resulting from sniper killings in the Washington, D.C. area in the fall of 2002, even though the statistical probability of falling victim to the snipers was quite low.)

[47] Chief Justice Warren Burger noted almost twenty years ago a "litigation neurosis" developing in "otherwise normal, well-adjusted people". Chief Justice Warren E. Burger, *Isn't There a Bettter Way?*, 68 A.B.A. J. 275 (1982)

activities because Americans understand that one injured or disappointed person could unilaterally drag them through years of legal process.

"An act is illegal," Professor Donald Black once observed, "if it is vulnerable to legal action." [48] By that standard almost any accident or dispute today is illegal. That's why people are fearful.

Getting Beyond Tort Reform

The debate over "tort reform" in the last two decades has focused not on the effectiveness of justice as the foundation for reasonable daily choices, but whether civil justice achieves fairness in particular cases.[49] As Derek Bok noted 20 years ago, there is a tendency to concentrate on the "plight of individual litigants and ignore the effects on the system as a whole."[50]

Tort reformers talk about the "lawsuit lottery," and point to jurisdictions that are notoriously tilted toward claimants and characterize them as "judicial hell-holes" and "magic jurisdictions" where plaintiffs' lawyers can bring baseless or excessive claims with a high probability of success.[51] The focus throughout is fairness. "Is it fair to get a couple of million

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[48] Donald J. Black, The Mobilization of Law, 2 J. Legal Studies 125,131 n.24 (1973).

[49] Those engaged in the current tort reform debate would do well to heed Geoffrey Hazard's advice that "In all law reform it is important to be circumspect about the nature and magnitude of the problems to which reform is to be addressed." Geoffrey C. Hazard, Jr., *Individual Justice in a Bureaucratic World,* 7 TUL. J. INT'L & COMP. L. 73 (1999). To properly tackle the problems in the current system, it is important to take a broader view of the effect of civil justice on society.

[50] BOK, *supra* note ____ at 27.

[51] AMERICAN TORT REFORM ASSOCIATION, *supra* note 1.

dollars from a restaurant because you spilled a cup of hot coffee on yourself?"[52] As the Chamber of Commerce asks on its website, "How fair are your courts?"[53]

Actual reform proposals have not questioned the basic functioning of the system, however. As Professor Robert Kagan put it, tort reform has only "nibbled at the edges."[54] Indeed, many tort reformers have gone out of their way to suggest that the problem can be fixed with a few tweaks: "all it takes is a few of those magic jurisdictions to distort the whole system,"[55] said a representative of the National Association of Manufacturers. "A minor change in procedures—the class action bill now pending before Congress—can make that impossible by driving those kinds of mass claims into federal court."[56] (That legislation—the Class Action Fairness Act of 2005—was passed earlier this year.)

The medical profession has thrown its energy into an effort to "cap" non-economic damages at $250,000. If ever enacted, this would certainly moderate malpractice insurance premiums. But most doctors acknowledge that "caps" do little to alleviate the extreme distrust that doctors harbor towards the system. For example, limiting damages awarded for pain and suffering is of little help to an obstetrician who could not have caused a baby's birth defects

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[52] "Politicians, pundits, and industry leaders replayed endless variations on [this] theme summarized by the national Chamber of Commerce." Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 454 (2004) (citing Ralph Nader & Wesley J. Smith, No Contest: Corporate Lawyers and the Perversion of Justice in America 267 (1996)).

[53] See the main page of the U.S. Chamber of Commerce's Institute for Legal Reform (as viewed on June 21, 2005) at http://www.instituteforlegalreform.com/

[54] Robert A. Kagan, *How Much do Conservative Tort Tales Matter? On Haltom and McCann's Distorting the Law.* 33 (6/25/05) (*Unpublished manuscript)*

[55] Wallstreet Week with Fortune, Scruggs/Baroody Debate, aired Jan. 28, 2005, *available at* http://www.pbs.org/wsw/tvprogram/20050128.html.

[56] That class action legislation was passed earlier this year. *Id. [CITATION]*

but is nonetheless found liable for millions of dollars of "economic" damages representing a lifetime of care.[57]

Where tort reformers see the system as rigged by trial lawyers, opponents of reform portray tort reformers as special interests trying to rig the system their way. Joanne Doroshow, a founder of the Center for Justice and Democracy, put it this way: "there has been an increase in efforts to eviscerate the civil justice system and make sure corporations do not get sued for anything they do wrong." [58]

Opponents of tort reform also focus on fairness, which they define as the right to have every case decided by a jury. Robert S. Peck, the head of the Center for Constitutional Litigation, extols the virtues of modern civil justice this way:

> There, an individual, neither wealthy nor well-connected, can haul a huge multinational conglomerate into court and hold it accountable for its wrongful and harmful actions.[59]

"I trust the jury system and I trust the American people and their common sense," as trial lawyer Richard Scruggs put it, "far more than the National Association of Manufacturers to protect the American public."[60]

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[57] A majority of states have passed laws that limit defendant's exposure in personal injury actions; for example, by limiting non-economic damages or joint and several liability. But these citizens in take states still seem to distrust the system of justice.

[58] Justice For all: Speaking Truth to Power, 40-JUL Trial 20 (2004).

[59] Robert S. Peck, *Tort Reform's Threat to an Independent Judiciary*, 33 RUTGERS L.J. 835, 838 (2002).

[60] Wallstreet Week with Fortune, Scruggs/Baroody Debate, aired Jan. 28, 2005, *available at* http://www.pbs.org/wsw/tvprogram/20050128.html. The populist rhetoric by trial lawyers about "trusting the American people" doesn't seem quite accurate. As Walter Olson recounts in detail in "The Rule of Lawyers" (Truman Talley/St. Martin's 2003) jury selection is a highly manipulated process (by lawyers for both sides). Manuals explain that Mexican Americans are "passive" and "Orientals tend to go along with the majority." Lawyers use focus groups to figure out which juries would be most sympathetic to their arguments. In the silicone breast implant cases, for example, they discovered that blue collar men would be most likely to return verdicts for the plaintiffs. cite.

The impact of justice on the workings of a society is only touched on tangentially. Plaintiffs' lawyers often assert that lawsuits serve a "regulatory function," but when the results vary from case to case, it's hard to find the regulatory rule.[61]

The focus on fairness has proved unproductive on many levels. In any given case, the question of fairness can easily be argued either way. Take the McDonald's hot coffee case, the poster child of "lawsuit abuse." There, an elderly woman was badly burned when she put her coffee cup between her legs, and it spilled as her daughter drove away from the drive-through window. That's her fault, it's easy to say. On the other hand, McDonald's coffee was brewed 20 degrees hotter than other restaurants. Why should the drive-in window sell coffee that's so hot? Why not, aren't drivers grown up?

Arguing about fairness quickly turns into a version of a playground spat. Tort reformers talk about the need to limit frivolous lawsuits. Who can be against that? Defenders of the system talk about protecting the little guy against corporate wrongdoers. Who can be against that? Any functional system of civil justice, of course, should accomplish both goals: it should reliably get rid of frivolous lawsuits, and it should also effectively protect the little guy against a corporate wrongdoer.

What's missing in the debate is any coherent vision of how a system of justice should accomplish these goals.

The Responsibility of Judges vs. Juries.

Ad questionem facti non respondent judices . . .

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[61] The trial lawyers seem to assume,,contrary to substantial evidence, that the more exposure to liability, the better people will behave. Cites to health care studies, note __supra.

"Judges do not answer questions of fact..."

...ad questionem juris non respondent juratores.
"...jurors do not answer questions of law."

Sir Edward Coke, Commentary on Littleton 460 (J. H. Thomas ed., 1818).

Just as both sides to the tort reform debate have focused on fairness rather than the broader effects of civil justice on society, so too have they assumed that juries, not judges, have the responsibility of deciding whether conduct constitutes negligence or an unreasonable risk. Under current judicial orthodoxy, judges believe they should lean over backwards to put every case to a jury. One standard often quoted is *Conley v. Gibson*, 355 U.S. 41 (1957) admonishing lower courts not to dismiss any claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to recover."[62]

Any effort at legal reform is routinely resisted as trespassing on the constitutional right of trial by jury. But the role of the civil jury is generally misunderstood and, to the public, probably confused with the jury's role in criminal cases. In criminal prosecutions, juries play a critical role as our protection against the abuse of government power. Juries are our defense against state coercion: no one can be convicted to jail unless a jury decides they're guilty. But in a civil case, where citizens can use the justice system as an offensive weapon, the role of the jury depends upon whether the issues should be determined as a matter of law or as a matter of disputed fact.

The Seventh Amendment, which states that the "right of trial by jury shall be preserved," underscores this fact-law distinction. It defines the civil jury right as applying to "suits in common law" and ends by saying that "no fact tried by a jury shall be otherwise

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[62] Conley v. Gibson, 355 U.S. 41, 45 (1957).

reexamined...than according to the rules of the common law."[63] Judges declare the standards of law that affect all of society; juries find disputed facts in the particular case.[64]

While most lawyers assume today that the Seventh Amendment is an automatic pass to the jury, what constituted a "suit at common law" in 1791 was sharply limited. There was no cause of action for negligence, for example, until judges in the 19th century made rulings creating this new cause of action. Some issues -- say, interpretation of a statute -- are clearly law. Others are clearly issues of fact: "credibility determinations, the weighing of evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."[65]

Determining whether someone acted reasonably involves mixed questions of law and fact. Any claim for negligence, for example, usually involves what is reasonable conduct in the circumstances. The almost universal practice in tort cases is to give the claim to the jury. One study found that courts show "extreme vigilance against treading on contested fact issues or mixes questions of law and fact - even arguable ones - reserving them for evidentiary hearings . . . This was especially true in cases applying indeterminate legal standards, such as

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[63] U.S. CONST. amend. VII. "In suits in common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

[64] Arthur Miller, *The Pretrial Rush to Judgment: are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1083 (2003). (Positing that an issue that "involves the resolution of principles generally applicable to a class of cases" is a question of law for the judge). *See also* Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 GREEN BAG 367 (1999) (Commenting that "Marshall the judge seems memorable for his insistence that the courts deal only and impartially with questions of law")

[65] Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986)

reasonableness."[66] Most courts do not even pay attention to the question of what should be decided as a matter of fact or law.

> There has been ... a strong tendency to let all issues go to the jury without discriminating among them. Judges may see this not only as conventional, but also as convenient, because it reduces judicial effort and the risk of reversal.[67]

The general practice of American courts is summed up by a sign that once hung over the federal courtroom door in New Orleans: "No spitting. No summary judgment."[68]

There is a different tradition of civil justice, however, that, at least in tort law, would dramatically increase the responsibility of judges. In this tradition, articulated most notably by Oliver Wendell Holmes, Jr., the overriding goal of civil justice is to provide guidance and protection to society as a whole. Instead of acting as referees over a neutral process, judges have the obligation to make rulings of law on legal duty and standards of care. Whether seesaws are a reasonable risk would be determined by the judge as a matter of law.

This approach has been largely lost to our generation and, to most, probably seems like heresy. But the jurists that we hold up as our leading common law thinkers considered this an essential responsibility of judges. To Holmes, what constitutes reasonable conduct was a question that required a ruling of law:

> Negligence ... [is] a standard of conduct, a standard we hold the parties bound to know before-hand, and which in theory is always

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[66] Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 147 (2000), *Quoted* in Miller, *supra* nt. 50 at 1027.

[67] Schwarzer, Hirsch & Barrans, *supra* note 41, at 460.

[68] Steven A. Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 6 REV. LITIG. 263, 264 (1987).

> the same fact and not a matter dependent upon the whim of a particular jury nor the eloquence of the particular advocate.[69]

Benjamin Cardozo devoted his famous lectures in 1923 to the importance of this type of "judicial legislation":

> The judge is under a duty...to maintain a relation between law and morals, between precepts of jurisprudence and those of reason and good conscience. "it is the function of courts to keep doctrines up to date with the *mores* by continued restatement...This is judicial legislation, and the judge legislates at his peril. Nevertheless, it is the necessity and duty of such legislation that gives to judicial office its highest honor; and no brave and honest judge shirks the duty or fears the peril."[70]

Chief Justice Roger Traynor of the California Supreme Court, a famous liberal innovator -- he created the doctrine of strict liability for manufacturers whose products fail[71] -- emphasized the need for judges to declare rulings even in the simplest accident, and not leave standards to the "oscillating verdicts of juries."[72] When a woman hit her head on an angled ceiling while walking down a staircase, Traynor insisted that the judge determine whether it was an unreasonable hazard; in that case, "the danger is so apparent that visitors could reasonably be expected to notice it."[73]

Judges in tort cases today assume that they lack this power, but they need only look to commercial law to see the philosophy in action. In commercial law, the focus is predictability and efficiency. It is a well-established principle that judges, not juries, have the obligation to interpret standard language of contracts.[74] The Uniform Commercial Code was a

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[69] Oliver Wendell Holmes, Jr., *Law in Science and Science in Law,* 12 HARVARD L. REV. 443, 458 (1899)
[70] CARDOZO *Supra,* note 3 at 133-135.
[71] *See* Escola v. Coca-Cola Bottling Co. of Fresno, 24 Cal.2d 453 (1944).
[72] *Quoted* in G. EDWARD WHITE, TORT LAW IN AMERICA, 185 (Oxford University Press 1980).
[73] *Id.* at 190-191.
[74] *See e.g.* Joseph M. Perillo, *Comments on William Whitford's Paper on the Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts,* 2001 Wis. L. Rev. 965, 965 (2001) (Explaining the limited (continued...)

legislative effort to achieve consistency.[75] Its core concepts, including ones that look very much like those of tort, including reasonableness, are often decided as a matter of law in situations where the fact patterns are likely to be repeated. America's system of commercial law, generally considered the most consistent and predictable in the world, is the bedrock of America's economic strength.

The Supreme Court in recent years has begun to emphasize the goal of legal consistency. Several important decisions, for example, emphasized the desirability of judges using summary judgment to make rulings as a matter of law. In *Celotex v. Caltrett*, a wrongful death asbestos case, the court starkly shifted direction from the presumption that summary dismissal should be avoided if there was a "scintilla of evidence."[76] Thus,

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the

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instances in which juries interpret contracts: "Courts which follow the more traditional approach permit the jury to determine the proper interpretation of a contract only if the judge without the aid of parol evidence deems the contract to be ambiguous and parol evidence is then admitted to clarify the parties' intentions. A wider role is permitted by courts that follow the Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co., approach, which essentially allows the court to hear parol evidence to determine whether the writing is susceptible to more than one interpretation. If the court finds that the writing is susceptible to more than one interpretation, and parol evidence is admitted in the hearing of the jury, the jury is charged with determining the meaning of the writing"); *Cf.* Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581 (2005) (Stating that "contract interpretation is, of course, a judicial staple."), The Hon. Justice Michael Kirby AC CMG, *Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts*, 24 STATUTE L. REV. 95 (2003) (Observing that a large part of the work of judges is composed of interpreting contracts and statutes); *But see* William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 Wis. L. Rev. 931 (2001) (Stating that a significant proportion of cases involving contract interpretation are actually decided by juries).

[75] U.C.C. § 1-102(2)(c) (one of the main purposes of the U.C.C. is "to make uniform the law among the various jurisdictions.")

[76] *Supra* note 42 at 251. "Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority [referring to Celotex and Matsushita 516 U.S. 367] have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."

> federal rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." (quoting Fed. Rules Civ. Proc. 1.)[77]

In *Markman v. Westview Instruments*, Justice Souter explained the importance of consistency in patent cases:

> "...we see the importance of uniformity in the treatment of a given patent as an independent reason to allocate all issues of construction to the court. As we noted in *General Elec. Co. v. Wabash Appliance Corp.*, "[t]he limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public."[78]

What discourages economic energy, Justice Souter cautioned, was a legal system that created a "zone of uncertainty:"

> "[A] zone of uncertainty which enterprise and experimentation may enter only at the risk of infringement claims would discourage invention only a little less than unequivocal foreclosure of the field," *United Carbon Co. v. Binney & Smith Co.*, 317 U.S. 228, 236, 63 S.Ct. 165, 170, 87 L.Ed. 232 (1942), and "[t]he public [would] be deprived of rights supposed to belong to it, without being clearly told what it is that limits these rights."" *Merrill v. Yeomans*, 94 U.S. 568, 573, 24 L.Ed. 235 (1877).[79]

In *Cooper v. Leatherman*, the court held that the boundaries of punitive damages should be decided as a matter of law: "Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to

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[77] Celotex v. Caltrett, 477 U.S. 317, 327 (1986).

[78] Markman v. Westview Instruments, 570 U.S. 370, 390 (1996).

[79] *Id.*

punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself."[80]

In *State Farm v. Campbell*, the Court went further on punitive damages, suggesting clear guidelines so that claims of punitive damages could not be used to extort settlements.[81]

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose..[82]

In *Daubert v. Merrell Dow*, the court shifted the responsibility of what constitutes credible expert testimony from jury to judge:

> ...the Rules of Evidence -- especially Rule 702 -- do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.[83]

Professor Arthur Miller, in a thorough article on the history of the fact-law distinction, is critical of what he sees as this new trend to make decisions as a matter of law on summary judgment. His main point, it seems, is that judges should not be allowed to draw on their values:

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[80] Cooper Industries Inc. v. Leatherman Tool Group, 532 U.S. 424, 436 (2001), *Quoting* Justice Breyer in BMW of N. Am. v. Gore, 517 U.S. 559, 587.

[81] For further discussion of the value of punitive damages in the context of tort law, see E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053 (1989)

[82] State Farm Mut. Auto Ins. Co. v. Campbell 538 U.S. 408, 416-17 (2003). *Citations omitted.*

[83] Daubert v. Merrell Dow Pharms., 509 U.S. 579, 597 (Note that Federal Rule 702 was modified in Dec. 2000, and now reads: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case," thereby essentially codifying Daubert.)

> Judges are human, and their personal sense of whether a plaintiffs' claim seems "implausible" can subconsciously infiltrate even the most careful analysis.[84]

The idea of "result-oriented" decisions based on considerations of policy strikes Professor Miller as basically unlawful because "lower courts may curtail litigants' access to trials - and obviously a jury - through arbitrary, result-oriented, or efficiency-motivated determinants at the pretrial motion stage."[85]

At bottom, Professor Miller trusts juries more than judges. But Holmes and Cardozo did not necessarily think that judges are wiser than juries. Their point is that juries can't make consistent rulings. Juries have no authority make rulings at all. Every case is a blank slate. The idea that juries are "Democracy in Action," a kind of mini-election with decisions made on an ad hoc basis, has populist appeal. But the effect is that civil law offers no predictability or guidance.

It is correct that, in making rulings of law, judges will necessarily have to draw on their sense of community values. Cardozo agreed that a judge can never "eliminate altogether the personal measure of the interpreter," but explained that society can't function without a ruling by someone:

> You may say there is no assurance that judges will interpret the mores of their day more wisely and truly than other men. I am not disposed to deny this, but in my view it is quite beside the point. The point is rather that this power of interpretation must be lodged somewhere...[86]

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[84] *Supra* note 50 at 1071.

[85] *Id* at 1076.

[86] CARDOZO *Supra* nt. 9 at 136.

"The basic moral principle, acknowledged by every legal system we know anything about," Yale Professor Eugene Rostow once observed, "is that similar cases should be decided alike."[87] To accomplish that goal, judges must take the responsibility to draw the boundaries of reasonable lawsuits.

Restoring Reliability to Civil Justice:

Times have changed.

In many ways, the changes have been for the better. The shift in legal philosophy that began in the 1960s opened doors for broad segments of society. In our efforts to avoid abuses of authority, however, we undermined the authority needed to make common choices and to run the institutions of society, including the system of civil justice.

We have created a society obsessed with law. Legal threat, once a rare event in anyone's life, is now commonplace. A recent Public Agency survey found that 78% of middle and high-school teachers in American had been threatened by their students with possible violation of their legal rights.[88] The debate over civil justice cannot take place by putting a magnifying glass over a particular dispute. Arguments about fairness, or homilies about the common sense of juries,[89] do nothing to confront the reality that legal fear has become a defining feature of our culture.

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[87] *Quoted in* Ken Greenwalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 1001, nt. 65 (1978).

[88] Public Agenda, "Teaching Interrupted: Do Discipline Policies in Today's Public Schools Foster the Common Good?" New York, NY: Common Good (May 2004), available at http://cgood.org/assets/attachments/22.pdf

[89] "People who are entrusted to choose the leader of the free world are capable of weighing evidence in a courtroom—and they do, every day across America. I found again and again that they take their service seriously, and follow the law even when the law is at odds with what they personally believe." John Edwards *supra* nt. 2, "One suspects that some judges are simply selling the good faith and collective wisdom of juries short." Arthur Miller, *supra* nt. 67 at 1024.; *See e.g.*, R.R. Co. v. Stout, 84 U.S. 657, 664 (1874).

Other countries are beginning to have a similar problem of legal fear (perhaps influenced by American culture) and are proposing solutions. British Prime Minister Tony Blair recently gave a speech pointing to how fear of possible lawsuits has resulted in counterproductive behavior in England: "something is seriously awry when teachers feel unable to take children on school trips, for fear of being sued" or when a town "remove[d] hanging baskets for fear that they might fall on someone's head, even though no such accident has occurred in the 18 years they had been hanging there."[90]

The problem in the UK occurs not because of erratic juries -- the UK long ago abolished juries in most civil cases[91]-- but because judges are not focusing on the social policy implications of allowing certain claims. In an important decision in 2003, the Appellate Committee of the House of Lords took this issue on, and discussed the responsibility of judges to consider policy when deciding whether to permit claims.[92]

The case before the House of Lords could have been picked from many courts in America. On a hot day in the Cheshire region of England, an 18 year-old named John Tomlinson went for a swim in the lake of a local park.[93] Racing into the water from the beach, he dived too sharply and broke his neck on the sandy bottom. He was paralyzed for life.[94]

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[90] Tony Blair, British Prime Minister, Remarks at the Institute of Public Policy Research (May 26, 2005) *available at* http://www.number-10.gov.uk/output/page7562.asp.

[91] STEPHEN ADLER, THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM xv-xvi (Random House 1994). (Noting that while Britain technically maintains a jury system, only 1 percent of civil trials are decided before a jury).

[92] Tomlinson v. Congleton BC, [2003] UKHL 47.

[93] *Id.* at [2].

[94] *Id.* at [3].

Mr. Tomlinson sued the Cheshire County Council for not doing more to protect against the accident. The Council, he discovered, knew about the risk. There were three or four near drownings every year. "No swimming" signs had been posted and widely ignored for over a decade. The popularity of the park—more than 160,000 visitors every year—made effective policing almost impossible. Fearful of liability, the Cheshire Council had decided to close off the lake by dumping mud on the beaches and planting reeds. But before the reeds could be planted Mr. Tomlinson had his accident. The Cheshire Council should have acted sooner, as his lawyer argued, to prevent "luring people into a deathtrap"[95] and to protect against a "siren sound strong enough to turn stout men's hearts."[96] The lower court accepted this argument because the County obviously knew the danger.

The Law Lords took the appeal and ordered the case to be dismissed. The lead opinion by Lord Hoffmann declared that whether a claim should be allowed hinged not just on whether an accident is foreseeable, but "also the social value of the activity which gave rise to the risk."[97] Permitting Mr. Tomlinson's claim, the Law Lords held, means that hundreds of thousands of people would not be able to enjoy the park: "[T]here is an important question of freedom at stake. It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty."[98]

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[95] *Id.* at [28].

[96] *Id.*

[97] *Id.* at [34].

[98] *Id.* at [46].

The County's ineffective effort to prevent swimming, instead of establishing negligence, the Lords held, demonstrated how a misguided conception of justice hurts the public. "Does the law require that all trees be cut down," Lord Hobhouse asked, "because some youth may climb them and fall?"[99] Lord Scott added, "Of course there is some risk of accidents.... But that is no reason for imposing a grey and dull safety regime on everyone."[100]

The Tomlinson decision exposes the forgotten goal in American justice. Judges have lost sight of the fact that lawsuits concern not only the particular parties to the dispute, but everyone in society.[101] The mere possibility of a lawsuit changes people's behavior.

Protecting the freedom of everyone in society requires a basic shift in responsibility. Judges must delineate the boundaries of claims that implicate social policy. Judges must act as gatekeepers, as Holmes and Cardozo advocated, giving legal substance to general standards.[102]

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[99] *Id.* at [81].

[100] *Id.* at [94].

[101] In recent years, several state Supreme Courts have emphasized the importance of public policy in making rulings of law in tort cases. In a case involving a mugging on a town beach at night, the California Supreme Court ruled that the town should not be liable because, imposing tort liability "admonishes against any use of the property whatever, thus effectively closing the area." Hayes v. State of California, 11 Cal. 3d. 469, 473 (1974). The California Supreme Court also dismissed a claim that a touch football participant was too rough because "imposition of legal liability for such conduct might well alter fundamentally, the nature of the sport." Knight v. Jewett, 3 Cal. 4th 296, 319 (1992). *See* generally Stephen D. Sugarman, *Judges as Tort Law Unmakers: Recent California Experience with "New" Torts*, 49 DEPAUL L. REV. 455, 461 (1999). The New Jersey Supreme Court recently held that an accident involving 2 toddlers at a block party should be dismissed because, otherwise, people would stop having block parties. Commentators note that courts wanting to dismiss negligence claims based on policy often use the language of duty. See Dobbs, The Law of Torts, cite, "When courts say the defendant owed no duty that was relevant on the facts....To cast the issue in terms of duty is to provide another subliminal sugeestion--namely that the decision is to be made by judges rather than juries.": Id at 578.

[102] *See* Sheldon M. Novick, *The Collected Works of Justice Holmes*, Vol. 3, Holmes, *The Common Law*, 1881 at 109-304 (University of Chicago Press 1995) "...when standards of conduct are left to the jury, it is a temporary surrender of a judicial function which may be resumed at any moment in any case when the court feels competent to do so. Were this not so the almost universal acceptance of the first proposition in this Lecture, that the general foundation of liability for unintentional wrongs is conduct different from that of a prudent man under the (continued...)

This shift in responsibility is intended to accomplish two goals. It will spawn a body of legal opinions on standards of care and scope of duty that will begin to establish the contours of reasonable dispute. Most citizens don't eagerly await judicial slip opinions, of course, to learn how to behave. The more immediate benefit will be that the public will know that judges now see it as their job affirmatively to defend reasonable conduct.

The rule of thumb for when a legal ruling is needed should probably be this: if allowing a claim (or defense) to proceed to a jury would affect people not in the courtroom, by chilling their reasonable choices, then the judge should make a ruling of law as to the contours of the claim. Are the risks inherent in a public lake ones that society should take? Avoiding this ruling is not neutral. Not ruling, in effect, is a decision to close the lake. It doesn't matter if the jury finds no liability, because the next jury may feel differently.

Shifting this responsibility to judges to make these rulings does not implicate serious concerns of judicial authority, at least if we accept that judges in civil cases are empowered to make rulings of law based on legal policy considerations. The precedents are numerous and several state supreme courts have begun to limit tort claims on this basis. [103] Nor is there any obvious need for procedural tools other than those that already exist, such as summary judgment.[104]

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circumstances, would leave all our rights and duties throughout a great part of the law to the necessarily more or less accidental feelings of the jury."; CARDOZO, Supra nt. 9 at 106. "It is the customary morality of right-minded men and women which he is to enforce by his decree. A jurisprudence that is not constantly brought into relation to objective or external standards incurs the risk of denigrating into what the Germans call "Die Gerfuhlsjurisprudenz," a jurisprudence of mere sentiment or feeling."; *Supra* nt. 103.; *But see,* Stephen B. Presser, *The Development and Application of Common Law*, 8 TEX. REV. L. & POL. 291 (2004) (discussing the importance of following prior doctrine, criticizing Holmes, and admonishing judges who "make it up as they go along")

[103] *See,* Cooper v. Leatherman *Supra* nt. 84; Markman v. Westview *Supra* nt. 79; State Farm v. Campell, *Supra* nt. 84; Hayes v. State of California and Knight v. Jewett *Supra* nt. 103.

[104] FED. R. CIV. P., 56(c). "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to (continued...)

But it will take years of important judicial rulings, even from the Supreme Court, to effect a change in the way most courts handle cases.[105] The power of inertia is always underestimated, and the Supreme Court has learned many times that doctrinal shift does not necessarily occur because it says it should.

Legislation would send a clearer signal. Prime Minister Blair recently announced that he will propose a new Compensation Bill that will "clarify the existing law on negligence to make clear that there is no liability in negligence for untoward incidents that could not be avoided by taking reasonable care or exercising reasonable skill."[106] Such a bill, Prime Minister Blair proposed, "will send a strong signal and...reduce risk-averse behavior by providing reassurance to those who may be concerned about possible litigation, such as volunteers, teachers and local authorities."[107]

The significance of the proposed legislation in the UK will probably not be to provide clear legislative answers, but to shift the *goal* of civil justice. [108] Instead of focusing only on fairness and foreseeability in a particular case, judges will likely be called upon to make

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any material fact and that the moving party is entitled to a judgment as a matter of law."; *See also,* FED. R. CIV. P. 50, FED. R. CIV. P. 12(b)(6), FED. R. CIV. P. 16(1).

[105] One example is the recognition by courts of a journalistic privilege akin to those acknowledged for lawyers, doctors, and psychologists. Although the Supreme Court ostensibly rejected such a privilege in Branzburg v. Hayes, 408 U.S. 665 (1972), there remains disagreement among lower courts, with some following the dissenting opinions filed in the case (recognizing a privilege) and others following Justice Powell's concurrence (narrow interpretation of the holding, privilege should be recognized in some cases).

[106] BLAIR, *supra* note ___.

[107] *Id.*

[108] Judicial interpretation of traditional concepts like reasonableness seems inevitable--no statute or rulebook can account for the infinite range of possible accidents.

rulings, as both Holmes and Lord Hoffmann suggested, based on "considerations of social advantage."[109]

Legislation to restore judicial authority in America could be in the form of a general principle, along the following lines:

> Judges shall take the responsibility of drawing the boundaries of reasonable dispute as a matter of law, applying common law principles and statutory guidelines. In making these rulings, judges should consider the impact of allowing such claims (or defenses) on the conduct of broader society.

Legislation could also address specific areas of crisis. Congress has already introduced a bill to authorize pilot projects for administrative health courts, with hearings in the Senate expected over the summer. [110]

Law is a conservative institution, as it should be. The shift towards judicial responsibility will only occur after leaders of bench and bar, exercising their considerable powers of skepticism, reach their own understanding of why this change is essential. Some of the concerns, however, can be predicted.

All citizens are entitled to their day in court, many will observe. I would go further: the courthouse doors should never be barred, even to frivolous claims. The pertinent question is how far the claim goes, i.e., whether it is subject to dismissal by motion with a legal

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[109] Holmes, *Supra* nt. 4. "I think that judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often claimed aversion to deal with such considerations is simply to leave the very ground and foundations of judgments inarticulate, and often unconscious..."

[110] Cite to Enzi bill A broad coalition of healthcare providers, patient advocates and consumer groups has come together behind the bill, cites, and Common Good is in a joint venture with the Harvard School of Public Health to design the system.

ruling.[111] What I advocate is not taking away the right to sue, but giving substance to the right to sue. The doctrines developed by judicial rulings will also, of course, be subject to oversight by the legislature.

Conservatives may object that this is "judicial activism." But there is a difference between a judge assuming legislative functions, such as taking control of a school system, and a judge dismissing an unreasonable private claim. A kind of defensive activism, where judges act as gatekeepers, is essential to keep private parties from using justice unilaterally to undermine the freedom of others in society.

The main concern, I suspect, will focus on what is called "the right to sue." The mischief caused by civil justice in the last 40 years has sustained itself so long, in my view, because of a false assumption about the nature of civil justice. Pretty much everyone seems to believe there is a constitutional right to sue for almost everything.

Suing is not an act of freedom, however. The rights of freedom that our founders gave us, such as freedom of speech, were rights *against* state power. Suing *invokes* the state's coercive power against another private citizen--if you lose, the marshal may come and take your home away. Suing is just like indicting someone, except that it is an indictment for money. We would never tolerate a prosecutor bringing a baseless charge. Nor would we allow a prosecutor to threaten the death penalty for a misdemeanor.[112] That would be using state power for extortion. Why, then, do we tolerate allowing self-interested private parties to invoke legal power for whatever they want against other free citizens?

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[111] Sanctions footnote

An "open season" philosophy of justice does not enhance our constitutional rights. The point of freedom is almost exactly the opposite--that we can live our lives without being cowed by state power. When private parties use the threat of state power for their private benefit, without any moderating judicial authority, justice becomes a tool for extortion.

Holmes famously defined law as "The prophecies of what the courts will do."[113] Today in America, in areas such as tort law, no one has any idea of what a court will do. What that means, I submit, is that in these areas Americans have lost the protection of law. That's why Americans are fearful.

Shifting the responsibility to judges to draw the boundaries of claims is a major doctrinal change, comparable in scope to the shifts that occurred in the 1960s. But a bold change is required to restore public trust, and to revive the authority needed to nurture America's common institutions back to health. Sooner or later, as Derek Bok observed, "our legal system [must] empower someone to keep watch and make sure that the process as a whole is meeting the needs of those whom it purportedly serves."[114]

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[113] HOLMES, *Supra* note 4; *See, eg.,* CARDOZO, *Supra* nt. 4 at 112. "One of the most fundamental social interests is that law shall be uniform and impartial."

[114] Bok, *supra* note___ at 23.

U.S. Department of Justice

Office of the Associate Attorney General

Washington, D.C. 20530

Please call Along 6-4424 Shaw for pick once approved.

This is not travel expense. This just needs approval by ASG.

MEMORANDUM

To: Robert D. McCallum, Jr. RDM
Associate Attorney General

From: Neil M. Gorsuch NMG
Principal Deputy Associate Attorney General

Subject: Approval of Travel Reimbursement

Date: June 21, 2005

I am requesting your approval for the Department of Justice to accept payment of expenses for my participation at the 2005 President's Reception dinner sponsored by the D.C. Bar honoring Mr. John C. Cruden and benefitting the D.C. Bar Pro Bono Program. The function is related to my official duties with the Office of the Associate Attorney General. The following information is supplied in support of my request:

1. The sponsor of the event: D.C. Bar

2. The location of the event: Washington, D.C.

3. The date(s) of the event: June 23, 2005

4. The nature of the event: Dinner honoring Mr. John C. Cruden to the presidency of the DC Bar. I will participate as representative of U.S. Department of Justice, Office of the Associate Attorney General

5. My position: Principal Deputy Associate Attorney General

6. The travel dates: None

7. The name of any organization other than the sponsor offering to pay expenses: DC Bar

8. Description and estimated cost of benefits to be provided: Dinner ($100.00)

10. Type of benefits to be paid by a check made out to the Justice Department: None

11. I am ___ am not X working on any matter pending before the Department that would affect the interests of the organization paying my expenses.

Recommendation of Ethics Official

After conducting a conflict of interest analysis, I recommend that the request to accept travel expenses be approved.

DATE 6-23-05

Robert D. McCallum, Jr.
Associate Attorney General

DATE _____

Steven G. Bradbury

AFTER RECEIVING PAYMENT FOR YOUR TRAVEL EXPENSES, PLEASE PROVIDE THE FOLLOWING INFORMATION AND RETURN A COPY OF THE ENTIRE FORM TO YOUR ETHICS OFFICIAL. (YOU SHOULD NOW REPORT EXACT AMOUNTS ALTHOUGH YOU MAY PROVIDE THE APPROXIMATE COST OF MEALS IF THE EXACT COST IS NOT EASILY AVAILABLE.)

TYPE OF BENEFIT RECEIVED	COST	ACCEPTED IN KIND OR BY CHECK PAYABLE TO DOJ

1036504

U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

July 21, 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE Acting ASSOCIATE ATTORNEY GENERAL NMG 8/2/06

FROM: Sue Ellen Wooldridge
Assistant Attorney General

SUBJECT: Acceptance of Concurrent Legislative Jurisdiction at Bureau of Prisons Facilities in California

PURPOSE: To obtain the signature of Attorney General Gonzales

TIMETABLE: Review and signature without delay

SYNOPSIS: The Attorney General should accept concurrent criminal legislative jurisdiction, on behalf of the United States and from the State of California over the lands comprising the United States Penitentiary at Atwater, the former Federal Prison Camp at Boron, the Metropolitan Detention Center at Los Angeles, the Correctional Institution at Taft, and the Federal Correctional Institution at Mendota. Acceptance of concurrent legislative jurisdiction will allow the Federal Government to enforce certain federal laws that apply only within areas under the United States' legislative jurisdiction, without displacing state enforcement authorities.

DISCUSSION: The Bureau of Prisons (Bureau) desires to renew concurrent criminal legislative jurisdiction over the site of the United States Penitentiary at Atwater (USP Atwater), the former Federal Prison Camp at Boron (FPC Boron), the Metropolitan

Detention Center at Los Angeles (MDC Los Angeles), and the Correctional Institution at Taft (CI Taft), and acquire concurrent criminal legislative jurisdiction over the site of the Federal Correctional Institution at Mendota (FCI Mendota).

At the Environment Division's request, the State recently renewed cession of concurrent criminal jurisdiction to the United States over the first four sites, and ceded concurrent criminal jurisdiction to the United States over FCI Mendota. Under federal law, these cessions do not take effect until (1) accepted by the Attorney General and (2) the cession documents have been recorded in the County land records where the respective lands are located. This memorandum recommends that the Attorney General accept concurrent legislative jurisdiction on behalf of the United States for the sites.

RECOMMENDATION: I recommend that you sign the enclosed letter to the Chairman of the California State Lands Commission, accepting concurrent criminal jurisdiction for the sites of USP Atwater, FPC Boron, MDC Los Angeles, CI Taft, and FCI Mendota.

LEGAL BACKGROUND

Article I, Section 8, Clause 17, of the United States Constitution authorizes the federal government to exercise jurisdiction over lands it acquires within a state. Clause 17 provides: "The Congress shall have power * * * to exercise exclusive Legislation in all Cases" over "all Places purchased by the consent of the Legislature of the State in which the Same shall be" for forts, docks, and "other needful buildings." This Clause authorizes the United States to exercise either exclusive legislative jurisdiction (displacing state authority) or concurrent legislative jurisdiction (establishing concurrent federal and state authority) over federal property, where state consent has been given. See James v. Dravo Contracting Co., 302 U.S. 134, 148 (1937).

Certain acts violate federal criminal law wherever they are

committed and, therefore, are uniformly subject to federal prosecution. However, other acts do not violate federal criminal law unless they are committed in areas within the special maritime and territorial jurisdiction of the United States, including areas over which the United States has acquired legislative jurisdiction pursuant to Clause 17. See 18 U.S.C. § 7. Laws that apply only in areas of federal legislative jurisdiction include: 18 U.S.C. §§ 81 (arson); 113 (assaults); 114 (maiming); 117 (domestic assault by habitual offender); 661 (theft); 662 (receiving stolen property); 1111 (murder); 1112 (manslaughter); 1113 (attempt to commit murder or manslaughter); 1201 (kidnaping); 1363 (destruction of property); 1801 (video voyeurism); and 2111 (robbery). Where Congress has not specifically criminalized particular conduct, the Assimilative Crimes Act, 18 U.S.C. § 13, makes it a federal crime to commit any act that would be punishable under the criminal laws of the relevant state.

The Bureau of Prisons routinely seeks concurrent legislative jurisdiction at federal correctional institutions to ensure that the United States can prosecute conduct, especially inmate conduct, that violates such statutes. The Bureau typically seeks concurrent, rather than exclusive, jurisdiction so that the United States will have a choice whether to prosecute a particular crime or to leave the prosecution to state authorities. State cession of concurrent jurisdiction allows the United States to enforce all federal criminal laws, without displacing state enforcement authorities.

Consent by the state is a prerequisite to the federal government's acquisition of jurisdiction under Article I, Section 8, Clause 17. See James v. Dravo Contracting Co., 302 U.S. at 147, 148. Cession by a state of legislative jurisdiction is not effective until an authorized federal officer accepts the jurisdiction. See 40 U.S.C. § 3112, formerly 40 U.S.C. § 255. Only the U.S. Attorney General is authorized to accept legislative jurisdiction on behalf of the Bureau.

CALIFORNIA'S CESSION OF CONCURRENT LEGISLATIVE JURISDICTION

California law authorizes the California State Lands Commission to cede concurrent criminal legislative jurisdiction to the United States for periods not to exceed five years. See Cal. Gov't Code § 126(e). On September 17, 2001, the Commission

approved the cession of concurrent criminal legislative jurisdiction to the United States over the lands comprising FPC Boron, CI Taft, MDC Los Angeles, and USP Atwater. (These lands are described in Exhibit A to the attached acceptance letter.) On April 17, 2006, the Commission approved the renewed cession of concurrent criminal legislative jurisdiction over these sites, as well as the cession of concurrent criminal legislative jurisdiction over the land comprising FCI Mendota.

California law sets certain conditions for the transfer of jurisdiction. Of relevance here, it provides that the State "reserves jurisdiction over the land, water, and use of water with full power to control and regulate the acquisition, use, control, and distribution of water" and that the state "exempts and reserves * * * to the state all deposits of minerals." Cal. Gov't Code §§ 126(g), (h). In the past, the United States has accepted legislative jurisdiction notwithstanding these provisions. Approximately 10 years ago, staff counsel for the California State Lands Commission provided the Department of Justice with a legal analysis of these reservations, based on available legislative history. The Commission's counsel concluded:

> It is my opinion that these [reservations] should be read to apply only to those situations where the State of California has conveyed fee title to the United States. * * * they should not be considered conditions precedent to the transfer of legislative jurisdiction. There is nothing to suggest that the Legislature intended that the United States convey its water rights or mineral estates as a condition for a cession. Nor is there anything to suggest that this is or ever was the Commission's administrative practice.

Letter from James R. Frey to Michael E. Wall (May 3, 1996) (Exhibit B to the attached acceptance letter). The acceptance letter would confirm our understanding that these state-law reservations do not require the United States to convey any water rights or mineral estates as a condition of this cession.

CONCLUSION:

Acceptance of concurrent legislative jurisdiction at the site of five Bureau of Prison sites would allow the United States authority to enforce certain federal laws at these five sites, without displacing state authority.

This matter is time sensitive because federal concurrent criminal legislative jurisdiction over the lands comprising FPC Boron, CI Taft, MDC Los Angeles, and USP Atwater will lapse in October, 2006, pursuant to the sunset provision in Cal. Gov't Code § 126(e). Should jurisdiction lapse, the United States cannot enforce certain federal laws, including the Assimilative Crimes Act, 18 U.S.C. § 13, at the facilities.

Should you have any questions regarding this matter, please have your staff contact Justin Smith, of the Environment & Natural Resources Division's Law and Policy Section, at 514-0750, or George Younger, of the Federal Bureau of Prisons' Office of General Counsel, at 353-4595.

Attachment

Office of the Attorney General
Washington, D.C.

Mr. Steve Westly
Chairman
California State Lands Commission
100 Howe Avenue, Suite 100 South
Sacramento, CA 95825-8202

Dear Chairman Westly:

On April 17, 2006, acting pursuant to Cal. Gov't Code § 126, the California State Lands Commission (Commission) approved the cession of concurrent criminal legislative jurisdiction to the United States over the lands comprising the United States Penitentiary at Atwater; the former Federal Prison Camp at Boron; the Metropolitan Detention Center at Los Angeles; the Correctional Institution (also previously known as the Federal Correctional Institution) at Taft; and the Federal Correctional Institution at Mendota.

On behalf of the United States pursuant to 40 U.S.C. § 3112, I accept concurrent criminal legislative jurisdiction over the specified lands. (See Exhibits A1– A5, attached.) My acceptance shall take effect upon recording of certified copies of the cession documents of the Commission in the office of the county recorder of each county where the lands are situated.

The United States understands that Cal. Gov't Code § 126 does not require the United States to convey any water rights or mineral estate as a condition of this cession. This understanding conforms to the 1996 interpretation of section 126 provided by counsel to the California State Lands Commission.

Please execute the acknowledgment of receipt of this letter in duplicate and return one original to: Justin Smith, United States Department of Justice, Environment & Natural Resources Division, Law and Policy Section, P.O. Box 4390, Washington, D.C. 20044-4390. Should you need any further information, please have your staff contact Mr. Smith at (202) 514-0570.

I appreciate your assistance.

Sincerely,

Alberto R. Gonzales
Attorney General

OASG CORRESPONDENCE ROUTING AND ACTION

From: Sue Ellen Wooldridge	Date: 07/28/2006	Due Date: 8/02/2006	Workflow ID: 1036504

Subject: Memo requesting the AG's signature on duplicate copies of a letter to Steve Westly, Chairman of the California State Lands Commission, regarding acceptance of concurrent legislative jurisdiction at the BOP facilities in California.

Review: **Jeffrey Senger**	**Due Back for processing to Exec Secy: 8/02/2006**

Instructions: **Please review and provide written comments.**

From: **Jeffrey Senger**	To: **Neil M. Gorsuch**	Date: 7/28/06

Comments:

This is a letter for AG signature accepting concurrent jurisdiction over California BOP facilities, which will allow enforcement of certain federal laws there. Looks fine.

Jeff

From: **Neil M. Gorsuch**	To: **~~Robert D. McCallum, Jr.~~**	Date:

Comments:

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/21/2006 **WORKFLOW ID:** 1036504
DATE RECEIVED: 07/21/2006 **DUE DATE:** 08/02/2006

FROM: The Honorable Sue Ellen Wooldridge
Assistant Attorney General
Environment and Natural Resources Division
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

TO: AG

MAIL TYPE: Action Memorandum

SUBJECT: Memo requesting the AG's signature on duplicate copies of a letter to Steve Westly, Chairman of the California State Lands Commission, regarding acceptance of concurrent legislative jurisdiction at the BOP facilities in California.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
07/28/2006	For ASG initialing on Action Memorandum. Return to ES for forwarding to the DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS: 7/28/2006: ENRD submitted a revised pkg.

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

1036505

U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

July 21, 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 8/2/06

FROM: Sue Ellen Wooldridge
Assistant Attorney General

SUBJECT: Acceptance of Concurrent Legislative Jurisdiction at Bureau of Prisons Facility in Devens, Massachusetts

PURPOSE: To obtain the signature of Attorney General Gonzales

TIMETABLE: Review and signature without delay

SYNOPSIS: The Attorney General should accept concurrent criminal legislative jurisdiction, on behalf of the United States and from the Commonwealth of Massachusetts over the land comprising the Federal Medical Center Devens. Acceptance of concurrent legislative jurisdiction will allow the Federal Government to enforce certain federal laws that apply only within areas under the United States' legislative jurisdiction, without displacing state enforcement authorities.

DISCUSSION: The Bureau of Prisons (Bureau) desires to acquire concurrent criminal and civil legislative jurisdiction over the site of the Federal Medical Center at Devens (FMC Devens). The Commonwealth recently approved cession of concurrent jurisdiction to the United States over FMC Devens. Under federal law, this cession does not take effect until accepted by the Attorney General.

This memorandum recommends that the Attorney General accept concurrent legislative jurisdiction on behalf of the United States for the site.

RECOMMENDATION: I recommend that you sign the enclosed letter to Governor Romney of Massachusetts, accepting concurrent jurisdiction for the site of FMC Devens.

LEGAL BACKGROUND

Article I, Section 8, Clause 17, of the United States Constitution authorizes the federal government to exercise jurisdiction over lands it acquires within a state. Clause 17 provides: "The Congress shall have power * * * to exercise exclusive Legislation in all Cases" over "all Places purchased by the consent of the Legislature of the State in which the Same shall be" for forts, docks, and "other needful buildings." This Clause authorizes the United States to exercise either exclusive legislative jurisdiction (displacing state authority) or concurrent legislative jurisdiction (establishing concurrent federal and state authority) over federal property, where state consent has been given. See James v. Dravo Contracting Co., 302 U.S. 134, 148 (1937).

Certain acts violate federal criminal law wherever they are committed and, therefore, are uniformly subject to federal prosecution. However, other acts do not violate federal criminal law unless they are committed in areas within the special maritime and territorial jurisdiction of the United States, including areas over which the United States has acquired legislative jurisdiction pursuant to Clause 17. See 18 U.S.C. § 7. Laws that apply only in areas of federal legislative jurisdiction include: 18 U.S.C. §§ 81 (arson); 113 (assaults); 114 (maiming); 117 (domestic assault by habitual offender); 661 (theft); 662 (receiving stolen property); 1111 (murder); 1112 (manslaughter); 1113 (attempt to commit murder or manslaughter); 1201 (kidnaping); 1363 (destruction of property); 1801 (video voyeurism); and 2111 (robbery). Where Congress has not specifically criminalized particular conduct, the Assimilative Crimes Act, 18 U.S.C. § 13, makes it a federal crime to commit any act that would be punishable under the criminal laws of the relevant state.

The Bureau of Prisons routinely seeks concurrent legislative jurisdiction at federal correctional institutions to ensure that the United States can prosecute conduct, especially inmate conduct, that violates such statutes. The Bureau typically seeks concurrent, rather than exclusive, jurisdiction so that the United States will have a choice whether to prosecute a particular crime or to leave the prosecution to state authorities. State cession of concurrent jurisdiction allows the United States to enforce all federal criminal laws, without displacing state enforcement authorities.

FMC Devens is an administrative facility housing male offenders requiring specialized or long-term medical or mental health care. FMC Devens also has a satellite camp housing minimum security male inmates. The lands comprising FMC Devens were formerly part of Devens Army Base. Administrative control of this portion of the Devens Army Base was transferred by the Army to the Bureau in 1997. The Bureau is now seeking to establish concurrent federal legislative jurisdiction over offenses occurring at FMC Devens, with the concurrence of the Criminal Division of the Department of Justice. The Criminal Division agrees that federal authorities should have jurisdiction over any offenses committed by inmates at FMC Devens because state and local authorities often decline to address non-federal offenses that occur on the site.

Consent by the state is a prerequisite to the federal government's acquisition of jurisdiction under Article I, Section 8, Clause 17. See James v. Dravo Contracting Co., 302 U.S. at 147, 148. Cession by a state of legislative jurisdiction is not effective until an authorized federal officer accepts the jurisdiction. See 40 U.S.C. § 3112, formerly 40 U.S.C. § 255. Only the U.S. Attorney General is authorized to accept legislative jurisdiction on behalf of the Bureau.

MASSACHUSETTS' CESSION OF CONCURRENT LEGISLATIVE JURISDICTION

The Bureau of Prisons began efforts to acquire concurrent legislative jurisdiction over the land in Harvard, Massachusetts that comprises FMC Fort Devens in 1998. The effort was unusually difficult and lengthy. Massachusetts ultimately ceded concurrent criminal legislative jurisdiction over that land to the United States by an act of the Massachusetts legislature of December 27, 2004. See Chapter 481 of the Acts of 2004. This was

subsequently signed into law by the Governor of Massachusetts on January 6, 2005. (These lands are described in Exhibit A to the attached acceptance letter.)

CONCLUSION AND RECOMMENDATION:

Acceptance of concurrent legislative jurisdiction at the FMC Devens site would allow the United States authority to enforce and prosecute certain federal laws, as well as other, non-federal offenses, without displacing state authority.

The Bureau considers it a priority to obtain concurrent jurisdiction over FMC Devens by acceptance at the earliest possible date, to avert the risk that the United States may lack jurisdiction to prosecute offenses that may occur prior to acceptance.

Should you have any questions regarding this matter, please have your staff contact Justin Smith, of the Environment & Natural Resources Division's Law and Policy Section, at 514-0750, or George Younger, of the Federal Bureau of Prisons' Office of General Counsel, at 353-4595.

Attachment

OASG CORRESPONDENCE ROUTING AND ACTION

From: Sue Ellen Wooldridge	Date: 07/28/2006	Due Date: 8/02/2006	Workflow ID: 1036505

Subject: Memo requesting the AG's signature on the attached letter to Governor of Massachusetts Mitt Romney, regarding acceptance of concurrent legislative jurisdiction at the BOP facility in Devens, MA.

Review: **Jeffrey Senger**	**Due Back for processing to Exec Secy: 8/02/2006**

Instructions: **Please review and provide written comments.**

From: **Jeffrey Senger**	To: **Neil M. Gorsuch**	Date: 7/29/06

Comments:

Antheidette for AG signature accepting concurrent jurisdiction over Massachusetts BOP facility to permit enforcement of certain federal laws. Looks fine.

Jeff

From: **Neil M. Gorsuch**	To: ~~**Robert D. McCallum, Jr.**~~	Date:

Comments:

Office of the Attorney General
Washington, D.C.

The Honorable Mitt Romney
Governor of the Commonwealth of Massachusetts
Boston, MA 02133

Dear Governor Romney:

On behalf of the United States, pursuant to 40 U.S.C. § 3112 (formerly 40 U.S.C. § 255), I accept concurrent legislative jurisdiction over the lands described in Exhibit A (formerly part of Devens Army Base and now comprising the Federal Medical Center Devens) from the Commonwealth of Massachusetts, as provided in Chapter 481 of the Acts of 2004, approved on January 6, 2005. Administrative control of this federal property was transferred by the Army to the Department of Justice, Federal Bureau of Prisons, in 1997.

It is deemed highly desirable and in the interests of sound administration of federal penal institutions that the United States have concurrent jurisdiction over this property. While the Massachusetts session law referred to above cedes such jurisdiction, federal law requires a specific acceptance on behalf of the United States, which this letter provides. See 40 U.S.C. § 3112. This acceptance of cession of concurrent jurisdiction from the Commonwealth of Massachusetts to the United States is effective as of the above date.

Please execute the acknowledgment of receipt of this letter in duplicate and return one original to: Justin Smith, United States Department of Justice, Environment and Natural Resources Division, Law and Policy Section, P.O. Box 4390, Washington, DC 22044-4390. Should you need further information, please have your staff contact Mr. Smith at (202) 514-0750.

I appreciate your assistance.

Sincerely,

Alberto R. Gonzales
Attorney General

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 07/21/2006 **WORKFLOW ID:** 1036505
DATE RECEIVED: 07/21/2006 **DUE DATE:** 08/02/2006

FROM: The Honorable Sue Ellen Wooldridge
Assistant Attorney General
Environment and Natural Resources Division
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

TO: AG

MAIL TYPE: Action Memorandum

SUBJECT: Memo requesting the AG's signature on the attached letter to Governor of Massachusetts Mitt Romney, regarding acceptance of concurrent legislative jurisdiction at the BOP facility in Devens, MA.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
07/28/2006	For ASG initialing on Action Memorandum. Return to ES for forwarding to the DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS: 7/28/2006: ENRD submitted a revised pkg.

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

S.AMDT.2004
Amends: H.R.2863
Sponsor: Sen Graham, Lindsey [SC] (submitted 10/4/2005) (proposed 10/5/2005)

AMENDMENT PURPOSE:
To require the President to submit the procedures for the Combatant Status Review Tribunals and Administrative Review Boards to determine the status of detainees held at Guantanamo Bay, Cuba.

Amendment SA 2004 as modified agreed to in Senate by Unanimous Consent

SEC. __.
(a) **Submission of Procedures for Combatant Status Review Tribunals and Administrative Review Boards To Determine Status of Detainees at Guantanamo Bay, Cuba.**--Not later than 180 days after the date of enactment of this Act the President shall submit to the congressional defense committees and committees on Judiciary in the House and Senate the procedures for the Combatant Status Review Tribunals and noticed Administrative Review Boards, in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay, including whether any such detainee is a lawful enemy combatant or an unlawful enemy combatant.

(b) **Procedures.**--The procedures submitted to Congress pursuant to subsection (a) shall ensure that--

(1) in making a determination of status under such procedures, the Combatant Status Review Tribunal and Annual Review Boards may not consider statements derived from persons that, as determined by the Tribunals or Boards, by the preponderance of the evidence, were obtained with undue coercion.

(2) the Designated Civilian Official shall be an officer of the United States Government whose appointment to office was made by the President, by and with the advise and consent of the Senate.

(c) **MODIFICATION OF PROCEDURES.**--The President shall submit to Congress any modification to the procedures submitted under subsection (a) no less than 30 days before the date on which such modifications go into effect.

O:\ARM\ARM05J53.LC S.L.O.

John McCain

AMENDMENT NO. ____ Calendar No. ____

Purpose: Relating to persons under the detention, custody, or control of the United States Government.

IN THE SENATE OF THE UNITED STATES—109th Cong., 1st Sess.

H.R. 2863

Makin t c

AMENDMENT No. 1977 e for d for

By McCain

To: H.R. 2863

Refer 3 ____

Page(s)

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. MCCAIN, Mr. Graham, Mr. Hagel, Viz: Mr. Smith, Ms. Collins

At the appropriate place, insert the following:

SEC. ___. UNIFORM STANDARDS FOR THE INTERROGATION OF PERSONS UNDER THE DETENTION OF THE DEPARTMENT OF DEFENSE.

(a) IN GENERAL.—No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation

not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

(b) APPLICABILITY.—Subsection (a) shall not apply to with respect to any person in the custody or under the effective control of the Department of Defense pursuant to a criminal law or immigration law of the United States.

(c) CONSTRUCTION.—Nothing in this section shall be construed to affect the rights under the United States Constitution of any person in the custody or under the physical jurisdiction of the United States.

SEC. ___. PROHIBITION ON CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT OF PERSONS UNDER CUSTODY OR CONTROL OF THE UNITED STATES GOVERNMENT.

(a) IN GENERAL.—No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(b) CONSTRUCTION.—Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.

(c) LIMITATION ON SUPERSEDURE.—The provisions of this section shall not be superseded, except by a provi-

sion of law enacted after the date of the enactment of this Act which specifically repeals, modifies, or supersedes the provisions of this section.

(d) CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT DEFINED.—In this section, the term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

S.AMDT.2004
Amends: H.R.2863
Sponsor: Sen Graham, Lindsey [SC] (submitted 10/4/2005) (proposed 10/5/2005)

AMENDMENT PURPOSE:
To require the President to submit the procedures for the Combatant Status Review Tribunals and Administrative Review Boards to determine the status of detainees held at Guantanamo Bay, Cuba.

Amendment SA 2004 as modified agreed to in Senate by Unanimous Consent

SEC. __.
(a) **Submission of Procedures for Combatant Status Review Tribunals and Administrative Review Boards To Determine Status of Detainees at Guantanamo Bay, Cuba.**--Not later than 180 days after the date of enactment of this Act the President shall submit to the congressional defense committees and committees on Judiciary in the House and Senate the procedures for the Combatant Status Review Tribunals and noticed Administrative Review Boards, in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay, including whether any such detainee is a lawful enemy combatant or an unlawful enemy combatant.

(b) **Procedures.**--The procedures submitted to Congress pursuant to subsection (a) shall ensure that--

(1) in making a determination of status under such procedures, the Combatant Status Review Tribunal and Annual Review Boards may not consider statements derived from persons that, as determined by the Tribunals or Boards, by the preponderance of the evidence, were obtained with undue coercion.

(2) the Designated Civilian Official shall be an officer of the United States Government whose appointment to office was made by the President, by and with the advise and consent of the Senate.

(c) **MODIFICATION OF PROCEDURES.**--The President shall submit to Congress any modification to the procedures submitted under subsection (a) no less than 30 days before the date on which such modifications go into effect.

1041341

U.S. Department of Justice

Washington, D.C. 20530

August 1, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

THROUGH: Neil M. Gorsuch NMG 8/2/06
Acting Associate Attorney General

FROM: Lee J. Lofthus
Acting Assistant Attorney General
for Administration

SUBJECT: Senior Executive Service (SES) Bonus and Pay Adjustment Policy

PURPOSE: To obtain your approval on SES performance bonus and pay adjustment policy and to issue guidance to Components

TIMETABLE: As soon as possible.

DISCUSSION: This is to request your approval to issue SES operating guidance to Component Performance Review Boards (PRB) including the Department's 2006 performance bonus and pay adjustment policy.

In addition, this is to request approval to limit the Department's total performance bonus pool to 7 percent of career SES pay (statutory limitation is 10 percent) and limit the total number of career bonuses to 50 percent of the career executives (the 2005 government-wide average was 66.5 percent versus 53.5 percent for the Department of Justice).

Upon your approval, the Justice Management Division's Personnel Staff will issue implementing guidance which will include bonus and merit-based salary adjustment ranges based on performance rating levels. Lastly, all bonus and pay recommendations will be submitted to you for approval after being reviewed by the Senior Executive Resources Board.

RECOMMENDATION: I recommend that you sign the attached memorandum to Heads of Department Components.

ASAG:

Approve: _____ Concurring Components:
None

Disapprove: _____ Nonconcurring Components:
None

Other: _____

DAG:

Approve: _____ Concurring Components:
None

Disapprove: _____ Nonconcurring Components:
None

Other: _____

Attachment

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 08/01/2006 **WORKFLOW ID:** 1041341
DATE RECEIVED: 08/01/2006 **DUE DATE:** 08/07/2006

FROM: Mr. Lee J. Lofthus
Acting Assistant Attorney General for Administration
Justice Management Division
950 Pennsylvania Avenue, NW, Room 1112
Washington, DC 20530

TO: DAG

MAIL TYPE: Action Memorandum

SUBJECT: Memo requesting the DAG's signature on the attached memo for Heads of Department Components regarding the 2006 Senior Executive Service Bonus and Pay Adjustment Policy. (J1036840)

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
08/01/2006	For ASG initialing on Action Memorandum. Return to ES for forwarding to the DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS:

FILE CODE:

EXECSEC POC: Kim Tolson: 202-514-8588

OASG CORRESPONDENCE ROUTING AND ACTION

From: Lee Lofthus	Date: 8/1/2006	Due Date: 8/7/2006	Workflow ID: 1041341
Subject: Memo requesting the DAG's signature on the attached memo for Heads of Department Components regarding the 2006 Senior Executive Service Bonus and Pay Adjustment Policy.			
Reviewer:		Due Back for Processing to Exec Sec: 8/6/2006	
Instructions: **Please review and provide written comments.**			
From:	To: **Neil Gorsuch**		Date:
Comments:			
From:	To: **Neil Gorsuch**		Date:
Comments:			

1005324

U.S. Department of Justice

Washington, D.C. 20530

July 14, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 7/28/06

FROM: Lee J. Lofthus
Acting Assistant Attorney General
for Administration

SUBJECT: Extension of a Detail for an Office of Justice Programs Employee

PURPOSE: To obtain your approval to extend the detail of an Office of Justice Programs (OJP) employee to the United Nations Office of Drugs and Crime (UNODC).

TIMETABLE: The detail for [redacted] Office of Justice Programs, is scheduled to expire on July 18, 2006. The approval of this extension will extend the detail to July 18, 2007. [redacted] has been detailed to UNODC since July 2004.

SYNOPSIS: [redacted] will continue to serve as the coordinator of projects funded through the UNODC. She has been instrumental in a number of initiatives at the UNODC. [redacted] work is a great influence in the global struggle against transnational criminal activity and terrorism. This is a reimbursable detail. Details to international organizations may be approved for up to five years.

The proposed detail extension for [redacted] is in the best interest of the Department, and I recommend your approval.

APPROVE: _____ Concurring Component
OJP

DISAPPROVE: _____ Nonconcurring Component

OTHER: _____

Attachment

OASG CORRESPONDENCE ROUTING AND ACTION

From: Lee J. Lofthus	Date: 7/17/2006	Due Date: 7/20/2006	Workflow ID: 1005324

Subject: (Cable rec'd from ODAG) Requesting renewal of the extension of the detail of OJP employee [redacted] so that she may continue to lead the program at the UN Office on Drugs and Crime to strengthen the implementation of the UN convention against Transnational Organized Crime.

Review: Jeffrey Senger	Due Back for processing to Exec Secy: 7/18/2006

Instructions: **Please review and provide written comments.**

From: Jeffrey Senger	To: **Neil M. Gorsuch**	Date: 7/27/06

Comments:

Looks okay.

JLA

From: **Neil M. Gorsuch**	To: **Robert D. McCallum, Jr.**	Date:

Comments:

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 05/06/2006 **WORKFLOW ID:** 1005324
DATE RECEIVED: 05/19/2006 **DUE DATE:** 07/20/2006

FROM: The Honorable Gregory L. Schulte
Ambassador
U.S. Mission to International Organizations
Vienna
Austria

TO: AG, DAG, OJP Schofield and CRM Swartz

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: (Cable rec'd from ODAG) Requesting renewal of the extension of the detail of OJP employee [redacted] so that she may continue to lead the program at the UN Office on Drugs and Crime to strengthen the implementation of the UN convention against Transnational Organized Crime. See WFs 996768, 647808, 786642 & other related corres in ES.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
07/17/2006	For ASG initialing on Action Memorandum. Return to ES for forwarding to the DAG. Office of the Associate Attorney General

INFO COMPONENT: AG, OAG (Underhill), DAG, ODAG (McAtamney), OJP, CRM, OASG

COMMENTS: 7/17/2006: JMD submitted an action memo dated 7/14/06 recommending approval. (J1006431)
6/7/2006: Per JMD, they are working with OJP on this and requests a due date ext from 6/6 to 6/15/06. Ext approved by ES/Paige.
5/22/2006: Per ODAG (McAtamney), assign to JMD to prepare recommendation and appropriate documentation to the DAG, in coordination with OJP and CRM.

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

U. S. Department of Justice

Office of the Associate Attorney General

Senior Counsel for Alternative Dispute Resolution

MEMORANDUM

Washington, D.C. 20530

To: Neil M. Gorsuch
Principal Deputy Associate Attorney General
Office of the Associate Attorney General

From: Linda Cinciotta
Senior Counsel for Alternative Dispute Resolution
Office of Dispute Resolution

Subject: Three Guides Developed by the Steering Committee of the Federal Interagency Alternative Dispute Resolution Working Group

Date: May 3, 2006

A. BACKGROUND, QUESTION PRESENTED, AND RECOMMENDATION/DECISION

Background

The Steering Committee of the federal Interagency Alternative Dispute Resolution Working Group (the Steering Committee) developed three new draft guides intended to assist federal agencies in developing procedures, policies, and training in how to use alternative means of dispute resolution. The guides cover the following areas:

- confidentiality protection in federal workplace dispute resolution programs
- ethical considerations for federal employee mediators
- ombuds practice in the federal sector

The draft guides were widely disseminated for public comment. The Steering Committee has considered and disposed of the comments received, and has finalized the guides. The last step is to post the documents on the interagency alternative dispute resolution web site. Because the web site is managed by the Department of Justice/Office of Dispute Resolution, any document posted there is potentially viewed as having the endorsement of the Department.

Before the public comments had been received, you and I felt the primary authors should conduct a briefing for you, along with representatives from the Office of Legislative Affairs and Office of Legal Policy, on the substance of the guides. That briefing would have taken place after the Steering Committee had received, and dealt with, the public comments but before the guides were actually posted. After the public comments had been received and analyzed, you and I revisited the question of a briefing. In view of the paucity of the public comments received, and the fact that the feasible suggestions have been implemented in the final version of the guides, we

both felt that a briefing is probably unnecessary. We agreed that I would give you this memo about the process followed, the areas covered by each guide, and the disposition of the public comments.

Question Presented

Do you feel that you need a briefing, or does this memo give you all the information you need to concur in the posting of the guides on the interagency web site?

Recommendation/Your Decision

I recommend that you read this memorandum. The full text of the three guides, as well as summaries of the public comments received and their disposition, are attached for your convenience but I do not think you need to review them. I also do not think you will need a briefing.

Please let me know if you would like a briefing or any further information. If not, I can proceed with the posting of the guides.

B. DISCUSSION

Role of the Attorney General/Department of Justice

Pursuant to the Administrative Dispute Resolution Act of 1996 and the Presidential Memorandum of May 1, 1998, the Attorney General is the head of federal alternative dispute resolution, and is responsible for facilitating and encouraging the use of dispute resolution by agencies throughout the Executive Branch of the federal government. The Office of Dispute Resolution (ODR) discharges this responsibility.

Other federal agencies look to the Department of Justice for leadership and guidance in the area of alternative dispute resolution (ADR). ODR manages an interagency alternative dispute resolution web site (www.adr.gov) which is the primary government-wide source of information on ADR for federal agencies. The web site includes a guidance page that offers resource material for different areas, including confidentiality in ADR, environmental conflict resolution policy, arbitration guidance, federal procurement, and federal court-annexed ADR programs.

Role of the Interagency Alternative Dispute Resolution Steering Committee

ODR represents the Attorney General on the Steering Committee of the federal Interagency Alternative Dispute Resolution Working Group (Steering Committee). The members of the Steering Committee are subject matter experts who are senior alternative dispute resolution professionals representing 32 federal agencies (all of the Cabinet departments and many of the independent agencies). They are responsible for facilitating and encouraging use of alternative

dispute resolution in the practices of their respective organizations.

Each of the three guides was written by a sub-group of the Steering Committee that called upon those with knowledge and expertise in the particular area. The draft guides then were considered and approved by the full Steering Committee before they were offered for public comment.

Opportunity for Public Comment on the Draft Guides

Federal Register publication is required only for "rule" documents designed to implement, interpret, or prescribe law or policy. The Steering Committee guides are "notice" documents which offer best practices for agencies to follow but do not require that they do so. Hence, Federal Register publication was not required. Nonetheless, ODR and the Steering Committee decided that a limited publication in the Federal Register, as well as a brief opportunity for public comment, was desirable. A summary notice, inviting public comment within thirty days, was published in the Federal Register on November 9, 2005, and it advised readers that the full text of the three draft guides was available on the interagency ADR web site. (In addition, the same summary notice with invitation for public comment was disseminated through the interagency ADR web site listserv, which has 200 subscribers interested in federal ADR.)

Very few public comments were received. Most of the suggestions received were implemented in the final version of the guides. Virtually all of the suggestions that were not adopted were impractical, infeasible, or beyond the scope of the guide.

The Draft Guides and Disposition of Comments Received

The following discussion summarizes: the areas covered by each of the three draft guides; the comments received on each guide; and the Steering Committee's disposition of those comments. Each of the guides, and the summary of comments received/disposition for each guide, are attached.

- "Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace Alternative Dispute Resolution Program Administrators"

  The Document (Attachment A). The Confidentiality Guide provides practical guidance to federal administrators on the application of the confidentiality provisions of the Administrative Dispute Resolution Act of 1996 to federal workplace dispute resolution programs. It describes in practical, non-legal terms the nature and limits of confidentiality in federal alternative dispute resolution proceedings, and provides suggestions to program administrators on how to ensure appropriate confidentiality is maintained when ADR is used in workplace programs. The topics addressed by the Guide include confidentiality during the various stages of an alternative dispute resolution proceeding, confidentiality agreements, record-keeping, program evaluation, access requests, and non-party

participants.

Comments and Disposition (Attachment B). Comments were received from two individuals and, following receipt of those public comments, members of the Steering Committee provided limited additional suggestions to further clarify the language and intent of the Guide. Clarifications, a correction, and editorial changes were made to implement most of the changes. A suggestion that the functions of agency program administrators be delineated precisely could not be implemented because those functions vary widely from agency to agency. The other suggestions that could not be implemented pertained to matters beyond the scope of the Guide: initiating an audit into arguably illegal conduct uncovered during the proceeding; provision of legal advice on the enforceability of agreements which increase confidentiality protections beyond those provided by statute; and analysis of the relationship between statutory confidentiality provisions and other laws and regulations that authorize access to, or reporting of, certain classes of information.

- "A Guide for Federal Employee Mediators"

The Document (Attachment C). The Guide for Mediators provides practical ethical guidance for federal employee mediators tailored to mediation practice within the federal government. It builds upon the September 2005 Model Standards of Conduct for Mediators issued by a joint committee of three major nationwide organizations (the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution) and approved by all three organizations. The Guide sets forth the Model Standards in their entirety and provides further explication through Federal Guidance Notes for federal employee mediators for mediations they undertake for the federal government. The Federal Guidance Notes include discussion of impartiality, conflicts of interest, confidentiality, and advertising and solicitation.

Comments and Disposition (Attachment D). Comments were received from two individuals, raising what each perceived as an ambiguity in a particular provision. Both concerns had merit and appropriate clarifications were made in the guide.

- "A Guide for Federal Employee Ombuds"

The Document (Attachment E). The Guide for Ombuds was developed by the Coalition of Federal Ombudsmen in conjunction with the Steering Committee. It builds upon the Standards for the Establishment and Operations of Ombuds Offices issued on February 9, 2004, by the American Bar Association. The Guide sets forth the Ombuds Standards in their entirety and provides supplementation through Federal Guidance Notes for specific areas unique to federal Ombuds practice. The Federal Guidance Notes include discussion of limitations on ombuds' authority, confidentiality, reporting, and record keeping.

Comments and Disposition (Attachment F). Comments were received from four sources. The first source is an individual who suggested editorial changes in the American Bar Association Standards, but the Steering Committee is without authority to change standards promulgated by another entity. Two individuals submitted joint comments suggesting clarification and/or elaboration in five areas. The relevant portions of the guide were revised to incorporate their suggestions. A federal agency submitted suggestions in five areas, and they were implemented with one exception. The exception related to implied notice and appeared to construe a constraint too narrowly. In any event, the implied notice provision was clarified in accordance with other comments submitted.

Final Step: Publication of the Guides As Final Documents

The Steering Committee is ready to publish the guides, as final documents, on the interagency web site. Each guide will be accompanied by a separate document which explains in detail each public comment received and the disposition of each comment in the final guide. In addition, ODR will publish a brief notice in the Federal Register which notes that the final guides, and summary of the disposition of the public comments on them, are posted on the interagency web site. (In addition, the same brief notice about the posting of the final guides and disposition of comments received will be disseminated through the interagency ADR web site listserv.)

Since we manage the interagency web site, the guides will be potentially viewed as having the endorsement of ODR/Department of Justice. The Office of the Associate Attorney General (Elizabeth Kessler, Deputy Associate Attorney General) reviewed the draft guides before they were offered for public comment and had no concerns or suggested changes. In view of the fact that the draft guides were widely disseminated for public comment, and that virtually all of the suggested changes were implemented, ODR does not believe publication of the guides will generate any controversy or problem. Nonetheless, ODR wanted the Office of the Associate Attorney General to have the opportunity to review the final version of the guides if desired before posting on the web site.

Attachments

Attachment A:	"Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace Alternative Dispute Resolution Program Administrators"
Attachment B:	Public Comments Received on the Confidentiality Guide and Their Disposition
Attachment C:	"A Guide for Federal Employee Mediators"
Attachment D:	Public Comments Received on the Federal Employee Mediator Guide and Their Disposition
Attachment E:	"A Guide for Federal Employee Ombuds"
Attachment F:	Public Comments Received on the Federal Employee Ombuds Guide and Their Disposition

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 05/10/2006
DATE RECEIVED: 05/19/2006
WORKFLOW ID: 1005380
DUE DATE: 07/20/2006

FROM: Terri Merriman
Rensselaer County Legislature
1600 7th Avenue
Troy, NY 12180

TO: AG

MAIL TYPE: General

SUBJECT: Enclosing a copy of Resolution No. P/288/06, adopted by the Rensselaer County Legislature on 5/9/2006, requesting federal and state review of rising gas prices.

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
07/17/2006	For component review. Office of the Associate Attorney General

INFO COMPONENT: OAG, ODAG, OASG, OIPL

COMMENTS: 7/17/2006: Per ODAG (Elston), forwarded to OASG for concurrence.
7/13/2006: ATR submitted proposed response and referral letter to FTC for OIPL signature. Forwarded to ODAG (Elston) for review. OIPL will run off final letters on OIPL letterhead.

FILE CODE:

EXECSEC POC: Shirley McKay: 202-514-5305

Ms. Terri Merriman
Rensselaer County Legislature
1600 Seventh Avenue
Troy, NY 12180

Dear Ms. Merriman:

Thank you for sending to the Department of Justice a copy of Resolution P/288/06. We appreciate knowing of your concerns regarding gasoline prices.

Like you, the United States Department of Justice is concerned about the adverse consumer impact of the increasing prices for gasoline and other refined petroleum products. Given the importance of energy to Americans' everyday lives and to the American economy, we have substantially increased our efforts to monitor, detect, pursue, and prevent violations of law in this industry. The Attorney General and Federal Trade Commission (FTC) Chairman Deborah Platt Majoras have written to the state attorneys general expressing concern about the adverse impact of increasing gasoline prices on American consumers and encouraging the states to work with us to ensure that appropriate enforcement action is taken against unlawful conduct resulting in artificial price spikes. Recently, the Attorney General and Chairman Majoras met with state attorneys general and their representatives to further this effort.

The Department shares civil antitrust enforcement authority with the FTC. The FTC has primary responsibility for investigating possible non-criminal antitrust violations in oil and gasoline markets. However, the Department has sole authority for criminal antitrust enforcement against hard-core violations such as price-fixing in all markets, including oil and gasoline.

At the President's directive, the Department and the FTC are undertaking a special inquiry to ensure that all evidence of potential anticompetitive conduct is carefully examined. We are coordinating our efforts with the FTC and with state attorneys general as appropriate. You may be assured that if any evidence of criminal conduct is uncovered, the Department will pursue it and take whatever enforcement action is warranted.

Thank you again for bringing your concerns to our attention. We have also forwarded a copy of Resolution P/288/06 to the FTC.

Sincerely,

Crystal R. Jezierski
Director

Ms. Jeanne Bumpus
Office of Congressional Relations
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Dear Ms. Bumpus:

Pursuant to the liaison agreement between the Antitrust Division and the Commission, we are forwarding the enclosed correspondence from the Rensselaer County Legislature to you for consideration and response. We have advised the members of this referral.

Thank you for your cooperation in this matter.

Sincerely,

Crystal R. Jezierski
Director

Enclosure

OASG CORRESPONDENCE ROUTING AND ACTION

From: Thomas Barnett	Date: 7/17/2006	Due Date: 7/20/2006	Workflow ID: 1005380
Subject: Enclosing a copy of Resolution No. P/288/06, adopted by the Rensselaer County Legislature on 5/9/2006, requesting federal and state review of rising gas prices.			
Review: Lily Fu Swenson		Due Back for processing to Exec Secy: **7/18/2006**	
Instructions: **Please review and provide written comments.**			

From: **Lily Fu Swenson**	To: **Neil M. Gorsuch**	Date: 7/24/06

Comments:

OK – recommend concurrence. I might delete the word "hard-core" in describing criminal violations but it is a stylistic matter.

From: **Neil M. Gorsuch**	To: **Robert D. McCallum, Jr.**	Date:

Comments:

This is ok. NMG 7.27

RECOMMENDATION: It is recommended that the Attorney General invite the President to provide remarks at the Human Trafficking Conference. It is recommended that the Office of the Attorney General work with the Office of Presidential Scheduling to identify a time during the three-day conference that would be convenient for the President to speak.

APPROVE: _____

DISAPPROVE: _____

OTHER: _____

DATE: _____

Attachment

OASG CORRESPONDENCE ROUTING AND ACTION

EXPEDITE (SPECIAL) EXPEDITE

From: Regina Schofield	Date: 8/2/2006	Due Date: 8/7/2006	Workflow ID: 1037819

Subject: Memo requesting the AG's approval and signature on the attached letter inviting the President to attend and provide remarks at the Human Trafficking Conference being held on 10/3-10/5/2006 in New Orleans, LA. States that this conference will bring together a diverse audience of researchers, law enforcement officers, victim advocates, justice professionals, and faith-based and community providers to discuss the complex issues surrounding human trafficking and then collaborate on strategies to help reduce and prevent the crime in the future.

Reviewer:	Due Back for Processing to Exec Sec: 8/6/2006

Instructions: **Please review and provide written comments.**

From: Andi Bottner	To: **Neil Gorsuch**	Date:

Comments: looks great! 8/2/06

From:	To: **Neil Gorsuch**	Date:

Comments:

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

SPECIAL

DATE OF DOCUMENT: 07/25/2006
DATE RECEIVED: 07/25/2006
WORKFLOW ID: 1037819
DUE DATE: 08/07/2006

FROM: The Honorable Regina B. Schofield
Assistant Attorney General
Office of Justice Programs
U.S. Department of Justice

Washington, DC 20531-0001

TO: AG

MAIL TYPE: Action Memorandum

SUBJECT: Memo requesting the AG's approval and signature on the attached letter inviting the President to attend and provide remarks at the Human Trafficking Conference being held on 10/3-10/5/2006 in New Orleans, LA. States that this conference will bring together a diverse audience of researchers, law enforcement officers, victim advocates, justice professionals, and faith-based and community providers to discuss the complex issues surrounding human trafficking, and them collaborate on strategies to help reduce and prevent the crime in the future.

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
08/02/2006	For ASG initialing on Action Memorandum. Return to ES for forwarding to the DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS: 8/2/2006: OJP submitted a revised pkg.7/28/2006: Per OASG, pkg returned to OJP for edits.

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

SPECIAL

OASG CORRESPONDENCE ROUTING AND ACTION

EXPEDITE (SPECIAL) EXPEDITE

From: Regina Schofield	Date: 8/2/2006	Due Date: 8/7/2006	Workflow ID: 1037819

Subject: Memo requesting the AG's approval and signature on the attached letter inviting the President to attend and provide remarks at the Human Trafficking Conference being held on 10/3-10/5/2006 in New Orleans, LA. States that this conference will bring together a diverse audience of researchers, law enforcement officers, victim advocates, justice professionals, and faith-based and community providers to discuss the complex issues surrounding human trafficking and then collaborate on strategies to help reduce and prevent the crime in the future.

Reviewer:	Due Back for Processing to Exec Sec: 8/6/2006

Instructions: **Please review and provide written comments.**

From: Andi Bottner	To: **Neil Gorsuch**	Date:

Comments: looks great! 8/2/06

From:	To: **Neil Gorsuch**	Date:

Comments:

1020253

U.S. Department of Justice

Washington, D.C. 20530

June 20, 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL 8/4/06

FROM: Lee J. Lofthus
Acting Assistant Attorney General
for Administration

SUBJECT: Proposed Reorganization of the Office of Justice Programs

PURPOSE: The Office of Justice Programs (OJP) is proposing to put into place a new organizational structure that will foster operational and managerial efficiencies and provide for enhanced accountability. OJP's proposal is responsive to recently-enacted legislative provisions addressing improved oversight of OJP grants, including establishment of an Office of Audit, Assessment, and Management to carry out and coordinate program assessments and ensure compliance with grant conditions. By implementing these specific changes, as well as those summarized below and on the attached document, this reorganization will improve OJP's overall responsiveness to the criminal justice field, states, localities, tribes, the general public, and the Congress.

TIMETABLE: The Assistant Attorney General, OJP, has requested a decision be made as soon as possible.

SYNOPSIS: The reorganization will: (1) expand the Program Review Office currently within the Office of the Assistant Attorney General and transform it into an Office of Audit, Assessment, and Management; (2) consolidate the functions and personnel of the Office of the Comptroller and the Office of Budget and Management Service and establish a new Office of the Chief Financial Officer (OCFO); (3) realign the current Office of Administration and show it on the organization chart; (4) eliminate the Office of Management and Administration from the organization chart; (5) realign the Equal Employment Opportunity Office to report

to the Office of the Assistant Attorney General; (6) eliminate the Office of Weed and Seed from the organization chart and realign its functions within the Community Capacity Development Office (CCDO); (7) eliminate the American Indian and Alaskan Native Desk from the organization chart and realign its functions within the CCDO; (8) eliminate the Office of the Police Corps and Law Enforcement Education from the organization chart and realign its remaining functions within the Bureau of Justice Assistance; and (9) change the name of the box entitled Chief Information Officer to the Office of the Chief Information Officer.

DISCUSSION: These changes, described in more detailed in the attached document, will transform OJP into an organization that is more streamlined and responsive to the customer, and that has an enhanced ability to respond to internal and external stakeholders' needs. These outcomes will be accomplished by streamlining OJP's program and administrative functions, eliminating structures with overlapping missions, programs and functions, and centralizing and simplifying lines of authority and accountability. For example, the establishment of the OCFO will consolidate and centralize budgetary and financial functions. This reorganization will fulfill several strategic goals that were identified in a 2001 report to Congress. It will enable OJP to become an even more efficient organization.

It has been determined that Office of Management and Budget (OMB) and Congressional notification will be required prior to implementing these changes. I will initiate these actions upon your approval of the reorganization. This reorganization will not require a budgetary reprogramming.

RECOMMENDATION: Signature on the attached organizational chart and memorandum to the Assistant Attorney General, OJP, approving the reorganization, contingent on review and approval by OMB and Congress.

APPROVE: _____

DISAPPROVE: _____

OTHER: _____

Concurring Components:

OLC: Sgb 8/2/06

Nonconcurring Components:
None

Attachments

U.S. Department of Justice
Office of Legal Counsel

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

August 2, 2006

MEMORANDUM FOR ALBERTO R. GONZALES
Attorney General

Re: Proposed Reorganization of the Office of Justice Programs

ACTION MEMORANDUM

The attached proposed organization chart and memorandum were prepared by the Justice Management Division, and forwarded by the Acting Assistant Attorney General for Administration to this Office for review with respect to form and legality.

The proposal would establish a new organizational structure for the Office of Justice Programs (OJP) to improve operational and managerial efficiency and provide for enhanced accountability. In particular, the most significant parts of the proposal would (1) expand the Program Review Office currently within the Office of the Assistant Attorney General and transform it into an Office of Audit, Assessment, and Management; (2) consolidate the functions and personnel of the Office of the Comptroller and the Office of Budget and Management Service and establish a new Office of the Chief Financial Officer; (3) realign the current Office of Administration and show it on the organization chart; (4) realign the Equal Employment Opportunity Office to report to the Office of the Assistant Attorney General; (5) eliminate the Office of Weed and Seed from the organization chart and realign its functions within the Community Capacity Development Office (CCDO); (6) eliminate the American Indian and Alaskan Native Desk from the organization chart and realign its functions within the CCDO; and (7) eliminate the Office of the Police Corps and Law Enforcement Education from the organization chart and realign its remaining functions within the Bureau of Justice Assistance. These changes would be accomplished within existing budgetary and personnel resources.

Your signature on the chart will constitute approval of the reorganization. Your signature on the memorandum will advise the Assistant Attorney General of OJP of your approval. The Justice Management Division has determined that notification of the Office of Management and Budget and Congress is required.

The organization chart and memorandum are approved with respect to form and legality.

Steven G. Bradbury
Acting Assistant Attorney General

OASG CORRESPONDENCE ROUTING AND ACTION

From: Lee Lofthus	Date: 8/3/2006	Due Date: 8/8/2006	Workflow ID: 1020253

Subject: Memo requesting the AG's approval and signature on the attached memo and reorganization chart approving the proposed reorganization of OJP. Advises that this package is nearly identical to the one proposed earlier and dated 5/5/2006, but eliminates the item related to OJP's competitive sourcing initiative.

Reviewer: Andi Bottner	Due Back for Processing to Exec Sec: 8/7/2006

Instructions: **Please review and provide written comments.**

From: Andi Bottner	To: **Neil Gorsuch/Greg Katsas**	Date:

Comments:

Looks good! 8/4/06

Andi

From:	To: **Neil Gorsuch/Greg Katsas**	Date:

Comments:

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 06/20/2006 **WORKFLOW ID:** 1020253
DATE RECEIVED: 06/20/2006 **DUE DATE:** 08/08/2006

FROM: Mr. Lee J. Lofthus
Acting Assistant Attorney General for Administration
Justice Management Division
950 Pennsylvania Avenue, NW, Room 1112
Washington, DC 20530

TO: AG

MAIL TYPE: Action Memorandum

SUBJECT: Memo requesting the AG's approval and signature on the attached memo and reorganization chart, approving the proposed reorganization of OJP. Advises that this package is nearly identical to the one processed earlier and dated 5/5/06, but eliminates the item related to OJP's competitive sourcing initiative. See WF 999268. (J1018617)

DATE ASSIGNED	ACTION COMPONENT & ACTION REQUESTED
08/03/2006	For ASG initialing on Action Memorandum. Return to ES for forwarding to the DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS: 8/3/2006: OLC submitted a memo dtd 8/2/06, approving order with respect to form and legality.

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

U.S. Department of Justice
Office of Legal Counsel

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

August 2, 2006

MEMORANDUM FOR ALBERTO R. GONZALES
Attorney General

Re: Proposed Reorganization of the Office of Justice Programs

ACTION MEMORANDUM

The attached proposed organization chart and memorandum were prepared by the Justice Management Division, and forwarded by the Acting Assistant Attorney General for Administration to this Office for review with respect to form and legality.

The proposal would establish a new organizational structure for the Office of Justice Programs (OJP) to improve operational and managerial efficiency and provide for enhanced accountability. In particular, the most significant parts of the proposal would (1) expand the Program Review Office currently within the Office of the Assistant Attorney General and transform it into an Office of Audit, Assessment, and Management; (2) consolidate the functions and personnel of the Office of the Comptroller and the Office of Budget and Management Service and establish a new Office of the Chief Financial Officer; (3) realign the current Office of Administration and show it on the organization chart; (4) realign the Equal Employment Opportunity Office to report to the Office of the Assistant Attorney General; (5) eliminate the Office of Weed and Seed from the organization chart and realign its functions within the Community Capacity Development Office (CCDO); (6) eliminate the American Indian and Alaskan Native Desk from the organization chart and realign its functions within the CCDO; and (7) eliminate the Office of the Police Corps and Law Enforcement Education from the organization chart and realign its remaining functions within the Bureau of Justice Assistance. These changes would be accomplished within existing budgetary and personnel resources.

Your signature on the chart will constitute approval of the reorganization. Your signature on the memorandum will advise the Assistant Attorney General of OJP of your approval. The Justice Management Division has determined that notification of the Office of Management and Budget and Congress is required.

The organization chart and memorandum are approved with respect to form and legality.

Steven G. Bradbury
Acting Assistant Attorney General

OASG CORRESPONDENCE ROUTING AND ACTION

From: Lee Lofthus	Date: 8/3/2006	Due Date: 8/8/2006	Workflow ID: 1020253

Subject: Memo requesting the AG's approval and signature on the attached memo and reorganization chart approving the proposed reorganization of OJP. Advises that this package is nearly identical to the one proposed earlier and dated 5/5/2006, but eliminates the item related to OJP's competitive sourcing initiative.

Reviewer: Andi Bottner	Due Back for Processing to Exec Sec: 8/7/2006

Instructions: **Please review and provide written comments.**

From: Andi Bottner	To: **Neil Gorsuch/Greg Katsas**	Date:

Comments:

Looks good! Andi 8/4/06

From:	To: **Neil Gorsuch/Greg Katsas**	Date:

Comments:

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 06/20/2006 **WORKFLOW ID:** 1020253
DATE RECEIVED: 06/20/2006 **DUE DATE:** 08/08/2006

FROM: Mr. Lee J. Lofthus
Acting Assistant Attorney General for Administration
Justice Management Division
950 Pennsylvania Avenue, NW, Room 1112
Washington, DC 20530

TO: AG

MAIL TYPE: Action Memorandum

SUBJECT: Memo requesting the AG's approval and signature on the attached memo and reorganization chart, approving the proposed reorganization of OJP. Advises that this package is nearly identical to the one processed earlier and dated 5/5/06, but eliminates the item related to OJP's competitive sourcing initiative. See WF 999268. (J1018617)

DATE ASSIGNED	**ACTION COMPONENT & ACTION REQUESTED**
08/03/2006	For ASG initialing on Action Memorandum. Return to ES for forwarding to the DAG. Office of the Associate Attorney General

INFO COMPONENT:

COMMENTS: 8/3/2006: OLC submitted a memo dtd 8/2/06, approving order with respect to form and legality.

FILE CODE:

EXECSEC POC: Barbara Wells: 202-616-0025

OASG CORRESPONDENCE ROUTING AND ACTION

From: Lee Lofthus	Date: 8/3/2006	Due Date: 8/8/2006	Workflow ID: 1020253

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Reviewer: Andi Bottner	Due Back for Processing to Exec Sec: 8/7/2006

Instructions: **Please review and provide written comments.**

From: Andi Bottner	To: **Neil Gorsuch/Greg Katsas**	Date:

Comments:

Looks good!

Andi

8/4/06

From:	To: **Neil Gorsuch/Greg Katsas**	Date:

Comments:

Fax Transmission

Office of the Deputy General Counsel (Legal Counsel)
Department of Defense

Room 3B652 Pentagon
Phone: (703) 571-9351
Fax: (703) 614-6745 (unclassified)
(703) 614-2040 (secure)

Classification: Unclassified

TO: Neil Gorsuch
Department of Justice

FAX#: (202) 514-0238

FROM: Frank Jimenez

DATE: July 8, 2005 **Number of Pages: 15**

SUBJECT: Draft Specter Legislation

Very close hold. Please share with Pat Philbin and Peter Keisler. Specter is calling Jim Haynes on Monday. Please provide informal views by then.

Title: To provide comprehensive procedures for the adjudication of cases involving unprivileged combatants.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; AUTHORITY; FINDINGS.

(a) Short Title.—This Act may be cited as the "Unprivileged Combatant Act of 2005".

(b) Authority.—The requirements, conditions, and restrictions established by this Act are made under the authority of Congress under clauses 1, 10, 11, 12, 13, 14, and 18 of article I, section 8 of the Constitution of the United States.

(c) Findings.—Congress finds the following:

(1) Article I, section 8, of the Constitution provides that the Congress has the power to "constitute Tribunals inferior to the Supreme Court; ... define and punish ... Offenses against the Law of Nations; ... make Rules concerning Captures on Land and Water; ... make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof".

(2) The Supreme Court has repeatedly recognized military tribunals, as stated in Madsen v. Kinsella 343 U.S. 341, 1952, "[s]ince our nation's earliest days, such tribunals have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war....They have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth." Madsen, citing In re Yamashita, 327 U.S. 1 (1946).

(3) The President has inherent authority to convene military tribunals arising from his role as Commander and Chief of the Armed Forces under article II of the Constitution and from title 10 of the United States Code. Due to the extraordinary circumstances of the ongoing war on terrorism, it is appropriate for Congress to provide additional and explicit authorization of and procedures for military tribunals to adjudicate and punish offenses relating to the war on terrorism.

(4) This Act is in direct response to the United State Supreme Court's ruling in Rasul v. Bush. With the passage of this Act, the 109th Congress will have addressed the concerns of the Supreme Court's Rasul majority, and there will no longer be any need for further cause or legal challenge by or concerning these detained individuals, excepting as allowed for by this Act.

SEC. 2. DEFINITIONS.

As used in this Act, the following definitions apply:

(1) CLASSIFICATION TRIBUNAL.—The term "classification tribunal" means any tribunal conducted under section 9 or any related proceeding.

(2) CLASSIFIED INFORMATION.—The term "classified information" has the same meaning given that term in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.).

(3) DESIGNEE.—The term "designee" means a person who has been in the custody of the Department of Defense for not less than 180 consecutive days after the date of enactment of this Act and who has not been charged with a criminal offense during that period.

(4) DESTRUCTIVE DEVICE.—The term "destructive device" means—

(A) any explosive, incendiary, or poison gas—

(i) bomb;

(ii) grenade;

(iii) rocket;

(iv) missile;

(v) mine; or

(vi) device similar to any of the devices described in the preceding clauses; and

(B) any type of weapon that will expel a projectile by the action of an explosive or other propellant.

(5) JUDGE.—The term "Judge" shall refer to a United States military judge designated by the Secretary of Defense to hear cases under this Act.

(6) UNPRIVILEGED COMBATANT.—The term "unprivileged combatant" means an individual—

(A) who has been designated as an enemy combatant by a Combatant Status Review Tribunal prior to the enactment of this Act;

(B) who a Field Tribunal conducted by the United States military as provided in this Act determines—

(i) is not entitled to the protections set out in the Convention Relative to the Treatment of Prisoners of War, done at Geneva, August 12, 1948 (6 UST 3516) (referred to in this Act as the "Geneva Convention"); and

(ii) either—

(I) knowingly assists, conspires with, or solicits for a group or an individual hostile to the United States;

(II) knowingly attempts to assist others in taking up arms against the United States;

(III) conspires with or solicits others to take up arms against the United States; or

(IV) has taken up arms against, or intentionally assisted combat operations against, the United States.

(7) CRIMINAL PROSECUTION.—The term "criminal prosecution" means a prosecution for a violation of any criminal law, including subchapter X of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice) or pursuant to the Department of Defenses Military Commission Instruction number two.

(8) FIREARM.—The term "firearm" has the same meaning given that term in section 921(a)(3) of title 18, United States Code.

(9) INTERNATIONAL TERRORISM.—The term "international terrorism" has the same meaning given that term in section 101(c) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(c)).

(10) PROTECTED INFORMATION.—The term "protected information" means information—

(A) that is classified information;

(B) protected by law or rule from unauthorized disclosure;

(C) the disclosure of which may endanger the physical safety of participants in Commission proceedings, including prospective witnesses;

(D) concerning intelligence and law enforcement sources, methods, or activities; or

(E) the disclosure of which would otherwise jeopardize national security interests.

(11) UNITED STATES PERSON.—The term "United States person" has the same meaning given that term in section 101(i) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(c)).

(12) WEAPON.—The term "weapon" means a club, knife, or similar object that is used to injure, defeat, or destroy.

SEC. 3. AUTHORIZING MILITARY COMMISSIONS.

The President is authorized to establish military commissions for the trial of individuals for offenses as provided in this Act.

SEC. 4. COMMISSION JURISDICTION.

(a) Unprivileged Combatants.—This Act establishes exclusive jurisdiction to hear any matter involving an unprivileged combatant who has been detained by the Department of Defense for not less than 180 consecutive days at Guantanamo Bay, Cuba, or any other location not located within the theater of war, as defined by the Department of Defense.

(b) Offenses.—

(1) CRIMINAL PROSECUTIONS.—The Commission shall have jurisdiction to hear any criminal prosecution involving international terrorism, including any offense under chapter 113B of title 18, United States Code.

(2) OFFENSES AGAINST THE LAWS OF WAR.—The Commission shall have exclusive jurisdiction over violations of the laws of war committed by unprivileged

combatants.

(3) OTHER OFFENSES.—The Commission shall have jurisdiction over other offenses traditionally triable by military commissions or pursuant to the Department of Defense's Military Commission Instruction number two.

SEC. 5. APPELLATE JURISDICTION.

(a) In General.—

(1) FINAL DECISIONS.—The Military Commission Review Panel designated by the Secretary of Defense shall have exclusive jurisdiction of appeals from all final decisions of the Commission and other tribunals under this Act.

(2) INTERLOCUTORY APPEALS.—The Military Commission Review Panel shall have exclusive jurisdiction of appeals of the disapproval of a summary of classified information under section 10(d)(2)(C). Any appeal under this subsection shall be conducted as expeditiously as possible.

(b) Review by Supreme Court.—

(1) CERTIORARI.—The decisions of the Military Commission Review Panel are subject to review by the Supreme Court by writ of certiorari.

(2) EXEMPTION FROM CERTAIN PETITION REQUIREMENTS.—A person who files a petition for a writ of certiorari under paragraph (1) shall not be required to submit—

(A) prepayment of any fees and costs or security therefor; or

(B) the affidavit required by section 1915(a) of title 28, United States Code.

SEC. 6. THE COMMISSION.

(a) Commission Personnel.—

(1) MEMBERS.—

(A) APPOINTMENT.—The Secretary of Defense shall designate no less than 12 United States military judges to serve as members of the Commission and to assume other duties assigned in this Act.

(B) NUMBER OF MEMBERS.—Each Commission shall consist of at least 3 military officers, at least one of whom shall be a military judges.

(C) ALTERNATE MEMBERS.—For each such Commission, there shall also be one or two alternate members. The alternate member or members shall attend all sessions of the Commission. In case of incapacity, resignation, or removal of any member, an alternate member shall take the place of that member.

(D) QUALIFICATIONS.—Each member and alternate member of the Commission shall be a military officer.

(E) PRESIDING OFFICER.—

(i) IN GENERAL.—From among the members of the Commission, the Secretary of Defense shall designate a Presiding Officer who is a military

judge to preside over the proceedings of that Commission.

(ii) DUTIES.—The duties of the Presiding Officer shall be as follows:

(I) The Presiding Officer shall admit or exclude evidence at trial in accordance with the rules of this Act. The Presiding Officer shall have authority to close proceedings or portions of proceedings in accordance with this Act or for any other reason necessary for the conduct of a full and fair trial.

(II) The Presiding Officer shall ensure that the discipline, dignity, and decorum of the proceedings are maintained, shall exercise control over the proceedings to ensure proper implementation of the President's Military Order and this Act, and shall have authority to act upon any contempt or breach of Commission rules and procedures. Any attorney authorized to appear before a Commission who is thereafter found not to satisfy the requirements for eligibility or who fails to comply with laws, rules, regulations, or other orders applicable to the Commission proceedings or any other individual who violates such laws, rules, regulations, or orders may be disciplined as the Presiding Officer deems appropriate, including revocation of eligibility to appear before that Commission. The Court may further revoke that attorney's or any other person's eligibility to appear before any other Commission convened under this Act.

(III) The Presiding Officer shall ensure the expeditious conduct of the trial. In no circumstance shall accommodation of counsel be allowed to delay proceedings unreasonably.

(IV) The Presiding Officer may certify interlocutory questions to the Military Commission Review Panel for the Armed Forces as the Presiding Officer deems appropriate.

(b) Powers of the Commission.—The Commission shall have the following powers:

(1) To summon witnesses to the trial and to require their attendance and testimony and to put questions to them.

(2) To require the production of documents and other evidentiary material.

(3) To administer oaths to witnesses.

(4) To appoint officers for the carrying out of any task designated by the Commission, including the power to have evidence taken on commission.

SEC. 7. PERSONS IN CUSTODY.

(a) Guantanamo Bay.—

(1) IN GENERAL.—Not later than 60 days after the date of enactment of this Act, the Secretary of Defense shall file with the clerk of the Commission a complete listing of all persons who—

(A) are being detained by the Department of Defense at Guantanamo Bay,

Cuba; and

(B) the Government wishes to continue to detain as an unprivileged combatant.

(2) UPDATED LIST.—The Secretary of Defense shall file an updated list of the persons identified under paragraph (1) with the clerk of the Commission at least once every 30 days after the date the list described in paragraph (1) was filed.

(b) Status of Non-Guantanamo Bay Detainees.—

(1) IN GENERAL.—Not later than 6 months after the date of enactment of this Act, the Secretary of Defense shall file with the clerk of the Commission a certification with respect to each designee, being found to be an unprivileged combatant under Section eight of this Act detained outside of the theater of war as defined by the Department of Defense, indicating—

(A) where the designee was captured;

(B) the basis for asserting the designee is an unprivileged combatant;

(C) whether it is the judgment of the Department of Defense that the national security of the United States, including the security of the Armed Forces of the United States and its allies, requires that the designee must continue to be detained; and

(D) whether the designee is a United States citizen and, if not, has any lawful immigration status under the immigration laws of the United States.

(2) NEW DESIGNEES.—For any designee taken into custody by the United States after the date of enactment of this Act, the Secretary of Defense shall file with the clerk of the Commission a certification providing the information required under paragraph (1) not later than 180 days after the date on which such designee is taken into custody so long as the detainee was found to be an unprivileged combatant under Section eight of this Act.

SEC. 8. FIELD TRIBUNALS.

(a) In General.—Not more than 30 days after a suspected unprivileged combatant has been detained by United States forces, the Department of Defense must conduct a field tribunal in order to determine whether the detainee is an unprivileged combatant and whether the detainee is entitled to the rights afforded under the Geneva Convention.

(b) Procedures.—The procedures governing these field tribunals shall be promulgated by the Department of Defense

SEC. 9. CLASSIFICATION TRIBUNALS.

(a) In General.—Any designee shall be released and repatriated to an appropriate country unless the classification tribunal finds by a preponderance of the evidence that—

(1)(A) the detainee is a threat to the national security interest of the United States; or

(B) there are reasonable grounds to believe that if released the person would take

up arms against the United States;

(2) the detainee is not a privileged combatant entitled to provisions under the Geneva Convention; and

(3) the detainee is not a citizen of the United States of America.

(b) Appointment.—The classification tribunals shall be appointed by the Secretary of Defense and consist solely of line officers, one of whom shall be an attorney.

(c) Determination.—If the classification tribunal finds that a person meets the requirements of subsection (a), the Commission shall order that the designee shall continue to be detained by the Department of Defense, subject to periodic review under subsection (e). The time period for the detention of these detainees may not exceed the time period that United States forces are engaged in combat operations as defined by the Department of Defense in the nation or theater where a detainee was captured. At the conclusion of combat operations within a given theater or nation, all detainees that were captured in that area must be either indicted under this Act or repatriated to the appropriate country.

(d) Considerations.—

(1) IN GENERAL.—In making a determination under subsection (a), the classification tribunal shall consider any information brought to its attention regarding the need for continued detention, including—

(A) the designee's alleged position or rank in any hostile organization;

(B) the activities of that hostile organization;

(C) any statements made by the designee in response to interrogation; and

(D) the designee's history of violence or terrorist activity.

(2) PRIMA FACIE EVIDENCE.—If the Government represents that a designee was captured during a military engagement while taking up arms against, or supporting military operations against, the Armed Forces of the United States or its allies, there shall be prima facie evidence that, if released, the designee would take up arms against the United States.

(e) Timing.—Any designee shall be afforded a classification tribunal as soon as is reasonably practicable. Said tribunal must be listed no later than 180 days after the designee's capture and must take place no later than 30 days after listing, unless continued.

(f) Periodic Review.—

(1) IN GENERAL.—The Administrative Review Board designated by the Department of Defense shall review an order authorizing the Government to continue to detain a person under subsection (b) annually to determine whether there are changed circumstances that warrant affording the person a new tribunal under subsection (a). Detainees apprehended during a military engagement while taking up arms against, or supporting military operations against, the Armed Forces of the United States or its allies may be detained until the cessation of armed hostilities in

the nation or region in which they were captured.

(2) ARGUMENT.—The Government and the designee may be heard regarding the review under paragraph (1).

SEC. 10. CLASSIFICATION TRIBUNAL PROCEDURES.

(a) Designees.—

(1) IN GENERAL.—The designee shall not be required to testify or present any evidence at a classification tribunal.

(2) PRESENCE.—The designee shall be entitled to be present at the classification tribunal.

(b) Counsel.—

(1) IN GENERAL.—A designee is entitled to the assistance of counsel admitted to practice under this Act at every stage of the classification tribunal, including the periodic review of orders under subsection (e).

(2) RIGHT TO APPOINTED COUNSEL.—A designee who is unable to obtain counsel is entitled to have counsel admitted to practice before the Commission.

(3) REFUSAL OF COUNSEL.—A designee may waive counsel.

(c) Discovery.—

(1) GOVERNMENT'S DISCLOSURE.—Not later than 3 days prior to the classification tribunal, the Government shall make available for inspection by counsel for the designee any affidavit or affirmation the Government intends to offer in support of continuing to detain the designee. The Commission shall maintain a copy of any submissions made by the Government for inspection by the designee and for transmittal, if necessary, to the Commission.

(2) DESIGNEE'S DISCLOSURE.—If the designee chooses to submit any evidence, such evidence, including a list of any witnesses the designee intends to call, shall be made available to the Government for inspection not later than 3 days prior to the classification tribunal.

(d) Evidence.—

(1) IN GENERAL.—The Rules of Evidence shall not apply to a classification tribunal.

(2) ADMISSIBILITY STANDARD.—Evidence shall be admitted if the Commission determines the evidence would have probative value to a reasonable person.

(3) AFFIDAVIT OR AFFIRMATION.—The Government may proceed by proffer and submit any relevant information by affidavit or affirmation, unless decided unreliable by the members of the tribunal.

(4) CROSS-EXAMINATION.—

(A) GOVERNMENT WITNESSES.—If the Government chooses to call witnesses,

the designee may cross-examine those witnesses on all relevant facts.

(B) DESIGNEE WITNESSES.—If the designee calls any witnesses, they shall be subject to cross examination.

(C) DESIGNEE.—If the designee chooses to testify, the designee shall be subject to cross-examination.

(e) Defenses.—The designee may challenge whether the designee satisfies the elements required under subsection (a).

(f) Proceedings.—

(1) IN GENERAL.—All classification tribunals shall be closed to the public.

(2) SECURITY CLEARANCES.—Each person present at a classification tribunal, other than the designee, shall possess a security clearance appropriate to the level of any classified information being presented.

(3) PUBLIC INFORMATION REGARDING PROCEEDINGS.—After the Commission has ruled in the classification tribunal, the parties shall propose a nonclassified summary to the Commission. The Commission shall publicly release a summary, containing any information generated at the tribunal which can be disclosed in a manner consistent with the Classified Information Procedures Act (18 U.S.C. App.) and the national security of the United States.

(g) Reinstituting Classification Proceedings.—

(1) IN GENERAL.—If a matter involving the classification tribunal of a designee is dismissed without prejudice by the classification tribunal or withdrawn by the Government at, or prior to, the classification tribunal, the Government may reinstitute the matter with the tribunal that dismissed or permitted the withdrawal of the matter.

(2) TIME LIMIT.—A complaint reinstituting proceedings under paragraph (1) shall be filed not later than 10 days after the dismissal or withdrawal of the matter.

(3) NUMBER.—The Government may reinstitute proceedings under paragraph (1) not more than twice and only if approved by the ranking member on the Classification Tribunal.

SEC. 11. CONTINUANCE OF CLASSIFICATION TRIBUNALS.

(a) Continuances.—

(1) IN GENERAL.—The Commission may, for cause shown, grant a continuance of a classification tribunal.

(2) CLASSIFIED INFORMATION.—Upon motion of the Government, a classification tribunal shall grant a continuance under paragraph (1) if the Court determines the classification tribunal cannot proceed without an unacceptable disclosure of classified information or evidence. The tribunal shall review the purported classified information in compliance with This Act. If the Commission grants a continuance

under this paragraph, the matter shall be continued until the sensitivity of the classified information or evidence is diminished or alternative evidence is developed.

(3) CONTINUANCE.—Upon motion of the Government, the tribunal may grant a continuance for as long as necessary, but no longer than one year, under paragraph (1) if the tribunal determines that the individual being detained is a high level individual in the planning or financing of terrorist activities or the individual possess information vital to the safety of the United States or its citizens.

(4) EX PARTE APPLICATIONS.—The Government may move for a continuance under paragraph (1) ex parte and a designee is not entitled to representation by counsel in connection with any such ex parte motion, nor shall the deisgnee be given notice of said request for a hearing prior to the Commission's ruling on the Government's request for a continuance pursuant to paragraph (3).

(b) Grant of Continuance.—For each continuance granted under subsection (a), the court shall note on the record of the proceedings—

(1) the grounds for granting each such continuance;

(2) the identity of the party requesting the continuance;

(3) the new date and time for the tribunal hearing; and

(4) the reasons that the date under paragraph (3) was chosen.

SEC. 12. CRIMINAL PROSECUTION PROCEDURES GENERALLY.

(a) Counsel.—

(1) IN GENERAL.—A defendant in a criminal proceeding under this Act has a right to be represented by counsel admitted to practice before the Commission under this Act.

(2) APPOINTED COUNSEL.—

(A) IN GENERAL.—A defendant who is unable to obtain counsel is entitled to have counsel appointed and to be represented by such counsel at every stage of the proceeding subsequent to being indicted.

(B) APPOINTMENT PROCEDURE.—The Secretary of Defense shall determine the rules for appointing counsel to practice before the Commission.

(b) Discovery.—

(1) CLASSIFIED DOCUMENTS AND OBJECTS.—

(A) SUMMARY OF CLASSIFIED INFORMATION.—

(i) IN GENERAL.—If the Government intends to offer classified information as evidence before the Commission or tribunal, the Government shall submit a summary of the information to the Presiding Officer and the defendant.

(ii) REVIEW.—

(I) IN GENERAL.—A Presiding Officer shall review any summary submitted under clause (i) to determine if the summary provides the substantially the same information that the classified information would tend to prove.

(II) DISAPPROVAL.—If a Presiding Officer determines the summary does not satisfy the requirements of subclause (I), the Commission shall notify the Government and the defendant and return the summary to the Government with the notification.

(iii) REVISED SUMMARY.—If the Presiding Officer does not approve a summary under clause (ii), the Government may submit a revised summary of the classified information to the Commission and the defendant not later than 15 days after the date on which the prosecution receives the notification. A revised summary of classified information submitted under this clause shall be subject to review as provided under clause (ii).

(B) ADMISSION OF EVIDENCE.—The Commission may admit and consider classified information offered by the prosecution if a summary of the information was submitted and approved under subparagraph (A). The Commission shall receive and consider the classified information ex parte and in camera.

(C) INTERLOCUTORY APPEAL.—

(i) IN GENERAL.—The Government may appeal any disapproval of a summary or revised summary of classified information.

(ii) TIMELINESS.—Any appeal under this subparagraph shall be commenced not later than 15 days after the date on which the Government receives the notification of disapproval from the judge under subparagraph (A)(ii)(II).

(iii) DOCUMENTATION.—If the Government files an appeal under this subparagraph, the filing by the Government shall include—

(I) the classified information;

(II) the summary and any revised summary of the classified information; and

(III) a summary of all other evidence intended to be offered by the Government.

(iv) ACTION BY COMMISSION.—The appellate court shall conduct a de novo review of the summary or summaries and issue a final ruling on the interlocutory appeal not later than 45 days after all submissions required by the Commission are filed.

(2) REGULATING DISCOVERY.—

(A) IN GENERAL.—The Commission may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief.

(B) EX PARTE REQUEST.—A party may make an ex parte request in writing that the Commission deny, restrict, or defer discovery or inspection under subparagraph (A). If the Commission grants a request under this subparagraph, the Commission shall preserve the entire text of the party's request under seal.

(C) FAILURE TO COMPLY.—If a party fails to comply with the rules of discovery applicable to the Commission, the court may—

(i) order that party to permit the discovery or inspection, specify its time, place, and manner, and prescribe other just terms and conditions; or

(ii) grant a continuance.

(c) Continuances.—In addition to any other basis for granting a continuance, upon motion of the Government, the Commission shall grant a continuance of a proceeding under section 3(c) if the Commission determines the trial cannot proceed without an unacceptable disclosure of classified information or evidence. If the Commission grants a continuance under this subsection, the matter shall be continued until the sensitivity of the classified information or evidence is diminished or alternative evidence is developed.

(d) Open Proceedings.—

(1) IN GENERAL.—Except as provided in paragraphs (2) and (3), a proceeding before the Commission shall be open to the public.

(2) CLASSIFIED INFORMATION.—Upon motion by the Government, a proceeding before the Commission shall be closed to the public if necessary to avoid disclosure of classified information.

(3) OTHER BASES.—The Commission may order that a hearing be held, in whole or in part, in camera, if the Commission determines—

(A) it is appropriate for the security of a witness or a Government employee or to protect public safety; or

(B) that an open hearing would deter a witness from testifying freely or prevent the witness from testifying at all.

(4) EXTRAJUDICIAL STATEMENTS.—At the discretion of the Commission, the Commission may issue an order limiting extrajudicial statements by the parties.

(e) Protected Information.—

(1) IN GENERAL.—The Commission may issue protective orders as necessary to safeguard protected information in a proceeding before the Commission.

(2) NOTIFICATION.—As soon as practicable, a party shall notify the Commission of any intent to offer evidence including protected information .

(3) TRIAL RECORD.—

(A) IN GENERAL.—All exhibits admitted as evidence but containing protected information shall be sealed and annexed to the record of trial.

(B) PROTECTED INFORMATION NOT ADMITTED.—Any protected information not admitted as evidence, but reviewed by the Commission in camera and withheld from the defendant's counsel over objection shall be sealed and annexed to the record of the trial, with any associated motions and responses and any materials submitted in support thereof, as additional exhibits.

(f) Record of Trial.—

(1) REQUIREMENT FOR RECORD.—A record of each proceeding by the Commission shall be prepared promptly after the conclusion of the trial.

(2) VERBATIM TRANSCRIPT.—The record of trial shall include a verbatim written transcript of all sessions of the trial.

(3) EXHIBITS AND OTHER EVIDENCE.—The record of trial shall also include all exhibits and other real or demonstrative evidence, except that photographs may be substituted for any large written or graphic exhibits and any other real or demonstrative evidence. If a photograph is substituted for an exhibit or other evidence, the Government shall retain the original exhibit or other evidence, respectively, until no further appeal of the results of the trial is authorized.

(4) CLASSIFIED INFORMATION.—In the case of a conviction of a charge on which classified information is admitted as evidence by the Commission, the copy of the record of trial submitted to the Commission shall include the classified information.

SEC. 13. TRIAL PROCEDURES FOR UNPRIVILEGED COMBATANTS.

(a) Specialized Procedures.—

(1) STANDARD OF PROOF.—All three members of a Commission must agree that the defendant is guilty beyond a reasonable doubt.

(2) EVIDENCE.—

(A) IN GENERAL.—Except as provided in subparagraphs (B) and (C), the Rules of Military Justice shall apply to proceedings under this subsection.

(B) STANDARD.—Evidence is admissible if the Commission determines that the evidence would have probative value to a reasonable person.

(C) CUSTODIAL STATEMENTS.—A statement made by a person who is not a United States person overseas is admissible, although the statement did not comply with the requirements for custodial statements under Miranda v. Arizona, 384 U.S. 436, and subsequent cases.

(3) FORM OF TRIAL.—Any trial under this subsection shall take place before two military officers or attorneys and at least one military judge.

(4) BAD ACTS.—Other bad acts may be considered if they would have fallen within the definition under this Act of either terrorism or terrorist activity and they are deemed to be relevant by the Commission including propensity.

(b) Custody.—The Department of Defense shall retain custody of any person

determined by Commission to be unlawful combatants after the person has been either convicted or sentenced in accordance with this Act, unless the Department of Defense deems otherwise. Decisions made by a Commission in regards to a designee guilt or innocence may be considered by a tribunal when assessing the need to continue the detention of a designee.

SEC. 14. COMMUNICATION WITH PERSONS IN CUSTODY.

An individual detained, indicted, or convicted under this Act shall only be permitted to communicate with the interpreter assigned to the individual, the counsel representing the individual, prison personnel, and any other individual approved by the Secretary of Defense.

SEC. 15. COMMISSION COUNSEL.

(a) In General.—A person shall be admitted to practice before the Commission if the person—

(1) is a United States citizen;

(2) has been admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court;

(3) has not been sanctioned or otherwise the subject of disciplinary action by any court, bar, or other competent governmental authority for misconduct;

(4) is eligible for access to information classified at the level of "secret" as defined by the Department of Defense; and

(5) signs a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings.

(b) Consultation With Colleagues.—Any person admitted under subsection (a) shall not confer with any colleague who does not have the appropriate clearance.

(c) Security Clearance.—

(1) EXPEDITED CONSIDERATION.—The Secretary of Defense shall ensure that a person seeking to be admitted under subsection (a) is timely processed for the security clearance required for access to materials necessary for providing a defendant with effective assistance of counsel.

(2) COUNSEL INELIGIBLE FOR CLEARANCE.—If the Secretary of Defense determines a person is not eligible for the necessary security clearance, the person shall not be permitted to represent an individual in any proceeding before the Commission. The determination of the Secretary of Defense shall be final and is not subject to appeal to, or other review by, any court of the United States.

(d) Travel Expenses.—The Secretary of Defense shall reimburse any person not employed by the Government who is representing an individual before the Commission for travel away from the home or regular place of business of the person in connection

with such representation. The rates for the payment of travel expenses under this subsection shall be those authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code.