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# **A DAY WITH THE DEPARTMENT OF JUSTICE**

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Federal Bureau of Investigation

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## INTRODUCTION

For many years, the National Legal Center has hosted a unique forum providing corporate general counsel, private sector attorneys, and policy makers the opportunity to be briefed on the enforcement policy priorities of the Department of Justice. The program offers a venue for real dialogue between a sizable cross section of business attorneys and the senior leadership of the Justice Department.

On March 21 and 22, 2006, private sector attorneys from across the country again assembled in Washington, D.C., to hear firsthand from senior officials of the Department of Justice, including the Attorney General, Solicitor General, Assistant Attorneys General, and the Deputy Director of the FBI.

This program would not be possible without the support, commitment, and cooperation of the Department of Justice, for which we are very grateful. The National Legal Center extends its appreciation to Attorney General Alberto Gonzales and his leadership team, who made the 2006 *Day With Justice* possible.

**Richard A. Hauser**  
President  
National Legal Center

**ALBERTO R. GONZALES**  
**Attorney General of the United States**

**THE BUSINESS OF JUSTICE:  
SHARED PRIORITIES FOR 2006**

This year, the United States is celebrating the three hundredth anniversary of the birth of one of our cherished Founding Fathers—Benjamin Franklin. Mr. Franklin wrote to a friend at the end of his life, “I believe I shall in some shape or other always exist.” I suppose he was right, since we are celebrating his incredible life nearly three centuries later. He gave us a number of reasons to perpetuate his existence in our nation’s consciousness, not the least of which that he was the only person to sign all five of the documents founding the United States, including the Declaration of Independence, the Treaty of Paris, and the U.S. Constitution. This great American also had good advice, which I share as particularly apt for a collection of lawyers. “If passion drives you, let reason hold the reins.” Now, as advocates for the rule of law, we are all charged with pursuing justice, with both an unending passion and a firm dedication to reason and good judgment. In fact, I think that our ability to follow Franklin’s advice and equal his dedication as a public servant is imperative to the success of our efforts to ensure justice for every American.

As business lawyers and corporate counsel, you play a vital role in upholding the rule of law by guiding clients to do the right thing in an environment of greater and greater legal and regulatory complexity. You bring a vital expertise and the highest ethical standards, passion, and reason to bear on a variety of legal challenges, and, so, before I go any further, I’d like to thank you for your hard work and your dedication. You are critical to the proper functioning of the American economy and our justice system.

There is, of course, a great deal of intersection between our work at the Justice Department and yours on behalf of the business community. Sometimes that intersection is pleasant, sometimes it is not so pleasant.

I’ve been Attorney General for about 13 months. After evaluating

my first year, I recently announced a strategic vision for the Department—what I think is important for the year ahead. It is a road map of priorities and initiatives rooted in the pursuit of the American dream. Fight terrorism; combat violent crime, drug trafficking, and cybercrime; protect civil rights; and preserve government and corporate integrity. In each of these six areas of special emphasis, we have a plan to secure the hopes and the opportunities of the American dream—a secure homeland, a safe community, a fair and equal chance to succeed, and a strong belief in the cherished values that make our country great.

I've already announced several new initiatives and a new antigang program that will strengthen the fight against violent gangs across the country, with special emphasis in six pilot cities. "Project Safe Childhood" will complement successful methods already used to combat gun crime and to prevent the exploitation of our kids over the Internet, which is a terrible, terrible problem. In "Operation Home Sweet Home," we'll refocus and expand the Civil Rights Division's Fair Housing Act testing program to root out discriminatory practices in housing.

These initiatives and others affect the lives of ordinary Americans every single day. The mother who wants her family to live safe from the fear of violence from guns or gangs; the child using the Internet to complete homework or connect with friends; the Mexican-American couple who can't find decent housing because of illegal discrimination. I'm concerned about those striving to live out the true meaning of the American dream. It is a dream that is, in many ways, an economic dream, and that's why, together, we have a responsibility to help protect the integrity of the marketplace and preserve the quality of life we have come to expect from the greatest economy in the world.

Many of the priorities that I mention include areas of importance to the business community as keepers of the American economic dream. And I'd like to discuss those in more detail.

Our effort to combat the growing trend of crimes threatening our economic national security includes a robust enforcement of the laws protecting intellectual property. Intellectual property rights infringement often is ignored or marginalized by the public as not being a real crime that causes harm. But the Office of the United States Trade Representative estimates that intellectual property theft worldwide costs American

companies—it costs you—\$250 billion a year. In addition, you might be surprised at some of the more serious human consequences. For example, in March 2002, a boy living in New York underwent a lifesaving liver transplant. After the operation, he began a regimen for recovery, which included a weekly injection to treat anemia. While the operation appeared successful, his anemia did not improve. In fact, after receiving his weekly injection, he began to experience excruciating spasms in his legs and the doctors were baffled. It took eight painful weeks to determine the cause—the medicine was counterfeit and did not contain the dosage required to treat his condition.

The Department has committed substantial resources to fight intellectual property crime. We created a Task Force on Intellectual Property that issued a comprehensive report detailing more than 25 separate recommendations to improve our efforts in this area, and I am committed to implementing each and every one of the recommendations. For instance, we've already stood up five new computer hacking and intellectual property units in prosecutors' offices throughout the country. Through this task force, we've designed programs focused on awareness and prevention and devoted considerable prosecutorial resources to enhance our ability to aggressively pursue crimes and protect the intellectual property rights of our citizens and our industries. As you know, we can't be content to combat this problem on our own shores. As global interconnectivity grows through computers and satellite communications, intellectual property crimes can be committed by a criminal in one country, stealing property from another, and sending it to a third in just minutes. The task force made several recommendations to improve international cooperation such as providing law enforcement training and deploying personnel to key U.S. embassies to serve as intellectual property law enforcement coordinators. The first has already been placed in Bangkok, Thailand. These individuals will coordinate intellectual property enforcement efforts in their region of emphasis and serve as a liaison with local law enforcement. At a time when many areas of the Department are facing cuts and reallocations, the increase in resources for IP protection is an important indication, an important sign of commitment, that we take these crimes very seriously. There is nothing fake about our commitment to investigate and prosecute

counterfeiters and pirates, both criminally and civilly, both here and abroad.

Now, also of interest to you, I know, is the Department's priority to promote and enforce appropriate ethical and professional standards of integrity and responsibility in both the public and private sectors. Integrity in government and business is essential for a strong America, and you all know that. Taxpayers and investors deserve nothing less. In the wake of corporate scandals such as WorldCom and public corruption scandals like the recent guilty plea of Congressman Randy "Duke" Cunningham, President Bush made clear that the nation cannot tolerate fraud and corruption. I told prosecutors to operate with one principle in mind, including Alice Fisher, head of the Criminal Division, that no one is above the law, not a city council person, CEO, a member of Congress, or an administration official. We will not allow public officials, Republican or Democrat, to misuse their office or misspend taxpayer dollars. And we will hold corporate executives accountable for the duties that they owe to shareholders.

We are working hard, particularly through the Corporate Fraud Task Force, to investigate and prosecute wrongdoing. The Department's aggressive enforcement actions against corporate fraud produce clear benefits for honest executives, for employees at responsible law-abiding corporations, and for the American economy. But I want to emphasize something. We are sensitive to the notion that there are impacts on your work in the way that we do our job. One issue that has provoked much discussion is our consideration of a corporation's cooperation in making criminal charging decisions and sentencing recommendations, and, more specifically, waivers by corporations of applicable privileges as part of that cooperation. According to the 2003 memorandum from then-Deputy Attorney General Larry Thompson, a prosecutor may consider "the corporation's willingness to identify the culprits within the corporation including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive attorney-client and work product protection." This last point, waiver of attorney-client protection, has raised concern in the private bar and the business community, and we at the Department have been actively engaged in a dialogue with the bar and

representatives of business. There are two important interests that all sides in this dialogue recognize and embrace. First, the benefits to society from the preservation of certain privileged and confidential communications; second, the benefits of vigorously enforcing criminal laws for corporate and public misconduct. We must find the right balance between these two goals. Let me assure you that the Department is actively engaged in this issue. We continue to embrace the Thompson memo as appropriate guidance to federal prosecutors. We believe it is balanced and deferential to legal privileges subject to the timely, accurate, and complete information needs of the prosecutor. We do not believe, as some have suggested, that it has been misapplied through routine requests for privilege waivers. We are also responsive to the perception concern, that even if waivers are not being inappropriately sought, there is a risk they might be, and, so, attorney-client communication is chilled.

We have issued guidance that requires each U.S. Attorney's office and each DOJ component to develop written review procedures for seeking waivers of privilege. These standards require the approval of the U.S. Attorney or a supervisor-level Assistant U.S. Attorney before seeking a waiver of the attorney-client or work-product privilege. This process ensures that waiver requests are based upon a deliberate and considerate evaluation of all of the circumstances affecting the exercise of the prosecutor's discretion in a particular case. Now I know that there are concerns that each U.S. Attorney's office could have a different set of procedures contributing further to an environment of uncertainty. We are continuing to focus on that issue, and I welcome your input as we work to find a solution that would at the least ensure a uniform baseline standard. We understand the importance of legal privileges in ensuring the free flow of candid communication between corporate counsel and their clients, and we understand that such appropriate communications can contribute to sound corporate governance. At the same time, we take very seriously our duty to enforce criminal law as prosecutors, and we will use all of the appropriate prosecutorial tools to do so. We want to continue this discussion on the civil litigation issue with all interested parties, especially the business community.

When I laid out my strategic vision for the Justice Department this year, I made it clear that our mandate comes from a long history of

protecting the American dream. As someone who has lived that dream in this wonderful country of ours, I know how important it is to preserve and protect the hopes and opportunities that all of us cherish in America. I appreciate your help in this mission. We cannot achieve our goals alone. We need cooperation at every level of government and from the private sector and concerned citizens worldwide. I look forward to our work together on these important priorities for the American people, including our efforts to enforce our intellectual property laws and preserve the integrity of our first-rate economy.



**PAUL D. CLEMENT**  
**Solicitor General of the United States**

**THE OFFICE OF THE SOLICITOR GENERAL  
AND THE SUPREME COURT**

I would like to talk about two things—the office of the Solicitor General and the Supreme Court. Let me spend a couple of minutes on each of these topics.

The office of Solicitor General is something that is obviously near and dear to my heart. It is a wonderful organization. It is an office full of the most talented lawyers that you can imagine, and they are all working every day to try to get it right in terms of the legal analysis. It is a wonderful place to work.

Most people, if they know one thing about the office of Solicitor General, will know that the office represents the United States government before the Supreme Court of the United States. And that is the highest honor that I can imagine as a lawyer. You are representing the United States of America before the United States Supreme Court. It is a tremendous honor for everyone in the office. Everyone in the office, in terms of the permanent legal staff, has that opportunity. It is not an office where just the Solicitor General and a couple of deputies argue before the Court, but all of the assistants in the office also argue in front of the Court two or three times each Term, and they are all uniformly terrific when they do so.

I know when I was in private practice, I had the experience of going to Court to hear the second case that was being argued that day. In the first case, I did not know that much about it, but I was sitting through it, and about the second or third lawyer who got up was just terrific. I did not know who it was, but I was not surprised to learn afterward that it was an Assistant to the Solicitor General. I think, if you watch the Court in action and see the lawyers from the office, you will get a sense that they are terrific lawyers, to a person.

As important as representing the United States before the Supreme Court is, however, it is just the tip of the iceberg in terms of the work of the office. I want to give you a picture of the rest of the work of the office, because it is a very important part of what we do on a

day-to-day basis. Sometimes, that other work can have as much of an impact on outside companies and other organizations as what we do in the Supreme Court. The first part of the rest of the iceberg is the process that gets us before the Supreme Court.

We are in front of the Supreme Court in roughly 80% of their merits cases, and, in a healthy percentage of those cases, we are a party, either the petitioner or the respondent. There also are a substantial number of cases in which we have not previously participated in the case, and the Court grants the case, and we have to decide on relatively short order whether we are going to participate in the case as an amicus and, if so, on which side we are going to participate. Generally, we have only about 40 days to figure out whether we are going to file a topside brief, and, if so, write that brief and get it on file. It is a tremendous challenge in terms of the intensity of the work, the importance of the work, and the time pressures.

The process of trying to decide whether to get into one of these cases does not just involve our office. As soon as the case is granted by the Court, we ask the affected agencies whether they have an opinion on whether we should get involved in the case. We ask other components within the Justice Department whether they have a view. All of that generates a series of memos that then come to our office, and an assistant to the Solicitor General will bring that material together and make an independent recommendation. A Deputy Solicitor General will then make an independent recommendation, and that will all come to the desk of the Solicitor General for an ultimate decision about whether to participate and on which side.

Generally in that process, if it is a case where there is a serious potential for the federal government to get involved, we will have an opportunity to meet with both sides of the case and have them come into the office and present, effectively, almost an argument. We have those lawyers come in and get a sense of what issues are lurking under the surface and what are the broader implications for the federal government. That is all part of this process of deciding whether or not we are going to get involved in a case. Some decisions are straight-forward. When a case clearly implicates the interests of a single agency, with a preexisting view of the issue reflected in a regulation, it is easy for us to decide to come in as their lawyer to defend that position.

But other cases involve issues where the federal government does not speak with one voice. A classic example is a case that implicates the proper construction of one of the civil rights statutes, like Title VII. The federal government, as you may know, is the nation's largest employer. The Civil Division in the Justice Department has the responsibility of defending the federal government in suits that are filed against the government as an employer. The Civil Rights Division down the hall has the responsibility as the chief enforcer of the civil rights laws. The EEOC across town has its role in enforcing those statutes as well. In many cases, the Civil Division will come into our office and say, "We ought to be on the side of the employer in this dispute." The Civil Rights Division will come in and say, "We need to be on the employee's side of this dispute." Sometimes the EEOC will come in and say, "We need to do this, and we have an EEOC guidance manual that addresses this." The process of sorting through the various opinions and coming up with the position of the United States is one that takes a great deal of time, but it is very important to get it right, and we go through that process and ultimately make a determination as to whether to participate.

That is the process of deciding whether to get in as an amicus. There is a similar process for deciding which adverse lower court decisions we should try to take up to the Supreme Court and file a cert. petition. As you can imagine, with the breadth of the federal government's litigation, we are occasionally on the losing side of a case in the court of appeals. When that happens, it is very often the case that the general counsel for the affected agency thinks that we should go to the Supreme Court in that case. It is no accident, because a lot of the agency general counsel used to be in private practice or were general counsel at outside corporations, and they are used to the idea that, when you get an adverse court of appeals decision, you pick up the phone, call your lawyers, and you say, "Let's take this to the Supreme Court." The lawyers who receive that call are generally enthusiastic and grateful because they think that is going to translate into some fees. It is a great, great thing for a lawyer in private practice to get that call. When you get that call in the Solicitor General's office, your response is a little bit different. You basically tell the general counsel, "Well, send us a memo and we will think about it." The memo is generated. The other affected

agencies of the government will opine. Sometimes it is pretty simple, and it is really one agency that has a dog in the fight, but in other cases, it can implicate the interests of a variety of agencies. We then go through a process similar to the one I described for amicus participation. We ultimately make the decision about whether we should file a petition.

It is a very important role that our office plays because we try to do our best to screen the cases for the Court so that when we are filing a petition with the Court, they understand that this is a petition that we think is one of the very most important cases that the federal government has and that we have already weeded out the cases that we do not think fit the Court's traditional criteria for granting cert. in a particular case. If you look at your average cert. petition, it has about a 1% chance of success. The Court gets between 7,000 and 8,000 petitions, and takes roughly 70 or 80 cases in an average Term. In the past couple of years, and this is pretty consistent over the years, the office of the Solicitor General, in the petitions that we file, has certiorari granted in around 67% to 75% of the cases. That is not because the Court likes us more. It is not because our cases are inherently more "cert-worthy." It is because, in the main, we are going through this process and we are screening the case to decide for ourselves which of the cases of the executive branch merit those few precious slots on the Court's docket.

We go through a very similar process, not just at the Supreme Court cert. stage, but in the process of deciding whether to appeal an adverse district court decision. Anytime somebody in the Justice Department gets an adverse decision from a court, whether it is a district court or the court of appeals, to take that case up to the next level, the lawyer has to initiate a process and ultimately get the approval of the Solicitor General. That involves an awful lot of work. We go through this process roughly 2,000 times a year. That means that basically every business day, you have six or seven of these big stacks of paper coming across your desk with a decision to be made about whether to take the case up to the next level. It is a process that we think is well worth the trouble, because we are determining the universe of cases that we will appeal and, therefore, could end up going to the Supreme Court.

Sometimes a lawyer will call me up and say, "You know, we want

to take this case up to the Circuit. We understand you are reluctant to take it up to the court of appeals.” They will try to make the pitch that, “We know the Circuit. We litigate there all the time. We can win this case there.” My response to them, as often as not is, “That is exactly what I am worried about.” If we take this case up where the legal position is not in the long-term interest of the government or is not particularly sound and we win, then our office loses the control over whether that case can be taken to the Supreme Court. If we win in the court of appeals, the decision as to whether to file a cert. petition is in the other party’s hands, not in our hands. That is why we think it is very important to put ourselves in a position where we are taking positions throughout the United States that we feel we can defend in the Supreme Court.

Let me also say that, before I leave you with the wrong impression, we actually win some cases in the courts of appeals, too. As much a part of our work as it is to decide whether to take cases to the Court that are adverse or to appeal cases, another big part of our responsibilities is to mind the docket in terms of keeping cases where we have won in the court of appeals out of the Supreme Court. If you accept that the Court looks at roughly 7,000 cert. petitions a year, fully half of those involve the federal government as the successful party in the lower courts. It is not that in all 3,500 of those cases, we file a brief in opposition. In many of those cases, we waive the opportunity to file a brief. That, itself, is a product of a decision-making process and, in many of the cases, we do end up filing a brief in opposition to explain to the Court why it is that the circuit split that is being advertised in the petition is not actually present or why the Court does not need to grant cert. in that particular case.

I hope that gives you a little bit of flavor of why I say that representing the United States in the Supreme Court at oral argument is just the tip of an iceberg, when it comes to the overall work of the office.

Let me fulfill my promise of talking briefly about the Court at this exciting time in the Court’s history. I want to do it by talking about the conventional wisdom about the Court at the beginning of this Term—and compare it to what we know now that we are about halfway through the Court’s Term.

At the beginning of the Term, as you looked at this Term of the

Court, it undeniably appeared that it would be a historic Term. You had a new Chief Justice for the first time in nearly two decades. You had a Court with new membership for the first time in a decade. You had the prospect, at the beginning of the Court's Term, for even greater change in personnel on the Court. In combination with this change in personnel at the Court, you had at the beginning of the Term a docket that already looked like it was filled with some blockbuster cases. When the Court began to sit in October, the docket already included the first abortion case in five years, an assisted suicide case, a couple of important federalism and Eleventh Amendment cases, the Solomon Amendment case, and a couple of campaign finance cases— one from Vermont, one involving the federal government. You had this change in personnel, you had all these great cases that the Court was going to hear with this change in personnel.

In addition, if I can try to describe what I think fairly describes the conventional wisdom at the beginning of the Term, it went something like this: the Court would first not issue a 5-4 decision in which Justice O'Connor cast the deciding vote. In looking at some of these cases, abortion, campaign finance, these appeared to be 5-4 decisions waiting to happen. The Justices who would be writing the dissent in these cases would know that, if Justice O'Connor was in the majority and they just took a little bit longer to write that dissent, that there would be a reargument in the case. So that dynamic, combined with all these big ticket issues on the Court's docket, suggested to a lot of people that there would be a substantial number of rearguments in some of these big cases. They also said the 5-3 or 6-2 decisions would issue but not the 5-4 decisions, when Justice O'Connor cast the decisive vote at Conference.

From the perspective of the middle of the Term, some of these predictions have borne out and some of them have not. Certainly, there is no doubt, at this point as you look at this Term, that it is an absolutely historic Term. You have a new Chief Justice presiding over the Court. You had Justice Alito joining the Court. As somebody who is up at the Court as often as Ted [Olson] indicated, almost every day when the Court is sitting, it seems like virtually every day is a new first or a new last. It is the last day that Justice O'Connor was sitting in a case, the last day that Justice O'Connor was there to hand down opinions, the first opinion issued by the

Chief Justice, the last opinion of Justice O'Connor, the first day that Justice Alito sat. There is a palpable sense of history and firsts and lasts around the Court.

A second thing, though, is that it is much less obvious, from the perspective of midterm, than it was at the beginning of the Term, that this will be a Term full of blockbuster decisions. I say that, in part, because there were a couple of cases that the Court looked like it might take this Term, like the partial birth abortion cases or the *Padilla* case involving enemy combatants, that ended up not getting added to this Term's docket.

More than that has been this remarkable phenomena in which the Court this Term has taken hot-button issues that traditionally divide the Court 5-4 and found common ground on some issue in the case, sometimes a narrow issue in the case, sometimes an issue that may appear narrow but may actually have more significance in the long term.

If you look at this Term, for example, the Court recently has decided unanimously the Solomon Amendment case. But before that, they decided unanimously an important Eleventh Amendment federalism case involving Title II of the Americans With Disabilities Act. That is an issue that in two very similar previous cases divided the Court 5-4 in two different 5-4 majorities; this time it was 9 to nothing. In an abortion case involving the parental notification statute in New Hampshire, the Court decided the case 9 to nothing. Then in a campaign finance case, the Court decided the case—again an issue that traditionally divides the Court 5-4—9 to nothing in less than a week. I think if you would have told me at the beginning of the Term that there would be a unanimous Eleventh Amendment immunity case, a unanimous abortion case, and a unanimous campaign finance case, I might have started looking for other signs of the apocalypse. It is really remarkable to see that degree of unanimity.

There is another respect, and it is the last thing I will say, in which the conventional wisdom has taken a battering, and that is the phenomenon in which the Court did issue, before Justice O'Connor stepped down, two 5-4 decisions in which she cast the decisive vote. The one that, to me, is the most remarkable, and I think speaks volumes about the Court's integrity, is the decision that was actually issued on the last day that Justice O'Connor sat on the Court to issue

opinions. It was a decision involving Eleventh Amendment immunity and the Bankruptcy Code. The Court, in a 5-4 decision, clearly broke new ground on the divisive issues of the Eleventh Amendment, federalism, and state sovereignty. The Court issued the decision 5-4, with Justice O'Connor casting the decisive vote. And if you read Justice Thomas's dissent in that case, there is no doubt that it is a passionate dissent and it is a case that the Justices felt strongly about. But, nonetheless, the decision was ready to go and, despite what had to be a temptation to hold on to the case and reargue it, the decision issued 5-4 on the last day that Justice O'Connor sat. I think that speaks volumes about the integrity of the Court, the integrity with which all of the Justices go about their jobs.

**THOMAS O. BARNETT**  
**Assistant Attorney General**  
**Antitrust Division**

**COMPETITION AND ECONOMIC GROWTH**

I would like to talk today about a critical aspect of the Antitrust Division's mission—the importance of sound antitrust policy to overall economic growth. I will spend a few minutes talking about, first, the relationship between competition and growth generally, and, second, how appropriate antitrust laws and enforcement can help promote that fundamental policy of competition. Then I will describe how we incorporate these ideas into the work of the Antitrust Division.

**COMPETITION AND GROWTH**

As many of you know, competition is a fundamental guiding principle for our economic policy. Why is that? Well, I'll go back to my younger days when I was at college. I remember reading a book called *A Theory of Justice* by John Rawls. Rawls talked about how one might want to organize a society if you did not know who you were going to be within that society. That is, if you were going to be randomly assigned a position in society, how would you want to set up the society's rules and structures? Rawls came up with something called the "maximin" theorem. Under that theorem, he suggests that you would order society in a way that would maximize the minimum share, because you wouldn't know whether or not you would receive the minimum share when you were randomly assigned a position in society.

I have always thought that this approach was fundamentally wrong. To be sure, we should—and I certainly do—care about improving the welfare of those least fortunate in our society. Nevertheless, the idea that we should care only about the minimum share loses focus on the overall size of social welfare, of the economic pie, if you will. If in maximizing the minimum share, you shrink the overall social wealth sufficiently, it has always been my

view that it is not worth doing.

This concept relates to antitrust law because competition is the best way that we have found to maximize social welfare. This happens in two ways.

First, competition provides a motivation to individuals. Adam Smith talked about this concept in *The Wealth of Nations* when he talked about the “invisible hand.” One of my favorite quotes comes from one of our staff economists. One day when we were talking about a particular subject, he said out of the blue, “You know, the invisible hand is a wonderful thing; you see it at work every day.” Though we don’t actually see it at work—obviously, what he meant is that we see the results of it every day—the invisible hand causes people to apply themselves harder to produce new products at lower prices and provide greater choice.

Again, going back to my college days, I remember a remarkable statistic from when I was studying the history of the Soviet Union. In the 1920s and the 1930s, Stalin was collectivizing the farms in the Soviet Union. I confess I don’t have the exact numbers for you, but something like 90% of the land being farmed had been collectivized. As a result, the individuals cultivating the land didn’t reap the rewards. Individuals were allowed, however, a tiny plot outside the homes or huts where they were living. Those plots constituted something like 2% of the land that was being farmed in the Soviet Union, but they were producing something like 50% of the produce in the country. To me, this disparity drove home that a system in which individuals have the ability to reap the rewards of their own efforts—which is essentially a free market system—is a system that leads to the greatest economic growth.

On a more modern front, if you ever want to see how powerful the opportunity for success, money, or a little bit of fame can be, I suggest that you tune in to a television show called *Fear Factor*. I do not know if any of you have ever seen it, but you will see people eat bugs and go through sewers and do all sorts of things, which I personally hope I never have to do, in order to get on television and have the opportunity to win a monetary prize.

The other thing that is very important about the invisible hand in the market system is that it leads to a more efficient allocation of resources. That is really what Adam Smith was talking about. When

individuals pursue their own self-interest, they actually promote social welfare. When you go through the crucible of a market test, you have an incentive to make your product at a lower cost and with better quality. At the end of that process, you become a stronger competitor or you fail. The end result is that society as a whole benefits.

### ANTITRUST LAW ENFORCEMENT AND GROWTH

Given my conviction that competition is the best way to maximize our social welfare, I want to turn now and talk about how antitrust law and enforcement policy play a critical role in that process.

It is important that antitrust enforcement be well calibrated, that it be focused on the correct goal. For example, if we block mergers of grocery stores that have a combined share of 10% of the market, we are preventing potentially beneficial integration without preserving any meaningful competition. That used to be the Antitrust Division's merger enforcement policy. I'm referring, of course, to the 1966 Supreme Court case involving Von's grocery chain.<sup>1</sup>

Today, however, we focus on consumer welfare. In his seminal book *The Antitrust Paradox*, Robert Bork argued that "the only legitimate goal of antitrust is the maximization of consumer welfare," and that at the time he was writing, in the 1970s, antitrust law erred by introducing conflicting goals, such as the "survival or comfort of small businesses."<sup>2</sup> Bork explicitly drew the connection between antitrust enforcement focused on consumer welfare and economic growth. As he wrote, "Consumer welfare is greatest when society's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit. Consumer welfare, in this sense, is merely another term for the wealth of the nation. Antitrust thus has a built-in preference for material prosperity . . . ."<sup>3</sup>

I am pleased to observe that we have made substantial progress since then. There is no longer, I believe, any serious debate among

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<sup>1</sup> United States v. Von's Grocery Company, 384 U.S. 270 (1966).

<sup>2</sup> ROBERT H. BORK, *THE ANTITRUST PARADOX* 7 (1978).

<sup>3</sup> *Id.* at 90.

antitrust policymakers in the United States that consumer welfare is and ought to be the focus of antitrust enforcement. I am also glad to be able to point out that there is increasing evidence of the connection between appropriate antitrust enforcement policies and economic growth.

As one example, in the 2003-04 *Global Competitiveness Report* published by the World Economic Forum, a Harvard professor, Michael Porter, reported on an analysis of micro- and macro-economic factors that contribute to a vibrant economy. Porter sees gross domestic product (GDP) per capita as “the broadest measure of national productivity” and the “best single, summary measure of microeconomic competitiveness available across all countries.”<sup>4</sup> He performed an econometric analysis using a wide range of variables that he believed contribute to GDP per capita.

His conclusions included the following: “[T]he incentives and rules governing local competition show a strong relationship to national productivity,” and the “effectiveness of antitrust policy” is a “particularly potent” factor.<sup>5</sup>

In recent years, this view of antitrust policy—that the proper focus of antitrust policy is to promote consumer welfare—has been spreading across the globe, and I view this trend as a positive development. The Director General of the European Commission’s competition agency has stated that “the goal of competition policy, in all its aspects, is to protect consumer welfare . . . .”<sup>6</sup> The OECD, the Organization for Economic Cooperation and Development, has observed that, “[a]mong OECD countries, there appears to be a shift away from use of competition laws to promote” nonantitrust objectives, in favor of a

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<sup>4</sup> Michael E. Porter, *Building the Microeconomic Foundations of Prosperity: Findings from the Business Competitiveness Index*, in WORLD ECONOMIC FORUM, THE GLOBAL COMPETITIVENESS REPORT 2003-04, at 38 (2003).

<sup>5</sup> *Id.* at 40.

<sup>6</sup> Speech by Mario Monti, *The Future for Competition Policy in the European Union 2* (July 9, 2001), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/01/340&format=HTML&aged=1&language=EN&guiLanguage=en>.

tighter focus on “the generally accepted ‘core’ competition policy objectives of promoting and protecting the competitive process, and attaining greater economic efficiency . . . .”<sup>7</sup> As one specific example, Brazil has recognized that “[t]he protection of competition is . . . a means of creating an efficient economy . . . . The goal of antitrust is to promote the maximum level of economic welfare the . . . economy can achieve.”<sup>8</sup>

### THE WORK OF THE ANTITRUST DIVISION

Turning back to the United States, the Division seeks to promote economic growth through appropriate antitrust enforcement. The Division has talked for some time about an enforcement priority or hierarchy that we maintain, and it is related to this general concept. Our highest priority is aggressive cartel enforcement, followed by expeditious merger review, and then enforcement against single-firm conduct.

Within each of these areas, the Division strives to identify and pursue the most harmful violations, to increase transparency so that private parties can better predict our enforcement actions, and to reduce the time and cost associated with our investigations. I will talk briefly about each of these areas and try to illustrate some of what we are doing. After discussing each of these areas, I will talk about something I call “competition advocacy.”

#### A. Cartel Enforcement

Cartel enforcement is our highest priority because we believe it is the single best way that we can promote economic growth. Cartels are a direct assault on the competitive process. When competitors get together and agree that they will not compete on price or innovation

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<sup>7</sup> OECD Secretariat Note, *The Objectives of Competition Law and Policy* 3 (Jan. 29, 2003), available at <http://www.oecd.org/dataoecd/57/39/2486329.pdf>.

<sup>8</sup> Brazil, *The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency* 3 n.2 (2003) (internal quotation omitted), available at <http://www.oecd.org/dataoecd/58/7/2485784.pdf>.

or that they will allocate customers, you lose that incentive that Adam Smith was talking about. The invisible hand no longer pushes society upward. As Robert Bork has written, “Price-fixing cases deliver more consumer welfare for the enforcement dollar than any other kind of prosecution.”<sup>9</sup> We certainly agree, and that is why we focus on cartel enforcement.

In pursuing cartels, there are two different aspects that are particularly important and warrant mention. First, the definition of what is a cartel and what should be prosecuted criminally as a cartel needs to be clear, narrow, and focused. The Division has a policy of only pursuing what we call “naked agreements,” in which two competitors have agreed not to compete, with no beneficial integration justifying their collusion. That is important because we don’t want to deter pro-competitive activity.

It is also important because the second prong of this enforcement priority is to seek severe penalties. We have worked for years to increase the penalties from what was a misdemeanor violation to what is now a felony violation. In 2004, penalties were increased to the point where you can be sentenced to serve 10 years in prison. We also now have statutory authority to impose fines of up to \$100 million, and we also have the opportunity for even higher fines, up to double the amount gained by the cartel participants or double the amount lost by the victims. These two aspects of our cartel enforcement are inter-related in that judges are more willing to impose severe sentences and significant fines when they are comfortable that the activity is clearly defined, clearly wrong, and has no justification, and that it was obvious to the participants that what they were doing was wrong. We are making significant progress in this regard.

We continue to obtain record fines from cartel investigations. Most recently, in our dynamic random access memory (DRAM) price-fixing investigation, we obtained a criminal fine of \$300 million against Samsung Electronics Company. This was the second largest fine in the Division’s history. Counting other fines in the same investigation paid by Hynix Semiconductor, a Korean company, Infineon Technologies, a German company, and Elpida Memory, a

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<sup>9</sup> BORK, *supra* note 2, at 406.

Japanese company, this single investigation has yielded total fines of more than \$700 million.

Our highest priority in terms of sanctions is to obtain prison sentences for cartel participants. Serving time in a U.S. prison speaks most directly to the business executives who engage in cartel activity. Rewarding our efforts, we have seen a steady increase in the total number of prison days imposed in sentences each year as well as an increase in the average sentences imposed.

In addition, because of the global reach of cartels these days, as illustrated by the DRAM investigation with Korean, Japanese, German, and American companies involved, it is more and more important that we be able to reach abroad, and we are doing so. It is a priority to obtain prison sentences for those foreign nationals who are engaged in cartels that prey upon U.S. consumers.

The Division this year added another country to our list of those with citizens who have agreed to or have served time in a U.S. prison for antitrust violations. That is Korea, where four Hynix executives recently pled guilty and will serve sentences ranging from five to eight months. We are also making progress in extraditing a citizen of the United Kingdom for both participating in a cartel and obstructing justice.

International advocacy and coordination is exceptionally important in this area. As more and more countries criminalize cartel activity, it makes our ability to detect and to prosecute cartels more effective. As just another recent example, the Division publicly confirmed that it had executed search warrants in coordination with competition officials in both Europe and Asia in the largest coordinated raid in our history. We will see where that investigation goes. With greater international coordination, we find that it is easier to obtain jurisdiction over individuals and obtain evidence, and the deterrent threat of sanctions in their own countries enhances our ability to prevent cartels in the United States.

Finally, before moving on from cartels, it is important to mention our leniency program. It is the single most effective means that we have developed for identifying cartels and building cases against them. It is said that there is no honor among thieves, and the way the leniency program works is by giving essentially a free pass on the criminal front for the first person in the door. We destabilize the

cartel. This program deters cartels to begin with, because the participants can never know if or when one of their members is going to be the first one in the door to apply for leniency.

The Antitrust Criminal Penalty Enhancement Act of 2004<sup>10</sup> has enhanced our leniency program. One of the provisions of that Act says that if you are a successful leniency applicant, in the follow-up private litigation you will be subject only to single damages, not treble damages, and only to the damages attributable to your actions. This reduces one of the disincentives to applying for leniency. While it is still fairly early on in this process because the Act only applies to activity that occurred after it was passed, we are finding companies even more eager than before to obtain leniency status. We believe that this provision of the 2004 Act has been particularly beneficial.

## **B. Merger Enforcement**

Next, I want to turn to merger enforcement, which presents a very different challenge. Here I am going to focus more on process than on substance. The Division recognizes that most mergers are either competitively neutral or affirmatively beneficial to consumer welfare. As a result, merger enforcement presents one of the greatest opportunities for reducing unnecessary burdens, delays, and costs. Therefore, the Division has been focused, for a number of years, on improving its efficiency in this area, which we believe will ultimately promote economic growth.

Our first goal in merger investigations is to clear them within the first 30-day period under the Hart-Scott-Rodino Act and avoid issuing what we call a “second request for information.” In 2001, the Division launched an initiative that was designed to improve the communication between parties and the Division during that first 30-day period, identifying information that could be provided voluntarily and encouraging transparency on the part of the staff. Those efforts are yielding positive results.

Since the initiative was adopted, the average percentage of preliminary investigations that ultimately lead to a second request has dropped by approximately 40%. Time is also important, as you well

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<sup>10</sup> Pub. L. No. 108-237 (2004).

know. Since the initiative was launched, the Division has been able to close investigations more quickly. There has been a drop of almost 40% in the average number of days that pass from the opening of a preliminary investigation to the early termination or closing of the investigation. Again, we believe that this has been very beneficial.

I will give you a specific example of what is driving these improvements. Even after we issue a second request, we encourage good communication between the parties and the Division so that we can identify key issues. When we were investigating the acquisition by the New York Stock Exchange of the Archipelago trading platform and the acquisition by NASDAQ of the Instinet platform, we were able to identify the key issue of entry as potentially dispositive. We focused our investigation on that issue, the parties focused on providing us information on that issue, and we were able to close that investigation without taking action in a shorter time period than otherwise would have been the case.

One point that I do want to emphasize: to be most effective, these efforts require good-faith cooperation by the parties who work with us, as well as good-faith cooperation by the staff in working with the parties.

While we have made substantial progress, I assure you we are not complacent. We are not satisfied, and more can be done. We are in the midst of reviewing the 2001 initiative to determine whether or not we can make additional changes to the merger review process that will enhance the efficiency, speed the process, and reduce the burden. In that regard, I applaud the efforts of the Federal Trade Commission (FTC), which recently announced changes to their process to limit the burdens, in particular, of second requests. We also expect to issue shortly a commentary on the Horizontal Merger Guidelines to help provide greater transparency in how we have applied those guidelines to specific factual settings with specific case examples. We hope that you will find the commentary useful.

### **C. Single-Firm Conduct**

Turning now to single-firm conduct, this area presents yet a different challenge that is focused more on substance than process. Here, a key problem is defining what constitutes misconduct under

the antitrust laws. The Supreme Court has made it clear that merely possessing monopoly power or charging monopoly prices is not unlawful. Instead, the focus is on determining whether a company has used exclusionary or predatory conduct to acquire or maintain monopoly power. At one level, it sounds simple. Have you impeded competition on the merits or have you not? When you get down into it, it is much harder to determine. Frankly, under current case law the standards are unclear for determining whether or not certain conduct, such as a bundled discount or loyalty rebate, violates the law. I find that to be an unsatisfactory state of affairs. The lack of clarity can lead to over-deterrence as companies are afraid to take risks, and under-deterrence as companies do not realize that something clearly should be condemned as unlawful.

Our goal here is to seek clear, objective criteria for determining when conduct does and does not violate the antitrust laws. To advance our knowledge in this area, the Division and the FTC have announced that we will be holding joint hearings on issues relating to unilateral conduct, or conduct by a single firm. We want input from the business community, from economists, from legal practitioners, and from anyone else who has an interest, so that we can help advance the learning in this very important area.

I also would observe briefly that single-firm conduct is an issue that is increasingly the focus of discussions around the world. In our discussions in the International Competition Network, the OECD, and our bilateral forums, we find that this is the area of least convergence, and one of the areas of greatest focus and discussion.

#### **D. Competition Advocacy**

Finally, let me turn briefly to the issue of competition advocacy. It is not, strictly speaking, an enforcement mission, but it is nonetheless one of the best uses of our resources. Competition advocacy can return substantial benefits for the cost.

I will give you a specific example involving real estate. Both the FTC and the Division have been focused on the real estate industry for a number of years and have advocated policies that promote free market principles and avoid restrictions on competition. It is an important question. As you know, buying or selling a home is the

single largest transaction with which most consumers will be involved during their lifetimes. Last year, Americans paid more than \$60 billion in real estate commissions, so the potential benefits of enhanced competition are large, indeed.

While there are several areas in which we have been active, I will focus specifically on so-called minimum service legislation. As the economy is becoming increasingly sophisticated, as individuals pursuing their own self-interest have come up with new models for providing real estate services to clients, some traditional brokers have felt the threat of competition and have responded by seeking governmentally sanctioned restrictions on competition. As a result, a number of states are considering laws or regulations that require somebody who retains a real estate broker to purchase an extensive package of services—not just the individual service that the consumer wants, such as the multiple-listing service, but also negotiation, marketing, and other services that the consumer might prefer not to purchase.

We have responded to requests for advice on how to evaluate whether or not these policies are good for the consumers of the states in which they are being considered. I am happy to say that, in most instances where we have provided the benefit of our competition expertise, minimum service proposals have been either rejected or significantly modified to allow consumers to choose what they do or do not wish to purchase.

Also, the Division is active in court litigation through its amicus program. In the last year, the Division participated through the Solicitor General's office in three Supreme Court cases by filing three amicus briefs. I am happy to report that the Court decided each case in a manner consistent with our filing.

Very briefly, in the *Texaco v. Dagher* case,<sup>11</sup> the Supreme Court addressed the application of the per se rule to a joint venture among two petroleum companies that had integrated their downstream operations, from refining down to the gas station. They had a policy in place relating to the pricing of products produced by that joint venture. The Court of Appeals for the Ninth Circuit had ruled that there was a question of fact as to whether or not that policy was a per se violation of the antitrust laws. The Supreme Court ruled that the

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<sup>11</sup> *Texaco, Inc. v. Dagher*, 126 S. Ct. 1276 (2006).

per se rule did not apply in such a setting. This result is particularly important because we find that joint ventures are an increasingly important part of our economy. Companies should be able to obtain the benefits of legitimate joint ventures, which ultimately will benefit consumers, without the fear of per se condemnation.

The Supreme Court also removed a presumption of market power that would arise from the mere existence of a patent in patent-tying cases,<sup>12</sup> and it construed the Robinson-Patman Act in a manner consistent with what I will call modern antitrust jurisprudence, which is focused on consumer welfare enhancement and harm to competition as opposed to individual competitors.<sup>13</sup> It is interesting to note that two of these three decisions were unanimous, showing a remarkable degree of consensus by the Justices of the Supreme Court.

As I promised to leave a few minutes for questions, I will conclude by saying that my goal as the Assistant Attorney General is for the Division to get to the right answers as quickly as possible with the least burdens necessary to make responsible enforcement decisions. In this way, we can best promote the national policy of competition and best ensure that consumers reap the benefits of that competition: lower prices, greater innovation, increased consumer choice, and, ultimately, robust economic growth.

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<sup>12</sup> *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006).

<sup>13</sup> *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006).

**ALICE S. FISHER**  
**Assistant Attorney General**  
**Criminal Division**

**PROTECTING THE INTEGRITY OF  
AMERICA'S SYSTEMS**

**INTRODUCTION**

From my perspective, the work being done by the Department today has its roots in some of the greatest traditions of our country, traditions like government integrity, corporate integrity, and market integrity. Exactly one hundred years ago next month, in April of 1906, President Theodore Roosevelt laid the cornerstone of the Cannon House Office Building here in Washington. And on that spring day in 1906, he took an opportunity to talk about the integrity of our systems of government and in business. And he said, “My plea is not for immunity to, but for the most unsparing exposure of the politician who betrays his trust, of the big businessman who makes or spends his fortune in illegitimate or corrupt ways, there should be a resolute effort to hunt every such man out of the position he has disgraced.”

This mission is just as important now as it was a hundred years ago, to go after corporate fraud, to go after corruption, and to preserve the integrity of our systems of business and of government. So I thought I would say a few words this morning about these several areas that are so critical to protecting the integrity of our systems—our legal and our political systems, as well as our economic and business systems. Those areas are public corruption, corporate fraud, and cybercrime, and they are among the priorities that the Attorney General has set for the Department for the upcoming year. That is because American business can only survive and thrive if the integrity of our legal, political, and economic systems is sound. In that way, I believe that the interests of business are aligned with the interests of law enforcement. The overwhelming majority of Americans and the overwhelming majority of businesses want to play by the rules. By rooting out corruption and fraud and by

going after cybercriminals, we are leveling the playing field for those companies and individuals who want to play by the rules.

## A. Public Corruption

There's a Latin proverb that goes: *corruptio optimi pessima*. Loosely translated, it means "corruption of the best is the very worst." That proverb could well be the motto of the Public Integrity Section here in the Criminal Division. Since its creation in 1976, the Public Integrity Section has sought to root out corruption among public officials. These career prosecutors within the Public Integrity Section are among those to go after those federal, state, and local officials whom the public trusts, and the Public Integrity Section goes after them to root out the most serious corruption offenses. Their efforts to protect and serve core American values of fair play and substantial justice are what bring them to work every day, and it's so important that they do this work to pursue the officials that violate the American trust.

From the Abscam scandals in the 1970s and '80s, with federal, state, and local officials, to the indictment and conviction of a federal judge in the '80s, and to today's congressional lobbying scandals, the Public Integrity Section has been there following the trail of improper influence, no matter where it leads. And because no one is above the law, we are aggressively prosecuting these public corruption cases.

As many of you know, in January, former lobbyist Jack Abramoff pled guilty to a series of charges involving his D.C.-based lobbying practice through which he had conspired to corrupt government officials and conspired to defraud his own client. Just a few weeks ago, contractor Mitchell Wade pled guilty to bribing former congressman Randy "Duke" Cunningham with millions of dollars to advance Wade's Pentagon contracts. We convicted Cleveland businessman Nate Gray on corruption charges involving public officials from Cleveland to Houston to New Orleans.

We are bringing these cases because we believe in preserving the integrity of our legal and political systems, and we are bringing these cases because we believe that the American people demand and have the right to expect honesty and integrity in government. We will continue to enforce the laws that Congress passes to hold American public officials accountable.

In addition to investigating and prosecuting corruption at home, we are working to stem corruption around the world. One of the ways

that we do that is by investigating those U.S. companies and individuals who are engaged in bribing and corrupting foreign officials. As I am sure most of you are aware, the Foreign Corrupt Practices Act (the FCPA) continues to be a major enforcement priority for the Department.

We are also assisting other countries to strengthen their own anticorruption laws. That is because stronger global anticorruption laws are essential to the integrity of the global business market. So by aggressively enforcing the FCPA at home and working to bring other countries' laws up to our standards, we are leveling the playing fields both at home and abroad. We are leveling the playing field at home by prosecuting companies that do not play by the rules, and we are leveling the playing field abroad by working to take away the unfair advantage held by many foreign companies where they are allowed to pay bribes and U.S. companies are not.

And, again, we are doing all this because global corruption threatens vital U.S. interests. Global corruption threatens U.S. homeland security by funding transnational crime and terrorism, and global corruption hinders the spread of democracy by lining the pockets of oppressive dictators and their agents.

One place where the advance of democracy is critical to U.S. interests is Iraq. Unfortunately, we have discovered corruption among some of the very same people who are supposed to be helping the Iraqi people rebuild their country. One example of such a case involved a conspiracy between Robert Stein, a comptroller in the Coalition Provision Authority (CPA), and a co-conspirator who owned and operated a construction and service company operating in Iraq. Stein and this co-conspirator agreed to rig bids on contracts being awarded by the CPA in Iraq so the contracts would go to the co-conspirator. In the end, Stein granted more than \$8 million in contracts to his co-conspirator and his company, and, in return, Stein received gifts, cash, jewelry, and the list goes on and on.

We are prosecuting these cases because we believe that the American people and the Iraqi people have the right to expect honesty and integrity in government.

## **B. Corporate Fraud**

In the corporate fraud arena, we believe that shareholders have the right to expect honesty and integrity in corporate governance. We believe in preserving the integrity of the American financial market. As a general matter, the markets expect stability and predictability, but more relevant to our discussion today, the financial markets want reliability, integrity, and transparency from American companies. Investing is itself a measure of trust. Investors do not put their money into companies or markets that they do not trust.

Looking back on the corporate fraud scandals in 2001 and 2002, we all saw how the markets responded. They responded dramatically and negatively. When whole companies disappeared into thin air overnight or crumbled like a house of cards, the markets crumbled too. And the markets' reaction was a simple and telling reminder that fraud is bad for business. So we reinvigorated our efforts against corporate fraud. We devoted substantial time, resources, and efforts to these prosecutions.

Since its inception in 2002 through this past December, the Corporate Fraud Task Force has obtained over nine hundred convictions. It has convicted 92 corporate presidents, 82 CEOs, 40 CFOs, 14 COOs, 98 vice presidents, and 27 corporate counsel or attorneys. The Enron Task Force alone has charged 31 individuals and obtained 21 convictions to date.

The purpose of these prosecutions is not to weaken American business but to strengthen it. I would like to think that our efforts in prosecuting these cases, along with the legislative efforts such as Sarbanes-Oxley, and the efforts of those of you in private practice in areas like compliance programs, and our efforts in white-collar enforcement, of course, go well beyond the context of corporate fraud.

Now, I know you are all familiar with the high-profile white-collar offenses often referred to in the media as "Ponzi schemes." What you may not know is that the original Ponzi scheme was devised and executed by a smooth talker named Charles Ponzi in Boston in 1920, who was ultimately brought down by the Department of Justice.

Ponzi's scheme was simple. Using postal coupons as his ostensible investment vehicle and a grandly named Securities Exchange Corporation—well before the Securities Exchange Commission—he used that as his front. He promised investors a 50% return on their investment in 45 days and 100% return on the investment in 90 days.

Ponzi ultimately enticed thousands of people to part with over \$15 million in barely a year's time. That would be about \$150 million today.

The Department of Justice caught up with him, though, and he was indicted on federal fraud charges. He pled guilty and was sentenced to federal prison.

His legacy lives on. The schemes have gotten more sophisticated, and the amounts at issue certainly have gotten larger, but two things remain unchanged between Ponzi's day and our own: the persistence of white-collar fraud and the resolve of the Department to combat it in all its forms. So we are working to weed out all types of white-collar crime—securities fraud, accounting fraud, telemarketing fraud, insider trading, money laundering, bank fraud, procurement fraud—and we are doing it both domestically and abroad.

By going after white-collar crime, we believe that we are preserving the integrity of American businesses. Just as a rising tide lifts all boats, we believe that market integrity benefits all American businesses, all of those businesses who want to play by the rules.

### **C. Cybercrime**

Similarly, we believe we are protecting businesses through our vigorous enforcement efforts in the cybercrime area. As you know, our economic system is increasingly an online, computer-based system. If American consumers know that their identities will be protected, they are more likely to take advantage of the enormous online marketplace. We think that benefits everyone—consumers, corporations, and shareholders. So we are devoting resources to better understand how to fight computer crimes, including hacking and identity theft.

Recently, the Department's Bureau of Justice Statistics launched the first-ever peer-reviewed study of 36,000 businesses to measure the nature and scope of computer crime against businesses. The survey will provide critical information for businesses, industry, and the government to make more sophisticated and informed decisions about how to target resources to fight cybercrime.

We are not waiting for the study to be completed to take action. Both the Criminal Division and the U.S. Attorneys' offices across the country are heavily involved in protecting the data security of

American businesses. For example, last year we obtained the conviction of Scott Levine. He had a company called Snipermail. At trial, we showed that Levine and others at Snipermail were responsible for stealing over a billion records containing personal information, physical addresses, and e-mail addresses that were in the possession of Acxiom, a national data processing provider. Levine was convicted of more than 100 counts of data theft and sentenced to several years in prison.

I would also like to briefly mention in passing that the Criminal Division is aggressively prosecuting intellectual property crimes of all types, including criminal copyright infringement, trafficking in counterfeit goods, and trade secret theft. I know the Attorney General will speak about these crimes later, and some of the other priorities that he has set for the Department in the upcoming year.

I think I'm a little bit ahead of schedule, so I just thought I would mention one thing that may not directly affect you all, but something that has been an absolute privilege for me to do at the Department since I started.

I started about three days after Hurricane Katrina hit the Gulf region, and it was devastating. We all watched on TV the devastation that came to the Gulf region, and we have watched it ever since.

Many of you here and many people across the country took out their wallets, they wrote checks to help the victims down in the hurricane region, as well as the federal government, who sent, as you know, billions to help the victims down there.

The Attorney General, three days after I started, appointed me to chair the Hurricane Katrina Fraud Task Force. The mission was very clear: to make sure that the money that was being sent by charitable Americans or charitable people across the globe, and the money sent by the government was going to get into the hands of the victims and get into the hands of the rebuilding effort down there.

So we set up a task force that involved many law enforcement agencies across the government and included state and local partners to basically root out the fraud. We have seen some of the most amazing scams with regard to ripping off the government or ripping off charities. One person down in Florida set up a Web site that basically—it was called [airkatrina.com](http://airkatrina.com)—said, "Donate here. I am going to take private planes, fly them into the Gulf region, take

humanitarian relief, and I am going to bring sick children out of the Gulf region.” It was all a scam, and he, in just a matter of a couple of days, he got \$40,000 worth of donations from people who actually thought that money was going to go to the victims. We found him. We prosecuted him, as we have many, many others who tried to rip off this money. I think we’ve brought over two hundred charges now across the country for people that were, or are, trying to rip off the victims down there, and that is something that I have been working on every day. It has just been something so rewarding that makes me happy to come to work every day.

I firmly believe it is our responsibility, as a nation, to support the victims in the Gulf region, and so we are going to stay at it. I think that we will probably see procurement fraud. We have already seen public corruption there with regard to that, and we have certainly seen the benefit fraud and insurance fraud.

### CONCLUSION

So, in closing, I would just like to step back for a moment and say that the work of the Department and the work of the Criminal Division have just been a delight for me to experience since I have been back at the Department. The men and women who are in the Division and in this Department come in every day to work long hours in the trenches. They spend time away from their families. They are dedicated. They are committed. They want to do what is right. They want to make sure that people are playing by the rules. I benefit from their wisdom and their dedication, and I am inspired by them every day. So it has been a true privilege to have this job as Assistant Attorney General in the Criminal Division.

We are going to continue to work hard on public corruption. We are going to continue to work hard on white-collar crime and fight cybercrime. We have many other priorities—going after violence and drug traffickers and gangs and other things to make sure that our streets are safe. I definitely look forward to working with the Department in the years to come.

It is because we believe so strongly in maintaining the integrity of our systems that we do what we do. A hundred years ago, President Theodore Roosevelt laid the first brick in building what would

become a symbol for our institutions of government, and today, we are back at the Department working hard every day, case by case, brick by brick, to build and strengthen our institutions for our future generations.



**WAN J. KIM**  
**Assistant Attorney General**  
**Civil Rights Division**

**THE DEPARTMENT OF JUSTICE'S**  
**CIVIL RIGHTS DIVISION:**  
**A HISTORICAL PERSPECTIVE**  
**AS THE DIVISION NEARS 50**

**INTRODUCTION**

Founded in 1957, the Division will celebrate its 50th anniversary next year. A brief history of the Division will show you how it has been shaped by some of the seminal events, legislation, and court decisions that have marked the progress of our nation toward embracing civil rights protection for all individuals. An appreciation of this history helps to clarify the Division's role in law and government today.

**A HISTORY OF THE CIVIL RIGHTS DIVISION**

**A. Creating a Civil Rights Division, 1957-59**

As many of you know, the Civil Rights Act of 1957 was the first civil rights legislation enacted into law following Reconstruction. It provided the Department with its first set of tools to prosecute racial inequality and political disenfranchisement. This Act was essentially a voting rights bill authorizing the Department to bring suits seeking relief for African American voters.<sup>1</sup> It also required the establishment of a Civil Rights Division within the Department of Justice to enforce the federal civil rights laws.

On December 9, 1957, Attorney General William P. Rogers formally established the Civil Rights Division and charged it with seven

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<sup>1</sup> Miriam R. Eisenstein, *The Civil Rights Division at Thirty-Five: A Retrospective*, CIVIL RIGHTS DIV. J. 4 (1992).

functions. In summary, these functions are:

- a. Enforcing all federal statutes affecting civil rights;
- b. Investigating civil rights complaints received by public officials or private citizens;
- c. Conferring with individuals and groups who call upon the Department regarding civil rights matters;
- d. Coordinating within the Department all civil rights matters;
- e. Consulting with and providing assistance to other federal, state, and local agencies on civil rights matters;
- f. Researching civil rights matters and making policy and legislative recommendations; and
- g. Assisting the United States Commission on Civil Rights and similar entities with research and the formulation of recommendations.<sup>2</sup>

The confirmation of the first Assistant Attorney General to head the Division, W. Wilson White, was delayed by eight months. Prior to his nomination in 1957, White had served as the United States Attorney for the Eastern District of Pennsylvania and as the Assistant Attorney General for the Office of Legal Counsel. White's activities in the latter position became the reason for opposition in the Senate: He had developed the legal basis for President Eisenhower's dispatch of National Guard troops to Little Rock, Arkansas, to enforce the desegregation of its schools.

To help push White's nomination along, the Reverend Dr. Martin Luther King, Jr., sent a telegram to each member of the Senate Judiciary Committee in July 1958 urging immediate action. In the telegram, Dr. King said he considered the newly established Division an "important arm of our democracy" that promised millions of African Americans the protection of their basic freedoms.<sup>3</sup> White

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<sup>2</sup> Off. Att'y Gen., Order Regarding the Establishment of the Civil Rights Division, No. 155-57 (1957).

<sup>3</sup> Telegram from the Reverend Dr. Martin Luther King, Jr., President, Southern Christian Leadership Conference, to Thomas C. Hennings, United States Senator (July 18, 1958) (on file with Estate of Martin Luther King, Jr.).

was eventually confirmed. The Division that he led for just over a year was made up of a small group of lawyers from the Criminal Division's civil rights section that, until then, had administered the handful of civil rights laws enacted during the Reconstruction period.

White was succeeded by Harold R. Tyler, who served as the Assistant Attorney General for Civil Rights from 1960 to 1961. This was a period during which "voting discrimination cases were vigorously resisted and required enormous commitments of legal resources."<sup>4</sup> Under Tyler, the Division acquired an additional statutory enforcement tool as the federal government grappled with undoing government-sanctioned racial discrimination in voting: In 1960, Congress passed legislation permitting federal courts to appoint voting referees to conduct voter registration following a judicial finding of voting discrimination.

Also in 1960, the Supreme Court in *Gomillion v. Lightfoot*<sup>5</sup> found that gerrymandering political boundaries to suppress votes by African American voters violated the Fifteenth Amendment. Because *Gomillion* extended the scope of the Equal Protection Clause to the drawing of political boundaries by state and local governments, the Division became involved in policing the principle of one-person, one-vote in an effort to ensure access to the polls by African American voters.

## **B. The Division and the Civil Rights Movement, 1961-67**

In 1961, Tyler was succeeded by Burke Marshall, an antitrust lawyer with no prior political or civil rights experience. Despite this unlikely background, Marshall set out to implement the nation's civil rights laws with vigor. Marshall worked to dismantle segregation by relying on the federal government's power to regulate interstate commerce. He enforced court orders mandating the integration of universities in Mississippi and Alabama. He also investigated racially

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<sup>4</sup> Open Letter from William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, U.S. Dept. of Justice, Regarding a Special Exhibit of the 30-Year Anniversary of the Civil Rights Division (Dec. 9, 1987).

<sup>5</sup> 364 U.S. 339 (1960).

motivated crimes like the bombing of the Sixteenth Street Baptist Church in Birmingham, which took the lives of four young girls. John Doar, who would succeed Marshall in 1965, recalls the delicate exercise Marshall practiced to enforce federal court orders; Marshall needed to be firm while avoiding any further inflammation of the ongoing political crisis. Before an *en banc* hearing of the old Fifth Circuit Court of Appeals, Doar remembers Marshall saying that the United States wanted to give the state of Mississippi every opportunity to cooperate, but that court orders must be enforced, including by the use of physical force. The country, Marshall told the court, would be better off with the state's cooperation.<sup>6</sup>

The year 1964, of course, saw the passage by Congress of a landmark Civil Rights Act that prohibited discrimination in public facilities, places of public accommodation, employment, and schools. The Civil Rights Division, now with John Doar as its Assistant Attorney General, used the authorities found in the 1964 Civil Rights Act to initiate suit after federal suit. Doar had served as First Assistant to Assistant Attorney General Burke Marshall for several years. During that tenure, Doar had personally escorted James Meredith onto the campus of the University of Mississippi in 1962,<sup>7</sup> and defused a near riot following the murder of Medgar Evers, a national field secretary of the Mississippi NAACP, in 1963.

Doar led a very active Division. Between 1965 and 1966, "thousands of public facilities and accommodations were desegregated, usually by consent but, when necessary, by litigation."<sup>8</sup> Doar's tenure also witnessed a lamentable level of violence stemming from the Civil Rights Movement. Several high-profile criminal investigations and prosecutions were commenced as a result. Doar personally directed the Division's prosecution of the murder of three civil rights workers in *United States v. Price*, which is commonly known today as the "Mississippi Burning" trial. Doar was able to secure the convictions of only 7 of the 18 defendants charged with these murders; and they received sentences ranging from just 4 to 10 years of imprisonment.

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<sup>6</sup> John Doar, *Burke Marshall's Memorial*, 113 YALE L.J. 791 (2003).

<sup>7</sup> IvyLeagueSports.com, *NCAA Honors John Doar* (Dec. 13, 2005), available at <<http://www.ivyleaguesports.com/article.asp?intID=4756>>.

<sup>8</sup> Eisenstein, *supra* note 1.

This case was a civil rights milestone because the defendants' uneven convictions and paltry sentences for brutal murders helped to raise public awareness about criminal civil rights violations.<sup>9</sup>

During Doar's tenure as Assistant Attorney General, the right to vote remained an elusive right for African Americans. In 1965, Congress passed additional voting legislation that prohibited, among other things, any voting changes that discriminated against minority voters, and established the Justice Department's authority to appoint federal examiners and monitors in the registration of voters and the operation of polls. The Voting Rights Act of 1965 is widely considered to be one of the most—if not the most—effective civil rights statutes ever passed by Congress. Doar used these new enforcement tools to strike down scores of voter literacy tests and to block voting changes in numerous jurisdictions, many of them in the deep South.

### **C. Increased Criminal Enforcement and Fair Housing, 1967-69**

The Mississippi Burning trial exposed the Division's difficulties in prosecuting criminal civil rights cases and obtaining penalties that would be commensurate with the crime. By 1968, Congress was considering additional legislation to strengthen the Division's authority to bring criminal cases and to ensure fair housing. At the same time, Stephen Pollak, John Doar's First Assistant, succeeded Doar as the Division's Assistant Attorney General.<sup>10</sup> A few years ago, Pollak commented that the high points of his tenure included passage of the Civil Rights Act of 1968, responding to the riots following the assassination of Dr. King, and implementing enforcement programs regarding employment discrimination.<sup>11</sup>

The Civil Rights Act of 1968 was necessarily broad in its reach. It aimed to combat the civil rights-related violence of the era, employ-

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<sup>9</sup> *Id.*

<sup>10</sup> *A Conversation with Stephen J. Pollak*, Bar Report (Dec./Jan. 2000), available at <[http://www.dcbbar.org/for\\_lawyers/resources/legends\\_in\\_the\\_law/pollak.cfm](http://www.dcbbar.org/for_lawyers/resources/legends_in_the_law/pollak.cfm)>.

<sup>11</sup> *Id.*

ment discrimination, housing discrimination, and the rights of Native Americans living on tribal reservations. With respect to civil rights-related violence, the Act expanded the list of acts considered to be criminal interference with civil rights and the penalties for such violations. As a result, federal criminal civil rights violations now included racial violence, involuntary servitude and slavery, and violations of civil rights under color of law. Severe penalties were imposed for acts that resulted in bodily injury or death.

With respect to employment, housing, education, and other matters, the Act authorized the Attorney General to initiate suits where he believed there to be a pattern or practice of discrimination on the basis of race, color, national origin, or religion. The 1968 Act also included the Fair Housing Act, which prohibited discrimination in the sale, rental, or advertisement of most private real estate transactions and in all publicly funded housing programs. Access to fair housing remains a critical component of the Division's commitment to civil rights enforcement today.

#### **D. The Civil Rights Division Expands, 1969-77**

For most of the 1970s, the Division was led by three Assistant Attorneys General who oversaw a period of great expansion. Not only did the Division undergo a significant reorganization, but the scope of its civil rights enforcement work evolved dramatically in the areas of employment, the rights of institutionalized persons, and the rights of persons with disabilities.

In 1969, President Nixon named Jerris Leonard to head the Division. Leonard, who had been a state legislator in Wisconsin for 12 years, oversaw a reorganization of the Division into sections defined by enforcement function rather than by region. At the time, these sections included Criminal, Education, Housing, Employment, Public Accommodations and Voting, Title VI, Legislation, and Special Appeals.

The Title VI Section was responsible for coordinating civil rights-related policies and practices throughout the federal government and in federally funded programs. It later evolved into today's Coordination and Review Section. The former Public Accommodations and Voting Section is now known simply as the "Voting Section."

Matters concerning public accommodations today arise in a variety of cases and are therefore enforced by a number of the sections. For example, the Division's Housing and Civil Enforcement Section recently filed a lawsuit alleging that a Milwaukee nightclub discriminated against blacks by refusing to admit them on pretextual grounds—such as that a private party was taking place, or that the club was full to capacity. Another example is the work of the Disability Rights Section, which enforces the public accommodations requirements of the Americans With Disabilities Act.

The 1970s also saw the beginning of the Division's involvement in civil rights issues concerning institutional confinement. This marked the first time the work of the Division significantly expanded to an area beyond racial discrimination.<sup>12</sup>

Leonard left the Division in 1971, and was succeeded by David Luke Norman, who at the time of his appointment was a Deputy Assistant Attorney General for the Civil Rights Division. Under his supervision, the Division commenced two decades of monitoring school systems that had been previously *de jure* segregated for any remaining vestiges of that system. Norman also worked to establish the precedent that northern schools found to have had dual education systems would be subject to desegregation actions just as their southern counterparts had been.<sup>13</sup>

Norman served as Assistant Attorney General until 1973, when he was nominated to be a judge on the Superior Court of the District of Columbia. President Nixon then tapped J. Stanley Pottinger to lead the Division. Interestingly, Pottinger also held the position of Director of the Office for Civil Rights at what is now the Department of Health and Human Services. During Pottinger's tenure, the issue of race-based remedies to redress past discrimination, or affirmative action, entered the civil rights lexicon. Pottinger led the Division until 1977.

#### **E. Perfecting Systems of Relief When Discrimination Is Found, 1977-89**

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<sup>12</sup> Jerris Leonard, A Short Biography of the Honorable Jerris Leonard (Feb. 1, 2006) (on file with author).

<sup>13</sup> Eisenstein, *supra* note 1.

President Carter selected Drew S. Days, currently a Yale Law School professor and attorney in Washington, D.C., to head the Civil Rights Division. Three significant events marked his tenure:

- First, Congress passed the Civil Rights of Institutionalized Persons Act (CRIPA) in 1980, which granted the Division the authority to investigate and prosecute unconstitutional conditions of confinement in state and local government institutions, such as jails, prisons, or institutions for the mentally ill;
- Second, regulations protecting the civil rights of persons with disabilities with respect to federally funded programs were implemented; and
- Third, the Division began an experimental approach to enforcement that combined public housing segregation with school desegregation issues.<sup>14</sup> Days sought to challenge city governments that intentionally planned affordable housing and school construction in a manner resulting in racial segregation. This experiment yielded a massive case against the city of Yonkers, New York, where the city was ultimately found, some years later, to have segregated its public schools and housing over a 40-year period. In January 2002, the Division reached a final resolution of this landmark case that provided for more than \$300 million in relief to fund and implement educational programs aimed at narrowing the performance gap between minority and nonminority students, and to improve the educational opportunities of all the children in Yonkers.

William Bradford Reynolds, nominated by President Ronald Reagan in 1981, succeeded Days and became the longest serving Assistant Attorney General in the Division's history. At that time, the Division had about 374 full-time employees, some 160 of whom were attorneys. Between 1981 and 1987, Reynolds sought to assist the courts in perfecting systems of relief to be adopted following a

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*Id.*

finding of discrimination. For example, with respect to discrimination in employment matters, Reynolds sought effective remedies such as requiring defendants to compensate victims of discrimination and to conduct outreach programs for those who had been previously excluded.<sup>15</sup> Reynolds has described his tenure as an era of expanded enforcement activities and support for the orderly development of legal precedent.<sup>16</sup>

In 1987, following a series of immigration reforms, Congress authorized the Division to protect immigrants and other workers from employment discrimination based upon citizenship, immigration status, or national origin. This responsibility rests with the Division's Office of Special Counsel for Immigration Related Unfair Employment Practices. That office is empowered to bring complaints before an administrative law judge, who may award the injured party civil remedies or injunctive relief.

#### **F. New Horizons for the Civil Rights Division, 1990-2001**

John R. Dunne, President George H.W. Bush's nominee for the Division, had served as a New York state legislator for a quarter century. In that capacity, he had bravely quieted the 1971 Attica, New York, prison uprising that took the lives of more than 35 persons.<sup>17</sup> His tenure witnessed the Division's further expansion toward such civil rights issues as disability rights. In 1990, Congress enacted the Americans With Disabilities Act, which reduced barriers of access for persons with disabilities. Its prohibition of discrimination based on an individual's disability greatly expanded employment, educational, and housing opportunities for millions of Americans. Voting cases during this period were also expanded to include issues of apportionment, method of election, and the rights of

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Reynolds, *supra* note 4.

<sup>16</sup> *Id.*

<sup>17</sup> *Confirmation of John R. Dunne To Be Assistant Attorney General for Civil Rights, U.S. Department of Justice: Hearing Before the Senate Comm. on the Judiciary, 101st Cong. (1990)* (statement of Sen. Daniel Patrick Moynihan).

language minorities in addition to the right to vote.

In 1994, President Clinton appointed Deval Patrick, an attorney in private practice and a senior official with the NAACP Legal Defense Fund, to succeed Dunne. Patrick confronted a rash of church burnings in the South. Between January 1995 and November 1997, more than 500 house of worship arsons were reported to the National Church Arson Task Force that was co-chaired by the Assistant Attorney General for Civil Rights and the Assistant Secretary of the Treasury for Enforcement. Hundreds were arrested in connection with these arsons.

Patrick was succeeded by Bill Lann Lee, who served from 1997 to 2001. Like Patrick, Lee had worked previously with the NAACP Legal Defense Fund. During the 1990s, the Division began opening a dialogue to address the issue of racial profiling, which occurs when law enforcement blindly singles out a particular racial group for a certain crime. Racial profiling undermines the confidence of our citizens in the fairness of our system of justice. In 2001, President George W. Bush took a similarly tough stance against racial profiling, declaring before a joint session of Congress, "It's wrong, and we will end it in America."<sup>18</sup> Subsequently, in 2003, the Department issued the first-ever guidelines prohibiting the use of racial profiling by federal law enforcement officials engaged in traditional law enforcement activities. Under these guidelines, race and ethnicity may only be considered in very narrow circumstances, such as in exceptional instances where national security is concerned or where there is trustworthy information, relevant to the locality or time frame of a specific investigation, that implicates a person by a particular ethnicity or race.<sup>19</sup>

## THE CIVIL RIGHTS DIVISION TODAY

### A. Renewing Aggressive Law Enforcement, 2001-Present

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<sup>18</sup> Press Release, U.S. Dept. of Justice, Fact Sheet: Racial Profiling (June 17, 2003), *available* at [http://www.usdoj.gov/opa/pr/2003/June/racial\\_profiling\\_fact\\_sheet.pdf](http://www.usdoj.gov/opa/pr/2003/June/racial_profiling_fact_sheet.pdf).

<sup>19</sup> *Id.*

The Civil Rights Division under President George W. Bush has been led by three Assistant Attorneys General. In 2001, President Bush nominated Ralph F. Boyd, Jr., a private practitioner and former federal prosecutor from Boston, Massachusetts, to be Assistant Attorney General for Civil Rights. Boyd was succeeded by R. Alexander Acosta, a former member of the Federal Labor Relations Board, in 2003. I had the honor of succeeding Assistant Attorney General Acosta in the fall of 2005.

By the end of 2005, the Division had grown to a total of 654 employees, 337 of whom are attorneys. My predecessors in this Administration and I have promoted several initiatives regarding human trafficking, voting rights, religious liberties, language access, and disability rights. We simultaneously have achieved a significant level of accomplishment in enforcing all of our nation's civil rights laws. Here are but a few examples of our accomplishments:

- We have brought more lawsuits to enforce Section 203 of the Voting Rights Act than during the prior entire history of the Act;
- We have launched the most extensive election monitoring efforts in history;
- We have filed significant fair lending cases against several major financial institutions;
- We have filed the first case ever alleging discrimination in commercial lending;
- We have brought successful lawsuits against several movie theater chains under the Americans With Disabilities Act;
- We have filed the first class-action lawsuit ever against American Airlines under the Uniformed Servicemembers Employment and Reemployment Rights Act to protect the rights of those who serve in our military;
- We have vigorously enforced the rights of institutionalized adults and juveniles, favorably resolving a record number of these matters in a recent year, thereby ensuring the constitutional and statutory rights of thousands of persons. And in matters involving children committed to juvenile justice facilities, we have increased the number of settlement

agreements, doubled the number of investigations, and tripled the number of findings letters issued;

- We expect to bring more cases challenging a pattern or practice of employment discrimination this year than during the last three years of the previous administration combined;
- We filed a major case alleging discrimination in public accommodations against Cracker Barrel Old Country Stores;
- We filed the first lawsuit since 1990 alleging racial discrimination in education under Title IV of the Civil Rights Act;
- We have reached settlement agreements with more than one hundred state and local governments that have created a better life for more than one million Americans with a disability; and
- We have obtained the highest monetary award by a jury ever obtained by the Justice Department in a lawsuit brought under the Fair Housing Act.

## **B. Going Forward**

We will continue to do more. Going forward, the Division will ensure that all Americans have an unfettered chance at the American dream. Part of our efforts will ensure that Americans have fair access to housing. The Attorney General recently announced a renewed commitment to fair housing in connection with his initiative, Operation Home Sweet Home. This initiative will focus on and expand the Division's Fair Housing Act testing program. The Division will ensure compliance through undercover visits designed to expose discriminatory practices. Over the next two years, the Division will fulfill the Attorney General's commitment to bring the number of these targeted tests to an all-time high, thereby protecting the rights of all Americans to obtain housing free from discrimination.

Going forward, the Division will continue to aggressively enforce the voting laws, such as the Help America Vote Act of 2002. HAVA, as it is known, was intended to preserve the integrity of federal elections by ensuring access to the polls by all voters, including those voters with disabilities. The Division recently filed the first lawsuit to enforce HAVA against the state of New York. In that lawsuit, the Division alleges that New York failed to adopt a voting system that is

fully accessible by voters with disabilities, and that is capable of generating a permanent paper record that can be manually audited. We also contend that New York failed to create a statewide computerized voter registration database, as the statute requires. Although New York has the dubious distinction of having been sued in the first HAVA lawsuit by the Department, it is not alone in its failure to comply with HAVA. Since many states have failed to come into full compliance with this congressional mandate, you can expect to see additional HAVA enforcement actions in the near future.

Going forward, the Division will continue to vigorously prosecute human trafficking offenses. Human trafficking is nothing short of modern-day slavery. As many trafficking victims are women and minorities, the Division's commitment to protecting some of society's most vulnerable members has never been stronger. In the last five years, the Department has increased the number of human trafficking prosecutions by more than 300%. The Attorney General recently released a report documenting the Department's activities to combat human trafficking between fiscal years 2001 and 2005. I encourage you to read this report, which sets forth our accomplishment—but also recognizes that we have much more to do in tackling these atrocious crimes.

### CONCLUSION

Since its creation during the Eisenhower administration, the Civil Rights Division has been an integral part of American history. The Division has labored for nearly half a century to ensure equal treatment, equal opportunity, and equal access to the ballot box. The Division has ensured that offenders of the federal criminal civil rights laws are held accountable for their conduct. Our history, like that of our country, has not been without periods of profound sadness and turmoil, but in the end it is worthy of immense pride.

I am privileged to serve as the Division's 16th Assistant Attorney General. Let me close with a few words from our 16th President, Abraham Lincoln, with whom I share no other connection but lineal order. A father of the civil rights movement in America, President Lincoln charged the country in 1865 with words that are just as applicable to the work of the Civil Rights Division today: "With

malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation's wounds \* \* \* to do all which may achieve and cherish a just and lasting peace, among ourselves, and with all nations."



**JOHN S. PISTOLE**  
**Deputy Director**  
**Federal Bureau of Investigation**

**FBI'S CRIMINAL INVESTIGATIVE PROGRAM:  
NEW PRIORITIES, HISTORICAL RESPONSIBILITIES**

**INTRODUCTION**

There are basically three points I want to discuss with you: one is that the FBI is still in the business of conducting criminal investigations, even though we have significantly shifted our focus and our priorities and our mission since 9/11. The second is we can benefit from our criminal investigations—the national security mission of the FBI and the United States government can benefit from those criminal investigations. And, then, third, we are trying to leverage our resources in new and meaningful ways with other agencies and through some private partnerships to make sure that we are using our criminal investigative resources in the best possible manner for taxpayer value.

The Associated Press last fall ran a story titled “FBI criminal cases down by nearly half since September 11th,” and—“since the September 11th attacks”—and it was based on a report by the DOJ’s Inspector General, Glenn Fine and his office, which does great work in many areas. The context of that, if I could provide a little bit of the story—what the article says is true in terms of the number of cases, our investigations being down. But my father, who was a retired minister and seminary professor, would sometimes get a little bit upset with people who would take things out of context—he had a phrase that stuck with me. He said, “Text without context is pretext.” So it is always good to have the context in whatever text that you are presenting.

The context here is that, yes, our number of investigations in the criminal investigative areas is down substantially, and, actually, it was around 6,200 investigations, which is 68% of our overall resources in '01 versus about 4,600 investigations we currently have, which is 48%—not to get bogged down in numbers. The shift has

been to counterterrorism, counterintelligence, national security matters, including cybertrusions, and state-sponsored issues.

Where we have cut back our resources is in the traditional, if you want to say the knuckle-dragger, areas for the FBI, the bank robberies. For example, we used to respond to virtually every bank robbery across the United States, hundreds if not thousands of those every year, including ones that would be something where an individual goes in and just passes a note, no weapon or anything. We'd call it a note job. Somebody goes in and gives a note that says, "Give me your money." It may be on the back of a deposit slip with the person's name and address on the back side. It doesn't take a rocket scientist to address those.

In those situations where there are other law enforcement agencies that can and do respond and investigate matters, we have cut back substantially. So we just have a very small cadre of people across the United States who respond to bank robberies now, and it is typically in the armed—the takeover of banks by those who are serial robbers.

Similarly, in the white-collar crime area, we used to basically do a great deal of small bank frauds, where it might be teller embezzlement or something like that, and we would package those for U.S. Attorneys' offices into what we would call "fast-track cases," where you might get six or eight of those and package them together. We are basically out of that business now. Most small—and that's defined by the different districts around the country and our 56 offices—white-collar crimes we do not do anymore.

So this article is right. It is saying that the numbers are down, and the reason is because we have shifted our resources to the top priority of the Attorney General—obviously of the President—but the Attorney General and the director, to focus on the prevention of terrorist acts. And, obviously, if there is a Timothy McVeigh-type Oklahoma City bomber, from 1995, that goes up and blows up the corporate headquarters of your best client, whoever did it, that's a bad day. And the question of who did it, whether it is al-Qaeda, whether it is Timothy McVeigh as a domestic individual who had his own agenda, his own item—his own motivations, really doesn't matter. If hundreds or thousands of people are killed or injured and the economy is disrupted, that is a problem for all of us.

And for us in the FBI, we're acutely aware of our shortcomings

prior to 9/11. There has been testimony in the *Moussaoui* case that highlighted some of the challenges that we faced between our field offices and our headquarters and the—just the perspective of having to keep criminal investigations and intelligence investigations separate, which the Patriot Act and Attorney General Guidelines addressed, obviously, after 9/11, and has put us in the position of not only sharing information within the FBI, but, of course, with all our intelligence community and law enforcement partners. So that is what has changed since 9/11 and the focus being on national security matters.

#### **A. Criminal Investigation**

The overall issue in terms of what we are doing in the area of what we would call “white-collar crime,” or our criminal investigative area, is focused really in two areas, and they track with the Attorney General’s top six priorities for ’06, which he identified; one of those being public and corporate corruption. And in his State of the DOJ, his annual address, he said, “Integrity in government and business is essential for a strong America, and taxpayers and investors deserve nothing less.”

Therefore, consistent with that, what we are doing in the FBI is focusing, first and foremost, in the criminal investigative area on public corruption. There obviously have been some high-profile cases, investigations in the public arena in the last year. We are trying to use our resources in a way to maximize the bang for the buck, basically; to say, yes, we have these people, these investigators, agents who are working on corruption. We have focused a number of people—in fact, we’re up substantially. Just again, not to get bogged down in numbers, but in 2001, we had about 400 agents working on public corruption. Today we have over 600 across the country.

We have several initiatives in that area that, obviously, are paying some dividends. In terms of, again, what you have seen in the press—whether it is federal government officials, state officials, or police officers—but in the last two years, we, the Department of Justice, based on our investigations, have convicted over a thousand government employees involved in corrupt activities, including 175

federal officials, 150 state officials, 350 local officials, and then over 350 police officers. And, obviously, Jack Abramoff and Randy “Duke” Cunningham are two of the significant ones that we’re all aware of, in the press, here in Washington. Some of the ones that you may or may not be familiar with are, for example, the City Council in San Diego, City Council in Dallas, and the Police Department—certain officers in Detroit. And then, of course, there is always Chicago and New Orleans, which, for us, have always been fertile ground. I do not know if anybody is from Chicago or New Orleans, but it is just—sometimes there are easier investigations, and sometimes more challenging ones. I’ll just leave it at that. We always have those two areas.

So we have focused on public corruption as being the highest criminal investigative priority. Alice Fisher has done a terrific job in terms of marshaling and directing her resources in the Criminal Division, and the U.S. Attorneys’ offices across the country in terms of prioritizing and giving the prosecutive resources that we need to support these time-consuming, intensive investigations. Thus we have that focus on corruption, and we will continue.

I mentioned several initiatives. One of those is just the idea that within most state governments, there are a number of ways that contracts are awarded, both in state government and city government. For example, our organizational structure, we have 56 field offices around the country with 400 sub-offices. In 34 of the state capitals around the United States, we have a sub-office; we call it a resident agency, rather than one of our main field offices. So we have probably not paid as much attention or directed the resources that we could in some of those state capitals. That is something that we started this past year, so you will probably see some additional work coming out of those initiatives. As we get to the integrity of the governmental process, the governance of—whether city, state, or federal resources, then the FBI will be involved in that.

Other than walking up to a particular person or causing particular publicity, we look for what impact we may have. We have had an investigation in Tennessee that you may have heard of—it is called “The Tennessee Waltz”—where 10 legislators have been indicted for accepting bribes as part of an undercover operation we were doing in exchange for legislation that they would propose.

As a result of that, the Tennessee legislature has proposed and is moving forward with fairly substantial ethics reform. We know that Congress here is talking about ethics reform. We haven't seen anything in terms of the results of that yet, but just the fact that people are talking about it, and, in some states, they are actually taking action and passing laws or are in the process of doing that, that is addressing ethics reform and what standard of conduct is expected of elected officials, that is something that we see as a positive development as a result of these investigations.

Let me turn briefly, then, to corporate fraud. With public corruption being the top priority, corporate fraud is the next most significant priority in terms of the criminal investigative issues. Let me just say there are certain things that the FBI is simply better suited to do than many state or local agencies or other federal agencies, and that is why we do them.

Another area is in civil rights, another one of the Attorney General's six priorities for this year. When people have been deprived of their civil rights under the color of law, if there is a police brutality issue or whatever it may be, then the FBI has the responsibility to investigate it, and we do that very aggressively. So civil rights is another area.

In corporate fraud, at last count we had 18 corporate fraud investigations ongoing, in which investors lost over a billion dollars in each of those 18 investigations. Some of those are well known; some of those are not, but 18 investigations where investors lost a billion— at least a billion dollars. Of course Enron is ongoing, but in that investigation alone—very complex, as you can imagine—there have been 34 individuals charged and more than \$227 million in assets seized in addition to the billions in losses. WorldCom, obviously, lots of—or billions—\$11 billion there.

Corporate fraud is something that we are focused on. Sarbanes-Oxley, something you are very familiar with, has generated lots of business, let us say, for the FBI. It is something where we have seen a lot of self-reporting, self-referrals. Also just the awareness, if you will, of some of the areas that perhaps were not focused on as much as they were in the past, generate a great deal of business for us, and so we continue to do the corporate fraud investigations.

Let me jump, for just a minute, on the second point about our

national security mission, and the intersection between our criminal investigations and national security. One of the things that we have found since 9/11 is that there is a growing nexus between some criminal investigative matters and some terrorism matters. If it is in the area of terrorism financing, that is probably the most prevalent area. For example, we have had a number of investigations where there have been individuals who are members, associates, or are providing material support to terrorist organizations.

Hezbollah, Hamas, al-Qaeda, Palestinian Islamic Jihad—those are the ones most prominent in the United States that we have identified as having received millions of dollars of funds from individuals in the United States, some through legitimate charitable organizations, fund-raising things, but much of which is through traditional illegal criminal activity, whether it is drug trafficking—Hezbollah has been involved in that for years—the counterfeiting of goods, whether it is jeans or Viagra® or whatever you want to say. If there is something to be counterfeited—there, of course, have been criminal organizations doing this for years, but we are seeing an intersection of terrorist groups who are involved in the same business, and those proceeds then going back to the group wherever they are. And the question, from our perspective, is, it may be charitable work that is helping the widows and orphans, as some of these organizations like to say, but our perspective is, if one dollar goes to buy bullets or bombs, than it is a terrorist organization that we need to be aware of. Then, working with our international partners that Alice Fisher is referring to, to assess whether they are actually providing material support—the overall review of things—a determination is made that, no, it is not material support; it is actually money for widows and orphans. So that is something that we focused on quite a bit.

There was an investigation last summer in Southern California, Torrance, California, where an individual or a group of individuals referring to themselves as “al-Qaeda in America”—it was a prison-led group—were actually out robbing convenience stores, armed robberies of convenience stores, to get money to acquire weapons matériel that they could use to conduct terrorist attacks, primarily against Jewish interests, in Southern California. So, again, this is just a homegrown group that was in the criminal business to raise money to conduct terrorist attacks.

We have seen, for example, in Madrid, from March 11, 2003, the Madrid bombings, that many of those individuals were involved in drug trafficking to finance their illegal—well, to finance the attacks, acquire weapons and the explosives.

I mentioned Hezbollah. One of their big areas has been cigarette smuggling, of untaxed cigarettes, and just, again, making millions of dollars. The question is, where does that go and what do we do about that?

So we see this intersection between criminal investigative matters and terrorism matters, and oftentimes we can develop new sources of information—that is, we jam somebody up on criminal charges who then can provide us information, perhaps about other individuals who have terrorist ties. We are at a distinct advantage over some of our partners overseas who do not have plea bargaining, who do not have other opportunities to acquire information from those who have been charged with crimes, who may look for a lesser sentence in exchange for cooperation. So we see that intersection, and we are trying to exploit it as best we can.

### **C. Leveraging Resources**

Another matter that we are trying to focus on—the third point is how we leverage our resources—again, the numbers are down, the number of agents who are working traditional criminal matters is down.

So just as we have done in the terrorism area, where we had expanded our Joint Terrorism Task Forces from 35 in 2001 to over a hundred today, those are all highly leveraged with other agencies. We have a National Joint Terrorism Task Force with 39 other agencies on it here in Northern Virginia.

Therefore, the emphasis is on, for example, what does the SEC have that can benefit us in terms of criminal investigations with corporate fraud and perhaps even on the corruption angle? We work with other agencies. We work with the American Institute of Certified Public Accountants, obviously the IRS, Postal Service, HUD, and then all the DOJ attorneys, who are also getting referrals from various sources. We try to leverage those in such a way that there may be one, two, a handful of FBI agents involved in a task

force, and Enron is a good example, where it is a task force that the FBI is obviously intimately involved in, and we have been trying to leverage those resources.

We also try to look at ways of maximizing our resources by having—for example, we have established a corporate fraud reserve team, but colloquially, it will be a “fly team,” a team that could go out—just as we have done in terrorism investigations, we have established what we call fly teams that, at a moment’s notice, can deploy to anywhere in the United States or around the world, as is more often the case today, to address terrorism matters. We are doing the same thing in corporate fraud, where some of our agents in some of our especially larger offices have some expertise in dealing in corporate fraud, securities fraud, and similar matters.

We have found that by having a cadre of subject matter experts back here in Washington that can deploy at a moment’s notice to assist, we have realized that the first few days, especially the first few weeks, in any investigation of an Enron type or of WorldCom, or Qwest, whichever it may be, can be critical to the successful outcome in terms of the investigation, in terms of preserving documents, preserving records. And so we have this corporate fraud reserve fly team that is ready to deploy and assist offices at the first indication that an investigation needs to be pursued. So that is another thing that we are trying to do.

We are also trying to work closely with DOJ, with the prosecutors, with the folks out of the Criminal Division at the outset. One of the ways in the past that the FBI has done business is to do an investigation and then turn it over to the prosecutor for prosecution; basically, put together a nice prosecutor report or investigator report that turns into a prosecution. That has not always been the case, but in many instances, it was.

What we have done in recent years is to work closely at the outset with prosecutors to ensure that there is an investigation that, if it leads to prosecution, will be better prepared.

## CONCLUSION

We also have several initiatives that I’ll discuss briefly, and then will be glad to take any questions you may have. For example, on

health care fraud, that has been a priority, obviously. Congress has given us a number of resources dedicated strictly to health care fraud. We have initiatives, for example, in the national outpatient surgery area, a medical transportation initiative, and a pharmaceutical fraud initiative. By, again, trying to leverage our resources and then targeting areas of most concern, we try to address those growing areas that have been identified and, if they are a trend, try to make sure the trend doesn't continue unabated.

So we believe that the strategy in terms of our criminal investigative resources is working. In corporate fraud, for example, since 2002, we have had over 363 convictions and over several hundred more indictments that are still awaiting prosecution or there have been a few acquittals. Mortgage fraud, our investigations are up 35% in the last two years. Again, that's an area where we have seen a lot of abuse.

So, even though national security programs—that being counter-terrorism, counterintelligence, and cyber—are the FBI's top priorities, we see a key intersection and linkage between those national security investigations and our criminal investigations. Corruption and corporate fraud are the two highest priorities that we are addressing.



**SUE ELLEN WOOLDRIDGE**

**Assistant Attorney General  
Environment and Natural  
Resources Division**

**FROM CLIENT TO COUNSELOR:  
A NEW PERSPECTIVE ON THE WORK OF THE  
ENVIRONMENT AND  
NATURAL RESOURCES (ENRD) DIVISION**

**INTRODUCTION**

My remarks today will follow an agenda of three items: First, I will talk a little bit about ENRD—who we are and how we work with other federal agencies. Then, I will share some thoughts on how I will be approaching the work of the Division, and finally, I will close by discussing some of the issues that ENRD has been working on.

**OVERVIEW OF THE ENVIRONMENT AND  
NATURAL RESOURCES DIVISION**

ENRD has approximately 700 employees, about 425 of whom are attorneys. While the vast majority of those attorneys are located in Washington, D.C., we do have field offices of varying sizes in six other cities. As you know, litigation in the areas of energy, natural resources, and the environment has exploded over the last decade. We have around 6,800 ongoing cases. We represent almost every executive agency in litigation, although we work more extensively with some than with others. For example:

About one-third of our cases, both defense and enforcement, come from the Environmental Protection Agency (EPA) and involve the alphabet soup of statutes—RCRA, CERCLA, CAA, CWA, TSCA, FIFRA, etc. These statutes are certainly the centerpiece of the environmental regulatory regime adopted by Congress over the last 35 years and, as I mentioned, a very substantial part of the work of the Division.

Another one-third of our cases come from the Department of the Interior. These cases involve the full range of Interior's responsibilities and the litigation spawned from actions undertaken to carry out those responsibilities, such as tribal and individual Indian issues, implementation of the Endangered Species Act, the operation of hydroelectric and agricultural irrigation projects, management of the National Parks, operation of western public lands and the multiple uses of those lands through cattle grazing, forestry, and minerals extraction, and Interior's offshore oil and gas leasing on the outer continental shelf.

Our third most frequent client is the Pentagon. Litigation for the Department of Defense comprises almost 15% of our caseload. The Department of Defense faces a multitude of environmental and natural resource issues in connection with its many installations and properties around the country, as well as cases that result from carrying out the responsibilities of the Army Corps of Engineers. We also work with the Department of Homeland Security on matters concerning the Coast Guard and Customs Service.

About 3% of our cases are criminal cases. Although I do have lots of experience in enforcing civil statutes, I am new to the prosecution of environmental crimes. As a result, I have been working hard with the attorneys in our Environmental Crimes Section to ensure that we are focusing appropriately on those whose actions deserve prosecution, whether it involves the systematic illegal discharge of pollution into waters of the United States, crimes that involve worker endangerment, vessel pollution, or the illegal transport of protected species.

In sum, there is almost no part of the U.S. economy that is not touched by ENRD's caseload. Our pollution cases have impacts on virtually every type of manufacturing or processing sector of our economy, on shipping, and on other forms of transportation. Our natural resources cases affect oil and gas production and the development of other energy sources, as well as the mining, logging, ranching, recreation, and service industries. Our wildlife and Indian resources cases influence commercial fishing, sport hunting, water markets, trade in exotic species, agriculture, home building, and commercial development. The list goes on.

## **THOUGHTS ON THE TRANSITION FROM INTERIOR TO ENRD**

It should not come as a shock to you that I believe in the rights of individuals, free enterprise, private ownership of property, balanced use of private and public resources, limited government, and a fair and efficient judiciary.

In addition, I believe that where our Constitution and laws vest authority in a government institution, it is imperative for a public servant who is tasked with implementing that authority to carry out his or her responsibilities fairly, decisively, and dispassionately.

I believe that we who serve in the executive branch of the federal government must act with fidelity to our constitutional framework, recognizing especially the separate roles of the other two branches of the federal government, and, in addition, the sovereignty of the states and their reserved powers.

How that translates into practice as a lawyer in ENRD is this:

I consider our role at the Division to be both litigator and counselor. As litigator in our defensive role, it is our job to determine what the client agency's interests are and respect that viewpoint and prerogative as we defend the actions of the agency.

Stated another way, having been in senior management at a programmatic agency and at a litigating agency, I can tell you that it is very much harder to do the work that must be done in a programmatic agency. Whether one is at Interior, EPA, Defense, or Transportation, management's job is to envision the policy and initiate and complete the work—enact a rule, investigate a polluter, issue a permit, build a facility, train a corps of personnel, decide whether and how some activity subject to the agency's jurisdiction will be regulated.

To do our jobs with fidelity to the client agency, we must understand why the decision was made, what prompted the action. We must be cognizant of and bounded by the client's policy choices as we describe the action being defended, and zealously defend the policy choice and action, where possible, as within the client's discretion and the boundaries of the laws that apply to the action under scrutiny.

Similarly, with our offensive litigation—primarily the civil enforcement of our environmental and regulatory statutes—we must make an effort to fulfill the choices and priorities of our client agencies, and with care strive for a balanced, firm, consistent

application of the environmental laws to any particular defendant. We should not attempt to exercise jurisdiction where it is not given or interpret a congressional or regulatory enactment beyond that which was intended.

We are very mindful of the powers that we wield and the need to beware of any philosophy that argues that the end justifies the means, or that we should ignore constitutional limitations or legal restraints on the grounds that good results may follow. For, as Justice Brandeis remarked, “experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent.”<sup>1</sup>

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In addition to being the litigator, we also have a role as counselor to our clients. In this, my years at Interior were probably the best possible training for my current job. At Interior, I spent the better part of five years refereeing the divergent missions and viewpoints of the various bureaus of Interior—conflicts between and among the Bureau of Reclamation, the Fish and Wildlife Service, the Bureau of Indian Affairs, the National Park Service, and the Bureau of Land Management. In the same manner, while many litigated cases at Justice involve only the interests of one client agency, many others affect multiple agencies, again with varied and at times divergent interests. Counseling agencies to find working solutions to their conflicts and advising them of the boundaries and contours of their discretion are roles that I am well familiar with and enjoy.

A final word on our work at ENRD: Our attorneys are working hard. They average somewhere around 2,400 hours of work, 1,700 of it billable. Like many lawyers, theirs is a special kind of work. It demands creativity, but it is not an act of creation. It demands fidelity, but it is directed toward someone else’s offspring—the actions of our clients. At Justice, ours is the work of an editor, not a writer; the critic, not the producer; the marketer, not the manufacturer.

### **HOT TOPICS AT ENRD**

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<sup>1</sup> *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

So, how about some actual issues we are involved in?

#### A. Clean Water Act Cases

Waterlaw issues have lately topped the list of ENRD's high-profile cases.

The Supreme Court recently heard oral argument in three ENRD cases—*Rapanos v. United States*, *June Carabell v. U.S. Army Corps of Engineers*, and *S.D. Warren Company v. Maine Board of Environmental Protection*.

**Rapanos and Carabell:** The *Rapanos* and *Carabell* cases both present statutory and constitutional challenges to the federal government's jurisdiction to regulate, under the Clean Water Act, wetlands hydrologically connected or adjacent to nonnavigable tributaries of the United States. These cases are important because they offer the Supreme Court the opportunity to expand on its decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC) and *United States v. Riverside Bayview Homes, Inc.*, as to the scope of EPA and the Corps of Engineers' authority to regulate "waters of the United States."

As you probably know, in *Riverside Bayview Homes*, the Court held that the Army Corps of Engineers may reasonably regulate wetlands adjacent to other navigable waters of the United States. In other words, it decided that waters of the United States, in the context of the Clean Water Act, included wetlands that were not themselves navigable. And in SWANCC, the Court held that the Army Corps of Engineers lacked the authority to regulate isolated, intrastate, nonnavigable ponds under the Clean Water Act as "waters of the United States" based solely on their use as habitat, for migratory birds.

Thus, on the facts of the two cases to be decided by the Supreme Court—which include questions of adjacency and hydrological connection—the Court will have the opportunity to further delineate the question of what are the "waters of the United States" as used in the Act.

**S.D. Warren:** The third ENRD case recently argued by the Solicitor General is one in which the United States participated as amicus. This case addresses whether the operation of hydroelectric facilities results in a "discharge into the navigable waters" within the

meaning of Section 401(a) of the Clean Water Act. The United States has argued that operation of hydroelectric facilities does result in a “discharge into navigable waters,” within the meaning of Section 401(a), and that S.D. Warren must obtain state certification that the water leaving its facilities complies with federal and state water pollution control requirements before the Federal Energy Regulatory Commission (FERC) may issue federal licenses for those facilities. It is important to note that the case does not involve the Section 402 question of whether such activities result in the “discharge of a pollutant.”

***Miccosukee and Friends of the Everglades***: Two other cases, *Miccosukee Indian Tribe v. South Florida Water Management District* and *Friends of the Everglades v. South Florida Water Management District* raise the question of whether the movement of pollutants from one navigable water to another by a water transfer constitutes the “discharge of a pollutant” subject to the National Pollutant Discharge Elimination System (NPDES) permitting provisions of Clean Water Act Section 402.

This issue arose because activities that result in the movement of navigable waters, such as trans-basin transfers of waters to serve municipal, agricultural, and commercial needs, can also move pollutants from one body of water to another. There are thousands of water transfers currently in place throughout the country, including 16 major diversion projects in the western states alone. The United States took the unusual step of intervening as a defendant in *Friends of the Everglades* because of the national importance of the issues involved.

EPA has issued an “Agency Interpretation on the Applicability of Section 402 of the Clean Water Act to Water Transfers,” which concludes that such water transfers are not subject to the NPDES permitting program under Clean Water Act Section 402. We have argued in *Friends of the Everglades* that EPA’s interpretation is reasonable and entitled to deference.

## **B. Clean Air Act Cases**

The Division is also responsible for defending EPA’s regulatory programs under the Clean Air Act against general challenges in the

federal courts of appeals. In the past year, we've had both successes and losses in defending EPA's programmatic improvements and policy choices against such challenges. For instance, in *State of New York v. EPA*, the D.C. Circuit largely affirmed one set of EPA's revisions to the Clean Air Act's New Source Review Program, allowing U.S. companies to more realistically assess whether a modification to a factory or power plant will actually result in a regulated increase in emissions of a pollutant. Whereas, last week the D.C. Circuit held invalid another EPA revision to its regulations on what would constitute a physical change for purposes of triggering New Source Review.

And in *Grassroots Recycling Network v. EPA*, the D.C. Circuit affirmed an EPA program that is designed to encourage research and development efforts aimed at improving and increasing the safe use of highly efficient bioreactor landfills for the disposal of municipal waste.

Finally, in *Commonwealth of Massachusetts v. EPA*, the D.C. Circuit affirmed that EPA may permissibly decline to impose command-and-control regulations on greenhouse gas emissions from mobile sources, such as cars and trucks, in light of continued scientific uncertainty and EPA's policy favoring voluntary programs to reduce such emissions.

### **C. Wildlife and Natural Resources Cases**

In the wildlife and natural resources context, we have in the past year successfully defended a variety of federal agencies against a variety of challenges to agency action.

For example, in *Oceana v. Evans*, (D.D.C.), both environmental and industry groups challenged a set of fishing regulations promulgated under the Magnuson-Stevens Fishery Conservation and Management Act by NOAA fisheries for the New England groundfish resource. The environmental groups argued that the regulations did not sufficiently limit over-fishing, as required by the Act, and did not adequately analyze and protect essential fish habitat, which are areas to be protected for conservation of over-fished stocks. Industry groups, on the other hand, argued that the over-fishing restrictions were too stringent and that the Secretary had

exceeded his authority with respect to several provisions. The Court held that the fishing regulations were not arbitrary, ruling for NOAA on all important claims. The Court agreed with our argument that the Act's requirement to end over-fishing did not have to be satisfied in an unreasonably short time, that is, not "overnight," and that NOAA can phase-in fishing restrictions as long as the rates will achieve the stock rebuilding targets in the future.

In *Northwest Environmental Advocates v. NMFS* (W.D. Wash.), we successfully defended the Army Corps of Engineers in a lawsuit brought by an environmental organization that sought to enjoin the Corps from proceeding with a navigation channel deepening project in the Columbia River that was necessary to provide for navigation to the Port of Portland.

In this case, the plaintiffs asserted that the Corps had not ensured that its actions were not likely to jeopardize endangered Columbia River salmon, as required under the Endangered Species Act. The plaintiffs brought similar claims challenging the sufficiency of the Corps' analysis under the National Environmental Policy Act (NEPA). The Corps had consulted with NOAA Fisheries on the project as required by the ESA, had prepared very substantial environmental analysis, and had even utilized outside peer reviewers to consider whether the Corps and NOAA had considered the best available scientific information. The Corps had worked hard to resolve difficult issues of sediment transport in the Columbia River and effects on the salmon species. The Court ruled for the Corps on all counts, allowing the dredging to proceed this past spring.

#### **D. Indian Resources Cases**

Our Indian Resources Section, which represents tribes in a trust capacity, is active in representing tribal and federal interests in water rights and land claims adjudications. During the past year, ENRD settled several major adjudications in which the United States had asserted significant claims. These adjudications are complex cases, involving the rights of thousands of parties.

In one case, ENRD worked with the Interior Department, the state of Idaho, private interests, and the Nez Percé Tribe to craft a historic settlement of a water rights claim, which Congress ratified in the

### Snake River Water Rights Act.

In another matter, we worked with the Interior Department, the state of Arizona, the Gila River Indian Community, and private water users to settle the Community's water claims. Congress also ratified this settlement.

In yet another case, a district court recently approved a consent decree proposed by the United States, New York State, and the Seneca Nation to resolve a 150-year-old land claim dispute. This was the first New York land claim to be resolved through settlement.

### **E. Criminal Enforcement**

In the criminal enforcement context, the Division currently is in trial in *United States v. Atlantic States Cast Iron Pipe Company et al.* (D.N.J.).

Atlantic States Cast Iron Pipe Company and five current and former managers were charged in September 2004 with conspiracy to violate the Clean Water Act and Clean Air Act; to make false statements and to obstruct EPA and OSHA; and to defeat the lawful purpose of OSHA and EPA. The defendants also were charged with substantive Clean Water Act, Clean Air Act, CERCLA, false statement, and obstruction charges.

The company manufactures iron pipes by a process that involves melting scrap metal in a multi-story furnace. Investigation revealed a corporate philosophy and management practice that led to an extraordinary history of environmental violations, workplace injuries and fatalities, and ultimately obstruction of justice. The United States has presented evidence that the defendants routinely violated their Clean Water Act permits by discharging petroleum-contaminated water and paint into storm drains that led to the Delaware River; repeatedly violated their Clean Air Act permits by burning tires and excessive amounts of hazardous paint waste in the furnace; systematically altering accident scenes; and routinely lying to federal, state, and local officials who were investigating environmental and worker safety violations.

In another case, *United States v. ACS*, a company and two individuals pled guilty to conspiring to obstruct OSHA, EPA, and the Small Business Administration (SBA) regulations. The defendants

fraudulently obtained approximately \$37 million in SBA set-aside contracts at federal facilities, including contracts for jobs involving asbestos, lead abatement, and hazardous waste operations. They also purchased approximately 250 false training certificates for their unqualified employees and directed them to conduct work involving asbestos, lead, and hazardous waste. Sentencing for several of the defendants is pending.

### CONCLUSION

As you can imagine, I have highlighted only a few of the many important issues confronting ENRD. If there is one thing I wish for you to remember about the Environment and Natural Resources Division, it is this: we will strive to do what we are authorized to do such as:

- a. act with care to enforce those laws that protect the environment,
- b. respect the constitutional restraints under which we do our jobs,
- c. work hard to partner with state and local governments and adhere to principles of federalism,
- d. refrain from substituting our judgment for that of the Congress or executive policymakers, and
- e. represent our clients zealously in matters before the judicial branch.

## ABOUT THE SPEAKERS

**ALBERTO R. GONZALES** was sworn in as the nation's 80th Attorney General on February 3, 2005.

Prior to serving at the Department of Justice, he was commissioned as White House Counsel to President George W. Bush in January of 2001. Prior to serving in the White House, he served as a Justice of the Supreme Court of Texas. Before his appointment to the Texas Supreme Court in 1999, he served as Texas's 100th Secretary of State from December 2, 1997, to January 10, 1999. Among his many duties as Secretary of State, Gonzales was a senior adviser to then-Governor Bush, chief elections officer, and the Governor's lead liaison on Mexico and border issues.

Prior to his appointment as Secretary of State, Gonzales was the General Counsel to Governor Bush for three years. Before joining the Governor's staff, he was a partner with the law firm of Vinson & Elkins L.L.P. in Houston, Texas. He joined the firm in June 1982. While in private practice, Gonzales also taught law as an Adjunct Professor at the University of Houston Law Center.

Among his many professional and civic activities, Gonzales was elected to the American Law Institute in 1999. He was a board trustee of the Texas Bar Foundation from 1996 to 1999, a board director for the State Bar of Texas from 1991 to 1994, and President of the Houston Hispanic Bar Association from 1990 to 1991. He was a board director of the United Way of the Texas Gulf Coast from 1993 to 1994, and President of Leadership Houston during this same period. In 1994, Gonzales served as Chair of the Commission for District Decentralization of the Houston Independent School District, and as a member of the Committee on Undergraduate Admissions for Rice University. Gonzales was Special Legal Counsel to the Houston Host Committee for the 1990 Summit of Industrialized Nations, and a member of the delegations sent by the American Council of Young Political Leaders to Mexico in 1996 and to the People's Republic of China in 1995.

Among his many honors, in 2003, Gonzales was inducted into the Hispanic Scholarship Fund Alumni Hall of Fame, was honored with the Good Neighbor Award from the United States-Mexico Chamber of Commerce, and received President's Awards from the United

States Hispanic Chamber of Commerce and the League of United Latin American Citizens. In 2002, he was recognized as a Distinguished Alumnus of Rice University by the Association of Rice Alumni and was honored by the Harvard Law School Association with the Harvard Law School Association Award. Gonzales was recognized as the 1999 Latino Lawyer of the Year by the Hispanic National Bar Association, and he received a Presidential Citation from the State Bar of Texas in 1997 for his dedication to addressing basic legal needs of the indigent population. He was chosen as one of the Five Outstanding Young Texans by the Texas Jaycees in 1994, and as the Outstanding Young Lawyer of Texas by the Texas Young Lawyers Association in 1992. Gonzales was honored by the United Way in 1993 with a Commitment to Leadership Award, and received the Hispanic Salute Award in 1989 from the Houston Metro Ford Dealers for his work in the field of education.

Gonzales was born in San Antonio, Texas, and raised in Houston. He is a graduate of Texas public schools, Rice University, and Harvard Law School. Gonzales served in the United States Air Force between 1973 and 1975, and attended the United States Air Force Academy between 1975 and 1977.

**PAUL D. CLEMENT** is the 43rd Solicitor General of the United States. He was nominated by President George W. Bush on March 14, 2005, confirmed by the United States Senate on June 8, 2005, and took the oath of office on June 13, 2005.

Mr. Clement is a native of Cedarburg, Wisconsin, and a graduate of the Cedarburg public schools. He received his bachelor's degree *summa cum laude* from the Georgetown University School of Foreign Service, and a master's degree in economics from Cambridge University. He graduated *magna cum laude* from Harvard Law School, where he was the Supreme Court editor of the *Harvard Law Review*.

Following graduation, Mr. Clement clerked for Judge Laurence H. Silberman of the U.S. Court of Appeals for the D.C. Circuit, and for Associate Justice Antonin Scalia of the United States Supreme Court. After his clerkships, he worked as an associate in the Washington, D.C., office of Kirkland & Ellis. Mr. Clement went on to serve as Chief Counsel of the U.S. Senate Subcommittee on the Constitution, Federalism and Property Rights. Afterward, he was a partner in the

Washington, D.C., office of King & Spalding, where he headed the firm's appellate practice. Mr. Clement also served from 1998 to 2004 as an Adjunct Professor at the Georgetown University Law Center, where he taught a seminar on the separation of powers.

Mr. Clement joined the Department of Justice in February of 2001. Before his confirmation as Solicitor General, he served as Acting Solicitor General for nearly a year and as Principal Deputy Solicitor General. He has argued over 30 cases before the United States Supreme Court, including *McConnell v. FEC*, *Tennessee v. Lane*, *Rumsfeld v. Padilla*, *United States v. Booker*, and *Gonzales v. Raich*. He also argued many of the key cases in the lower courts involving challenges to the President's conduct of the war on terrorism.

**THOMAS O. BARNETT** was confirmed by the Senate as Assistant Attorney General of the Antitrust Division, U.S. Department of Justice, on February 10, 2006. Mr. Barnett became the Antitrust Division's Acting Assistant Attorney General effective June 25, 2005, and previously served as the Division's Deputy Assistant Attorney General for Civil Enforcement, a position occupied since April 18, 2004. Prior to joining the Antitrust Division, Mr. Barnett was a partner in the Washington, D.C., office of Covington & Burling, where he served as Vice Chair of the firm's Antitrust and Consumer Protection Practice Group. At Covington & Burling, Barnett provided counsel on corporate transactions and licensing arrangements in the airline, chemical, construction aggregate, defense, hospital, petroleum, pharmaceutical, and other industries. Mr. Barnett is experienced in antitrust litigation and, among others, in antitrust issues involving intellectual property, e-commerce, sports law, and corporate compliance programs.

From 1989 to 1990, Mr. Barnett clerked for The Honorable Harrison Winter of the U.S. Court of Appeals for the Fourth Circuit. He has been an Adjunct Professor at Georgetown University Law Center and was a co-teacher of an advanced antitrust seminar at the University of Virginia School of Law. Mr. Barnett is a member of the Maryland and District of Columbia bars and the Antitrust Section of the American Bar Association.

Mr. Barnett graduated *magna cum laude* from Harvard Law

School in 1989, where he was a John M. Olin Fellow in Law and Economics. He received a master of science degree in economics in 1986 from the London School of Economics while a Fulbright Scholar to the United Kingdom. He received his bachelor's degree in 1985 from Yale University, where he graduated *summa cum laude*.

**ALICE S. FISHER** is the Assistant Attorney General for the Criminal Division, U.S. Department of Justice. She supervises the enforcement of federal criminal laws and policy for the Department of Justice. She supervises the prosecutors in the Division on matters ranging from national security to international affairs to corporate fraud and public corruption.

From 2003 to 2005, Ms. Fisher was a partner in the litigation department of Latham & Watkins' Washington, D.C., office, specializing in white-collar and internal investigations, including accounting and securities fraud, health care fraud and Foreign Corrupt Practices Act matters, congressional investigations, and complex civil litigation. Ms. Fisher also advised clients on a range of issues related to the Patriot Act.

From July 2001 to 2003, Ms. Fisher served as Deputy Assistant Attorney General of the Criminal Division in the U.S. Department of Justice. While at the Department of Justice, Ms. Fisher was responsible for managing the Counter-Terrorism Section, the Fraud Section, the Criminal Appellate Section, and the Capital Cases. She worked on various policy issues for criminal law enforcement and national security.

Prior to 2001, Ms. Fisher was a partner at Latham & Watkins; litigation associate at Sullivan & Cromwell, and served as Deputy Special Counsel to the U.S. Senate Special Committee to Investigate Whitewater Development and Related Matters.

She earned her bachelor's degree in 1989 from Vanderbilt University, where she was a member of the Gamma Beta Phi Honorary Society, and her J.D. from Columbus School of Law, Catholic University of America, in 1992, where she was Note and Comment Editor for the *Catholic University Law Review*.

**WAN J. KIM** was sworn in as the Assistant Attorney General for the Civil Rights Division of the U.S. Department of

Justice on November 9, 2005.

Immediately prior to his nomination, Mr. Kim served as a Deputy Assistant Attorney General in the Civil Rights Division. He has spent most of his career at the Department of Justice, having entered through the Attorney General's Honors Program as a Trial Attorney in the Criminal Division, and later serving as an Assistant U.S. Attorney for the District of Columbia. Mr. Kim also has worked on the staff of the Senate Judiciary Committee for former chairman Orrin G. Hatch, and as a law clerk to Judge James L. Buckley of the U.S. Court of Appeals for the District of Columbia Circuit. Mr. Kim graduated with honors from both the Johns Hopkins University and the University of Chicago Law School. He has served as an enlisted soldier and a rifle platoon leader in the United States Army Reserve.

Born in Seoul, South Korea, Mr. Kim is the first immigrant to serve as Assistant Attorney General for the Civil Rights Division of the U.S. Department of Justice, and he is the first Korean-American to become an Assistant Attorney General.

**JOHN S. PISTOLE** began his career as a Special Agent with the FBI in 1983. He first served in the Minneapolis Division, where he investigated Organized Crime (OC) and Violent Crimes. In 1985, Special Agent Pistole was transferred to New York, where he investigated OC matters focusing on two La Cosa Nostra (LCN) Families. In 1990, he was promoted to a Supervisor in the OC Section at FBI Headquarters, handling LCN and Italian OC matters. During this tenure, he coordinated FBI investigative response and assistance to the Italian National Police in their investigations into the 1992 assassinations of two prominent Magistrates. He also served as an Instructor in OC matters at the FBI Academy for nearly 30 New Agents Classes.

In 1994, Mr. Pistole was promoted to Field Supervisor of a White-Collar Crime (WCC) and Civil Rights Squad in Indianapolis, Indiana. During this time, he developed curricula and provided instruction at the International Law Enforcement Academy in Budapest, Hungary, at the first two sessions (1995) and again in 1996. He was the FBI representative to a State Department delegation sent to Sofia, Bulgaria, assessing their laws and police response to Russian/Eurasian OC and Financial Crimes.

Mr. Pistole next served as Assistant Special Agent in Charge, Boston, Massachusetts, where he had oversight for WCC, Civil Rights, Computer Intrusion Programs, and all FBI matters in the states of Maine and New Hampshire and WCC, especially Public Corruption, in Rhode Island. In 1999, he helped lead the investigative and recovery efforts for the Egypt Air Flight 990 crash off the coast of Rhode Island. Following the espionage arrest of Robert Hanssen, he was detailed to FBIHQ and led the “Blue Team” for the Information Security Working Group, addressing security and vulnerability issues. In July of 2001, he was named an Inspector in the Inspection Division in Washington, D.C., where he led teams conducting evaluations and audits of FBI field offices and Headquarters Divisions.

Following the events of 9/11, Director Mueller appointed Mr. Pistole to the Counterterrorism Division, first as Deputy Assistant Director for Operations, then as Assistant Director. In December 2003, Mr. Pistole was appointed to serve as the Executive Assistant Director for Counterterrorism and Counterintelligence. In October 2004, Mr. Pistole was promoted to Deputy Director, the number-two position in the FBI.

Mr. Pistole practiced law for two years prior to joining the FBI. He is married and has two daughters.

**SUE ELLEN WOOLDRIDGE** is the Assistant Attorney General in charge of the Environmental and Natural Resources Division at the U.S. Department of Justice.

Prior to joining the Department of Justice in November 2005, Ms. Wooldridge served as the Solicitor of the Department of the Interior, and before that as the Deputy Chief of Staff for Secretary of the Interior Gale Norton.

Ms. Wooldridge grew up on a farm in Artois, California, where she was an avid horseback rider. She graduated from Willows High School in 1979, received her bachelor’s degree in political science and history from the University of California at Davis in 1983 (Phi Beta Kappa), and graduated from Harvard Law School in 1987, where she received the Outstanding Graduate Award of the National Association of Women Lawyers.

She has worked as a litigator for the firm of Diepenbrock, Wulff,

Plant & Hannegan in Sacramento, and as the legal and policy adviser to then-California Attorney General Dan Lungren, where she negotiated the multi-billion dollar 1998 tobacco settlement for the state of California. Ms. Wooldridge was one of the seven founding partners of Riegels Campos & Kenyon LLP, where she represented the National Association of Attorneys General in the enforcement of the 1998 tobacco settlement. She also served as General Counsel for the California Fair Political Practices Commission.