

2. Submission by the Community Relations Service

Community Relations Service Mission

The Community Relations Service (CRS), created by the Civil Rights Act of 1964, is a specialized conciliation service authorized to help local communities resolve racial and ethnic conflict, and prevent violence, and civil disorder. When racial conflicts and unrest threatens community stability, Governors, Federal Prosecutors, Police Chiefs and Mayors call on CRS to restore peaceful relations. Without CRS' assistance, the unresolved tensions fester and become fuel for serious civil disturbances.

Challenge: During CRS' 36 years, the agency experienced an initial expansion period that lasted until the 1972 post-urban race riots, where CRS had a budget of \$14M and almost 340 FTE's. In 1995, CRS suffered a 50% budget cut, dropping resources to the agency's lowest levels with only \$3.3M and 41 FTE's for 1997-98. Therefore, from 1992-1998, CRS has seen its budget decline more than 80%, and its staffing decrease by about 60%. Thus, CRS has operated with insufficient resources to carry out its mandated responsibilities. In 2000, CRS currently operates its entire program with 12 headquarters staff and just 41 conciliators. In order to carry forth CRS' mission, Director Rose Ochi instituted both strict management and administrative controls, and operational and programmatic strategic priorities to help optimize these limited resources.

To maximize impact of services, the Director's strategic operational/programmatic priorities included:

- CRS leverages its limited resources by establishing cooperative relationships with federal and State and local agencies by establishing violence prevention networks.
- CRS improves the capabilities of police, schools, and communities to respond effectively during times of racial conflict and violence.
- CRS builds the skills and capacity of locals to manage and resolve racial conflict on their own.
- CRS enhances the capacity of local agencies and organizations to forecast, serving as an early warning system and respond to community racial conflict.
- CRS supports efforts to improve civic discourse on issues of race to mend social divisions.

Over the last four years, CRS has demonstrated how much a Federal agency can do despite a very modest budget because of a handful of dedicated mediators. Nevertheless, the greatest challenge to CRS remains balancing an expanding workload with limited personnel. CRS is forced to continue to defer or decline an increasing number of requests for services, and must restrict its conflict resolution services to only the most volatile and violent situations.

Attorney General Janet Reno has sought to restore the agency to its former complement of staffing. While 1998-2000 saw a modest growth, and the staff grew to 51 (56 authorized), her intentions have not been fully realized.

This challenge comes at a time when the paradigm of race relations has assumed new dimensions. Historical "black-white" conflicts persist, but multiracial and multiethnic conflicts and tensions, involving the new demographic changes, have reshaped racial/ethnic fault lines and CRS work. As a result, more and more local officials from across America, who once felt secure about race relations in their communities, turn to CRS for crisis response assistance. CRS is especially suited to help because its expert assistance is impartial, confidential, and relies on voluntary locally fashioned resolutions.

THE PRESIDENT'S INITIATIVE ON RACE

Background: For the new millennium, the President has said that building "one America" is our most important mission for the nation. With the foresight to see what America would continue to face in the years to come if the nation could not address the evil of racial discrimination and work toward healing and unity, the President charged his Administration to shape a Race Initiative that would make a difference for all Americans, with a goal for us to enter the next century as a strong and united America.

CRS Activities: The Attorney General appointed CRS Director Ochi to represent the Department on the President's Initiative on Race White House Task Force. CRS' major contribution was introducing the idea of conducting community-based race dialogue with the widest possible participation, to help local communities identify, discuss and develop action plans to address critical racially divisive issues.

The President's One America Initiative came to include a goal of helping communities to confront differences through honest dialogue, discover common values, overcome discrimination, and help all Americans achieve their full potential. In our day to day work, CRS provides assistance on best ways to restore and improve communications to reduce racial tensions and bridge divisive conflicts.

To promote the One America Race Dialogues, CRS helped facilitate, provide materials and training for hundreds of public officials and citizens around the country. For example, in St Louis, Missouri, at the invitation of the Mayor, CRS helped citizens talk openly about race and work toward improving racial understanding and relations.

CRS Accomplishments: As one of the Director's primary strategic goals, CRS worked in partnership with the President's Initiative on Race and experts from national organizations that specialize in race dialogues to coordinate hundreds of candid race relations discussions around the country.

In 1998, CRS coordinated the development of a dialogue tool - known as the One America Dialogue Guide (Guide) - using a collaborative process involving the top race relations experts wherein CRS extracted the best approaches and techniques to aid in the conduct of a positive and constructive conversation. The Guide provides practical, step-by-step recommendations on how people can establish, structure, and facilitate conversations about race. It also discusses how to thoughtfully explore perspectives and ideas, to discover differences and commonalities, and to map out ways to address outstanding concerns. The Guide continues to be used by public officials and citizens so communities can talk and plan successfully together about difficult issues involving race.

In collaboration with 15 prestigious national organizations committed to bridging racial and ethnic divisions, including CRS, the Joint Center for Political and Economic Studies has developed a national network to promote and institutionalize race dialogues and to continue

promising practices. This initiative is known as the Network of Alliances Bridging Race and Ethnicity (NABRE). Through an Internet website, NABRE electronically links local organizations that are involved in racial reconciliation activities, so they can share ideas, learn from each other's experiences, support and sustain each other through difficult times, and broaden the base of support for their activities.

Next Steps: In the next years, communities will continue to be challenged to find the best ways to address divisive racial issues, bridge differences and find common ground. The One America Dialogue Guide and the NABRE infrastructure will continue to be a valuable resource, complemented by expert assistance from mediators from the Community Relations Service.

THE PRESIDENT'S CHURCH ARSON TASK FORCE

Background: Since January 1995, more than 945 churches have been burned, desecrated or bombed or attempted to be bombed across the United States. In response to this national crisis, President Clinton established the National Church Arson Task Force (NCATF) with the responsibility of helping to prevent additional fires, rebuilding the churches attacked, and prosecuting those responsible. CRS was invited to be an integral partner with responsibilities for promoting racial healing in those communities affected by church burnings.

CRS chaired the Community Outreach Working Group, ensuring communication and coordination between the various agencies, groups, and individuals who responded to the church burnings and those affected by the burnings, and contributed expertise and guidance on certain "best practices" to ameliorate community fears and concerns.

CRS Activities: Director Ochi created a CRS Church Burning Response Team (CBRT). The CBRT worked at the grassroots level to restore peace, reduce fears and mistrust, and help mend the racial rifts that arose from these shameless acts.

The CBRT has provided conciliation activities in approximately 300 communities. In early July 1996, in the aftermath of a series of church burnings in Southern states, CRS joined the efforts of the City of Rocky Mount, North Carolina Chamber of Commerce and Common Ground, a community coalition devoted to improve race relations and embracing diversity, to bring together a cross section of community representatives to discuss ways to address racial tensions.

The significance of CRS' role in church arsons is best summarized by Mark Logan's, ATF "Officer of the Year" statement at the House Judiciary Hearing on Church Arsons: "Without CRS, we could not have done it. We needed CRS on the ground, calming the community and making sure a volatile situation did not get much worse. With CRS' help, we were able to conduct a thorough investigation which led to indictments of suspected church arsonists."

CRS Accomplishments: CRS was instrumental in helping the NCATF establish "best practices" for developing an effective response to church burnings and other incidents that may have racial origins. In institutionalizing the best practices, assembling seasoned professionals

knowledgeable in a variety of subject areas to assist communities in aftermath of church burnings, developing local mechanisms to continue dialogue in aftermath of church burning, and a well-designed conference format for members of affected communities to discuss points of frustration.

The NCATF coordinated Federal agencies' efforts to aggressively prosecute church burnings and to rebuild churches has been cited by a number of entities - such as the International Association of Police Chiefs - as a model of collaboration.

Next Steps: The NCATF has taken steps to institutionalize the protocols and guidelines for joint investigations and prosecutions of suspected arsonists in the Department of Treasury and the Department of Justice. The NCATF federal partners, the FBI and AFT special agents, CRS mediators and victim/witness coordinators will continue to meet once a month. CRS has returned the responsibilities for handling church burnings in the respective Regional Offices across the country. This continues to be the mode of operation to present.

THE PRESIDENT'S HATE CRIME SUMMIT

Background: In 1998, the President convened an historic White House Hate Crimes Summit, and with the Attorney General, established the matter of hate crimes as a national priority. CRS helped plan the Summit where top hate crime experts and community leaders came together to develop strategies to address this national dilemma. Under the leadership of the Attorney General, a Department of Justice Hate Crime Task Force was formed to develop a number of tools and resources to help local police, prosecutors and hate crime victims.

CRS Activities: During the past few years, CRS responded to many individual cases of hate crime. For example, in Jasper, Texas following the brutal dragging death of James Byrd, Jr. CRS staff was on the ground helping local officials maintain racial calm, plan for the Klan rally and counter demonstrators. In the longer term, CRS worked with the Mayor to bring together multi-racial Task Force to confront racial issues that surfaced in the wake of the murder. CRS helped school officials come to grips with the fears and suspicion among students and between neighbors. The Jasper 2000 Task Force was instrumental in being able to overcome the racial tensions that followed the tragic death. In keeping with both the President's and the Attorney General's efforts of creating partnerships with local levels in the community, CRS supported the U.S. Attorneys' Hate Crime Working Groups in conducting meetings, by conducting training seminars and organizing hate crime forums and conferences.

CRS Accomplishments: In keeping with the Administration's position that hate crime and intolerance are issues best resolved at the local level, CRS, as part of the DOJ Hate Crime Task Force, developed hate crime materials. CRS took the lead in convening an expert panel to create the centerpiece of the hate crime resources, a state-of-the-art hate crime training curriculum. In conjunction with the Department's Bureau of Justice Assistance, CRS held three regional training sessions, creating unique teams of 380 qualified State-based trainers who could, in turn,

provide hate crime training to law local enforcement agencies. The state teams have held hundreds of training sessions and several thousand law enforcement officers have received training on how to improve hate crimes response.

On another front, the Administration has long been aware that hate and intolerance on the nations' college campuses are a major threat to the educational process. CRS helped alleviate serious racial tensions on college campuses, including Kean University in New Jersey, where racial incidents heightened tensions across racial and religious lines. CRS convened a series of mediated discussions; as a result, a campus conflict resolution team was established to work as university troubleshooters and early warning forecasts for brewing tensions.

CRS also conducted a survey of over 100 colleges and universities to determine whether policies and procedures were in place to address hate crimes and bias-related incidents. CRS then convened a focus group of college and university administrators, police, educators, and civil rights representatives to discuss and develop best practices. The work of the focus group resulted in the development of a well received CRS publication known as "Responding to Hate Crimes and Bias-Motivated Incidents on College/University Campuses" in May 2000. CRS has conducted presentations and workshops at conferences and training sessions. Other Hate Crime publications are listed in the Appendix.

Next Steps: The Hate Crime Training for Law Enforcement, the work on hate crime on campus and the development of similar training materials for elementary and secondary school officials will require additional funding. There is a need to develop the teaching of tolerance for elementary schools.

THE ATTORNEY GENERAL'S INITIATIVE ON STRENGTHENING POLICE/COMMUNITY RELATIONS

Background: There has been much media coverage and public outcry over alleged cases of police misconduct, including police shootings of unarmed subjects, perceptions of discriminatory traffic stops and the use of racial profiling, that have resulted in a lack of confidence in the administration of justice. This has increased police-community tensions, jury nullifications, lack of cooperation with police, reluctant witnesses and endangering officer safety. After meeting with concerned civil rights organizations, the Attorney General established a departmental working group to plan a conference to explore these issues. The working group planned several follow-up conferences, and formed several committees to address racial profiling, police management policies, police use of force issues, community-partnering programs, and recruitment and promotion of minority officers.

CRS Activities: CRS was an active partner in the Attorney General's initiative to improve police-community relations through headquarters participation in the working group and also through both case work and regional police and community conferences. CRS held focus groups discussions the use of excessive force by police, and published the recommendations in

publications such as "Police Use of Force-Addressing Community Racial Tensions" and "Police Use of Excessive Force: A Conciliation Handbook for the Police and the Community."

CRS Accomplishments: As a result of CRS work in the field, in the wake of either allegations of use of excessive force or perceptions of racial profiling, our mediators have stabilized many communities, and helped them develop local strategies to address conflicts with law enforcement. Emergency assistance by CRS in response to controversial police actions helped contain community violence. In 1999, CRS brought together law enforcement officials and community leaders in Pittsburgh, Pennsylvania following the death of a Black man during a traffic stop. Tensions were reduced and agreement reached on the scope and timetable for an official investigation. After a mental patient was killed by police in Cincinnati, Ohio, CRS mediated a series of discussions between the police department, city council officials, and minority organizations. Agreement was reached on increased civilian oversight of the police department and tensions were eased. In Riverside, California, CRS responded to a fatal police shooting of a Black motorist and negotiated understandings between community leaders and police on the arrangements for peaceful protests over a 12-month period.

An historic significant agreement involved the State of Oregon, where CRS involved all stakeholders - police, religious leaders and unions - to mediate a non-discrimination traffic stop policy. Other negotiations of Memorandums of Understanding (MOUs) between communities and local leadership include (Battle Creek, MI, Muskegon, MI), the development of police-community partnerships and the integration of community policing within local police cultures. By bringing together all appropriate local community leaders, police chiefs, and police unions, for example in Kansas City and in the New England region, CRS succeeded in proactively building lasting relations between community stakeholders within an institutionalized framework to improve police-community relations, thus lessening racial tensions across the country.

Next Steps: An essential and integral part of the best practices being promulgated around the country, is the strengthening of police-community relations by incorporating community input into police department's policy and procedures. As the public is scrutinizing police practices, CRS' is available to help reform efforts.

CRS COMMUNITY CONFLICT RESOLUTION

Background: The “nuts and bolts” of CRS are what its mediators do “on the ground” every day in hundreds of communities across America. CRS activities are conducted by a handful of mediators stationed across the country who assist communities to reduce racial tensions, avoid violence, and bridge divisive conflicts. Through the application of established mediation and conciliation processes and techniques, CRS helps State and local officials tailor local solutions to local problems. By necessity, CRS focuses its services on quelling those racial conflicts that place communities at the greatest vulnerability. Experience has shown that these conflicts often involve controversies regarding perceptions of police use of excessive force, hate crimes, racial violence in schools, and large scale demonstrations and marches.

CRS Activities: CRS leverages its limited resources by providing tools and resources that communities can use after CRS leaves. CRS establishes cooperative relationships with federal and State agencies, builds the skills and capacity of local communities to manage and resolve racial conflicts themselves; and helps officials learn how to anticipate brewing racial tensions. It enlists the active engagement of local officials and other leaders to lead efforts in racial reconciliation.

For large scale community racial conflicts, CRS partners with other federal agencies, such as the INS, U.S. Attorneys, the FBI, and the Civil Rights Division, and serves as a bridge between officials and leaders in the affected communities. On the local level, CRS helps to link together mayors, chiefs of police, other local elected officials, civil rights and minority community leaders, school officials, clergy, and/or business leaders. Depending on the conflict and local community needs, CRS may help establish advisory boards, formulate memorandums of understanding, reach informal agreements, engage in rumor control, provide technical assistance and training, and facilitate dialogues. CRS helps to strengthen and establish human relations commissions so that jurisdictions have increased capacity to resolve racial issues before community disruptions and conflicts occur. Given dramatic immigration and demographic changes, human relations commissions can be a critical mediating institutions to help communities cope with the challenge of providing full opportunity and access in the context of new people, languages, cultures and customs.

CRS Accomplishments

In communities across the country, CRS has demonstrated successfully that from racial crisis can come racial reconciliation. To share and document the best practices in conflict resolution, in 1999, CRS convened a National Race Relations Symposium (Symposium) on “Building Peaceful Communities.” The Symposium, attended by CRS community partners from around the country, enabled participants to learn from each other and affirm their mutual commitment of resolving and preventing racial and ethnic conflict, violence, and civil disorder. The result was two publications: *Project Profiles*, a compilation of best practices in racial reconciliation and *Proceedings*, a record of the discussion and panel presentations. These publications have become a valuable resource to communities on how to deal with racial and ethnic tensions in

their own communities.

- At the request of the Federal Court in Pulaski County, Arkansas, CRS successfully mediated a series of discussions between October, 1997 and March, 1998, which resolved the remaining issues involving the long-standing Little Rock school desegregation case. The presiding Federal Judge, school officials and community plaintiffs agreed that the guidance from an experienced CRS mediator was the difference.
- CRS mediators assisted local officials in communities experiencing racial tensions over the response to changing demographics, new immigrants, illegal immigrants, and ethnic migration. Often, this involved improving understanding between enforcement agencies, including the Immigration and Naturalization Service, police, city officials, and advocacy organizations. In Nebraska, for example, CRS helped during 1998 to resolve conflicts over the apprehension and detention of illegal aliens, the conduct of INS raids, and the deportation of families and minors.
- In the wake of a racially-charged assault on a school administrator in the Los Angeles School District, the second largest and most diverse system in the nation, CRS facilitated a comprehensive assessment of racial and ethnic tensions by a collaborative group of city and county agencies. The product was a mediated action plan among parents, school administrators, teachers, and school officials to jointly address underlying racial and ethnic issues.

Managing Major Special Events

When special events involve large numbers of participants, especially youth, there is the potential for confrontation and disorder. CRS is concerned specifically about celebrations, rallies, and demonstrations which may deteriorate into racial and ethnic conflict and violence. Based on its experience of more than thirty-six years, CRS has developed specific guidance for local officials, law enforcement, and event planners on effective planning and collaboration to ensure that these events run smoothly and safely.

Each year, for example, more than 100,000 minority students and youth celebrate Greek organization events in a dozen locations around the country. These create enormous challenges for local communities, whose capacity for traffic, visitors, and patience are sorely tested. CRS has helped these communities conduct essential advance contingency plans, encouraged cooperation between officials and event organizers, and shared experience from other communities who had successfully managed these challenges. CRS mediators were on-site before and during the gatherings, helping to ameliorate tensions and conflicts.

In the fall of 1999, CRS convened officials from eight cities who had hosted large gatherings of minority college-age youth for special events and celebrations. Most of these jurisdictions were beach communities where annual gatherings of 25,000 - 150,000 youths. The result of this

consultation was a publication, Managing Major Public Events: A Planning Guide for Municipal Officials, Law Enforcement, Community Leaders, Organizers, and Promoters. This guidebook, published in November 2000, summarizes the experience of these communities, and describes essential elements for successful planning and execution of major public events.

- In October, 1996, CRS lead the Department's overall response to the Million Man March in Washington, D.C. CRS staff worked with multiple law enforcement agencies and march organizers over a six-month period to help ensure a safe and peaceful event. CRS mediators circulated throughout the crowd on that day and helped avert any serious incidents. CRS helped with the development of a self marshaling plan and facilitated closely coordinated contingency planning by law enforcement agencies and other Federal and local agencies.

During this year, CRS also played a central role in minimizing violence associated with the Republican and Democratic conventions held in Philadelphia and Los Angeles, respectively. Teams of CRS mediators were stationed between demonstrators and law enforcement, working out ground rules, clarifying misunderstandings, and averting, by quick action on the streets, more serious conflict and violence when tensions escalated. We are beginning the assessment process for the planned 2000 Inaugural protest demonstrations in the nation's capitol and around the country.

Finally, at the urging of the CRS Director, the Department established a task force of Federal, State, and local officials to develop a standard training curriculum on prevention of and response to civil disorders by police departments. Two curricula were developed: a 40 hour basic training program and a 40 hour command officers training program. The training, which emphasizes CRS principles of community engagement and other prevention strategies, is now underway in departments across the country and a national training center has been established in Fort Benning, Georgia.

Youth and Conflict Resolution

CRS helped advance the Attorney General's interest in preparing youth to cope successfully with conflicts and disputes. Nationwide demographic changes have contributed tremendously to the increase of racial unrest and conflicts between students in our communities and school systems. This is exacerbated when youth resort to the use of weapons and physical assaults to resolve their differences. CRS responded to an increasing number of requests from school officials to help prevent and resolve school disturbances associated with racial and ethnic conflicts.

- CRS along with the local human relations commission helped Inglewood High School defuse a racial conflict between Latino and Black students over the celebration of Black History Month. In addition mediation of the immediate concerns, CRS trained students in the following approach so that they would be better able to resolve disputes on their own in the future.

CRS designed two unique programs to assist educators, parents, and students prevent racial conflicts in their schools - *Student Response Teams (SRT)* and *Student Problem Identification and Resolution (SPIR)*. These programs involve early identification of potential problems areas and prompt conflict resolution techniques and skills. Students and teachers are trained on alternative means for resolving racial conflicts and are engaged in joint problem solving activities. CRS also has developed guidance on ways to reverse the hostile relationship between police and youth, found in the publications Police & Urban Youth and School Disruption: Tips for Educators and Police.

CRS Accomplishments: CRS Regional offices co-sponsor annual education conferences with school officials to present special workshops devoted to early intervention techniques and model programs to equip youth with alternative methods for resolving conflicts. The New England CRS Regional office, which has sponsored these gatherings for the past 15 years, focuses its program on early intervention methods and program solving techniques. In the years ahead, creative strategies should be identified and additional resources engaged to support educators who seek early intervention strategies to avoid and reduce racial violence in their schools.

NATIVE AMERICAN INITIATIVES

Background: Respecting the independent sovereignty of Indian nations and consulting with them on tribal issues, while working on developing better community relations between Indians and non-Indians has been a major goal of the Attorney General's administration. In addition to the traditional conflicts between Native American tribes and the non-Indian communities regarding Indian stereotypes, team mascots, holidays and religious rights, issues of tribal sovereignty on policing, gaming, and taxation have become intensified as some tribes have prospered from gaming enterprises and seek to reacquire former tribal land and new land. Jurisdictional disputes on taxes and policing have caused major disputes causing racial tensions, with many cases in litigation.

Activities: CRS has worked with all the major stakeholders in responding to the major disputes in Indian Country which meet CRS jurisdictional mandate, working with the U.S. Attorneys, FBI, BIA, tribal leaders, and state and local leaders. By bringing the stakeholders together, CRS has been able to prevent major disruptions from occurring.

Accomplishments: Governor Tommy G. Thompson asked the Attorney General for federal intervention, so CRS helped the Tribal Council of the Bad River Band of the Lake Superior Tribe of Chippewa Indians and the Sheriff of Ashland County, Wisconsin settle a dispute between the Tribe and the Wisconsin Central Railroad, which was shipping toxic sulfuric acid across its reservation on tracks they believed to be unsafe. Tension eased after all parties agreed CRS would mediate the dispute.

Racial tensions between the Ogala Sioux on the Pine Ridge reservation and the City of White Clay, NE, arose over the sale of alcohol to tribal members (which is unlawful on the reservation), and also the unsolved homicides of Native Americans. A protest march of approximately 750 protesters from the reservation to White Clay was monitored by law enforcement agencies in South Dakota and Nebraska. CRS mediators were called upon to ensure the march was peaceful, and to bring all the stakeholders together to discuss the homicides and the underlying issues impacting the Indian and non-Indian communities adjacent to the reservation. Nebraska Governor Michael Johanns asked CRS to facilitate a meeting with tribal representatives.

When a faction of the Ogichida tribe in Odanah, Wisconsin blocked the tracks of the Wisconsin Central Railroad in a dispute over the shipping of toxic sulfuric acid across their reservation, the Governor of called for CRS assistance. State and local law enforcement reported negotiations to be stalemated over jurisdictional issues and internal conflicts. CRS, a trusted and impartial service, mediated a mutual acceptable solution which averted violence and established environmental safeguards for the safe resumption of shipments.

Next Steps: Included in the proposed 2001 Appropriations Bill are provisions for the development of a training center for Indian Country mediators. If funding is provided as part of the final appropriations bill, CRS will be an integral part of the Department's efforts to provide

the training, so that intra-tribal conflicts (that do not meet CRS jurisdictional requirements) can be addressed. Due to the expanse of Indian country, more CRS personnel resources and personnel are needed to establish a permanent field office in the Dakotas. CRS is exploring with the Police Services Office of the Bureau of Indian Affairs the possibility of detailing an employee to CRS for training in mediating tribal disputes.

FUTURE CHALLENGES & NEXT STEPS

While CRS has made significant administrative and managerial improvements over the last four years, budget shortfalls have left certain critical issues unaddressed. Without adequate funding, CRS' case management system will be at risk, investments in information technology will be jeopardized, and deferral of basic and necessary infrastructure improvements will continue.

Daily media accounts reveal that issues such as police use of force, hate crimes and racial profiling continue to be the source of heightened racial tensions and community conflicts around the country. As the Department's race relations arm, it is CRS' responsibility to put a lid on the racial "hot spots."

As our nation continues to face the challenge of ensuring safe and peaceful communities, a strong and vital CRS can help meet this challenge. CRS is the only federal agency with the appropriate credibility and neutrality, that is devoted to mediating and resolving racial violence and conflict in local communities. With out CRS assistance, unresolved community conflicts fester and fuel further serious community-wide violence, with significant social and economic consequences.

A professional and experienced corps of racial conflict mediators is one of the Federal government's best investments in the stability and safety of our nation's communities. The cost of just one civil riot would far exceed CRS' annual budget. The savings – in lives, property loss, and further prevention of community violence – far outweigh this modest investment.

The Department FY2002 budget request would bring CRS back to manageable levels.

DOCUMENTATION

THE PRESIDENT'S INITIATIVE ON RACE

- ▶ One America in the 21st Century - President's One America Taskforce Concept Paper (April 1997)
- ▶ One America Dialogue Guide (March 1998)

THE PRESIDENT'S INITIATIVE CHURCH ARSON

- ▶ CBRT Coordinator Testimony Before the House Judiciary Committee (March 1997)
- ▶ Church Burning Response Team: First Year Report (June 1997)
- ▶ Church Burning Response Team: Second Year Report (September 1998)

THE PRESIDENT'S SUMMIT ON HATE CRIMES

- ▶ Hate Crime Training (1999)
(Due to the voluminous nature of the document, only cover sheets are attached)
 - Core Curriculum for Patrol Officers, Detectives & Command Officers
 - Curriculum for Command Officers
 - Curriculum for Detectives & Investigators
 - Student Manual
- ▶ CRS Bulletin - "Hate Crime: The Violence of Intolerance" (1998)
- ▶ Responding to Hate Crimes and Bias-Motivated Incidents on College/University Campuses (May 2000)
- ▶ Preventing Youth Hate Crime (1998)
- ▶ Police and Urban Youth Relations: An Antidote to Racial Violence (September 1995)

THE ATTORNEY GENERAL'S INITIATIVE ON STRENGTHENING POLICE/COMMUNITY RELATIONS

- ▶ CRS Bulletin - "Police Use of Force - Addressing Community Racial Tensions" (1999)
- ▶ Police Use of Excessive Force: A Conciliation Handbook for the Police and the Community (June 1999)
- ▶ Principles of Good Policing: Avoiding Violence Between Police and Citizens (Revised March 1993)
- ▶ Avoiding Racial Conflict: A Guide for Municipalities (1991)

CRS COMMUNITY CONFLICT RESOLUTION

- ▶ CRS Fact Sheet
- ▶ CRS Annual Reports 1995, 1996, 1997, 1998 and 1999
- ▶ National Race Relations Symposium: Proceedings & Project Profiles (2000)
- ▶ Guidelines for Effective Human Relations Commissions (Revised September 1998)
- ▶ Managing Major Public Events (Draft- November 2000)
- ▶ Planning for Safe Marches and Demonstrations
- ▶ So . . . You're A Demonstration Marshal (2000)

- ▶ Civil Disorder Curriculum: Basic Training and Command Officers Training (2000)
- ▶ CRS Bulletin - "Conflict Resolution in Indian Country"
- ▶ School Disruptions: Tips for Educators and Police (Revised 1998)
- ▶ Mediation Report - Cincinnati, Ohio (February 1998)
- ▶ Letter of Understanding - Muskegon, Michigan (November 1998)
- ▶ Mediated Agreement - Trumbull, Connecticut (June 1999)
- ▶ Letter of Understanding - Battle Creek, Michigan (May 2000)

B. Protecting Our Environment

Submission by the Environment and Natural Resources Division

PROTECTING OUR ENVIRONMENT: THE ENVIRONMENT AND NATURAL RESOURCES DIVISION

Background

The Environment and Natural Resources Division enforces our Nation's environmental laws. The mission of the Division is to ensure that the American people have clean air and water, live in healthy communities, and benefit from and enjoy our nation's natural resources. The Division also works to protect wild life, implement our government's trust responsibility to Indian tribes, acquire land on behalf of federal agencies, and defend challenges to federal agency decision making related to these areas of law.

The Division consists of nine sections: the Environmental Enforcement Section; the Environmental Crimes Section; the Environmental Defense Section; the Wildlife and Marine Resources Section; the General Litigation Section; the Indian Resources Section; the Land Acquisition Section; the Appellate Section; and the Policy, Legislation, and Special Litigation Section. The Division also has an Executive Office that oversees administrative and organizational support functions.

Major Goals and Guiding Policies

The Division's responsibilities and, accordingly, its major goals may be divided into five categories.

First, we litigate pollution cases. Our primary mission in this litigation is to ensure that we have clean air, safe water, and healthy neighborhoods for all Americans. We bring civil enforcement cases against violators for cost recovery, injunctive relief and penalties, as well as criminal cases referred by EPA, the FBI, the Coast Guard, and other agencies for the most serious violations. We defend cases under the pollution statutes when federal environmental protections are challenged in court by industry groups, environmental groups, and in many cases by both sides. We also represent federal agencies -- such as the Department of Defense and the Department of Energy -- when they are alleged to have violated pollution-protection standards that apply equally to federal facilities. These cases are handled primarily by the Environmental Enforcement Section, the Environmental Crimes Section, and the Environmental Defense Section.

Second, we handle land and natural resources cases. Our major clients in these cases are

the Interior Department and the Forest Service in the Agriculture Department. Our primary mission in this area is to defend challenges to agency decisions concerning the national forests and other federal lands such as the national parks, particularly with regard to oil and gas, mining, grazing, water, and other land-related issues. We also defend the environmental reviews performed by federal agencies in the course of making permitting and licensing decisions or undertaking major projects. These cases are handled primarily by the General Litigation Section.

Third, we bring and defend cases under the federal fish and wildlife laws. In these cases, we primarily represent the Interior Department and the National Oceanic and Atmospheric Administration. We bring enforcement actions to protect endangered species and to stop the illegal smuggling of birds, reptiles, and other wildlife. And we defend the Forest Service and other agencies in challenges brought under the Endangered Species Act, and on issues involving fisheries management and the coastal zone. These cases are handled primarily by the Wildlife and Marine Resources Section.

Fourth, we litigate Indian cases. We represent the Interior Department and other agencies acting in fulfillment of the United States' trust responsibility to tribes by protecting land and waters, as well as tribal treaty rights involving hunting and fishing. At the same time, we defend challenges to agency actions that affect Native Americans. These cases are handled primarily by the Indian Resources Section and the General Litigation Section, respectively.

Fifth, the Environment Division litigates condemnation cases. These cases include affirmative condemnations to acquire land, for example to build a federal courthouse or to expand protection of sensitive ecosystems such as the Everglades. We also defend against so-called "inverse condemnation" cases, including "regulatory taking" cases, where the claimant argues that federal action has impaired a property right so as to constitute a taking of property that requires Just Compensation under the Fifth Amendment. These cases are handled primarily by the Land Acquisition Section and the General Litigation Section, respectively.

The responsibilities of the Division's Appellate Section and Policy, Legislation, and Special Litigation Section cut across all of the categories identified above. The Appellate Section handles appeals in all of these categories and the Policy, Legislation, and Special Litigation Section handles policy and legislative issues that arise in each of the categories, as well as the filing of amicus briefs, among other things.

Review of Major Activities and Accomplishments

The Division has had many major accomplishments in each of these five categories in the last eight years. Because of the length limitations on this memo, what is provided below is not intended to be a complete listing of these accomplishments and activities, but merely gives a flavor of what the Division has accomplished. More comprehensive descriptions of the Division's accomplishments and activities are contained in the accompanying annual Accomplishments Reports, speeches etc.

First, the Division has revitalized the enforcement of criminal laws protecting the environment. It has spearheaded several nationwide task forces involving federal and, in some cases, state and local agencies that are cracking down on a broad range of environmental threats. These include pollution from oceangoing vessels such as cruise ships, illegal importation of chlorofluorocarbons, and fraud in environmental testing and certification. (Testing for compliance with environmental requirements is a cornerstone of any environmental protection program -- fraud in this area undermines the national environmental laws.) These task forces have yielded impressive results. For example, the vessel pollution enforcement initiative has resulted in over forty prosecutions in the last seven years, with a major cruise line pleading guilty to violations of the environmental laws and being sentenced to \$18 million in fines and implementation of a court-supervised environmental compliance program. The chlorofluorocarbon smuggling initiative has resulted in over 80 convictions and more than \$58 million in fines and restitution, as well as increased protection of the earth's fragile ozone layer.

The Division has also achieved excellent results in individual prosecutions outside of the task force context. One such prosecution occurred recently, when, working together with the United States Attorney's Office in Idaho, it obtained the longest prison sentence ever for an environmental crime. In this prosecution, a Wharton-educated businessman and attorney who sentenced one of his employees to a lifetime of severe brain damage by ordering him to clean up a tank containing sodium cyanide finally received his own sentence -- seventeen years imprisonment and \$6 million in restitution to the victim's family.

Also in the area of its pollution litigation docket, the Department has strengthened civil enforcement of anti-pollution laws. Our enforcement of the environmental laws has direct positive impacts on public health. We have brought several actions under the Safe Drinking Water Act to ensure that citizens all over the United States can drink from public water supplies without fear, and obtained a \$12 million civil penalty (upheld on appeal) from a slaughterhouse for the illegal discharge of wastes into a Virginia river. Air pollution strikes particularly hard against our elderly and children and the sick, and we have obtained commitments from companies violating the Clean Air Act that they will engage in projects to reduce air pollution and will help establish and fund a clinic to diagnose and treat respiratory diseases. Overall, between 1993 and 2000, the Division brought more than 469 civil Clean Air Act cases and 317 civil Clean Water Act cases, imposing more than \$425 million in penalties. Among the successes in this litigation, the Division negotiated the largest Clean Air Act settlement in history with manufacturers who allegedly disabled emission control systems of heavy duty diesel engines, obtaining specific commitments to reduce such emissions in the future and collecting \$83.4 million in civil penalties. Joining forces with the Department of Housing and Urban Development and the EPA, the Division also secured settlements with several landlords requiring the implementation of millions of dollars in lead poisoning prevention measures.

The Division also obtained hundreds of millions of dollars in commitments to clean up hazardous waste sites, resolved claims of federal responsibility for such sites where appropriate, and entered into prospective purchaser agreements that will facilitate the transition of

contaminated sites and brownfields to property in productive use. In the last five years, the government has entered into approximately 125 such agreements which have facilitated redevelopment projects on more than 1200 acres and created more than 1500 short-term and 1700 permanent jobs. The Division has also integrated alternative dispute resolution into major enforcement programs and carefully selected cases to most effectively leverage the resources of the Department.

Second, in the category of natural resource protection, the Division has had many major accomplishments over the last eight years, including several successes in defending agency programs designed to protect federal lands and resources on those lands. The Supreme Court upheld a challenge by several livestock ranching groups to the Department of the Interior's amendments to regulations governing grazing on public lands managed by the Bureau of Land Management, holding that the Department has broad authority under the statutes to determine grazing privileges on the public rangelands. Another milestone in the Division's history was its successful defense of the Clinton Administration's Northwest Forest Plan, which was the first initiative for the management of the remaining old-growth forests of the lower 48 states to withstand challenge in over a decade. The Division also helped protect federal land management officials in so-called "county supremacy" litigation.

In many cases, what the Division accomplishes is not just protective of our natural resources and environment - it actually restores and improves them. For example, it has successfully defended the reintroduction of gray wolves into their former home in the Greater Yellowstone ecosystem and enhanced the restoration of lake trout in the Great Lakes. In the case of an oil spill off Rhode Island's coast, the parties responsible for the spill have agreed to implement programs to restore lobsters and loons, and to acquire land for salt ponds and seabirds such as eider. Regarding the Bunker Hill Superfund Site in Idaho, the Division negotiated a novel consent decree with Union Pacific to cap mine tailings along its 71.5-mile railroad right of way in the Coeur d'Alene Basin and to convert the right-of-way into a world-class biking and hiking trail that will be maintained as a State park for most of its length and as a tribal park for a segment on the Coeur d'Alene reservation.

Third, in the category of wildlife and marine protection, the Division launched a criminal enforcement program targeting the \$6 billion illegal wildlife smuggling industry (second in size only to the drug smuggling trade.) Prosecutors from the Division, in conjunction with the U.S. Attorneys' Offices, have brought prosecutions to break up several international wildlife smuggling rings. For example, they achieved trial and appellate court victories in the prosecution of Tony Silva, an internationally prominent Chicago-area writer and lecturer on the plight of endangered parrots in the wild. He was sentenced to 82 months of imprisonment for leading an international parrot smuggling conspiracy and for a related income tax violation. Silva and his co-conspirators smuggled into the United States highly protected species of birds trapped in South America, most significantly a substantial number of very rare Hyacinth Macaws. At Silva's sentencing, the judge found that the value of the smuggled wildlife was over \$1.3 million. Silva's 82-month sentence constitutes the longest prison term ever handed out for

bird smuggling, and one of the longest for any federal wildlife crime.

One major activity of the Division with regard to wildlife litigation has been the defense of a wide variety of agency decisions regarding species protected by the Endangered Species Act or the Marine Mammal Protection Act, including bald eagles, salmonid species, Umpqua River cutthroat trout, and many others. Litigation against the government pursuant to these Acts has increased markedly in the last eight years, and all the indications are that this trend will continue.

Fourth, with regard to litigation on behalf of and affecting Indian tribes, one of the Division's major accomplishments has been to resolve almost all of the many Indian Commission claims cases that have been pending for years, if not decades. Other accomplishments include the protection of Indian hunting and fishing rights in several cases, including a case in which the Supreme Court upheld the treaty rights of the Mille Lacs Band of Chippewa Indians to hunt, fish and gather wild rice free of State regulation on off-reservation lands in Minnesota. The Division also collected over \$1 million dollars for the Confederated Salish and Kootenai Tribes for damage to their lands in Montana resulting from forest fires, and won a jury verdict of approximately \$40 million for the Cayuga Nation in a centuries-old dispute with the State of New York in which the State had obtained land from the Cayuga in violation of federal law.

Fifth, in the Division's work regarding condemnation of land for the federal government, the Division has saved U.S. taxpayers tens of millions of dollars in recent years by achieving settlements and judgments based on fair market values, which were far below the valuations asserted by claimants. It has played a vital role in many cases, including the federal government's purchase of the New World Mine properties just north of Yellowstone National Park to protect the park from pollution from mining. It also continues to contribute to the conservation and restoration of the Everglades' unique ecosystem by representing the National Park Service in its acquisitions through eminent domain of approximately 2,500 tracts of land for expansion of Everglades National Park and Big Cypress National Preserve.

Prominent among the Division's success stories in this category was its role in Utah v. United States. This litigation, brought under the Utah Schools and Lands Improvement Act of 1993, involved the valuation of thousands of acres of State-owned lands within national parks, monuments, and forests, and Indian reservations. Interior Secretary Babbitt and Governor Leavitt reached a settlement agreement that recently was approved by Congress. The settlement results in the exchange of more than 425,000 acres of land between the United States and Utah, the largest such land exchange in history. The agreement will be worth at least \$1 billion to the State's school endowment over the next 30 years, and it ends more than six decades of controversy surrounding State school lands.

State of Affairs Today and Challenges for the Future

Over the last eight years, the Division has developed a strong but fair program of

environmental and natural resource protection. It has obtained hundreds of millions of dollars in commitments to clean up hazardous waste sites across the country, made violators of the nation's environmental laws understand that they will pay for their crimes and violations and that compliance makes better business sense in the long run, and has protected a broad range of important agency programs. It has also helped Indian tribes from New York to Alaska build a better future for their children. The biggest challenge for the future will be to maintain and build on this strong record of protection for all Americans.

C. Protecting American Consumers from Unfair Market Practices

Submission by the Antitrust Division

Protecting Free-Market Competition Through Antitrust Enforcement

Background and Overview

Sound antitrust enforcement is vital to America's economic health. Competition is the cornerstone of this country's economic foundation. We have long extolled the virtues of the free market, which provides business with the opportunity to innovate, produce, and distribute goods and services without direct intervention by the government. Competition, rather than government directives, determines which businesses will succeed, and consumers are the ultimate -- and appropriate -- beneficiaries of the competitive process.

The antitrust laws help promote and protect this free-market economy, by ensuring that the benefits of the competitive process are not thwarted by private anticompetitive conduct. The Supreme Court has described the Sherman Act as the "magna carta" of the free enterprise system. Sound antitrust enforcement enables consumers to obtain more innovative, high-quality goods and services at lower prices, while enhancing the competitiveness of American businesses in the global marketplace by promoting healthy rivalry, encouraging efficiency, and ensuring a full measure of opportunity for all competitors. For these reasons, the antitrust laws have rightly enjoyed substantial bipartisan support through the years.

In a free market system, innovation and creativity should be rewarded, not penalized, and the Antitrust Division has taken care to ensure that the antitrust laws are used only to prevent private conduct from impairing the vigor of the competitive process, not to protect competitors from that vigor. While there will inevitably be winners and losers, they should be picked by consumers through their purchasing decisions, not by antitrust enforcers. Distinguishing the few business alliances that can result in market power and decrease competition from the many that are procompetitive responses to economic change has required a commitment to a principled and pragmatic antitrust enforcement policy, characterized by careful attention to facts, informed by economic analysis.

Major Goals and Guiding Policies

With our economy in the midst of dramatic changes, highlighted by increased globalization of trade, rapid technological innovation, and deregulation, the past eight years have been an active period for the Antitrust Division across the full range of its enforcement responsibilities: criminal prosecutions, merger review, and civil non-merger activities.

Globalization of Trade

The increasing importance of international trade -- touching roughly 25 percent of our GDP -- presents special challenges to antitrust regimes traditionally administered by individual sovereign nations. The Antitrust Division has responded in several important ways. The Division has devoted more resources to uncovering international cartel behavior that harms American consumers, such as the successful prosecution last year of the international vitamin cartel, which has thus far resulted in fines of over \$910 million for companies and significant jail time for individuals. The Division has also responded to the increase in mergers that have competitive implications in more than one country and are subject to multi-country review, working closely with governments around the world to cooperate in merger review, both to minimize burdens on private parties and to advance the cause of proper antitrust analysis. And the Division has promoted competition principles in a variety of international forums, and has entered into a web of bilateral antitrust agreements with countries comprising most of the world's economy, setting out principles for cooperation on merger review and on civil and criminal investigations.

Rapid Technological Change

Some of our most important industrial sectors have recently seen unprecedented levels of technological change that can bring industries once considered separate and distinct into the same competitive sphere. Some have argued that the prospect for companies to rapidly develop new products and services reduces the need for antitrust enforcement, because a company that attempts to exploit its current dominance can expect to find itself pushed aside by eager new entrants. In fact, however, rapid technological change may actually increase barriers to entry through network effects and first-mover advantages that may solidify a firm's market dominance. The more important innovation becomes to society, the more important it is to preserve economic incentives to innovate. In such circumstances, effective antitrust enforcement is key to preserving an environment in which current and future innovators can be confident that there will be no anticompetitive barriers to bringing new products and services to market.

It is undoubtedly true that rapid technological change requires careful attention to facts. Our challenges to the Lockheed Martin/ Northrop Grumman transaction and to Microsoft's abuse of its monopoly in computer operating systems required careful consideration of the current state of these markets, historical conduct, and likely future effects. While high-technology industries may present additional challenges for antitrust analysis, sound enforcement decisions made today can provide significant competitive benefits to the American economy for many years to come.

Deregulation

In recent decades, legislative and regulatory changes in the United States have reversed a generation of pervasive government regulation in such basic industries as telecommunications, energy, financial services, and transportation. As competition, with appropriate reliance on

antitrust to ensure that its benefits are not impaired by private restraints, has again become the norm, the Division has continued its role as the government's foremost proponent of competition. The Division has worked with various agencies to replace regulatory constraints with competitive incentives, for example in helping forge the procompetitive Telecommunications Act of 1996 and in working on its implementation at the Federal Communications Commission and in the courts. The Division was also the primary advocate of competition within the Executive Branch and with Congress, urging that the marketplace rather than government agencies be permitted, to the maximum extent possible consistent with other important goals, to determine the products and services that businesses will provide. Antitrust enforcement strengthens this effort by keeping markets competitive, thereby staving off the urge to protect consumers through regulatory intervention.

Review of Major Activities and Accomplishments

Criminal Enforcement

The Division criminally enforces section one of the Sherman Act against hardcore cartel activity such as price-fixing, bid-rigging, and market-allocation agreements. Such conduct causes substantial harm to purchasers of goods and services. Over the last eight years, the Division filed 457 criminal cases, charging 277 individuals and 335 corporations with criminal violations; in these cases, the courts have imposed 24,284 days of jail time for 93 individuals, \$1.85 billion in fines against corporations, and \$26.78 million in fines against individuals. Fines are paid to the U.S. Treasury and set aside to fund the Victims of Crime Fund. Industries in which the Division has uncovered and prosecuted hard-core cartel activity during the Clinton Administration include: vitamins; the livestock feed additive lysine; citric acid; commercial explosives; real estate foreclosure auctions; fine arts auctions; fax paper; plastic dinnerware; milk and dairy products; graphite electrodes used in steel mills to melt scrap steel; sorbates used as chemical preservatives to prevent mold in high-moisture and high-sugar food products; marine construction and transportation services; point-of-purchase display materials; the industrial cleaner sodium gluconate; metal buildings insulation; carpets; residential doors; steel wool scouring pads; painted aluminum; and wastewater treatment facilities construction.

In the last several years, a top Division priority has been prosecution of international cartels, which pose a particularly great threat to American businesses and consumers in that they tend to be highly sophisticated and extremely broad in their geographic impact, in the amount of commerce they affect, and in the number of businesses and consumers they victimize. The Division has had unprecedented success in cracking international cartels, securing the conviction of major conspirators and obtaining record-breaking fines. During the Clinton Administration, the Division has prosecuted international cartel activity affecting over \$10 billion in U.S. commerce and costing U.S. businesses and consumers many hundreds of millions of dollars annually. Just since the beginning of FY 1997, the Division has obtained over \$1.5 billion dollars in criminal fines -- over 90 percent of it in connection with international cartels -- many multiples higher than the sum total of all criminal fines imposed under the Sherman Act dating

back to the Act's inception in 1890, and many multiples higher than the Division's budget during those years..

The international vitamin cartel alone affected over \$5 billion in U.S. commerce, involving nutritional supplements and food and animal feed additives, victimizing every American consumer who took a vitamin, drank a glass of milk, had a bowl of cereal, or ate a steak. The ongoing vitamin investigation has resulted thus far in convictions against Swiss, German, Canadian, Japanese, and U.S. firms; over \$910 million in criminal fines against the corporate defendants, including record fines of \$500 million and \$225 million imposed on F. Hoffmann-La Roche Ltd. and BASF AG; a total of 24 corporate and individual prosecutions; 13 convicted American and foreign executives sentenced to federal prison or awaiting sentencing along with heavy fines, including six Europeans who agreed to submit to U.S. jurisdiction.

In August 1993, the Division expanded its Amnesty Program to strengthen the incentives for companies to come forward and cooperate in exchange for avoiding prosecution. Today, that program is the Division's most effective generator of large cases -- in the past two years alone, dozens of convictions and over \$1 billion in criminal fines. Amnesty applications are arriving at the rate of more than one per month, a ten-fold increase over the prior amnesty program.

Merger Enforcement

Section 7 of the Clayton Act prohibits mergers that are likely to substantially lessen competition. The Division's goal in enforcing section 7 is to preserve for individual, business, and government consumers the price-reducing and quality-enhancing effects of competition. The Division's merger enforcement program has been severely tested in recent years by a steadily growing merger wave. A record \$1.4 trillion in U.S. merger transactions took place in 1999, with \$1.35 trillion in 2000 through December 13. In FY 1998 and 1999, approximately 4,500 transactions were filed each year under the Hart-Scott-Rodino Act's premerger review provisions, and in FY 2000, the number increased further to over 4900. These are by far the most filings in the Division's history -- more than twice the annual filings just a few years ago.

The Division has had a very busy eight years in merger enforcement. Although the vast majority of mergers did not raise significant competitive concerns, the Division identified those that did and took appropriate enforcement action to prevent competitive harm. Over the past eight years, the Division challenged 263 as anticompetitive, leading to their abandonment or restructuring. These challenges have involved many products and services, including: telecommunications, Internet, health insurance, health care, airlines, banking, local radio, newspapers, movie theaters, broadcast media, cable programming and distribution; aluminum cans; bread; milk; tissue paper products; women's hair products; trash hauling and disposal; electronic benefits transfer; crop biotechnology; energy; and our military's most sophisticated weapons. Many have involved firms with billions of dollars in revenues, operating in numerous product and service markets.

The analysis of proposed mergers has become increasingly difficult as the products and services of our economy become more complex and the pace of their development increases. In technologically complex or rapidly changing markets, the Antitrust Division must determine not only the extent to which the merging firms compete today but also the manner in which such rivalry is likely to be affected by foreseeable innovation from these firms and others in the same or related markets. This type of complex, fact-based analysis underlay the Division's suit to block the \$11.9 billion proposed merger of Lockheed Martin and Northrop Grumman, as well as the divestitures insisted upon in connection with Raytheon's acquisitions of the defense electronics businesses of Texas Instruments and Hughes Electronics. The Division's goal in both these cases was to preserve for our armed services the competition necessary for development of innovative, advanced weapons systems.

Consolidation in the wake of the deregulated environment that resulted from passage of the Telecommunications Act of 1996 has led to a number of merger challenges to preserve competition in radio advertising and multichannel video programming. The Division has investigated over 100 radio mergers, and has successfully challenged those that would have harmed competition in local radio markets. And in *United States v. Primestar*, the Division's challenge led five of the nation's largest cable television companies to abandon their attempt to acquire control over the last available orbital slot for nationwide direct broadcast satellite, a technology that provides the most effective competition to their local cable monopolies.

The Division also undertook a number of merger challenges to preserve competition in important emerging technologies markets, including the Internet backbone in MCI/Worldcom and Sprint/Worldcom and broadband content in AT&T/MediaOne.

While most merger challenges involve concerns about the anticompetitive potential of the merging parties as sellers, in two 1999 merger challenges, *United States v. Aetna* and *United States v. Cargill*, the Division demonstrated that its concerns about market power extend to "monopsony power" on the part of buyers. In *Aetna*, the concern was that the merged firm would be able to depress physicians' reimbursement rates, reducing the availability or quality of physicians' services. In *Cargill*, the concern was that the merged firm would be able to depress the prices paid to farmers for grain and soybeans in selective geographic areas. Both cases were successfully resolved by consent decree.

Most of the Division's merger cases were resolved by consent decrees requiring divestitures designed to protect competition. When a consent decree can cure the anticompetitive effects of a merger, the Division insists on full compliance, as shown by its filing of contempt charges in 1999 against Smith International and Schlumberger, Ltd. for violating their consent decree; the companies paid \$13.1 million in civil fines and \$750,000 each in criminal fines. And when a consent decree cannot cure the anticompetitive effects of a merger, the Division has shown its determination to stop the transaction in its entirety, filing suit to fully block over 13 mergers.

While staying abreast of the merger wave, the Division has also worked hard, along with the FTC, to make merger review as efficient as possible, so that the merging parties may complete their transaction without unnecessary burden and delay. Improvements announced in March 1995 included measures to speed the determination of which agency should review a particular transaction, and development of a model "second request" for additional information, to increase consistency and reduce compliance burdens. Further improvements announced in April 2000 included high-level review of second requests prior to issuance, early conferences with the merging parties to identify competitive issues, quick response to requests for modifications of a second request, and new procedures for appealing second request issues.

In the 106th Congress, the Division supported legislation to revise the premerger reporting thresholds and filing fee structure in the Hart-Scott-Rodino Act, to account for inflation and economic growth since the HSR Act was enacted in 1976 (raising the filing threshold from \$15 to \$50 million), while ensuring the effectiveness of the premerger review program and adequate antitrust funding (increasing the fee for the biggest transactions). The legislation was enacted at the end of the 106th Congress as part of the appropriations resolution.

Civil Non-Merger Enforcement

The Antitrust Division's civil non-merger enforcement program has been demonstrating the antitrust laws' continuing effectiveness in protecting consumers from anticompetitive harm in the midst of unprecedented technological change. During the Clinton Administration, the Division has filed 61 civil non-merger cases challenging anticompetitive conduct, both unilateral and joint, in a wide variety of industries.¹

What economists call "network effects" have particular importance in the industries involving information technology, which have seen unprecedented technological change in recent years. Network effects arise when the value of a product or service to a user increases with the size of the "network" of users -- directly, where communication with other users is important, such as in telecommunications, or indirectly, where a product's value depends on the availability of complementary products, such as in application programs compatible with a computer's operating system. Where network effects are substantial, the market success of a competitor's product will depend not only on its inherent attributes (such as price or ease of use) but also on its ability to interface seamlessly with the dominant firm's products or with complementary products tailored for those products. Installed-base compatibility advantages can give the dominant firm a competitive edge also in related markets, as well as help defend its core market power against rivals whose offerings are otherwise superior.

The most significant of the Antitrust Division's civil non-merger enforcement efforts

¹ This does not include nine cases filed under section 7A of the Clayton Act for a failure to file premerger notification under the Hart-Scott-Rodino Act.

relating to network effects has been its 1998 action charging Microsoft with violating Sections 1 and 2 of the Sherman Act, for using exclusionary practices to protect its monopoly in personal computer operating systems and to extend its monopoly power into the Internet browser market. Following a 78-day trial and review of thousands of pages of Microsoft's own documents, the district court issued extensive findings of fact in November 1999, finding that Microsoft had repeatedly used its monopoly power to crush emerging threats to Windows' dominance and, specifically, to increase the barriers to entry into the PC operating system market. After settlement efforts spurred by the district court proved unsuccessful, it entered judgment in April 2000, ruling that Microsoft had violated section 2 of the Sherman Act. The court concluded:

[O]nly when the separate categories of conduct are viewed, as they should be, as a single, well-coordinated course of action does the full extent of the violence that Microsoft has done to the competitive process reveal itself. In essence, Microsoft mounted a deliberate assault upon entrepreneurial efforts that, left to rise or fall on their own merits, could well have enabled the introduction of competition into the market for Intel-compatible PC operating systems. While the evidence does not prove that they would have succeeded absent Microsoft's actions, it does reveal that Microsoft placed an oppressive thumb on the scale of competitive fortune, thereby effectively guaranteeing its continued dominance in the relevant market. More broadly, Microsoft's anticompetitive actions trammelled the competitive process through which the computer software industry generally stimulates innovation and conduces to the optimum benefit of consumers.²

In June 2000, the district court ordered the breakup of Microsoft into two separate companies, along the lines proposed by the Division. Under the court's order, Microsoft is to be separated into an operating systems company and an applications company. The applications company will then have every healthy competitive incentive to develop the kinds of cross-platform products that will help stimulate other operating systems to compete with Windows, bringing innovation and choice to the marketplace that had been suppressed by Microsoft's sustained abuse of its monopoly power. The district court's order has been stayed pending appeal to the United States Court of Appeals for the District of Columbia Circuit.

Concerns about innovation also led the Division to file suit in October 1998 charging Visa and MasterCard, the two dominant general-purpose credit card networks, with restraining competition between themselves through overlapping governance arrangements among the large banks that own and control them, as well as adopting rules to prevent their member banks from dealing with other credit card networks. Trial was held in the summer of 2000, and the district court's decision is pending.

² *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 44 (D.D.C. 2000) (citations omitted), *appeal docketed*, No. 00-5212 (D.C. Cir. 2000), *direct appeal denied*, 121 S. Ct. 25 (2000) (mem.).

Another important pending civil non-merger case charges American Airlines with monopolizing airline passenger service on routes emanating from its hub at Dallas/ Ft. Worth International Airport (DFW) in violation of section 2 of the Sherman Act, by using predatory practices designed to drive low-cost carriers out of DFW routes. This is the first non-merger antitrust case seeking to keep the airline marketplace competitive since the industry was deregulated in the late 1970s.

Among other important civil non-merger cases the Division has brought during the Clinton Administration are cases involving: monopolizing the sale of artificial teeth; anticompetitive joint negotiation of television program retransmission rights; monopolistic licensing restrictions on personal computer operating system software; using tying arrangements to monopolize ATM processing; using "teaming arrangements" to restrain competition in defense procurement; inflating the cost to investors of 2-year U.S. Treasury notes; anticompetitive tying of gas meters and installation services to use of a gas gathering system; monopolizing bus passenger transportation services; restraining competition in importation of wine and spirits; resale price maintenance of specialty toys; monopolizing trash hauling services; monopolizing the flat glass market through licensing restrictions; distorting the ABA law school accreditation process to inflate faculty salaries; attempting to boycott auto manufacturers offering consumer rebates; and attempting to boycott travel providers who cut travel agent commissions.

The Telecommunications Competition Program

During the Clinton Administration, the Division built on its decades-long record of accomplishment in promoting competition in telecommunications. Its 1982 consent decree breaking up the AT&T monopoly, known as the Modification of Final Judgment or MFJ, had created an environment in which competition was flourishing in all parts of the industry, except for the local telephone service market, which was permitted to remain a regulated monopoly under the MFJ. The Telecommunications Act of 1996, enacted with the active support of the Division, eliminated legal restrictions on competition in local telephone service and established a national policy favoring competition and deregulation. Since passage of the 1996 Act, the Division has successfully advocated the procompetitive interpretation and implementation of its local-market-opening provisions, successfully defending the constitutionality of the Act's transitional restrictions on the BOCs entry into long distance, and participated as amicus in numerous cases under section 252 of the Act concerning arbitrated interconnection agreements.

The Division has also evaluated long-distance service applications by the BOCs under Section 271 of the Act, which requires a BOC to meet certain local market opening criteria before the FCC grants it the ability to offer long distance telephone service in a state in which it is the incumbent local phone service provider. The Division has evaluated whether the local market is "fully and irreversibly open to competition." By explaining in detail how it would apply the evaluation in a variety of situations, and by devoting substantial resources to working with the BOCs, interested parties, and state commissions on the issue, the Division has helped the 271 process work its incentives and enabled a number of BOCs to meet many of the

requirements for a successful 271 application, and two applications, in New York and Texas, have been granted by the FCC.

Strengthening International Antitrust Policy and Procedures

The Division has responded to increasing economic globalization by actively pursuing criminal enforcement against international cartels, currently devoting approximately 30 ongoing grand juries to the task. The Division took several steps to build international support for antitrust enforcement; participating in numerous multilateral and bilateral forums to promote sound competition enforcement policies, including securing OECD adoption in 1998 of its anti-cartel recommendation; proposing and helping enact the International Antitrust Enforcement Assistance Act of 1994, authorizing reciprocal agreements with foreign antitrust authorities to share information and obtain evidence under appropriate confidentiality protections; signing bilateral antitrust cooperation agreements with major trading partners accounting for roughly two-thirds of U.S. international trade; coordinating merger and civil non-merger enforcement where appropriate; promoting the use of "positive comity" to obtain another antitrust agency's assistance in investigating an apparent anticompetitive denial of market access in that agency's country;³ and establishing the International Competition Policy Advisory Committee (ICPAC), whose February 2000 report is the most comprehensive ever on international antitrust enforcement policy issues, reflecting the perspectives of prominent antitrust experts in the United States and throughout the world. At the same time, the Division has opposed proposals by some nations to use the World Trade Organization for development of internationally binding antitrust rules as counterproductive to the kind of careful application of economically-based competition principles to the facts of individual cases that has been the hallmark of sound antitrust enforcement.

Providing Guidance to the Business Community

The vast majority of businesses seek to compete fairly and legally within the boundaries of the law, as beneficiaries of the free market environment that the antitrust laws nurture and protect. To assist businesses in organizing their activities consistently with the antitrust laws, the Division has undertaken substantial efforts during the Clinton Administration -- through guidelines and policy statements issued jointly with the FTC, expedited responses to requests for business reviews, speeches before business groups, and Congressional testimony -- to provide as clear guidance as possible.

Statements of Policy in the Health Care Area. These policy statements, issued in

³ The sole positive comity referral thus far resulted in European Commission proceedings against several European airlines regarding possible anticompetitive conduct impeding competition from U.S.-based computer reservations systems, proceedings which were terminated after private agreements were announced that would likely enable U.S.-based computer reservation systems to compete more effectively in Europe.

September 1993 and September 1994, provide antitrust guidance with respect to subject areas such as mergers among hospitals, hospital joint ventures involving expensive health care equipment, price and cost information exchanges, joint purchasing arrangements, and physician network joint ventures.

Antitrust Guidelines for the Licensing of Intellectual Property. These guidelines, issued in April 1995, explain the generally complementary relationship between the antitrust laws and the laws that protect intellectual property in fostering innovation, and the circumstances in which an attempt to exploit intellectual property rights can raise antitrust concerns.

Guidelines for International Operations. These guidelines, issued in April 1995, articulate the agencies' resolve to protect both American consumers and American exporters from anticompetitive restraints in the international marketplace, and the emphasis on international cooperation to achieve those objectives.

Revisions to Merger Guidelines Regarding Efficiencies. In April 1997, the Division and the FTC revised a section of their Merger Guidelines to clarify how they analyze claims that a merger is likely to lower costs, improve product quality, or otherwise achieve procompetitive efficiencies that would not be possible absent the merger.

Antitrust Guidelines for Collaborations Among Competitors. These guidelines, issued in April 2000, describe the analytical framework used to assess joint ventures and other horizontal agreements among competitors.

Business Review Letters. Under the Division's Business Review Procedure, parties may seek guidance as to specific prospective conduct by requesting a statement of current enforcement intentions. The Division publishes a digest of business review letters to provide further general guidance. During the Clinton Administration, the Division has issued 135 business review letters, covering a wide variety of practices.

Next Steps/Challenges for the Incoming Administration

The antitrust enforcement program is on a strong and sound footing. The new information-based global economy will continue to present important challenges for maintaining and protecting competitive markets at home and abroad. The new Administration should continue this mainstream application of antitrust enforcement to ensure that U.S. markets stay the most competitive and innovative in the world. The new Administration should also work to expand international enforcement relationships, through initiatives like the Global Competition Initiative recommended by ICPAC, Assistant Attorney General Joel Klein, and Acting Assistant Attorney General Doug Melamed. Additionally, the Division should continue to focus on some of the important issues at the intersection of antitrust and intellectual property.

D. Representing the United States in Civil Proceedings

Submission by the Civil Division

DEFENDING OUR NATIONAL POLICIES The Civil Division, 1993-2000

Background

The Civil Division of the Department of Justice is responsible for defending and enforcing many of the nation's most important policies, thereby ensuring that the federal government speaks with one voice in its view of the law. In addition, many cases handled by the Division, such as contract disputes and allegations of negligence, involve monetary claims against the government. The Division's role in such matters is to ensure that only those claims with merit under the law are paid. As a result of prosecutions for fraud against the government and the pursuit of the government's interest in various commercial transactions, the Civil Division also recoups hundreds of millions of dollars each year in money owed to the federal government.

Major Goals and Guiding Policies

The Civil Division's primary goal is the effective representation of the United States, its agencies, officers, and employees in all litigation within the scope of its delegated authority. Several broad policies guide this effort: (i) protection of the public fisc by recovering money owed to the government and by defeating unmeritorious monetary claims against the government; (ii) defense and enforcement of federal statutes, regulations, policies, and programs; and (iii) where appropriate, resolution of disputes without extended litigation, e.g., through negotiated settlements and alternative dispute resolution.

Major Activities and Accomplishments

The Civil Division experienced unprecedented success during the last eight years, while managing some of the most demanding and complex cases in its history. As a result of a crackdown on fraud in both the health care and defense industries and the vigorous representation of the government's interest in loan defaults and bankruptcies, the Division recovered approximately \$7 billion in judgments and settlements in affirmative actions – a record \$1.5 billion in fiscal year 2000 alone. Further, due to its highly successful track record in defensive litigation, the Civil Division has saved the taxpayers billions more.

Fraud. The Civil Division's remarkable, recent achievements in combating fraud against Medicare, Medicaid, and other federal health care programs have already been discussed above. The Division has also realized comparable success in obtaining huge recoveries for the U.S. Treasury from companies that defrauded the government in defense procurements and other activities. For example, the Division obtained the largest recovery in history against a defense

contractor – \$150 million – from United Technologies for over-billing and misrepresenting facts to the government. Another \$112.5 million was recovered from Teledyne for fraud in the testing of military components and in accounting practices, \$88 million from Lucas Western Industries for failing to test airplane parts sold to the Army, Navy, and Air Force, and \$82 million from Litton Systems for overcharging for computer services. Settlements exceeding \$230 million were reached with several major oil companies to resolve claims that they had underpaid oil royalties to the government and Indian tribes. More than \$140 million was also recovered in settlements with five brokerage firms that sold market securities with artificially low yields that affected municipalities' purchases of low-interest U.S. Treasury bonds.

Bankruptcy. Since 1993, the Civil Division has recovered over \$3 billion in some of the largest and most complicated Chapter 11 bankruptcy cases in history. Many of these cases were the result of the severe economic turmoil during the 1980s in the rural electric utility industry, which is financed largely by the Department of Agriculture's Rural Utilities Service. When cooperatives that borrowed billions of dollars to finance huge power generation projects defaulted, they sought Chapter 11 relief. The Civil Division's successes in such cases include full recovery of over \$1.1 billion in the Big Rivers Electric Cooperative (Kentucky) case, a \$237 million settlement from Soyland Power Cooperative, and a \$205 million recovery in the Wabash Valley Power Association bankruptcy proceeding.

Contract Cases. In the last eight years, the Civil Division has handled the two largest and most complex contract cases ever litigated, Winstar and A-12. The Winstar litigation consists of approximately 130 cases that arose from banking reforms implemented in accordance with the Financial Institutions Recovery, Reform and Enforcement Act of 1989 (FIRREA).¹ In July 1996, the Supreme Court ruled in United States v. Winstar Corp.² that federal regulators in the 1980s had entered into contracts with thrift institutions concerning the treatment of "supervisory goodwill," and that FIRREA had breached those contracts. The Court thus remanded the Winstar-related cases for the determination of damages. Plaintiffs seek approximately \$30 billion, but the Civil Division thus far has succeeded in reaching settlements and obtaining judgments far less than the amounts sought. For example, in 1998, the Civil Division reached favorable settlements in four of the largest cases; of the \$1.2 billion in damages sought by the plaintiffs, the government payout was held to \$103 million. Since then, additional cases have been settled or dismissed, and favorable judgments on damages have been obtained in all but one of the cases that have been tried thus far. The government's appeal in the latter case is pending.³

¹ Pub. L. No. 101-73, 103 Stat. 183 (1989).

² 518 U.S. 839 (1996).

³ See Glendale Fed. Bank, FSB v. United States, 43 Fed. Cl. 390 (1999), appeals pending, Nos. 99-5103 & 5113 (Fed. Cir.).

The A-12 litigation involves claims by McDonnell Douglas and General Dynamics for damages incurred when the Navy terminated the A-12 stealth fighter contract in early 1991. Approximately \$4 billion is at issue for an airplane that was never built. Refusing to consider whether the contractors had defaulted, the trial court held that the government terminated the contract for convenience, and it awarded \$1.2 billion in damages to plaintiffs, which had already received some \$2.8 billion before the contract was terminated. On the government's appeal, the court of appeals reversed and upheld the authority of senior agency officials to manage major procurements for which they are responsible.⁴ The case was remanded for decision on the merits of the Navy's default termination, and trial is scheduled to begin in 2001.

Tort Cases. The Civil Division is often faced with defending cases of national significance, in which substantial damages are sought for alleged government neglect or other wrongful conduct. Over the past eight years, the Division has saved the taxpayers many billions of dollars by defeating excessive and unwarranted demands. Such cases include the highly publicized action that sought damages in connection with federal law enforcement operations at the Branch Davidian compound near Waco, Texas, in 1993. After a six-week trial, both an advisory jury and the presiding judge concluded that agents of the FBI and the Bureau of Alcohol, Tobacco, and Firearms had not acted unlawfully. In a novel case overturning an award to General Dynamics of over \$25 million in damages for alleged "accounting malpractice" by the Defense Contract Audit Agency, the court of appeals held that plaintiff's alleged harm was the result of protected, discretionary judgments for which the government could not be held liable.⁵ The Civil Division has also successfully defeated attempts by the asbestos-products industry,⁶ the manufacturers of agent orange,⁷ and numerous industrial polluters of groundwater⁸ to shift to the taxpayers tort liability totaling billions of dollars.

Tobacco Litigation. Beginning in 1993, the Civil Division placed a top priority on protecting the public – especially children – from the dangers associated with tobacco products. The Division thus brought the government's first action to enforce a 1971 statute banning cigarette advertising on television. As a result, Phillip Morris agreed to remove cigarette advertisements at all professional football, basketball, soccer, hockey, and baseball stadiums, where such signs were likely to be broadcast during televised coverage of the events. The Division's defense of the Food and Drug Administration's (FDA) assertion of jurisdiction to

⁴ McDonnell Douglas Corp. v. United States, 182 F.3d 1319 (Fed. Cir. 1999).

⁵ General Dynamics Corp. v. United States, 139 F.3d 1280 (9th Cir. 1998).

⁶ See, e.g., Keene Corp. v. United States, 508 U.S. 200 (1993).

⁷ See Hercules, Inc. v. United States, 516 U.S. 417 (1996).

⁸ See, e.g., Tucson Airport Auth. v. General Dynamics Corp., 136 F.3d 641 (9th Cir. 1998); United States v. Green, 33 F. Supp. 2d 203 (W.D.N.Y. 1998).

regulate tobacco products as a drug ultimately failed by only a single vote in the Supreme Court.⁹ However, during the pendency of that case, FDA regulations prohibiting the sale of tobacco products to minors and requiring photographic identification for certain sales were allowed to remain in effect, causing tobacco manufacturers and distributors to continue voluntary enforcement of such requirements.

In September 1999, the Civil Division filed suit against the major cigarette companies, alleging that defendants acted in concert as a conspiracy and enterprise to maximize their own profits through unlawful means; the government thus seeks equitable relief under the Racketeer Influenced and Corrupt Organizations Act (RICO), including disgorgement of the tobacco companies' ill-gotten profits. The complaint also seeks recovery under the Medical Care Recovery Act (MCRA) of medical expenditures that the federal government has incurred in connection with smoking-related illness. On September 28, 2000, the district court denied defendants' motion to dismiss the government's RICO claims, concluding that there is an adequate basis for permitting the United States to pursue its claim for equitable relief and noting that defendants' potential liability remains in the billions of dollars.¹⁰ Although the court dismissed the government's MCRA claims, its ruling nonetheless constitutes an important victory for the United States by allowing the case to move forward. The government's request for reconsideration of the court's MCRA ruling is pending and discovery is proceeding, with trial scheduled to begin in July 2003.

Defense of Federal Legislation and Executive Branch Policies. Since 1993, the Civil Division has successfully defended countless laws, programs, and policies of the United States against constitutional and other challenges. For example, the Division successfully defended the Freedom of Access to Clinic Entrances Act, which makes it a crime to interfere with individuals who provide or obtain reproductive health services.¹¹ The Division also presented arguments that were instrumental in securing federal and state appellate court decisions upholding "Megan's Laws" – designed to protect children by requiring registration and community notification of released sex offenders – in New Jersey, New York, Connecticut, Washington, and other states.¹² As a result of the Division's arguments, the courts have also upheld the Prison Litigation Reform

⁹ Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291 (2000).

¹⁰ United States v. Philip Morris Inc., 116 F. Supp. 2d 131 (D.D.C. 2000).

¹¹ See, e.g., Hoffman v. Hunt, 126 F.3d 575 (4th Cir. 1997), cert. denied, 523 U.S. 1136 (1998); Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996), cert. denied, 520 U.S. 1264 (1997).

¹² E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997), cert. denied, 522 U.S. 1110 (1998); Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1997), cert. denied, 523 U.S. 1007 (1998); Doe v. Pataki, 120 F.3d 1263 (2d Cir. 1997), cert. denied, 522 U.S. 1122 (1998); Roe v. Office of Adult Probation, 125 F.3d 47 (2d Cir. 1997); Doe v. Poritz, 142 N.J. 1, 662 A.2d 367 (N.J. 1995).

Act of 1996,¹³ the North American Free Trade Agreement,¹⁴ and the legislation that reformed the federal welfare system, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.¹⁵ And, after Congress enacted legislation in 1993 governing homosexual conduct in the military – the so-called “don’t ask; don’t tell” policy¹⁶ – the Civil Division successfully defended the constitutionality of this statute and its implementation by the Department of Defense in every court of appeals in which the policy was challenged.¹⁷

Immigration. The Civil Division handles cases that challenge the ability of the executive branch to control the flow of aliens across our nation’s borders, including cases involving suspected alien terrorists and criminal aliens who fight deportation orders. Since 1993, the Division has obtained favorable rulings in the vast majority of immigration cases. Certainly, the most highly publicized and sensitive such case involved Elian Gonzalez, the young Cuban child rescued at sea and brought to Miami. The court ruled that the Immigration and Naturalization Service (INS) has sufficient discretion to decline to consider an asylum application submitted by a six-year-old child and a non-parental relative, against the wishes of the child’s parent, and confirmed that INS policy is entitled to considerable deference when such policy has significant implications for foreign affairs.¹⁸

¹³ See, e.g., Madrid v. Gomez, 190 F.3d 990 (9th Cir. 1999); Collins v. Montgomery County Bd. of Prison Inspectors, 176 F.3d 679 (3d Cir.), cert. denied, 120 S. Ct. 932 (2000); Wilson v. Yaklich, 148 F.3d 596 (6th Cir.), cert. denied, 525 U.S. 1139 (1999); Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997); Norton v. Dimazana, 122 F.3d 286 (5th Cir. 1997).

¹⁴ Made in the USA Found. v. United States, 56 F. Supp. 2d 1226 (N.D. Ala. 1999), appeal pending, No. 99-13138-BB (11th Cir.).

¹⁵ Turner v. Glickman, 207 F.3d 419 (7th Cir. 2000); City of Chicago v. Shalala, 189 F.3d 598 (7th Cir. 1999), cert. denied, 120 S. Ct. 1530 (2000); Rodriguez v. United States, 169 F.3d 1342 (11th Cir. 1999); Aleman v. Glickman, 217 F.3d 1191 (9th Cir. 2000).

¹⁶ 10 U.S.C. § 654.

¹⁷ See Thomasson v. Perry, 80 F.3d 915 (4th Cir.) (en banc), cert. denied, 519 U.S. 948 (1996); Selland v. Perry, 905 F. Supp. 260 (D. Md. 1995), affd, 100 F.3d 950 (4th Cir. 1996) (Table), cert. denied, 520 U.S. 1210 (1997); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996), cert. denied, 522 US 807 (1997); Able v. United States, 88 F.3d 1280 (2d Cir. 1996); Able v. United States, 155 F.3d 628 (2d Cir. 1998); Phillips v. Perry, 106 F.3d 1420 (9th Cir. 1997); Thorne v. Department of Defense, 139 F.3d 893 (4th Cir. 1997), cert. denied, 525 U.S. 947 (1998); Holmes v. California Army National Guard, 124 F.3d 1126 (9th Cir. 1997), cert. denied, 525 U.S. 1067 (1999).

¹⁸ Gonzalez v. Reno, 212 F.3d 1338 (11th Cir.), cert. denied, 120 S. Ct. 2737 (2000).

Consumer Protection. The Civil Division enforces numerous federal consumer protection laws and defends the policies and programs of agencies with consumer protection responsibilities. Since 1993, the Division has obtained nearly \$271 million in criminal fines and civil penalties under such laws. For example, in a criminal investigation of generic drug manufacturers that intentionally failed to follow approved pharmaceutical formulas and submitted fraudulent documents to the FDA, the Civil Division obtained convictions of 17 companies and 47 individuals and collected over \$37 million in fines. The Division also successfully prosecuted 137 persons who rolled back the odometers on used cars, which cost the public an estimated \$4 billion annually.

Alternative Dispute Resolution. The Civil Division has actively supported and participated in alternative dispute resolution (ADR) as a fair and effective means to conclude lengthy and complex litigation. For example, a nationwide class of African-American farmers alleged that they had been the victims of racial discrimination in Department of Agriculture farm credit and other benefits programs dating back to 1983. The government entered into a consent decree that provided two "tracks" under which class members could have their discrimination claims decided in a binding ADR process.¹⁹ Over 21,000 persons qualified for class membership and elected to have their claims decided under one of the ADR processes, and, thus far, the government has prevailed in 40 percent of those proceedings.

Compensation Programs. The Civil Division plays a major role in the administration of two federal compensation programs. The National Childhood Vaccine Injury Act of 1986²⁰ created a program to compensate individuals injured by specified vaccines and to ensure the continued supply of vaccines. The Program offers an innovative, streamlined way to process claims, while ensuring that unwarranted claims are not paid. Since the filing of the first claims in 1988, 5,236 cases have been adjudicated, resulting in the award of \$1.2 billion to qualified claimants and the defeat of approximately \$3.5 billion in unsupported claims. The Radiation Exposure Compensation Act of 1990 (RECA)²¹ provides compensation to individuals who developed specified diseases presumptively due to radiation released during above-ground nuclear weapons tests and uranium production from 1942 to 1971. The RECA Amendments of 1999²² dramatically amended the original statute, expanding the act's geographic coverage and including radiation injuries from uranium milling and transportation. Since 1993, over \$270 million has been approved for compensation to eligible beneficiaries, including affected individuals and their spouses and children.

¹⁹ Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999).

²⁰ Pub. L. No. 99-660, 100 Stat. 3755 (1986).

²¹ Pub. L. No. 101-426, 104 Stat. 920 (1990).

²² Pub. L. No. 106-245, 114 Stat. 501 (2000).

Pending Litigation and The Challenges Ahead

The Civil Division expects to continue its successful efforts to protect the U.S. Treasury from health care providers, defense contractors, and others who defraud the government. Similarly, the ongoing case filed against the major tobacco companies in 1999 presents a significant opportunity to protect young Americans from the harmful effects of smoking and to recover billions of dollars in ill-gotten industry profits. The Division will also seek to limit the government's liability for damages in the remaining Winstar-related cases and the A-12 litigation.

Several matters present particular challenges for the future. For instance, although regulating certain unlawful conduct on the internet may pose constitutional problems, greater participation by the Division's litigators at the time legislation is drafted may improve the likelihood that such legislation (especially that aimed at child pornography) will be upheld by the courts. In addition, because the RECA program is funded by only annual, discretionary appropriations, there are insufficient funds to pay all eligible claimants. Legislation establishing a permanent, indefinite appropriation would address this problem.

E. Fighting Health Care Fraud

Background: Health care fraud in the United States remains a serious problem that has an impact on all health care payers, and affects every person in this country. Health care fraud cheats taxpayers out of billions of dollars every year. Tax dollars alone do not show the full impact of health care fraud on the American people. Beneficiaries must pay the price for health care fraud in their copayments and contributions. Fraudulent billing practices may also disguise inadequate or improper treatment for patients, posing a threat to the health and safety of countless Americans, including many of the most vulnerable members of our society.

In late 1993, the Attorney General named health care fraud DOJ's number two priority, (behind violent crime), and created the position of Special Counsel for Health Care Fraud. The Special Counsel coordinates the Department's health care fraud enforcement policies and activities, both among the various components inside the Department (e.g., Civil Division, Criminal Division, Civil Rights Division), the Federal Bureau of Investigation (FBI), the United States Attorneys' Offices, and the Justice Management Division, and with federal, state, and local agencies outside the Department (e.g., Department of Health and Human Services Inspector General (HHS/OIG); Defense Criminal Investigative Service (DCIS); Office of Personnel Management (OPM); state Medicaid Fraud Control Units (MFCUs); Health Care Financing Administration (HCFA)).

To facilitate the coordination necessary for effective health care fraud enforcement, in November of 1993, the Executive Level Health Care Fraud Policy Group was created. Chaired by the Deputy Attorney General, the quarterly meetings are attended by the Inspector General for HHS, and the Administrator of HCFA.

In 1994, the Attorney General's Advisory Committee created a Health Care Fraud Subcommittee. This Subcommittee meets frequently to address issues of particular concern to U.S. Attorney's Offices. Over the course of 1994 and 1995, each U.S. Attorney appointed a health care fraud coordinator to assist in coordinating each U.S. Attorney's offices health care fraud enforcement efforts. In addition, the majority of offices have created health care fraud working groups and/or task forces that are composed of participants such as representatives of the FBI, HHS/OIG, DCIS, the MFCUs and private insurance plans.

Major Goals and Policies: The Department's efforts to combat health care fraud were consolidated and strengthened considerably by the Health Insurance Portability and Accountability Act of 1996 (P.L. 104-191, HIPAA or the Act), signed by President Clinton on August 21, 1996. HIPAA established a national Health Care Fraud and Abuse Control Program (the Program), under the joint direction of the Attorney General and the Secretary of the U.S.

Department of Health and Human Services (HHS)¹, acting through the Department's Inspector General, designed to coordinate federal, state and local law enforcement activities with respect to health care fraud and abuse. HIPAA brought much-needed and powerful new criminal and civil enforcement tools and financial resources that permitted the government to expand and intensify the fight against health care fraud.

The Program's goals include:

- (1) coordinating federal, state and local law enforcement efforts relating to health care fraud and abuse;
- (2) conducting investigations, audits, and evaluations relating to the delivery of and payment for health care in the United States;
- (3) facilitating enforcement of all applicable remedies for such fraud;
- (4) providing guidance to the health care industry regarding fraudulent practices; and
- (5) establishing a national data bank to receive and report final adverse actions against health care providers.

In order to achieve the goals laid out in the Act, Congress provided in HIPAA for additional criminal, civil and administrative tools to combat health care fraud. The Act:

- (1) created new criminal offense for health care fraud, theft or embezzlement in connection with health care offense, false statements relating to health care offense, and obstruction of criminal investigations of health care offenses;
- (2) added a Federal health care offense to the money laundering statute as a specified unlawful activity;
- (3) extended injunctive relief relating to health care offenses (includes freezing of assets);
- (4) authorized investigative demand procedures;
- (5) established forfeiture for Federal health care offenses;
- (6) expanded anti-kickback statute to cover all Federal health care programs (except FEHBP), not just Medicare and State health care programs; and
- (7) strengthened exclusions for health care convictions.

Additionally, HIPAA allowed for a stable source of funding for the health care fraud efforts of the HHS/OIG and DOJ. The Act appropriates monies from the Medicare Trust Fund to a newly created expenditure account, called the Health Care Fraud and Abuse Control Account (the Account), a sub-account requires that the Secretary and Attorney General jointly certify certain sums that are necessary to finance anti-fraud activities. The maximum amounts available for certification are specified in the Act. A portion of the annual sum is to be available only for activities of the HHS/OIG, with respect to Medicare and Medicaid programs. In FY 2000, the fourth year of the Program, the Secretary and the Attorney General certified \$158 million for appropriation to the Account. These resources supplement the direct appropriations to HHS and DOJ that are devoted to health care fraud enforcement. Separately, the FBI received \$76 million

¹Hereafter, referred to as the Secretary.

from the Account in FY 2000.

In January 1997, the Attorney General and the Secretary issued guidelines that provided a coordinated framework for enforcement and prevention efforts. These guidelines incorporated input from the law enforcement agencies charged with combating health care fraud.

Effective health care fraud and abuse control requires close collaboration and regular exchanges of information between federal, state and local law enforcement entities. One example of a new collaborative effort is the National Health Care Fraud and Abuse Task Force, formed in April of 1999. Chaired by the Deputy Attorney General, the task force brought together top officials from federal, state and local law enforcement agencies responsible for fighting health care fraud and abuse, including HHS; the FBI; the National Association of Attorneys General; the National District Attorneys Association; and the National Association of Medicaid Fraud Control Units. The task force was designed to foster communication and coordination at the highest levels, where policy development and implementation can make a significant difference. Under the sponsorship of this National Task Force four regional training conferences were held focusing on improving quality of care in nursing homes, and a national conference was held in June of 2000, focusing on the use of data technology in detecting and prosecuting health care fraud. The National Task Force has focused on a full range of additional issues relating to health care fraud, including:

- Medical records privacy and the need to balance the need to ensure the privacy of sensitive medical records with the need to protect the public through the investigation and prosecution of crimes;
- Strategies to bolster the investigation and prosecution of criminal and civil health care fraud, and policies and procedures for the coordination of enforcement efforts that impact multiple jurisdictions;
- The use of information technology to detect and combat fraud, including examining and identifying electronic fraud detection measures, approaches, and analytical tools as well as potential mutual areas of benefit from promoting greater uses of such technology across government-sponsored health care programs; and
- and, Training programs for prosecutors, investigators and other law enforcement officials, with an emphasis on the development of "best practices" and the use of inter-agency efforts to combat health care fraud.

Major Activities and Accomplishments: Since FY 1992, there has been a dramatic increase in the numbers of settlements and prosecution brought to successful conclusion through the efforts of DOJ, working closely with our partners in the fight against health care fraud. There has been an increase of 481 percent in criminal health care fraud matters (from 343 in FY 1992 to 1,994 in FY 2000), an increase of 347 percent in criminal health care fraud prosecutions filed (from 83 cases involving 116 defendants in FY 1992 to 371 cases involving 506 defendants in FY 1999),

and an increase of 346 percent in criminal health care fraud convictions (from 59 cases involving 90 defendants in FY 1992 to 263 cases involving 398 defendants in FY 1999). A major factor in this expansion has been an increase in resources available to fight health care fraud; since FY 1994, the Department has seen a 58 percent increase in the number of workyears devoted to health care fraud by all components (from 310 in FY 1994 to 758 in FY 1999).

Significant increases in workload have also been seen in the Department's civil efforts. There has been an increase of 743 percent in civil health care fraud matters (from 270 in FY 1992 to 2,278 in FY 1999), and an increase of 225 percent in civil health care fraud cases filed (from 28 in FY 1992 to 91 in FY 1999).

The most important statistics are those involving the financial health of the Medicare Trust Fund. While Medicare is not the only government health program, it is the yardstick by which the Department's efforts are most often judged. From FY 1997, the first full year of the HIPAA program, to FY 2000, DOJ won or negotiated more than \$3.2 billion in judgments and settlements in health care fraud cases. The total in judgment and settlements exceeds \$4 billion when the recent Columbia/HCA settlement of \$840 million (the largest fraud settlement in the history of the Department) is included. During that same time period, DOJ collected and disbursed more than \$2 billion, including \$1.7 billion that was returned to the Medicare Trust Fund.

Another indicator of the effects of increased enforcement is the Medicare Error Rate. In FY 1996, the HHS/OIG developed the methodology to measure noncompliance with laws and regulations in the Medicare fee-for-service program. This resulted in the first-ever, statistically valid, national rate of improper Medicare payments. At HCFA's request, HHS/OIG has continued these reviews annually. Recently, HHS/OIG reported that improper Medicare fee-for-service payments totaled an estimated \$13.5 billion during 1999, or 7.9 percent, of Medicare's total fee-for-service spending. That estimate is \$9.7 billion less than that for 1996. The drop is due in part to the deterrent efforts of increased enforcement by HHS and DOJ.

During February 1999, the Department, the HHS/OIG, HCFA, and the Administration on Aging joined with the American Association for Retired Persons to launch an initiative against Medicare fraud, waste, and abuse. The educational campaign – entitled "Who Pays? You Pay. Report Medicare Fraud" – was held in 31 cities throughout the country, and was attended by approximately 10,000 Medicare beneficiaries.

In addition to the Department's on-going Nursing Home and Elder Abuse Initiative (discussed at length in the preceding section), a major new effort was launched in FY 2000, the Data Technology Initiative. In June of 2000, DOJ and HCFA co-sponsored a National Data Technology Conference that focused on the technologies that drive the science of fraud detection in the 21st Century, and how to apply those technologies to combating fraud and abuse. In January 2001, the report from the June Conference is scheduled for release. This Conference Report will include a plan of follow-up actions to expand the initiative nationwide. The major

action items are:

- Formation of a National Technology Group - activities will include: addressing technology, fraud detection and data sharing issues, as well as policy, operations, resources and barriers related to data matching; serving as a clearinghouse for best practices in using fraud detection technology; disseminating vendor information and results of successful anti-fraud activities; and, developing Regional Technology Training Conferences.
- Formation of Regional Technology Users Groups - each regional group will develop a 'nuts and bolts' approach to cases and issues, e.g. beneficiary fraud, access to data and fraud indicators, sharing experiences/expertise in data mining or other techniques.

Significant cases: The following significant health care fraud cases were brought to conclusion during the period FY 1994 to FY 2001:

FY 1994 - National Medical Enterprises - On July 12, 1994, National Medical Enterprises, Inc. (NME) entered a criminal plea and civil and administrative settlement agreements, including a then record \$379 million in criminal fines, civil damages and penalties for kickbacks and fraud at NME psychiatric and substance abuse hospitals in 30 states. NME pled guilty to bribing doctors and other referral sources to refer patients for admission to NME facilities.

FY 1995 - Caremark Inc. - Caremark Inc., a nationwide provider of health care services, entered into a global criminal, civil and administrative settlement with DOJ, HHS and the states. Caremark pleaded guilty to charges that it defrauded federal health care programs by making improper payments to induce doctors to refer patients to its facilities. Caremark agreed to pay a total of \$161 million in fines, restitution and damages and to implement a corporate integrity plan to ensure future compliance with health care laws and regulations.

FY 1996/1997 - Operation LABSCAM - The Federal Government determined that many members of the independent clinical laboratory industry were billing Medicare for millions of unnecessary individual tests that were performed routinely and automatically together with an automated series of tests. These labs misled physicians who purportedly 'ordered' the tests to think that the tests would be performed for free or would be billed as part of the package of automated tests. A national project was launched in FY 1993, involving DOJ, HHS/OIG, state MFCUs and DCIS, with major cases reaching settlement in FY 1996 and FY 1997, including the following:

- SmithKline Beecham Clinical Laboratories, headquartered in Philadelphia, paid \$325 million to resolve federal and state fraud claims alleging overcharges to the Medicare, Medicaid, FEHBP, Railroad Retirement, and TRICARE health care programs. The alleged fraud schemes included the automated chemistry allegation, improper billing for kidney dialysis test, and a variety of other billing schemes.
- Two other very large settlements, that were also an outgrowth of the

LABSCAM investigation, were reached with Damon Clinical Laboratories, Inc. for \$119 million in criminal fines and civil damages, and with Laboratory Corporation of America (LabCorp) for \$182 million. Both of these cases involved the automated chemistry allegation.

FY 1997 - First American Health Care of Georgia, Inc. - First American Health Care of Georgia, Inc., agreed to reimburse the federal government approximately \$252 million for overbilled and/or fraudulent Medicare claims submitted by the company. First American, which operated 425 facilities in more than 30 states, billed Medicare for personal expenses of First American's senior management, and marketing and lobbying expenses.

FY 1998 - Health Care Service Corporation - Health Care Service Corporation, the Medicare carrier for Illinois and Michigan, agreed to pay the government \$140 million in settlement of a *qui tam* suit alleging that it shredded claims, altered documents and otherwise manipulated data relied on by HCFA to evaluate its contract performance. In addition to the civil settlement, the corporation pleaded guilty to obstructing a federal audit, conspiring to obstruct a federal audit, and making false statements to HCFA which resulted in the imposition of a \$4 million criminal fine. In order to guard against future misconduct, and to ensure that any potential lapses would be detected early, the government and the corporation also entered into a strict corporate integrity agreement.

FY 1999 - Olsten Corporation/Kimberly Home Health Care - The Olsten Corporation major provider of home health services, and one of its subsidiaries, entered into a global settlement totaling \$61 million, including approximately \$10 million in criminal fines, to resolve the corporation's criminal, civil, and administrative liability arising from Medicare fraud investigations in Georgia, Florida, and New York. In Georgia and Florida, the investigation revealed a scheme to disguise the costs of acquiring other home health agencies as management fees, which Medicare does not reimburse. As a result of this investigation, the subsidiary pleaded guilty to conspiracy, mail fraud, and violation of the Medicare anti-kickback statute in three districts. In New York, a separate investigation focused on allegations that the corporation submitted unallowable expenses on its Medicare cost reports, including personal expenses of executives, gifts and entertainment, and merger costs. In addition to paying \$61 million, the corporation entered into a comprehensive corporate integrity agreement with the Government.

Genentech, Inc - Genentech, Inc., paid \$50 million in criminal fines and civil damages and pled guilty to a violation of the Food, Drug & Cosmetic Act. The charges resulted from Genentech's illegal off-label marketing of its human growth hormone drug Protropin from 1985 through mid-1994. Of that amount, Genentech paid \$20 million to resolve civil claims under the False Claims Act, mostly involving Medicaid, and a \$30 million criminal fine.

FY 2000 - National Medical Care, Inc. - The world's largest provider of kidney dialysis products and services agreed to pay the United States \$486 million to resolve a wide range of health care fraud claims. The criminal fine is the largest ever recovered by the United States in a health care

fraud investigation. Under the criminal plea agreement, the company agreed to pay a record \$101 million in criminal fines for submitting false claims to Medicare for nutritional therapy provided to patients during their dialysis treatments, for hundreds of thousands of fraudulent blood testing claims, and for kickbacks. Under the civil settlements, the company agreed to pay \$385 million to resolve civil claims relating to nutritional therapy, kickbacks, blood laboratory tests, improper reporting of credit balances, and billing for services that were provided to dialysis patients as part of clinical studies. The civil settlements compensate the United States for damages to five federal health insurance programs -- Medicare, U.S. Railroad Retirement Board Medicare, TRICARE, the Veterans Administration and FEHBP -- and also pay for damages to state Medicaid programs. The company also agreed to a comprehensive eight year corporate integrity agreement.

Beverly Enterprises, Inc - The government entered a global settlement agreement with the nation's largest operator of nursing homes to resolve allegations that it fabricated records to make it appear that nurses were devoting much more time to Medicare patients than they actually spent. The settlement required the company to pay \$170 million in civil settlement; this figure is less than the amount of actual overpayments by Medicare, but was negotiated based on the chain's limited ability to pay. Because of Beverly's financial position, repayment of most of this amount will be accomplished through reduction of future Medicare payments. In addition, the company entered one of the most comprehensive corporate integrity agreements established to date; the agreement will remain in effect until the company has fulfilled all of its payment obligations under the civil settlement (an estimated eight years). In addition, a subsidiary of Beverly, which owns 10 nursing homes, pleaded guilty to wire fraud and false statements, and agreed to pay \$5 million in fines. This subsidiary must be divested to unrelated qualified operators approved by the government. While divestiture is being accomplished, other terms of the agreement will ensure that residents receive high quality care.

FY 2001 - HCA-The Healthcare Company - (formerly known as Columbia-HCA), the largest for-profit hospital chain in the United States, has agreed to plead guilty to criminal conduct and pay more than \$840 million in criminal fines, civil penalties and damages for unlawful billing practices, this agreement is the largest government fraud settlement ever reached by the Justice Department. Under this agreement, which is subject to review by the court, HCA will pay a total of \$745 million to resolve five allegations regarding the manner in which it bills the U.S. government and the states for health care costs. The settlement requires HCA to pay: 1) more than \$95 million to resolve civil claims arising from the company's outpatient laboratory billing practices for lab tests that were not medically necessary or not ordered by physicians; 2) more than \$403 million to resolve civil claims arising from "upcoding", where false diagnosis codes were assigned to patient records in order to increase reimbursement; 3) \$50 million to resolve civil claims that the company illegally claimed non-reimbursable marketing and advertising costs it disguised as community education; 4) \$90 million to resolve civil claims that HCA illegally charged Medicare for non-reimbursable costs incurred in the purchase of home health agencies in Florida, Georgia and Alabama; and 5) \$106 million to resolve claims for billing for home health visits for patients who did not qualify to receive them or which were not performed. In addition

to the civil settlement, two subsidiaries of Tennessee-based HCA, Columbia Homecare Group, Inc. and Columbia Management Companies, Inc., entered into a criminal plea agreement under which they agreed to pay more than \$95 million in criminal fines and plead guilty to criminal conduct that occurred at HCA's hospitals nationwide including cost report fraud, fraudulent billing of Medicare for personnel who worked at home health agencies and at wound care centers, fraudulent billing to Medicare for pneumonia patients, and payments of kickbacks. Under the settlement agreement, HCA also agreed to enter into an eight-year corporate integrity agreement, as well as a divestiture agreement. Affected health care programs include: Medicare, Medicaid, TRICARE, FEHBP, and 30 state Medicaid programs.

Lifescan, Inc - Lifescan, Inc., a California subsidiary of Johnson & Johnson, pled guilty to Food and Drug charges. Lifescan was ordered to pay criminal fines and civil penalties totaling \$60 million. The charges stemmed from defects in a blood glucose monitoring system about which the company knew, but failed to disclose to customers or the Food and Drug Administration (FDA) in obtaining approval to sell the device. Lifescan pled guilty to misbranding, failure to report, and false reporting, and was ordered to pay a criminal fine of \$29.4 million and civil penalties, damages and restitution to the United States of \$30.6 million. Lifescan will also be on probation for three years, allowing FDA to oversee certain aspects of its business. In addition, the company entered into a corporate compliance agreement with HHS.

Current Environment: Health care fraud schemes are changing and becoming more sophisticated. Unscrupulous persons and companies can be found in every health care profession and industry, and schemes targeting health care patients, providers, and plans occur in every part of the country.

Fraud has been perpetrated by individual physicians and large publicly traded companies, medical equipment dealers, contract carriers for Medicare and Medicaid, laboratories, hospitals, nursing homes, and home health care agencies. Individual scam artists who provide no health care at all prey upon the nation's health care programs, as well. Fraud schemes put billions of dollars in the pockets of individuals and providers who cheat the system, while government health care systems strive to meet their mission to provide necessary services to its recipients.

The Department continues to take a balanced approach to combating health care fraud. The Department's strategy consists of two components: a strong civil and criminal enforcement program, strengthened under HIPAA, together with prevention efforts, which encourage providers to adopt compliance programs and accept responsibility for policing their own activities. The Department is committed to tough but responsible enforcement of federal civil and criminal laws, as well as to strong partnerships with health care providers to promote compliance within the industry.

In addition to the Department's civil and criminal health care fraud prosecutions, the Civil Rights Division has played an important role in protecting the rights of individuals in health care facilities and improving their conditions of confinement. The Civil Rights Division continues its

vigorous enforcement program under the Civil Rights of Institutionalized Persons Act (CRIPA) to remedy egregious and widespread deficiencies in the quality of care offered by public facilities. Under CRIPA, the Attorney General has authority to investigate conditions in a wide variety of public health care and residential treatment institutions -- including nursing homes and mental health and mental retardation facilities -- and to remedy abuse, neglect, inadequate care and treatment, and other unlawful conditions. As a result of the Department's efforts since CRIPA was enacted in 1980, tens of thousands of institutionalized persons who were living in dire, often life-threatening, conditions now receive adequate care and services.

Outreach efforts are crucial to winning the fight against health care fraud. The Department seeks to encourage corporate citizenship and affirm the importance of strong compliance programs. This emphasis on compliance plans represents a fundamentally different approach from traditional law enforcement. Rather than the FBI and the HHS-OIG policing corporations, corporations police themselves. Rather than an adversarial relationship between law enforcement and private sector, there is a relationship of cooperation and mutual support. Providers also benefit because a successful compliance program helps them to avoid potential civil and criminal liability.

Under a compliance program, providers become knowledgeable about when, where, and how fraud can occur, as well as about what the law and regulations require. They then develop control procedures and reporting for vulnerable aspects of their operations to prevent common types of fraud. They also develop reporting and audits that can detect fraud, and a way to deal with problems when they are found. If problems are found, they should be disclosed to the appropriate agencies and authorities to limit potential liability. HHS and DOJ have tried to encourage responsible provider action by providing model compliance guidance, and by providing interpretations of the law to guide providers in assessing their activities.

Outreach efforts also focus on beneficiary populations, educating them on how to recognize and report suspected fraud and abuse. Consumers of health care should be the first line of defense against fraud. The Department places a high priority on this kind of outreach and intends to increase its efforts to enhance public awareness of health care fraud.

Next Steps/Challenges: The Department of Justice is working to ensure that, as technological advances alter the landscape of health care delivery and payment, fraud prevention strategies will be in place and we will have the tools we need to investigate and prosecute this fraud. The Internet and other information technologies are revolutionizing the health care industry. Americans "consume" health care information which is now abundant on the Internet, thereby making themselves more knowledgeable as patients. Health care related products are advertised and sold over the Internet, and web sites offer to "diagnose" ailments and "prescribe" and sell drugs online. Such practices in violation of law pose a significant risk to public health and safety, particularly for individuals who may face serious health crises and may be desperate in their search for cures.

Internet-health companies that simply provide information to consumers may run afoul of fraud and abuse laws as well. In addition to legal issues stemming from financial relationships between web site operators and other health care providers, Internet-health care companies also come into possession of large amounts of private health information, which must be protected. Misuse of individuals' health information, including the use of such information in violation of a web site's posted privacy policies, may implicate various federal laws.

The Department of Justice will keep pace with the Internet-health revolution. It will also be vigilant to ensure that as payment methodologies change, and additional health benefits are conferred on government health care program beneficiaries, anti-fraud safeguards are built into the benefit structure.

F. Protecting Older Americans

I. Submission by the Criminal Division

Protecting Older Americans

During the past decade, older Americans have increasingly become the targets of a wide range of fraudulent schemes. Telemarketing "boiler room" operations, for example, have often targeted seniors with fraudulent offerings ranging from "guaranteed" foreign lotteries to prize-promotion schemes to fraudulent charities that purport to help persons in need, such as anti-drug programs and relief for victims of natural disasters. In some cases, fraudulent telemarketers even operate "recovery rooms," pretending to be law enforcement agents, lawyers, or court personnel who can help victims recover a portion of their past losses. The effects of these schemes have often been magnified by the fact that telemarketing operations buy so-called "mooch lists" (i.e., lists of people victimized by previous schemes) and then recontact those victims to offer new fraudulent opportunities. As a result, telemarketing fraud victims have often suffered substantial financial losses — in some instances, even their life savings and their homes — as well as tremendous personal humiliation and embarrassment. Other fraudulent schemes, such as home-repair and advance-fee schemes, have also targeted seniors for substantial losses.

To combat the criminals who conduct such ruthless schemes, the Department developed a three-part approach that incorporated a number of new and innovative measures.

Undercover Investigations and Prosecutions

During the 1990s, the FBI and other law enforcement agencies conducted three nationwide undercover operations, the first of their kind, that were directed at telemarketing fraud: Operation Disconnect (announced 1993), Operation Senior Sentinel (adopted 1995), and Operation Double Barrel (announced 1998).

In Operation Disconnect, the first of its kind, FBI undercover agents pretended to sell a machine that would enable fraudulent telemarketers to dial as many as 12,000 calls per hour. Such a machine would have vastly increased the ability of telemarketing schemes to contact large numbers of prospective victims throughout the United States. By persuading the fraudulent telemarketers that they needed to know exactly how they conducted their telemarketing businesses — including specific information about their most successful telemarketing techniques — the undercover agents were able to obtain many damaging and revealing admissions from the telemarketers about the fraudulent and criminal nature of their business

activities. As a result of Operation Disconnect, several hundred fraudulent telemarketers were successfully prosecuted, in some cases receiving prison sentences as high as ten years.¹

In Operation Senior Sentinel, federal agents and investigators, who had taken over telephone numbers of people who had been repeatedly victimized by telemarketing schemes (or established undercover identities as victims), tape-recorded thousands of fraudulent and deceptive solicitations and conversations by fraudulent telemarketers. These tape recordings were of incalculable value in determining which schemes most warranted criminal investigation and in providing evidence for search warrants and criminal indictments and informations relating to federal criminal violations. To date, Operation Senior Sentinel has resulted in approximately 1,000 fraudulent telemarketers being charged with a variety of federal crimes. In some cases, sentences imposed in Operation Senior Sentinel prosecutions have ranged as high as 14 years or more.²

Finally, in Operation Double Barrel, federal law enforcement agencies expanded on Operation Senior Sentinel by joining forces with state attorneys general and other local law enforcement to expand the impact of telemarketing fraud enforcement. From the conclusion of Senior Sentinel in mid-1996 to December 1998, federal authorities charged 795 individuals in 218 federal criminal cases, and 14 state Attorneys General charged 194 individuals in 100 state criminal investigations. During that same period, 255 state civil complaints were lodged against 394 individuals.³

These three operations had a tremendously crippling effect on fraudulent telemarketing operations. In some cities where telemarketing "boiler rooms" had been widespread, such as Las Vegas, Chattanooga, and San Diego, telemarketing fraud was virtually eliminated; in other areas, telemarketing fraud was seriously reduced.

International Cooperation and Coordination

Even as law enforcement has made major inroads against U.S.-based telemarketing operations, more and more major telemarketing schemes directed at seniors have been operating internationally, typically calling from venues in Canada to U.S. residents. To combat this

¹ U.S. Department of Justice, "Telemarketing Fraud,"
<<http://www.usdoj.gov/criminal/fraud/telemarketing/doj.htm#disconnect>>.

² Department of Justice Press Release, Dec. 7, 1995,
<www.usdoj.gov/criminal/fraud/telemarketing/609txt.htm>; U.S. Department of Justice, supra
note 1.

³ Department of Justice Press Release, Dec. 17, 1998,
<<http://www.usdoj.gov:80/opa/pr/1998/December/596cr.htm>>.

problem of cross-border telemarketing fraud, in 1997 the United States and Canada established a binational working group on telemarketing fraud that produced a major report and recommendations for President Clinton and Prime Minister Chrétien on measures needed to combat cross-border telemarketing fraud more effectively.⁴ These recommendations included identifying telemarketing fraud as a serious crime, establishing regional task forces to provide cross-border cooperation on telemarketing fraud, and coordination of national strategies against telemarketing fraud. Both countries have implemented substantially all of these recommendations; the United States, for example, has adopted enhancements to the U.S. Sentencing Guidelines that authorize higher sentences in all telemarketing cases, and in cases where a substantial part of the scheme is conducted from outside the United States. In addition, U.S. law enforcement authorities have been working closely with Canadian law enforcement in Montreal, Toronto, and Vancouver on telemarketing fraud investigations and prosecutions.

Public Education and Prevention

The Department has taken several significant steps to improve its outreach and prevention efforts to combat fraud directed at seniors. First, in 1998, the Department began a pilot project, "Elder Fraud Prevention Teams," in which United States Attorneys' Offices and other law enforcement agencies partnered with the AARP to develop innovative projects for elder fraud prevention. In Arizona, for example, the EFPT collaborated with the AARP and the Arizona Cardinals football team to produce a series of public service advertisements on telemarketing fraud, and to conduct a "reverse boiler room" (an event in which law enforcement, AARP, and Cardinals representatives telephoned people on fraudulent telemarketers' call lists to warn them about telemarketing fraud) that reached thousands of people in Arizona and other states. The Department is now exploring the expansion of the EFPT concept to other states. Second, the Department created a series of English- and Spanish-language Webpages on telemarketing fraud to inform the public about the problem and to assist report possible telemarketing fraud.⁵ Third, the Department provided significant advice and assistance to the AARP in the AARP's development of a massive public-service advertisement campaign to inform older Americans about the dangers of telemarketing fraud and how to protect themselves from it.

* * *

⁴ U.S.-Canada Working Group on Telemarketing Fraud, Report (November 1997), <<http://www.usdoj.gov/criminal/uscwgrtf/index.html>>.

⁵ See U.S. Department of Justice, supra note 1.

B. Submission by the Civil Division /
Elder Justice / Nursing Homes Initiative

PROTECTING OLDER AMERICANS

Nursing Home Initiative and Elder Justice Efforts

Background

In mid-1998 the President announced the Administration's nursing home initiative to address reports that severe quality deficiencies persisted in too many nursing homes. At the same time, Senator Grassley, then-Chairman of the Senate's Special Committee on Aging, held the first of a series of hearings on the issue that continued over the next two and a half years.

In October 1998, the Department, under the auspices of the Office of the Deputy Attorney General (DAG), launched an initiative to crack down on abuse, neglect and fraud in nursing homes and other residential care facilities. The Nursing Home Initiative, coordinated by a Civil Division attorney, focused on issues cutting across the Department's components including the DAG's office, Civil Division (CIV), Criminal Division (CRM), Civil Rights Division (CRT), Executive Office of United States Attorneys (EOUSA), Justice Management Division (JMD), Office of Justice Programs (OJP), Federal Bureau of Investigation (FBI), and several United States Attorneys Offices. In 2000, the Initiative expanded to address Elder Justice issues generally, not limited to nursing home matters and additional Department components -- including the Offices of the Attorney General, the Associate Attorney General, and Policy Development -- became involved in the effort.

Areas pursued by the Elder Justice and Nursing Home Initiatives include (1) enhanced enforcement, (2) training; (3) improved coordination, outreach and public awareness; (4) proposed new legislation; (5) enhanced use of data; (6) criminal background checks; (7) medical forensic issues in elder abuse and neglect, and (8) involvement of the Attorney General, Deputy Attorney General, and Associate Attorney General.

Major goals and guiding policies

The goal of these endeavors is to prevent abuse and neglect of older people and nursing home residents in home, community and institutional settings by promoting enforcement, training, research, and coordination. Our goals were to enhance substantive knowledge about the nature of elder abuse and neglect and how best to prevent and redress it, as well as to open lines of communication and promote "infrastructure" at the federal, state and grass roots levels, that would increase the likelihood that these efforts will be ongoing.

Major activities and accomplishments

1. Enforcement

In 1996, the Eastern District of Pennsylvania brought the first False Claims Act case against a nursing home asserting a failure of care so serious that it amounted to no care at all, and resulted in grave illness and/or death of residents. The case was settled for monetary damages and injunctive relief including imposition of a temporary monitor and other requirements designed to improve care. EDPA since has resolved six more such cases. The defense bar slowly has come to accept failure of care cases as an appropriate use of the False Claims Act, and a court recently rendered a favorable decision holding that knowingly billing for services not performed – for example failing to adhere to the relevant standard of care set forth in statutes, regulations and rules – states a claim under the False Claims Act.⁶

In addition, nursing home officials in Arkansas recently were convicted and sentenced for making false statements regarding the cause of death of a resident. And a significant public corruption matter is ongoing in Oklahoma, where the deputy commissioner for health and a nursing home owner were convicted in October 2000 of soliciting and offering to pay a bribe, respectively. Other cases also are underway, some of which were identified by the efforts of the State Working Groups (discussed *infra*).

Moreover, the financial crisis in the nursing home industry has an impact on our claims and case load. Five of the country's seven largest nursing home chains -- Vencor, Sun, Mariner, Integrated Health Services (IHS), and Genesis (cumulatively owning about 2000 facilities), as well as several mid-sized chains -- are attempting to reorganize under the federal bankruptcy code. Vencor, against which the Civil Division was pursuing a major failure of care matter, recently entered into a far-reaching Corporate Integrity Agreement (CIA) with the Department of Health and Human Services, Office of Inspector General (HHS/OIG) – similar to the consent orders in our EDPA nursing home cases.

In these matters, we are working closely with the Health Care Financing Administration (HCFA) and HHS/OIG to balance our law enforcement and public health goals of recouping lost and defrauded federal funds and punishing and deterring wrongdoing, while protecting the vulnerable residents.

Because these cases often raise difficult legal, investigative, and medical issues, we have prepared a proposal for a Resource Group that would assist Department attorneys with such matters. If and when the modest funding for this project is obtained, it is ready to commence. This group would consist of a small number of Department attorneys and medical experts with relevant expertise. Decision-making and litigation responsibility for the cases would remain with

⁶ U.S. v. NHC Healthcare Corp., 115 F. Supp. 2d 1149 (W.D.Mo. 2000).

the respective USAOs handling the cases. This group would function simply as an additional resource for those who elect to use it. Information about the types of assistance the Group could provide, as well as sample pleadings, subpoenas, settlement agreements, indictments, plea agreements, and other relevant documents would be posted on the DOJ Intranet. We also are examining the feasibility of drafting a monograph to address legal issues that arise in these cases.

2. Training and Publications

The Department held four regional nursing home abuse and neglect prevention conferences from July 1999 to February 2000 that brought together federal, state, and local law enforcement, regulatory, survey, healthcare, social service and advocacy professionals. In October 2000, the Department, in partnership with the Department of Health and Human Services, sponsored a national symposium that showcased coordinated, multidisciplinary approaches for responding to elder abuse and neglect in institutional settings, at home, and financial exploitation and consumer fraud against older people. In all, the Department has trained more than 1000 people since July 1999.

As a result of these initiatives, the Department has in the last year or will in the near future issue several publications, see attachments ___ - ___.⁷

3. Coordination, Outreach and Public Awareness

During the regional conferences, State Working Groups (SWG) were formed (or expanded where they existed), including representatives of the many entities that play a role in nursing home quality of care. These SWGs provide a forum for key players to share information and skills, identify problem facilities, best practices, and ways to improve quality of care given the unique situations in the various states. In June 2000 we held a meeting of representatives of state working groups and relevant national organizations (during which the Attorney General made remarks) to address the challenges and successes of those groups. We are attempting to locate funding to launch a SWG Listserve that will allow group members to communicate with one another.

Federal coordination has been enhanced by productive monthly Nursing Home Steering Committee meetings attended by CIV, CRM, CRT, FBI, HHS/OIG, HCFA, and HHS/Office of

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- ⁷ 1. An Office of Victims of Crime focus group report making recommendations to reduce victimization of nursing home residents from fraud, abuse and neglect. The group called for enhanced enforcement, coordination, and training, suggestions incorporated into the Department's activities;
2. A publication summarizing the Report describing promising multidisciplinary approaches for combating abuse, neglect and financial exploitation, discussed during the October 2000 Symposium (also available on the Department's Office of Justice Programs website (www.ojp.usdoj.gov)).
1. Report and transcript of the roundtable discussion on medical forensic issues in elder abuse and neglect.
2. Report to Congress regarding criminal background checks under Public Law 105-277.

General Counsel (OGC) to address specific cases and policy issues. In addition, nursing home issues are frequent topics at DOJ/HHS Health Care Fraud Senior Staff and Executive Level Health Care Fraud Policy Group meetings, as well as before the Health Care Fraud and Abuse Task Force, which brought together federal state and local law enforcement entities.

In an attempt to raise the profile of elder abuse and neglect issues in the medical and public health communities, the Attorney General and Secretary Shalala sent letters to deans of medical, public health, and 100 nursing schools asking them to consider devoting research monies and teaching time to the issues of elder abuse and neglect. In addition, the letter encourages them to partner with local law enforcement agencies in elder abuse and neglect matters, and encourages them to inform DOJ their activities in the area. (Attachment __.)

We also are making efforts to reach out to healthcare, social service, public safety, academics and advocates, as well as to industry. We have quarterly meetings with industry representatives to discuss concerns and promote compliance.

The Department plans in the near future to send a letter to formula grant administrators to encourage them to consider projects impacting the safety and welfare of older Americans.

4. *Proposed Legislation*

There are serious gaps in federal law that limit our ability to to enforce statutes and regulations governing care nursing homes. For example, the Department has no primary jurisdiction to bring a case for inadequate care, per se, against a privately-owned nursing home. Failure of care cases are pursued under financial fraud and/or falsification of records theories. In addition, HHS only may impose sanctions against individual facilities — its authority does not extend to chains or management companies. And when HHS does impose Civil Money Penalties (CMPs), its efforts are stymied by the huge backlog in adjudication of those cases.

Thus, we drafted and the Administration cleared proposed legislation that would provide criminal, civil and injunctive remedies against nursing homes that engage in patterns of violations of laws or regulations resulting in harm to residents. The proposal has not been enacted, (see attachment __, proposed legislation), but we continue to urge its passage.

5. *Data*

We are working with HHS to analyze the myriad nursing home data sources to determine how they might be used most effectively and to assist SWGs to identify problem facilities. We also worked with HHS to draft a certification for the Minimum Data Set (MDS) forms, which include key information used to determine reimbursement rates and resident care plans.

6. *Criminal Background Checks*

In October 1998, Congress enacted Public Law 105-277 which provides that “[a] nursing facility or home health care agency may submit a request to the Attorney General to conduct a search and exchange of [Federal Bureau of Investigation (FBI) criminal history] records . . . regarding an applicant for employment if the employment position is involved in direct patient care.” But by early 2000, that statute had been used only a handful of times. We have been working with the FBI to educate providers and the relevant state entities about the existence of and procedures for obtaining background information under this statute. A report to Congress about use of this statute is complete and going through final clearance. Attachment ___.

7. *Medical Forensic Issues in Elder Abuse and Neglect*

There is wide-spread consensus that detection, diagnosis, research, training, availability of experts and multi-disciplinary cooperation are significantly less advanced in the area of elder abuse and neglect than in other areas, such as child abuse and domestic violence. This has an impact on our ability to pursue and treat elder abuse and neglect because it often goes undetected and the medical community is rarely trained to diagnose or report it. Even when it is identified, there are very few experts who can provide medical forensic testimony in any ensuing case. We thus hosted a roundtable discussion entitled Elder Justice: Medical Forensic Issues in Elder Abuse and Neglect, to address these issues. Healthcare, law enforcement, and social service experts participated. A report of the discussion, recommendations, and the transcript will be published in the near future.

8. *Involvement of the Attorney General*

The Attorney General has presented keynote speeches at three events – our State Working Group meeting on June 12, 2000, the AARP Foundation’s Aging and the Law conference on October 5, 2000, and the National Citizens’ Coalition for Nursing Home Reform (NCCNHR) Annual Meeting on October 30, 2000. (Speeches attached as Att. ___.) The Attorney General was presented with awards for the Department’s efforts at each of the two latter events.

In addition, the Attorney General presented remarks to and participated in a roundtable on medical forensic issues in elder abuse and neglect as well as in the OJP symposium addressing promising multidisciplinary approaches to prevent elder abuse, neglect and exploitation of all types. (Remarks attached as Att. ___.)

The challenges ahead

The number of Americans over 65 will more than double in the next 30 years and those over 85 are the fastest growing segment of our population. At the same time, the number of caregivers is projected to decrease and there currently is a critical staffing shortage in nursing homes. Older people have distinct needs vis-a-vis the justice system, which most likely will demand increasing attention and importance as their number grows. Thus, the new

administration is encouraged to continue the Department's efforts outlined above, and take the additional steps necessary to adequately protect the growing population of older Americans.

G. Enforcing Internal Revenue Laws

Submission by the Tax Division

Background

The Tax Division holds a central position in the national tax litigation system, with the responsibility for securing correct, uniform and fair interpretations of the internal revenue laws and ensuring that uniform standards are applied to criminal tax prosecutions. Under the supervision of an Assistant Attorney General, the Tax Division represents the United States and its officers in civil and criminal litigation arising under the internal revenue laws in all courts except the United States Tax Court (which is the exclusive domain of the IRS Chief Counsel). The Tax Division currently has more than 350 attorneys who perform three main functions: civil trial litigation, criminal trial litigation, and appellate litigation. These functions are carried out through fourteen sections and offices, which are supervised by two Deputy Assistant Attorneys General. All of the Division's offices are located in Washington, D.C., except the Southwestern Civil Trial Section, which is located in Dallas, Texas.

H. *Major Goals and Guiding Policies*

A. *Civil Litigation*

The work of the Tax Division's Civil Trial Sections covers a broad spectrum of tax litigation in the United States district courts, the United States Court of Federal Claims, United States bankruptcy courts and state courts. Tax Division attorneys conducting civil tax litigation are charged with the responsibility of maximizing tax revenues for the Federal Treasury, and ensuring, by strict and even-handed enforcement, public compliance with the nation's internal revenue laws.

The litigation handled by the Division's Civil Trial attorneys requires substantial expertise in tax law and procedure, as well as significant trial advocacy skills. The types of litigation include tax refund suits challenging the IRS's determination of a taxpayer's federal income, employment, excise, and estate tax liabilities; bankruptcy litigation raising issues of the validity and priority of federal tax claims and the feasibility of reorganization plans; actions to enforce IRS administrative summonses that seek information essential to determine and collect taxpayers' liabilities; suits challenging determinations in collection due process proceedings before the IRS Office of Appeals; suits to overcome fraudulent conveyances, sham entities, and alter egos in order to collect taxes due; suits against IRS and other Government officials for damages for injuries allegedly caused during tax assessment or collection activities; suits against the IRS brought pursuant to the Freedom of Information and Privacy Acts; and State and local inter-governmental tax immunity suits. In addition, the Division's civil litigators work closely with the IRS to target and address critical enforcement problems, such as corporate tax shelters,

the tax protest movement, and the pyramiding of employment tax liabilities.

The Tax Division's Appellate Section litigates all civil federal tax cases (including Tax Court cases) appealed to the United States Courts of Appeals, (except cases from the Southern District of New York) and to state appellate courts. This work consists largely of writing appellate briefs and presenting oral arguments before various courts of appeal. Appellate Section attorneys also assist the Solicitor General of the United States in drafting pleadings and briefs filed in federal tax cases considered by the United States Supreme Court. These include amicus curiae briefs in lawsuits in which the federal government is not a party but which present issues affecting the interests of the United States or in which the Court otherwise invites the United States to state its views on tax-related questions.

B. *Criminal Enforcement*

The federal tax criminal enforcement program is designed to protect the public interest by preserving the integrity of our self-assessment tax system through the vigorous enforcement of the internal revenue laws. This program is supervised by the Tax Division, which has the exclusive authority to approve tax grand jury investigations and tax prosecutions.

The Tax Division's three criminal enforcement sections are responsible for reviewing proposed criminal tax matters from across the country and determining whether these investigations and prosecutions meet the requisite standards for going forward. In addition to evaluating criminal offenses set forth in Title 26 of the United States Code (*i.e.*, the Internal Revenue Code), the three criminal sections also have jurisdiction over proceedings brought under Title 18 where the conduct is tax-related. The Tax Division reviews and authorizes all criminal tax prosecutions and investigates and tries, and assists the 94 U.S. Attorneys' Offices in investigating and trying, tax cases. In addition, we provide legal advice to the U.S. Attorneys' Offices on a wide range of issues.

The Criminal Appeals & Tax Enforcement Policy Section of the Tax Division handles appeals in criminal tax prosecutions tried by Criminal Enforcement Section attorneys and supervises appeals in cases prosecuted by the various United States Attorneys' offices. CATEPS also processes grand jury and trial immunity applications and reviews Freedom of Information Act requests made to the Division concerning criminal tax matters. In addition to its appellate responsibilities, CATEPS is charged with formulating criminal tax enforcement policy for the Division through the compilation of data and preparation of reports on significant criminal tax matters. In recent years, CATEPS attorneys have taken the lead in developing policies for the investigation and prosecution of tax crimes involving emerging technologies and have participated in activities to broaden cooperation with foreign nations whose financial institutions are used to conceal taxable income earned in the United States or which have sought assistance from the United States in setting up their own tax enforcement and collection programs.

III. Review of Major Activities and Accomplishments

A. Joint Civil and Criminal Activities

i. Introduction

In the last several years, the Tax Division addressed several issues of broad importance that implicated both the civil and criminal sections. These issues included abusive trusts, international tax compliance, and illegal tax protest litigation.

ii. Abusive Trusts

In 1997, the Internal Revenue Service identified abusive trusts as an emerging area of illegal tax avoidance. Although 3.3 million trust returns were filed in 1997, the IRS believed that over 11.5 million trusts did not file returns. More and more unscrupulous promoters are aggressively marketing abusive trusts, using strained and often outright false interpretations of the tax laws as the means by which taxpayers can improperly shift income and hide ownership of assets in order to avoid paying proper income tax liabilities.

Many criminal cases against large promoters span several jurisdictions and coordination is necessary to ensure uniform prosecution and avoid damaging investigations through targeting of individuals who also are targets of other investigations. To this end, a Task Force was established, consisting of one member each from the Tax Division, Chief Counsel (Criminal Tax), and Criminal Investigation of the Internal Revenue Service. This group works to identify in advance, and to propose solutions for, novel and difficult issues that arise in this area. In addition, the Tax Division's centralized review provides a global perspective which facilitates coordination of these cases.

In one of the first cases successfully prosecuted, *United States v. Chappell, et al.* (E.D. Cal.), a former CPA, an attorney, and two others were convicted on charges that arose out of their sale of abusive trust packages to wealthy clients. This scheme resulted in a tax loss in excess of \$2.5 million. In 1999, the defendants were sentenced to prison terms ranging from 37 months in prison for one to 7 years and 3 months in prison for another.

In order to coordinate the litigation of civil trust cases, the Tax Division has appointed an "Abusive Trust Coordinator" who seeks, among other goals, to identify opportunities to shut down abusive trust schemes at their source by targeting promoters. This appointment had immediate results in increased coordination between the Tax Division and the IRS both in developing streamlined procedures for case development, and in training Revenue Agents in the legal framework for dealing with abusive promotions, including acquainting them with the statutory tools available to deal with those who promote abusive schemes. In 1999, the Division obtained two civil injunctions against significant abusive shelter promotions in *United States v. Estate Preservation Services* (9th Cir.) and *United States v. Robert Raymond, et al.* (7th Cir.).

iii. International Tax Compliance

The use of "tax haven" countries by U.S. citizens who are attempting to evade their tax obligations has long been a concern of the Tax Division and the IRS. With the recent technological advances that have occurred in the banking industry and the explosion in the use of the Internet, the advancement of dubious foreign trusts and other offshore schemes has become easier for promoters and more popular with potential tax evaders. The Tax Division has worked closely with the IRS to assist in combating this problem.

Criminal Enforcement Section attorneys in FY 1998 almost doubled the time spent on cases involving international compliance over the time spent in FY 1997, and then almost doubled time spent on international cases again in FY 1999. They have been aided in their efforts by the Tax Division's Senior Counsel for International Tax Matters, who assists them, Assistant United States Attorneys, and IRS agents in obtaining evidence located offshore, repatriating assets, and extraditing fugitives.

Senior Counsel also worked to improve cooperation with other countries in areas of international tax matters. For example, in 1996 and 1997, Senior Counsel participated in a series of meetings between the Criminal Investigation Division of the IRS and their counterparts in Canada with a view toward improving the coordination of assistance between the two countries. Senior Counsel worked with the Criminal Division's Office of Overseas Prosecutorial Development Assistance and Training to provide tax enforcement training to officials from Argentina, Hungary, and Finland. Counsel also regularly participated in financial fraud training courses at the Federal Law Enforcement Training Center attended by enforcement officials from throughout the world. Criminal Enforcement Section attorneys traveled overseas to participate in training programs sponsored by the Central and Eastern European Training Center and in technical assistance training programs coordinated by the Treasury Department.

Much of Senior Counsel's time during the period between 1993 and 2000 was spent participating in treaty negotiations with foreign nations with a view to increasing the exchange of information in tax cases. Counsel brought the Tax Division's perspective to successful tax treaty negotiations with the Netherlands, Austria, Canada, France, Switzerland, Luxembourg, Ireland, Israel, South Africa, and Thailand. Senior Counsel was also intimately involved in mutual legal assistance treaty negotiations with Luxembourg, Germany, Russia, Israel, and the Eastern Caribbean States. Successful negotiation of information exchange agreements with foreign states makes it easier to ferret out income hidden abroad and prosecute those who use offshore banks and business arrangements to evade United States tax obligations.

The Tax Division's Civil Trial Sections have assisted the IRS in investigating offshore schemes by filing summons enforcement actions. For example, in *In re John Doe* (S.D. Fla.) the Division recently secured approval to issue "John Doe" summonses to American Express and MasterCard International to obtain information regarding credit and debit cards issued by foreign banks to U.S. taxpayers. The IRS believes that information from MasterCard and American

Express will identify many taxpayers who may have failed to pay their full tax liabilities. Once that information is compiled, the IRS will initiate audits, potentially leading to thousands of criminal investigations, some potential civil injunction suits against promoters of illegal tax avoidance schemes, additional summons enforcement proceedings, and tax assessments.

iv. Illegal Tax Protest Movement

Following several years of declining numbers, the number of IRS investigations of illegal tax protesters¹ began to increase in 1995. Under the guise of constitutional and other objections to the tax laws, these individuals and groups utilize a variety of tactics to evade taxes and to obstruct the Internal Revenue Service -- e.g., vows of poverty; "common law courts" to enter default judgments and return indictments against IRS employees, government attorneys, and judges; Forms 1099 sent to the IRS falsely reporting the payment of income to persons involved in the tax collection process; warehouse banks to conceal income; sale and use of so-called "untax" packages; bogus financial instruments to pay taxes and other debts; and, fictitious trusts to evade the payment of taxes.

To meet the growing threat posed by the illegal tax protest movement, the Tax Division in 1996 appointed two Special Counsel for Tax Protest Matters, one to handle criminal matters and one to handle civil matters. The Special Counsel coordinate with the Internal Revenue Service and other law enforcement agencies concerned with the illegal tax protest movement. Because many of the individuals associated with violent domestic militia also espouse illegal tax protest rhetoric and some have a history of making violent threats against the IRS, the criminal Special Counsel serves on the Department's Domestic Terrorism Working Group. Both Special Counsel serve as information clearing houses and lecturers for state and federal prosecutors and investigators.

United States Attorneys offices frequently seek trial assistance in illegal tax protester cases because of the experience and expertise of the Special Counsel and Tax Division attorneys. Typical of the cases coordinated by the criminal Special Counsel and handled by Tax Division attorneys are *United States v. Noske* (D. Minn.) (defendants convicted on multiple tax and money laundering charges arising out of the concealment of assets and income from the IRS through the use of multi-layered trust schemes and alleged non-profit corporations); *United States v. Brodin* (D. Idaho) (six self-described "constitutionalists" convicted of numerous charges, including conspiracy to defraud the IRS, filing false claims for refunds, mailing threatening communications, extortion for filing false liens against federal and state judges and IRS employees, and attempting to collect money on false liens; sentences as high as 210 months in prison were imposed).

¹ The term "illegal" tax protester is used to distinguish individuals who commit tax crimes and declare themselves to be "tax protesters" outside the revenue system from those individuals who are merely exercising their First Amendment rights to oppose tax policies while otherwise obeying the tax laws.

Illegal tax protest is the basis for a wide variety of frivolous civil actions against the government and against individual IRS employees. These suits are vigorously defended through the strong, coordinated effort of the civil trial sections in responding to the arguments raised and in successfully convincing the judiciary of the frivolous nature of the vast majority of the issues presented. The civil trial sections were aided in this effort by guidance on common tax protest arguments developed by the civil Special Counsel.

Successes achieved in this effort include *United States v. Robert Raymond, et al.* (7th Cir.) (enjoining of sales of "De-Taxing America" packages by a promoter who espoused the doctrine that ordinary citizens were not liable for the payment of income taxes) and *National Commodity & Barter Association* (10th Cir.) (court dismissed refund suit in which the plaintiff sought to recover over \$2 million in civil penalties for failing to file partnership returns and promoting the sale of a manual that contained instructions for conducting frivolous tax protest litigation).

B. Civil Litigation

i. Introduction

During the years 1993-2000, the civil trial and appellate sections of the Tax Division worked to ensure fairness and uniformity in the administration of the tax laws and to protect the federal treasury. One of the most enduring marks the Tax Division made during the past eight years was in establishing legal precedents that govern the conduct of millions of taxpayers. A single case or series of cases that establishes the "rules of the road" may affect thousands of identical or similar matters pending administratively and millions of future tax returns. In the years 1993 through 2000, the civil trial sections of the Tax Division of the Tax Division obtained more than 24,000 court decisions, and consistently won more than 90 percent of their cases. The appellate sections successfully litigated thousands of taxpayer and Government appeals in the same time period, and consistently won more than 95 percent of the taxpayer appeals and 90 percent of the Government appeals.

ii. Generating Tax Collections and Protecting the Treasury

In the last eight years, the civil trial and appellate sections functioned as an extraordinary profit center, returning, in a recent three year period, over \$37 dollars for each dollar spent. The raw numbers do not directly reflect, however, the impact of the litigation on numerous similarly situated taxpayers. Examples of the cases which had wide impact beyond the immediate issue in the case include *Bell Atlantic Corp. and Subsidiaries v. United States* (3rd Cir.) (direct savings to the Treasury of \$77 million; overall estimated nationwide tax revenue impact exceeded \$30 billion) and *American Mutual Life Insurance Co. v. United States* (8th Cir.) (overall estimated savings to the Treasury of \$4 billion industry wide).

The civil trial sections also directly collected substantial amounts of revenue, either

through litigation or settlement. Among cases litigated or settled by our civil trial section that resulted in substantial collections by the United States were *United State v. K.T. Derr, Chairman of Chevron Corporation, and Chevron Corporation* (N.D. Cal.) (approximately \$650 million payment collected) and *In re Nelson Bunker Hunt and In re William Herbert Hunt* (Bankr. N.D. Tex.) (approximately \$133 million collected). Although the amounts collected or saved were subject to annual variations, the Tax Division consistently brought in many more millions of dollars than it spent, solidly maintaining its position as an efficient and effective protector of the public fisc. Moreover, because of the overwhelmingly successful litigation record of the Tax Division, many millions more have been saved because of taxpayers' reluctance to bring non-meritorious suits or to ignore court decisions clarifying the law.

iii. Corporate Tax Shelters

Abusive corporate tax shelters cost the government \$10 billion annually according to official Treasury Department estimates. As a result of focused audits by the IRS, the Tax Division has recently defended a number of corporate tax shelter cases involving large corporations. At first, much of this litigation originated in the Tax Court and was handled on appeal by our appellate section. These cases-- all favorably decided for the Government -- include *ACM Partnership* (3rd. Cir.) (a tax shelter marketed by Merrill Lynch to Colgate-Palmolive and ten other large corporations); *ASA Investerings* (D.C. Cir.) (AlliedSignal); *Compaq Computer* (5th Cir.) (tax shelter designed to convey unusable foreign tax credits from tax exempt organizations (such as pension funds) to other corporations); and *Winn-Dixie* (11th Cir.) (tax shelter involving corporate owned life insurance).

More recently, a number of corporate tax shelter cases have originated in the federal district courts and have been handled by our civil trial sections. Favorable decisions were obtained for the Government in *IES Industries, Inc.* (N.D. Iowa) (involving the same shelter that was the subject of litigation in Compaq Computer's unsuccessful Tax Court case) and *CM Holdings* (D. Del.) (corporate owned life insurance tax shelter similar to the *Winn Dixie* shelter, involving \$300 million in this case and potential overall industry impact of \$4 billion). Both those cases are currently on appeal. We are also now litigating three cases involving a shelter similar to that promoted by Merrill Lynch and used by Colgate-Palmolive: *BOCA Investerings Partnership* (D. D.C.) (American Home Products) and *Nieuw Willemstad Partnership* (D. D.C.), and *Oud Philipsburg Partnership* (D. D.C.) (both involving R.T. Donnelly, Inc., successor to Dun & Bradstreet, Inc.) and two shelter cases involving corporate owned life insurance similar to that in *CM Holdings*, *American Electric Power Company* (S.D. Ohio) and *Dow Chemical Company* (E.D. Mich.).

C. Criminal Enforcement

i. Introduction

During the past eight years, the criminal tax enforcement component of the Tax Division faced many difficult and new challenges. Large numbers of individuals and businesses failed to file required tax returns and the yearly legal source income tax gap (the difference between taxes owed and taxes paid) exceeded \$100 billion. There was a resurgence in the number of illegal tax protest schemes, including a growing number of abusive trust schemes, to evade taxes and obstruct the activities of the Internal Revenue Service. The push to convert the Internal Revenue Service to paperless filing created new opportunities to commit fraud against the system. Evasion of taxes on motor fuel exceeded \$1 billion a year. Rapid growth in the electronic transmission and storage of data made it easier to move funds offshore quickly and more difficult to discover violations of the tax laws. The use of tax haven countries and foreign trusts to evade United States taxes increased.

Working closely with the Internal Revenue Service, United States Attorneys, and other law enforcement entities, both federal and state, the Tax Division's Criminal Enforcement Sections devised effective and novel means to meet these problems. The Division maintained a conviction rate exceeding 95 percent.

ii. Non-filers and Tax Gap Cases

Our Criminal Enforcement Sections made a significant contribution to the continued good health of the tax system between 1993 and 2000. Nowhere was this more evident than in the area of legal source income. Although most Americans are law-abiding citizens who self-assess and pay their taxes on time, a significant number do not. In the early 1990's, the "tax gap" (the difference between the amount of taxes owed on legal source income and the amount voluntarily paid) was somewhere between \$100 and \$150 billion each year, approximately \$10 billion of which was attributable to approximately 10 million individual and business non-filers. At the same time, the Tax Division and the Internal Revenue Service were being called upon to devote an increased share of their resources to investigations and prosecutions involving illegal sources of income, such as narcotics trafficking, public corruption, and financial institution fraud. This decline in emphasis on legal source income cases threatened to reduce the deterrent effect of criminal tax sanctions on other taxpayers and create the impression among those earning legitimate income that it was safe to cheat on taxes.

To address this problem and improve voluntary compliance, the Tax Division responded in two ways. First, as a result of a cooperative effort with the Internal Revenue Service, over 150 non-filers were indicted between November 1, 1992, and May 1, 1993. Additionally, in 1995, the Tax Division and the IRS launched an effort to reinvigorate tax enforcement of "tax gap"

cases. Working groups² were established to address a number of problems responsible for the declining numbers of legal source income cases. New procedures were instituted, such as the simultaneous review of grand jury cases by IRS Chief Counsel and the Tax Division, to speed up the processing of grand jury cases. Due in part to these efforts, prosecutions arising from grand jury investigations in legal source income cases increased from 209 in FY 1995 to 546 in FY 1998 and the number of defendants in legal source cases investigated administratively increased by 52 percent in the same period.

Tax Division attorneys also played a significant role in meeting the "tax gap" problem through litigation assistance rendered to United States Attorneys' offices. Among the legal source income cases successfully prosecuted by Criminal Enforcement Section attorneys were *United States v. Raney* (W.D. Va.) (owner of airport who failed to pay \$450,000 in taxes convicted of tax evasion for four years and sentenced to 18 months in prison, fined \$100,000, and ordered to pay back taxes); *United States v. Sparks* (D. Nev.) (owners of plastering and drywall firm who failed to disclose \$5 million in business receipts pled guilty to conspiracy to defraud IRS); *United States v. Bishop* (S.D. Tex.) (attorney convicted of evading approximately \$350,000 in taxes sentenced to 18 months in prison and ordered to cooperate with the IRS in paying back taxes); *United States v. Perlmutter* (S.D. Fla.) (multi-millionaire owner of nationwide chain of arts and crafts stores sentenced to 3 years in prison for conspiring to defraud IRS by skimming business receipts; agrees to pay \$6.4 million in back taxes to IRS).

iii. *Electronic Filing Fraud and Cybercrime*

The computer age brought about major changes in the way the Internal Revenue Service operated, including the option to file tax returns electronically. No sooner had the IRS first instituted its electronic filing (ELF) program, however, than it began to be victimized by fraudulent filing schemes. Many of these schemes involved as many as several thousand false individual returns and millions of dollars in stolen funds.

In many of these cases, immediate responses were necessary to stop the drain on the treasury caused by ongoing schemes. The Tax Division streamlined and expedited procedures for referrals and authorizations for investigations, arrests, and prosecutions, and assigned an attorney to be available at all times to assist the IRS and Assistant United States Attorneys with ELF matters. Form pleadings were created and distributed to the field for use. In addition, the Tax Division played a central role in the Task Force formed by the Treasury Department which developed several modifications in the program that curtailed some of the abuses. Because of the technical nature of many of these cases, Criminal Enforcement Section attorneys had to assume responsibility for conducting many of these prosecutions -- e.g., *United States v. Emmanuel* (E.D. Tex.) (defendant convicted on charges of conspiring to file and filing false claims for tax

² The working groups consisted of representatives from the Tax Division, the Attorney General's Advisory Committee of United States Attorneys, the Criminal Investigation Division of the Internal Revenue Service, the Assistant Chief Counsel (Criminal Tax), and the Treasury Department.

refunds in a scheme involving approximately 800 false returns claiming and approximately \$1.8 million in refunds).

Advances during the 1990's in the electronic storage, retrieval, and transmission of data present new challenges to law enforcement. The Tax Division devotes one attorney to address these issues and provide advice to prosecutors and agents. This attorney participated in the drafting of the 1994 "Federal Guidelines for Searching and Seizing Computers"; co-chaired the working group that prepared the "Online Investigative Principles for Federal Criminal Investigations"; and chaired the subcommittee of the Electronic Commerce Working Group that prepared the Department's OMB-mandated guidance to Federal agencies on the legal issues raised by the Government Paperwork Elimination Act.

iv. *Motor Fuel Excise Tax Evasion*

The 1990s saw a large and growing problem in the area of motor fuel excise tax evasion. Revenue losses from such schemes, which employed false IRS exemption certificates, forged invoices, and thinly-capitalized shell corporations, amounted to approximately \$1 billion per year. Perpetrators of these schemes enjoyed a significant price advantage over companies complying with the law and paying the excise tax. Evidence indicated that Russian organized crime figures were working with La Cosa Nostra crime families to control the illegal, untaxed sale of millions of gallons of gasoline a month.

Criminal Enforcement Section attorneys, working with the Internal Revenue Service, the FBI, the Transportation Department, and local taxing authorities and law enforcement agencies, investigated these schemes, devised prosecution strategies, and prosecuted large numbers of these cases. In *United States v. McNaughton, et al.* (E.D. Pa), four defendants were convicted of assorted motor fuel excise tax violations, including conspiracy, wire fraud, and RICO conspiracy charges for their participation in a fuel tax evasion scheme that cost the federal and state governments more than \$14 million in diesel fuel excise taxes. In 1998, Tax Division prosecutors successfully completed prosecution of the largest motor fuel case ever pursued. In *United States v. Enright, et al.* (D. N.J.), four defendants were convicted of conspiring to defraud the United States and the State of New Jersey of motor fuel excise taxes totaling approximately \$140 million. The defendants were also convicted of other charges, including conspiracy to commit tax evasion, wire fraud, and money laundering. The lead defendant was sentenced to 17 years in prison and fined \$1 million. Twenty-three other defendants pled guilty to various tax-related charges.

IV. *State of Affairs Today*

The Tax Division continues to be an essential part of the Country's tax system. Division attorneys conduct sophisticated civil tax litigation, criminal prosecutions and appeals. This litigation is conducted with professionalism and to the highest ethical standards.

V. Next Steps/Challenges for the Incoming Administration

Two recent actions outside the Tax Division will have an impact on the Division in the near future.

First, the IRS Restructuring and Reform Act of 1998 (RRA 98) resulted in a significant decrease in collection efforts by the IRS as it implemented the reorganization changes mandated by the Act. Recently, the Commissioner of the IRS publicly announced that the IRS would be refocusing its efforts on collections and traditional audits. These steps likely will lead to a large increase in civil cases referred to the Tax Division. In addition, RRA 98 implemented new due process protections that give taxpayers the right to administrative and judicial review of liens and levies and require court approval for a levy upon a personal residence. These new due process protections already have resulted in a small increase in caseload, which also is likely to increase dramatically as the IRS steps up its collection efforts. Additional resources, including additional attorneys, may be needed to address this influx of cases.

Second, in April 1999, the Webster Commission Report provided a detailed and thorough analysis of the IRS's criminal arm and determined that IRS Criminal Investigation Division had drifted from its primary mission of administering and enforcing the federal internal revenue laws. The Webster Commission stated that if IRS-CI failed to do its job effectively, no other agency could fill the void. In response to the Webster report, CI has undertaken a complete restructuring of its organization. The refocusing of IRS-CI resources on legal source income cases will have an effect upon the Tax Division's allocation of its own assets and attorney time.

Finally, the sophistication of the methods used by some taxpayers for tax avoidance or evasion is constantly increasing. To meet the challenges of the resulting complex litigation and potential increased caseload, the Tax Division will continue to need to recruit and retain the best and brightest attorneys. This will be particularly challenging because of the increasing competition for quality legal talent and the tremendous compensation differential between the public and private sectors.

H. Representing the United States and Its Interests in Supreme Court Litigation and Providing Legal Advice to the Executive Branch

1. Submission by the Office of the Solicitor General

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I. Overview of the Office of the Solicitor General

The Solicitor General, with the assistance of a small staff of attorneys, is responsible for representing the United States and its interests in litigation before the Supreme Court. Additionally, the Solicitor General is responsible for determining whether the United States will appeal from adverse decisions in the lower courts, whether to petition appellate courts for rehearing en banc, whether the United States should file as amicus curiae in any appellate court, and whether the United States should intervene in any court in which the constitutionality of an Act of Congress has been brought into question. See 28 C.F.R. §0.20.

During the eight years of the Clinton Administration, the interests of the United States were represented by two Solicitors General and two Acting Solicitors General. William C. Bryson served as Acting Solicitor General from January 1993 to May 1993; Drew S. Days, III, served as Solicitor General from May 1993 through June 1996; Walter E. Dellinger served as Acting Solicitor General from July 1996 through August 1997; and Seth P. Waxman has served as Solicitor General from November 1997 to the present.

II. Guiding Policies for the Office of the Solicitor General

The Solicitor General is charged with, among other things, representing the interests of the United States in the Supreme Court. The interests of the United States are multitudinous and varied, and it is ultimately the responsibility of the Solicitor General to unify those interests so that the United States may speak with one voice – a voice that speaks on behalf of the rule of law. The Office of the Solicitor General is thus in a position that resembles and yet differs from that of a traditional advocate with a traditional client. As former Solicitor General Simon Sobeloff described it:

The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory, but to establish justice.

The Office has discharged that duty while maintaining fidelity to the rule of law and acting with the highest level of candor in its representations to the Court.

III. Review of Major Activities and Accomplishments

A. *Review of Major Activities -- Workload Figures*

Litigation in the Supreme Court: From January 20, 1993, to the present, the Office of the Solicitor General filed over 200 petitions for certiorari, filed over 4000 responses to petitions in which the government was named as respondent, and filed briefs on the merits (either as a party or as amicus curiae) in over 550 cases. These figures do not include the numerous motions, responses to motions, and reply briefs that the Office filed relating to matters pending before the

Court. On average, the Office of the Solicitor General participated in 70% of the cases the Court heard each Term.

Requests for Authorization to Take Action in a Lower Court: From January 20, 1993, to the present, the Office of the Solicitor General has made over 10,000 determinations whether to appeal, to petition for rehearing en banc, to intervene, or to participate amicus curiae.

J. *Review of Major Accomplishments*

I. Civil Rights

The Supreme Court adopted the position of the Solicitor General in several important cases that ensured protections for employees under Title VII of the Civil Rights Act of 1964. In Harris v. Forklift Systems,¹ the Court found, consistent with the position advocated by the Solicitor General, that conduct giving rise to a hostile work environment action need not seriously affect an employee's psychological well-being or lead the employee to suffer injury. Rather, the standard under Title VII is whether the environment is objectively hostile and whether the victim perceived the environment as hostile. Several terms later, in Oncale v. Sundowner Offshore Services, Inc.,² the Court again agreed with the Solicitor General, holding that sexual harassment by a person of the same sex is actionable under Title VII. Finally, in Burlington Industries, Inc. v. Ellerth³ and Faragher v. City of Boca Raton,⁴ the Court adopted the position of the Solicitor General when it held that an employer may be liable for sexual harassment by a supervisor who creates a hostile working environment, even when no tangible adverse employment action is taken against the employee.

The Supreme Court also adopted the position of the Solicitor General in a case involving Title IX of the Education Amendments of 1971. In Davis v. Monroe County Board of Education,⁵ the Supreme Court held that an individual victimized by student-on-student sexual harassment could institute a private action against a school board. The Court further held that a school board could be held liable when the harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victim of access to educational opportunities, and when the school board had actual knowledge of the harassment and reacted with deliberate indifference.

¹510 U.S. 17 (1993).

²523 U.S. 75 (1998).

³524 U.S. 742 (1998).

⁴524 U.S. 775 (1998).

⁵526 U.S. 629 (1999).

The Solicitor General won a landmark victory against gender discrimination in United States v. Virginia.⁶ In that case, the Supreme Court invalidated the male-only admissions policy of the Virginia Military Institute (VMI), and held that the exclusion of women from the school had not been remedied by the creation of a separate women-only institute. Through its effect on VMI and other educational institutions, this ruling has opened doors to educational opportunities previously unavailable to women.

Several significant decisions involved women's access to reproductive health services. In Madsen v. Women's Health Center,⁷ and again in Schenck v. Pro-Choice Network of Western New York,⁸ the Court, agreeing with the position of the Solicitor General as amicus curiae in both cases, held that narrowly tailored injunctions creating buffer zones around reproductive health centers did not violate the First Amendment. Such regulations, the Court reasoned, serve the significant government interest of protecting women's freedom to seek pregnancy-related services and burden no more speech than is necessary to further that interest. In Hill v. Colorado, the Court again adopted the Solicitor General's position as amicus curiae, upholding a Colorado statute making it unlawful to knowingly approach within eight feet of a person entering a health care facility to engage in "oral protest, education, or counseling" without that person's consent.⁹ Following the reasoning of the Solicitor General's brief, the Court ruled that the Colorado statute, like the injunctions upheld in Madsen and Schenck, was a permissible regulation of the time, place, and manner, rather than the content, of speech, and that the law was narrowly tailored to serve significant and legitimate governmental interests. This important decision has been instrumental in allowing States to protect freedom of access to health care facilities. Finally, in Stenberg v. Carhart,¹⁰ the Court struck down a Nebraska statute which made criminal the performance of an abortion, both pre- and postviability, by a procedure which the statute called "partial birth abortion." Adopting the reasoning of the Solicitor General's brief, the Court held the statute invalid for two independent reasons: first, it failed to make an exception when the procedure is necessary for the preservation of the life or health of the mother, and second, the statute defined the prohibited procedure so broadly that it included the most commonly used method for performing previability second trimester abortions, and therefore placed an undue burden upon a woman's right to terminate her pregnancy before viability.

The Solicitor General also successfully protected the rights of individuals with disabilities. In a series of cases, the Supreme Court agreed with the Solicitor General's

⁶518 U.S. 515 (1996).

⁷512 U.S. 753 (1994).

⁸519 U.S. 357 (1997).

⁹120 S. Ct. 2480 (2000).

¹⁰120 S. Ct. 2597 (2000).

interpretation of the Americans with Disabilities Act of 1990 (ADA). In Bragdon v. Abbott,¹¹ the Court held that the ADA protects persons who test positive for the human immunodeficiency virus (HIV) against discrimination in services offered by places of public accommodation. Agreeing with the Solicitor General's position as amicus curiae, the Court found that HIV infection significantly restricts major life activities and thus qualifies as a disability under the ADA. In Olmstead v. Linn,¹² the Supreme Court was persuaded by the Solicitor General's argument that the ADA prohibits States from confining disabled individuals in an institution when community-based treatment is recommended by the treating professionals and is not financially burdensome. In another case, Cleveland v. Policy Management Systems Corp.,¹³ the Court agreed with the Solicitor General's position that claims for Social Security disability benefits do not inherently conflict with claims for damages under the ADA, and that an employee is entitled to an opportunity to explain how, in applying for Social Security, she may claim she is totally disabled, while in her ADA suit, she may claim she can perform the essential functions of her job. Finally, in Pennsylvania Department of Corrections v. Yeskey,¹⁴ the Court sided with the government in holding that Title II of the ADA protects inmates in state prisons.

2. Environmental Protection

The Solicitor General has on several occasions defended state and federal authority to protect our nation's air, water, and wildlife. In Public Utility District No. 1 of Jefferson v. Washington Department of Ecology,¹⁵ the Solicitor General, as amicus curiae, successfully supported the State of Washington, arguing that it had authority under Section 303 of the Clean Water Act to establish a minimum stream flow requirement (needed to protect salmon habitat) for certification of any activity that results in a discharge into intrastate waters. In Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,¹⁶ the Solicitor General defended the Department of the Interior's interpretation of the Endangered Species Act's prohibition against "harming" an endangered species. Agreeing with the position of the Solicitor General, the Supreme Court sustained the Interior Department's regulations, which prohibit the modification of an endangered species' habitat without a permit if that modification actually kills or injures protected wildlife.

¹¹524 U.S. 624 (1998).

¹²527 U.S. 581 (1999).

¹³526 U.S. 795 (1999).

¹⁴524 U.S. 206 (1998).

¹⁵511 U.S. 700 (1994).

¹⁶515 U.S. 687 (1995).

Most recently, the Court heard arguments in Browner v. American Trucking Association,¹⁷ in which the Solicitor General defended the constitutionality of Section 109 of the Clean Air Act (CAA), which sets revised National Ambient Air Quality Standards for ozone and particulate matter. This case, argued in November of 2000, will have important implications for the authority of the Environmental Protection Agency to implement the CAA.

In addition to these defenses of particular environmental regulations, the Solicitor General scored an important victory regarding liability for environmental damages. In United States v. Bestfoods,¹⁸ the Court ruled that a parent corporation may be held derivatively liable under the Comprehensive Environmental Response, Compensation, and Liability Act for the polluting activities of its subsidiary if the corporate veil is misused to accomplish fraud or other wrongful purposes.

3. First Amendment

In numerous cases, on topics ranging from education to funding for the arts, the Solicitor General successfully defended federal laws, regulations, and policies aimed at balancing freedom of expression with government and community interests.

The Solicitor General has successfully defended several federal laws facing First Amendment challenge. In United States v. X-Citement Video,¹⁹ the Court reversed an appeals court decision striking down the Protection of Children Against Sexual Exploitation Act, which makes it a crime to knowingly transport, receive, distribute, or reproduce child pornography. By successfully defending this statute, the Solicitor General fortified the ability of the federal government to address the exploitation of children.

The Solicitor General was again called upon to defend a federal law in National Endowment for the Arts v. Finley,²⁰ in which several performance artists claimed that the grant application review process of the National Endowment for the Arts (NEA) violated their constitutional rights. Again the Solicitor General was successful—the Court held that a statute requiring the NEA to take into account “general standards of decency and respect” in its evaluation of grant applications did not interfere with the performance artists’ freedom of speech.

The Solicitor General has also prevailed in several significant freedom of religion cases.

¹⁷Nos. 99-1257, 99-1462 (argued Nov. 7, 2000).

¹⁸524 U.S. 51 (1998).

¹⁹513 U.S. 64 (1994)

²⁰524 U.S. 569 (1998).

Perhaps most important was Agostini v. Felton.²¹ In that case, the Court reversed its position in Aguilar v. Felton,²² holding that government programs that used public school teachers to provide remedial education to disadvantaged children in parochial schools did not violate the Establishment Clause. This decision freed the government more comprehensively to assist needy parochial school students under Title I of the Elementary and Secondary Education Act.

4. Government Regulation

Several cases argued by the Solicitor General had a significant impact on the regulation of the telecommunications industry. In two landmark cases, Turner Broadcasting System v. Federal Communications Commission²³ and AT&T Corp. v. Iowa Utilities Board,²⁴ the Solicitor General scored major victories for the authority of the FCC to oversee and promote competition and assure quality of service within the broadcasting and telecommunications industry.

In 1997, the Solicitor General prevailed in his defense of the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act. In that case, Turner Broadcasting System v. Federal Communications Commission, the Court held that regulations requiring the carriage of local broadcast television stations on cable television systems directly served substantial government interests by preserving free broadcast television, by promoting widespread dissemination of information, and by promoting fair competition.

Another set of Federal Communications Commission (FCC) regulations came before the Court in AT&T Corp. v. Iowa Utilities Board and its companion cases, in which several incumbent telephone local exchange carriers challenged local competition rules issued by the FCC pursuant to the Telecommunications Act of 1996. The Court, agreeing with the arguments of the Solicitor General, held that the FCC has the authority to promulgate such local competition provisions, and that the FCC's policies under the Telecommunications Act were rational and reasonable.

Regulation of the airwaves was once again at stake in Arkansas Educational Television v. Forbes,²⁵ in which the Court held, consistent with the position of the Solicitor General, that a state-owned television broadcaster may exclude marginal candidates from a televised election debate.

²¹521 U.S. 203 (1997).

²²473 U.S. 402 (1995).

²³520 U.S. 180 (1997), 512 U.S. 622 (1994).

²⁴525 U.S. 366 (1999).

²⁵523 U.S. 666 (1998).

5. The Political Process

The Solicitor General has also successfully advocated positions protecting the political rights of America's citizens. In United States Term Limits v. Thornton²⁶ the Supreme Court struck down as unconstitutional an amendment to the Arkansas Constitution precluding persons who had served a certain number of terms in the United States Congress from having their names placed on the ballot for election to Congress. The Court agreed with the Solicitor General, who argued as *amicus curiae* that such a provision impermissibly imposes qualifications for federal offices in addition to those set forth in the Constitution. A similar barrier to political participation was removed in Morse v. Republican Party of Virginia,²⁷ where the Court held unconstitutional a political party's regulations charging a fee to candidates to the party's nominating convention.

In Nixon v. Shrink Missouri Government PAC,²⁸ the Supreme Court also agreed with the position of the Solicitor General as *amicus curiae* that a Missouri statute limiting campaign contributions did not violate the First Amendment. The decision affirmed the authority of the Court's decision in Buckley v. Valeo²⁹ for the purposes of assessing the constitutionality of state campaign finance laws.

6. Criminal Law

The Solicitor General prevailed in several important cases involving the authority of federal and state law enforcement officials to convict and sentence criminal offenders. In Wisconsin v. Mitchell,³⁰ the Solicitor General, as *amicus curiae* supporting the State of Wisconsin, successfully argued that the First Amendment does not prohibit enhancement of a criminal sentence when the defendant selects his victim based on the victim's race, religion, color, or other protected status. That holding strengthens both federal criminal laws punishing intentional discrimination and federal sentencing guidelines that impose tougher penalties when the victim's racial or ethnic characteristics made him particularly vulnerable.

The Supreme Court also sided with the Solicitor General in two cases defining the scope

²⁶514 U.S. 779 (1995).

²⁷517 U.S. 186 (1996).

²⁸120 S. Ct. 897 (2000).

²⁹424 U.S. 1 (1976).

³⁰508 U.S. 476 (1993).

of the Double Jeopardy Clause of the Fifth Amendment. In United States v. Ursery,³¹ the Supreme Court confirmed the ability of the government to seize assets used to facilitate illegal drug transactions, agreeing with the Solicitor General's position that civil forfeitures after a prior criminal case do not constitute punishment for purposes of the Double Jeopardy Clause. The following term, in Hudson v. United States,³² the Court again adopted the position of the Solicitor General with respect to the Fifth Amendment, ruling that monetary penalties imposed by federal regulators in addition to criminal penalties do not amount to double jeopardy. These decisions have been instrumental in supporting the federal government's efforts to fight drug trafficking and corruption.

The Solicitor General also won a major victory against securities fraud in United States v. O'Hagan.³³ In O'Hagan, the Court agreed with the Solicitor General's argument that Section 10(b) of the Securities Exchange Act of 1934 prohibits securities trading based on misappropriated information. The Court held that a person who uses misappropriated confidential information to make a profit in securities trading may be held liable under the securities laws.

Finally, in Dickerson v. United States³⁴ the Supreme Court was asked to rule on the constitutionality of a statute enacted in 1968 purporting to overrule Miranda v. Arizona,³⁵ which held that a statement made by an accused during custodial interrogation could not be admitted into evidence on the government's direct case if the suspect had not received certain warnings before being interrogated. The Department of Justice as a whole spent a great deal of time carefully weighing the competing considerations and determining its appropriate course. Ultimately, the Solicitor General, representing the Department, argued that the Miranda rule was constitutionally based and therefore could not be overruled by Congress, and that under settled principles of stare decisis it should not be overruled by the Court. That position prevailed in a 7-2 decision authored by the Chief Justice.

IV. Conclusion

The past eight years have seen significant developments in a number of areas of constitutional law. The Solicitor General has been at the forefront of these advances, sometimes breaking new ground (as in the telecommunications cases) and sometimes advancing traditional

³¹518 U.S. 267 (1996).

³²522 U.S. 93 (1997).

³³521 U.S. 642 (1997).

³⁴120 S. Ct. 2326 (2000).

³⁵384 U.S. 436 (1966).

federal interests (as in the criminal law and environmental protection cases). At all times, the Solicitor General and his staff have strived to protect the interests of the United States while remaining faithful to the rule of law, in accordance with the highest standards and best traditions of our legal system.