U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

April 22, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- Nothing to report.

B. THIS WEEK

- **Supreme Court Granted Certiorari in Indian Law Case.** On April 22, the Supreme Court granted the Department's petition for certiorari in *United States* v. *White Mountain Apache Tribe*. The question presented is whether the government's failure to maintain property in accordance with a particular, statutorily prescribed trust creates an action for monetary damages. The Department argues that monetary damages are not available under such circumstances.

- **Office of Solicitor General to Argue Tax Case.** On April 22, the Department will argue as petitioner in *United States* v. *Fior D'Italia, Inc.* The question presented is whether the employer' s share of the Federal Insurance Contribution Act (FICA) tax on employee tip income must be determined by accumulating the result of individual audits of individual employees or may instead be based on a reasonable estimate of the aggregate tips received by all employees. The Department will argue that the government may determine the employer's share based on a reasonable estimate of the aggregate amount of tips received.

- **Office of Solicitor General to Argue as *Amicus Curiae* in Automotive Safety Case.** On April 23, the Department will argue as *amicus curiae* in support of petitioners in *City of Columbus* v.

Ours Garage and Wrecker Service. The Federal Aviation Administration Authorization Act of 1994 prohibits States from regulating the price, route, or service of any motor carrier, but the Act does not diminish States' "safety regulatory authority * * * with respect to motor vehicles." 49 U.S.C. 14501(c)(2)(A). The question presented is whether a State's safety regulatory authority allows the State to delegate its regulatory power to municipalities within the State's borders. The Department will argue that the Act permits such a delegation of authority.

- **Office of Solicitor General to Argue as *Amicus Curiae* in Case Concerning Availability of Punitive Damages.** On April 23, the Department will argue as *amicus curiae* in support of petitioners in *Barnes* v. *Gorman*. The question presented is whether, or under what circumstances, courts should impute a Congressional intent to provide a punitive damages remedy in the context of an implied private right of action. The Department will argue against imputing such Congressional intent with respect to Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

- **Office of Solicitor General to Argue as *Amicus Curiae* in Family Educational Rights and Privacy Act Case.** On April 24, the Department will argue as *amicus curiae* in support of petitioner in *Gonzaga University* v. *John Doe*. The question presented is whether a student may sue a private university for damages under 42 U.S.C. 1983 to enforce provisions of the Family Educational Rights and Privacy Act of 1974 (FERPA) that bar the furnishing of federal funding to educational institutions that permit the release of educational records to unauthorized persons. The Department will argue that a cause of action under Section 1983 is not available to enforce FERPA's disclosure provisions.

- **Solicitor General to Argue Criminal Case.** On April 24, the Department will argue as petitioner in *United States* v. *Ruiz*. The questions presented are (1) whether, before pleading guilty, a criminal defendant is constitutionally entitled to obtain all exculpatory information possessed by the government, including impeachment material, and (2) if so, whether that right may be waived by the terms of a plea agreement. The Department will argue that a defendant has no right to obtain such information before pleading guilty and that, if such a right exists, it may be waived in a plea agreement.

C. LAST WEEK

- **Office of Solicitor General Argued in Criminal Case.** On April 15, the Department argued as petitioner in *United States* v. *Cotton*. The question presented is whether a defendant's enhanced sentence may be affirmed, even though his indictment omitted a fact that justified an increased maximum sentence, because the defendant failed to object, because the evidence supporting the operative fact was overwhelming, and because the defendant was on notice that that fact could be used to seek an enhanced sentence. The Department argued that such sentences may be upheld.

- **Office of Solicitor General Argued in Statute of Limitations Case.** On April 15, the Department argued as respondent in *Franconia Associates* v. *United States*. The questions

presented are whether a breach of contract claim or a Fifth Amendment takings claim accrued for purposes of 28 U.S.C. 2501, the six-year statute of limitations governing actions in the Court of Federal Claims, when Congress enacted a statute that allegedly abridged petitioners' contractual right to prepay governmental mortgage loans. The Department argued that the claims accrued at the point the statute was enacted.

- **Supreme Court Decided First Amendment Case.** On April 16, the Supreme Court issued its decision in *Ashcroft* v. *Free Speech Coalition*. The question presented was whether the Child Pornography Prevention Act of 1996 violated the First Amendment by criminalizing the possession and distribution of material that portrayed, or conveyed the impression of portraying, sexually explicit conduct involving a minor. The Department argued that such depictions are not protected by the First Amendment because they are linked to the sexual abuse of real children, even if the images themselves are entirely computer-generated. The Supreme Court disagreed, holding that indecent images that are not legally obscene may be regulated only if they were produced using actual children. Justice Thomas filed an opinion concurring in the judgment. Justice O'Connor filed an opinion concurring in the judgment in part and dissenting in part, which Chief Justice Rehnquist and Justice Scalia joined in part, and Chief Justice Rehnquist filed a dissenting opinion, which Justice Scalia joined in part.

- **Office of Solicitor General Argued in Fourth Amendment Case.** On April 16, the Department argued as petitioner in *United States* v. *Drayton*. The question presented is whether a Fourth Amendment "seizure" occurs when a police officer informs a bus passenger that he is conducting drug and illegal weapons interdiction and asks the passenger for consent to search, if another officer stays at the front of the bus without blocking the exit. The Department argued that no seizure occurs in such circumstances.

- **Office of Solicitor General Argued in Labor Law Case.** On April 16, the Department argued as respondent in *BE&K Construction Company* v. *NLRB*. As framed by the Court, the question presented is whether the court of appeals erred in holding that the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show that the suit was not objectively baseless under *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993). The Department argued that the NLRB's actions were proper.

- **Supreme Court Decided Tax Case.** On April 17, the Supreme Court issued its decision in *United States v. Craft*. The question presented was whether a tax lien may reach a delinquent taxpayer's interests in property that is held as part of a tenancy by the entirety. The Department argued that a tax lien attaches to such property rights, and the Supreme Court agreed. Justice Scalia filed a dissenting opinion, which Justice Thomas joined, and Justice Thomas filed a dissenting opinion, which Justices Stevens and Scalia joined.

- **Office of Solicitor Argued as *Amicus Curiae* in Qualified Immunity Case.** On April 17, the Department argued as *amicus curiae* in support of the petitioner in *Hope* v. *Pelzer*. The question presented is whether tying a prisoner to a "hitching post" for an extended, painful period of time violated clearly established Eighth Amendment rights. The Department argued that judicial precedents

that were "materially similar" to the facts alleged would have informed a reasonable officer that such conduct was unconstitutional.

- **Office of Solicitor General Argued as *Amicus Curiae* in Alien Diversity Case.** On April 17, the Department argued as *amicus curiae* in support of the petitioner in *Chase Manhattan Bank* v. *Traffic Stream (BVI) Infrastructure, Ltd.* The question presented is whether corporations organized under the laws of United Kingdom Overseas Territories are "citizens or subjects of a foreign state" for purposes of alienage diversity jurisdiction under 28 U.S.C. 1332(a)(2). The Department argued that such corporations are properly subject to federal jurisdiction.

- **Office of Solicitor General Filed Brief in Firearms Possession Case.** On April 15, the Department filed a brief as petitioner in *United States* v. *Bean*. Federal law prohibits convicted felons from possessing firearms, but the Secretary of the Treasury, acting through the Bureau of Alcohol, Tobacco, and Firearms (ATF), may grant relief from that prohibition if he is satisfied that certain preconditions are established. Since 1992, every appropriations law for ATF has specified that no appropriated funds may be used to act on applications for such relief. The question presented is whether federal district courts may, despite Congress's appropriations decision, grant relief to felons convicted of possessing firearms. The Department argued that courts lack authority to make such decisions.

- **Office of Solicitor General Filed Brief as *Amicus Curiae* in Due Process Case.** On April 15, the Department filed a brief as *amicus curiae* in support of a petition seeking a writ of certiorari in *Connecticut Department of Public Safety* v. *Doe*. The question presented is whether the court of appeals erroneously concluded that Connecticut's sex offender registration law violates due process by allowing the publication of true and accurate information about an offender's conviction history without first providing him with a hearing about his "current dangerousness." The Department argued that the absence of such a hearing does not offend due process.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

January 22, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- Nothing to report.

B. THIS WEEK

- Nothing to report.

C. LAST WEEK

- **Office of Solicitor General Argued in Tax Case.** On January 14, the Department argued as petitioner in *United States* v. *Craft*. The question presented is whether a tax lien may properly reach a delinquent taxpayer's rights regarding property held in a tenancy by the entirety. The Department argued that a tax lien does attach to such property rights.

- **Office of Solicitor General Argued as *Amicus Curiae* in Prison Litigation Reform Act Case.** On January 14, the Department argued as *amicus curiae* in support of petitioners in *Porter* v. *Nussle*. The question presented is whether the exhaustion provision of the PLRA requires an inmate to exhaust available administrative remedies before filing an action against a corrections officer alleging use of excessive force. The Department argued that exhaustion is required because an action challenging a particular instance of alleged excessive force is an action with respect to "prison conditions" within the meaning of the PLRA's exhaustion requirement.

- **Office of Solicitor General Argued in Labor Case.** On January 15, the Department argued as respondent in *Hoffman Plastic Compound* v. *NLRB*. The question presented is whether the NLRB exceeded its remedial authority by awarding backpay against an employer for discriminating against an employee for union-organizing activity, when the employee was an undocumented alien not authorized to work in the United States. The Department argued that the Board properly awarded backpay up to the date the employer learned the employee was an undocumented alien.

- **Office of Solicitor General Argued as *Amicus Curiae* in Employment Discrimination Case.** On January 15, the Department argued as *amicus curiae* in support of petitioner in *Swierkiewicz* v. *Sorema N.A.* The question presented is whether a complaint in an employment discrimination suit under Title VII or the Age Discrimination in Employment Act must plead specific facts establishing a prima facie case of discrimination under the Supreme Court's decision in *McDonnell Douglas Corp* v. *Green*. The Department argued that the court of appeals' requirement that employment discrimination complaints include facts demonstrating a prima facie case is fundamentally flawed and that a complaint properly states a claim for relief when it meets the requirements of Federal Rule of Civil Procedure 8(a).

- **Office of Solicitor General Argued as *Amicus Curiae* in ERISA Case.** On January 16, the Department argued as *amicus curiae* in *Rush Prudential HMO, INC.* v. *Moran*. The question presented is whether Section 4-10 of the Illinois Health Maintenance Organization Act, which requires HMOs to "provide a mechanism for * * * review by a physician * * * in the event of a dispute between the primary care physician and the Health Maintenance Organization regarding the medical necessity of a covered service proposed by the primary care physician," is preempted by the Employment Retirement Income Security Act of 1974. The Department argued that the law is not preempted because, although it "relates to" ERISA plans, it "regulates insurance" within the meaning of ERISA's insurance savings clause and does not conflict with any specific provision of ERISA.

- **Office of Solicitor General Argued in Social Security Case.** On January 16, the Department argued as petitioner in *Barnhart* v. *Walton*. The questions presented are: (1) whether a social security claimant is entitled to disability benefits even though his physical or mental disability will not prevent him from working for longer than twelve months; and (2) whether a claimant is entitled to a "trial work period" of up to nine months even though his alleged impairment no longer prevents him from working at the time his disability insurance benefits claim is adjudicated. The Department argued that claimants are not entitled to social security benefits, or to a trial work period, under such circumstances.

- **Supreme Court Decided First Amendment Case.** On January 15, the Supreme Court issued its decision in *Thomas* v. *Chicago Park District*. The questions presented were: 1) whether immediate access to the courts following a denial of a permit for core political speech in a traditional public forum constitutes prompt judicial review; 2) whether an ordinance requiring a permit for core political speech in a traditional public forum must include each of the procedural safeguards established in *Freedman* v. *Maryland*; 3) whether a content-neutral ordinance requiring a permit for core political

speech in a traditional public forum should be analyzed as a prior restraint or as a "time, place, or manner" restriction; 4) whether the petitioner properly brought a facial challenge to the permit ordinance; and 5) whether an ordinance requiring a permit for core political speech in a traditional public forum may include discretion to issue or withhold permits. The Department argued as *amicus curiae* that the ordinance is a valid "time, place, or manner" restriction that does not impose a "prior restraint" on speech. The Department also argued that First Amendment procedural standards were satisfied because individuals may obtain judicial review if their permit requests are denied The Supreme Court held in a unanimous opinion that the park's ordinance constituted a facially valid "time, place, or manner" restriction, but did not reach the issue whether *Freedman*'s requirement of prompt judicial review requires a prompt judicial determination.

- **Supreme Court Decided Fourth Amendment Case.** On January 15, the Supreme Court issued its decision in *United States* v. *Arvizu*. The questions presented were: (1) whether the Fourth Amendment's totality-of-the-circumstances test for reasonable suspicion allows a court to exclude from consideration certain facts observed by a Border Patrol officer; and (2) whether reasonable suspicion supported the officer's decision in this case to stop respondent's vehicle near the Mexican border. The Department argued that reasonable suspicion analysis requires an examination of all facts known to the acting officer, and that the facts in this case required a finding that there was reasonable suspicion. The Supreme Court unanimously agreed that the Ninth Circuit had erred in excluding factors from the "totality of the circumstances" analysis, which supported the officer's reasonable suspicion in this case.

- **Supreme Court Decided Employment Discrimination Case.** On January 15, the Supreme Court issued its decision in *EEOC* v. *Waffle House*. The question presented was whether an employee's agreement to arbitrate employment-related disputes with an employer bars the EEOC, in an enforcement action against the employer, from obtaining victim-specific remedies such as backpay, reinstatement, and damages. The Department contended that private arbitration agreements do not limit the EEOC's authority to obtain such remedies. The Supreme Court agreed in an opinion written by Justice Stevens, joined by Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer. Justice Thomas filed a dissenting opinion, which was joined by the Chief Justice and Justice Scalia.

- **Supreme Court Decided Telecommunications Case.** On January 16, the Supreme Court issued its decision in the consolidated cases of *National Cable Television Ass'n* v. *Gulf Power Co., et al.* and *FCC* v. *Gulf Power Co.* In 1978, Congress enacted the Pole Attachments Act to reduce monopoly rents charged to cable operators by utility companies for attaching cable distribution facilities. The Department contended that the Pole Attachments Act, as reasonably interpreted by the agency, requires the FCC to regulate all pole attachments by cable television systems or telecommunications service providers, including attachments that provide high-speed Internet access and cable television, as well as attachments by providers of wireless telecommunications services. The Supreme Court agreed, in an opinion by Justice Kennedy, joined by the Chief Justice, and Justices Stevens, Scalia, Ginsburg, and Breyer, and joined in part by Justices Souter and Thomas. Justice Thomas filed an opinion concurring in part and dissenting in part, in which Justice Souter joined. Justice O'Connor took no part in the consideration or decision of the cases.

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U.S. Department of Justice
Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

November 19, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- **Office of Solicitor General to Argue as Intervenor in State Sovereign Immunity Case.** On November 26, the Department will argue as an intervenor in *Raygor* v. *Regents of the University of Minnesota*. The question presented is whether the tolling provision of the federal supplemental jurisdiction statute is unconstitutional as applied to claims against a nonconsenting state defendant. The Department will argue that the Court should avoid the constitutional question by construing the statute as not applying to state-law claims against non-consenting state defendants.

- **Office of Solicitor General to Argue in Fourth Amendment Case.** On November 27, the Department will argue as petitioner in *United States* v. *Arvizu*. The questions presented are (1) whether the court of appeals erroneously departed from the totality-of-the-circumstances test that governs reasonable-suspicion determinations under the Fourth Amendment by holding that seven facts observed by a law enforcement officer were entitled to no weight and could not be considered as a matter of law, and (2) whether, under the totality-of-the-circumstances test, the Border Patrol agent in this case had reasonable suspicion that justified a stop of a vehicle near the Mexican border. The Department will argue that, as the Supreme Court has held repeatedly, reasonable-suspicion analysis requires examination of all the facts known to the officer who makes an investigative stop. The Department will further argue that, when all of the facts are considered, reasonable suspicion supported the officer's decision to stop respondent and ask questions of the respondent.

- **Office of Solicitor General to Argue as *Amicus Curiae* in "Family Educational Rights and Privacy Act" Case.** On November 27, the Department will argue as *amicus curiae* in support of petitioner in *Owasso Independent School District* v. *Falvo*. The question presented is whether

allowing students to grade each other's homework and tests as their teacher goes over the correct answers aloud in class violates FERPA's prohibition against the release of "education records." The Department will argue that the practice does not violate FERPA and urge the court to hold that "education records" covered by FERPA consist of documents retained or preserved as institutional records, but not student homework or classroom work.

- **Solicitor General to Argue Child Online Protection Act Case.** On November 28, the Department will argue as petitioner in *Ashcroft* v. *ACLU*. The Child Online Protection Act (COPA) prohibits any communication for commercial purposes, by means of the World Wide Web, that is available to minors and that includes material that is "harmful to minors," unless good-faith efforts are made to prevent children from obtaining access to such material. The question presented is whether the court of appeals properly barred enforcement of COPA on First Amendment grounds because COPA relies on "community standards" to identify material that is "harmful to minors." The Solicitor General will argue that reference to community standards has long been a component of both state "harmful-to-minors" laws and state and federal obscenity laws and that there is nothing unreasonable about requiring a commercial entity that chooses to operate a business on a nationwide medium to observe community standards throughout the nation.

- **Office of Solicitor General to Argue Fifth Amendment Case.** On November 28, the Department will argue as *amicus curiae* in support of petitioner in *McKune* v. *Lile*. The question presented is whether the Fifth Amendment privilege against compelled self-incrimination prevents a State from encouraging incarcerated sexual offenders to participate in a clinical rehabilitative program, in which participants must accept responsibility for their offenses, by conditioning the availability of certain institutional privileges on participation in the program. The Department will argue that nothing in the Self Incrimination Clause precludes a State from adopting, or encouraging inmates to participate in, a rehabilitative program in which information about a participant's past sexual history that indicates a current risk may be revealed. In light of the significant restrictions inherent in any sound penal regime, and in the absence of arbitrary state action, the minor changes in the privileges available to a prisoner who declines to participate do not result in unconstitutional compulsion. Moreover, any burden on Fifth Amendment rights is justified by the State's legitimate penological interests in rehabilitating convicted sexual offenders.

B. THIS WEEK

- **Office of Solicitor General To File Brief in Coal Act Case.** On November 19, the Department anticipates filing a brief as petitioner in *Barnhart* v. *Peabody Coal Co.* The Coal Industry Retiree Health Benefit Act of 1992 established the United Mine Workers of America Combined Benefit Fund to ensure the continued provision of health-care benefits to retired coal miners and their dependents. The question presented is whether the Commissioner's assignments of responsibility for retired miners that were made on or after October 1, 1993, are void because the Act provides that the Commissioner of Social Security "shall, before October 1, 1993," assign responsibility for retired miners.

- **Office of Solicitor General To File Brief in Public Housing Cases.** On November 20, the Department anticipates filing a brief as petitioner in *HUD* v. *Rucker*, which on October 1 was consolidated with *Oakland Housing Authority* v. *Rucker*. The question presented is whether a statutorily required provision in a public housing lease — stating that any drug-related activity by the tenant, the tenant's family, or anyone under the tenant's control is cause to terminate the lease — is violated by any such drug-related activity, regardless of what the tenant knew or had reason to know.

- **Office of Solicitor General to File Brief in Social Security Case.** On November 21, the Department anticipates filing a brief as petitioner in *Barnhart* v. *Walton*. Title II and Title XVI of the Social Security Act define disability as the "inability to engage in any substantial gainful activity by reason of any . . . impairment which can be expected to result in death or which has lasted or can be expected to last for . . . not less than 12 months." Under Title II, once a claimant is entitled to disability insurance benefits, the claimant may engage in substantial gainful activity during a "trial work period" of up to nine (not necessarily consecutive) months without being disqualified from receiving benefits. The questions presented are: (1) whether a claimant is entitled to disability benefits under Titles II and XVI of the Social Security Act if he has an impairment that has lasted or can be expected to last at least 12 months, but his inability to engage in substantial gainful activity by reason of that impairment has not lasted or cannot be expected to last 12 months; and (2) whether a claimant under Title II may be under a disability and entitled to a "trial work period" if, at the time his disability insurance benefits claim is adjudicated, his impairment no longer prevents him from performing substantial gainful activity.

C. LAST WEEK

- **Supreme Court Decided Civil Service Reform Act Case.** On November 13, the Supreme Court issued its decision in *United States Postal Service* v. *Gregory*. The question presented was whether, in disciplining or removing an employee for misconduct pursuant to the Civil Service Reform Act of 1978, a federal agency may take account of prior disciplinary actions that are the subject of pending grievance proceedings. The Department argued that agencies may consider an employee's disciplinary record without regard to pending grievance proceedings. The Supreme Court unanimously agreed.

- **Supreme Court Decided Fair Credit Reporting Act Case.** On November 13, the Supreme Court issued its decision in *TRW, Inc.* v. *Andrews*. The question presented was whether the Fair Credit Reporting Act's limitations period begins to run at the time of the alleged violation even if the plaintiff has no reason to know that he has been injured. The Department had filed a brief and argued in support of the petitioner, contending that a "discovery rule" is appropriate and that the Act's limitation period should run from the time the aggrieved party knows or should know of his alleged injury. A unanimous Supreme Court disagreed, reasoning that the Act's text and structure demonstrate that Congress intended to preclude the use of a discovery rule.

- **Office of Solicitor General Filed Brief as *Amicus Curiae* in Takings Clause Case.** On November 15, the Department filed a brief as *amicus curiae* in support of respondents in *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*. The question presented is whether the court of appeal properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause. We argued that, because the temporary development moratorium was reasonably designed to preserve the status quo pending completion of a comprehensive land-use plan, it did not effect a taking of property.

- **Office of Solicitor General Filed Brief as *Amicus Curiae* in Employment Discrimination Case.** On November 16, the Department filed a brief as *amicus curiae* in support of petitioner in *Skierkiewicz* v. *Sorema N.A.* The question presented is whether a complaint in an employment discrimination suit under Title VII or the Age Discrimination in Employment Act must plead specific facts establishing a prima facie case of discrimination under the Supreme Court's decision in *McDonnell Douglas Corp* v. *Green*. We argue that the court of appeals' requirement that employment discrimination complaints include facts demonstrating a prima facie case is fundamentally flawed and that a complaint properly states a claim for relief when it meets the requirements of Federal Rule of Civil Procedure 8(a)(2).

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

November 26, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- **Office of Solicitor General To Argue as *Amicus Curiae* in Medicaid Case.** On December 3, the Department will argue as *amicus curiae* in support of the petitioner in *Wisconsin Department of Health and Family Services v. Blumer*. Through the Medicaid program, the federal government contributes funds to States in order to provide medical services to eligible needy persons. Federal law denies Medicaid eligibility to a married individual who receives institutional medical care if she has a spouse who is not institutionalized (the "community spouse"), and if that community spouse possesses financial resources above a specified level. The question presented is whether a State may, in determining the maximum permissible resource level of a community spouse, consider possible income transfers from an institutionalized spouse. The Department will argue that federal law does permit States to consider such income transfers.

- **Office of Solicitor General To Argue as *Amicus Curiae* in First Amendment Case.** On December 3, the Department will argue as *amicus curiae* in support of the respondent in *Thomas v. Chicago Park District*. A city ordinance requires individuals to obtain a permit before conducting "events involving more than fifty individuals" in municipal parks. The Department will argue that petitioner's facial challenge to the ordinance is inappropriate, and will contend that the ordinance does not impose a "prior restraint" on speech. The Department will also argue that First Amendment procedural standards are satisfied because individuals may obtain judicial review if their permit requests are denied.

• **Office of Solicitor General To Argue Related Telecommunications Act Cases.** On December 5, the Department will argue as respondent in *Mathias v. Worldcom Technologies*, and as petitioner in *United States v. Public Service Commission of Maryland*. The Telecommunications Act of 1996 opens local markets to competition through interconnection agreements between incumbent local exchange carriers and potential competitors. The Telecommunications Act grants authority to state public utility commissions to regulate such interconnection agreements, and provides that the exercise of such authority is reviewable in federal court. The questions presented in *Mathias v. Worldcom Technologies* are: (i) whether a state commission's action relating to enforcement of an interconnection agreement is reviewable in federal court, (ii) whether the participation of a state commission in the Act's regulatory scheme constitutes a waiver of Eleventh Amendment immunity, and (iii) whether *Ex parte Young* allows federal suit for prospective relief against state commissioners for ongoing violations of federal law in the performance of federal regulatory functions. The Department will argue that such an action is reviewable in federal court, that a State's participation under the Act does constitute an Eleventh Amendment waiver, and that *Ex parte Young* does permit suits for injunctive relief.

The related question presented in *United States v. Public Service Commission of Maryland* is whether a federal district court has subject matter jurisdiction under 28 U.S.C. 1331 to determine whether a state public utility commission's order interpreting or enforcing an interconnection agreement violates the Act. The Department will argue in favor of such subject matter jurisdiction.

B. THIS WEEK

• **Supreme Court Grants Certiorari in Attorney's Fees Case.** On November 26, the Supreme Court granted certiorari in *Gisbrecht v. Massanari*. The question presented is whether attorney's fee awards under the Social Security Act should be based on an hourly-based "lodestar" calculation, rather than a fixed percentage of the benefits awarded. The Department opposed the petition for certiorari in this case, and argued that the district court had properly applied the lodestar method.

• **Office of Solicitor General To Argue as Intervenor in State Sovereign Immunity Case.** On November 26, the Department will argue as an intervenor in *Raygor v. Regents of the University of Minnesota*. The question presented is whether the tolling provision of the federal supplemental jurisdiction statute is unconstitutional as applied to claims against a nonconsenting state defendant. The Department will argue that the Court should avoid that constitutional question by construing the statute's tolling provision as not applying to state-law claims brought against nonconsenting state defendants.

• **Office of Solicitor General To Argue Fourth Amendment Case.** On November 27, the Department will argue as petitioner in *United States v. Arvizu*. The questions presented are: (i) whether the Fourth Amendment's totality-of-the-circumstances test for reasonable suspicion allows a court to exclude from consideration certain facts observed by a Border Patrol officer, and (ii) whether

reasonable suspicion supported the officer's decision in this case to stop respondent's vehicle near the Mexican border. The Department will argue that reasonable suspicion analysis requires an examination of all facts known to the acting officer, and that the facts in this case required a finding that there was reasonable suspicion.

- **Office of Solicitor General To Argue as *Amicus Curiae* in Education Case.** On November 27, the Department will argue as *amicus curiae* in support of petitioner in *Owasso Independent School District v. Falvo*. The question presented is whether allowing students to grade each other's homework and tests in class violates a prohibition in the Family Educational Rights and Privacy Act against the release of "education records." The Department will argue that the practice does not violate the Act and will urge the court to hold that the term "education records" includes documents retained or preserved as institutional records, but does not include student homework or classroom work.

- **Solicitor General To Argue Child Online Protection Act Case.** On November 28, the Department will argue as petitioner in *Ashcroft v. ACLU*. The Child Online Protection Act (COPA) forbids the commercial communication through the World Wide Web of any materials that are both available to and harmful to minors, unless good-faith efforts are made to prevent children from accessing such materials. The question presented is whether the Act violates the First Amendment by relying on a "community standards" test to identify materials that are harmful to minors. The Solicitor General will argue that reference to community standards is a permissible, well-established component of state and federal laws, and that there is nothing unreasonable about requiring commercial entities that operate within a nationwide medium to observe community standards throughout the nation.

- **Office of Solicitor General To Argue Fifth Amendment Case.** On November 28, the Department will argue as *amicus curiae* in support of petitioner in *McKune v. Lile*. The question presented is whether a State's rehabilitative program for incarcerated sexual offenders violates the Fifth Amendment privilege against compelled self-incrimination, because the program conditions institutional privileges on the participants' accepting responsibility for their offenses without barring the use of such confessions in future criminal prosecutions. The Department will argue that conditioning institutional privileges in this way does not unconstitutionally coerce participants to incriminate themselves, and that providing such incentives is constitutionally reasonable in light of the State's penological interests in rehabilitating convicted sexual offenders.

C. LAST WEEK

- **Office of Solicitor General Petitioned for Supreme Court Review in Firearms Case.** On November 19, the Department filed a petition for a writ of certioriari in *United States v. Bean*. Under federal law, a person convicted of a felony is prohibited from possessing firearms, unless the Secretary of the Treasury, acting through the Bureau of Alcohol, Tobacco, and Firearms (ATF), determines that relief from that prohibition is warranted. Since 1992, every ATF appropriations law

has forbidden that agency from using appropriated funds to act on such applications for relief. The question presented is whether, despite the appropriations bar, a federal district court may restore firearms privileges to a person convicted of a felony. The Department argued that district courts could not properly circumvent the congressional appropriations bar.

- **Office of Solicitor General Filed Brief in Coal Act Case.** On November 19, the Department filed a brief as petitioner in *Barnhart v. Peabody Coal Co.* The Coal Industry Retiree Health Benefit Act of 1992 established the United Mine Workers of America Combined Benefit Fund to ensure the continued provision of health-care benefits to retired coal miners and their dependents. The question presented is whether the Commissioner's assignments of responsibility for retired miners that were made on or after October 1, 1993, are void because the Act provides that the Commissioner of Social Security shall assign responsibility for retired miners before October 1, 1993.

- **Office of Solicitor General Filed Brief in Public Housing Cases.** On November 20, the Department filed a brief as petitioner in *HUD v. Rucker*, a case that has been consolidated with *Oakland Housing Authority v. Rucker*. The question presented is whether a statutorily required provision in a public housing lease — which provides that any drug-related activity by the tenant, the tenant's family, or anyone under the tenant's control provides cause to terminate the lease — is breached by drug-related activity of which the tenant did not know or have reason to know.

- **Office of Solicitor General Filed Brief in Social Security Case.** On November 21, the Department filed a brief as petitioner in *Barnhart v. Walton*. The Social Security Act defines disability as the "inability to engage in any substantial gainful activity by reason of any . . . impairment which can be expected to result in death or which has lasted or can be expected to last for . . . not less than 12 months." A claimant entitled to disability benefits may engage in a "trial work period" of up to nine months without being disqualified from receiving benefits. The questions presented are: (i) whether a claimant is entitled to benefits if his impairment has lasted or can be expected to last at least 12 months, but his inability to engage in substantial gainful activity has not lasted and cannot be expected to last 12 months; and (ii) whether a disability claimant is entitled to a "trial work period" if his impairment no longer prevents him from performing substantial gainful activity at the time his disability claim is decided.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

February 4, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- Nothing to report.

B. THIS WEEK

- Nothing to report.

C. LAST WEEK

- **Office of Solicitor General Filed Brief as *Amicus Curiae* in Habeas Case.** On January 29, the Department filed a brief supporting the petitioners in *Bell* v. *Cone*. The questions presented are: (i) whether a defendant's claim of ineffective assistance of counsel may presume prejudice when counsel does not present mitigating evidence and does not offer a closing argument during a capital sentencing hearing, and (ii) if so, whether a state court's decision to deny such a claim involved an unreasonable application of clearly established federal law. The Department argued that prejudice should not be presumed under such circumstances, because allegations of attorney error do not constitute a *per se* constitutional violation.

- **Supreme Court Orders Expedited Hearing in Direct Appeal of Census Case.** On January 22, the Supreme Court postponed further consideration of jurisdiction in *Utah* v. *Evans* until a hearing on the merits, and on January 24, the Supreme Court ordered an expedited schedule for briefing and oral argument in that case. The questions presented are: (i) whether the use in the 2000

Census of imputation violated 13 U.S.C. 195, which prohibits "the use of the statistical method known as 'sampling'" in determining the population "for purposes of apportionment of Representatives in Congress among the several States," and (ii) whether use of imputation violated the Census Clause of the Constitution, Art. I, § 2, Cl. 3. Imputation is a process whereby the number of residents of a housing unit is determined based on the known number of residents of a nearby similar unit. The Department had argued that the imputation was permissible and requested that the Supreme Court affirm the district court's judgment. Argument in the case will be held March 27.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

February 26, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

Nothing to report.

B. THIS WEEK

- **Office of Solicitor General To Argue as *Amicus Curiae* in Disabilities Case.** On February 27, the Department will argue as *amicus curiae* in support of petitioner in *Chevron, U.S.A., Inc.* v. *Echazabal*. The question presented is whether the Americans with Disabilities Act permits an employer to refuse to hire an applicant because his job performance would, as a result of his disability, pose a direct threat to his own health or safety. The Department will argue that the EEOC's regulations allowing such refusals implement a valid, reasonable interpretation of the Act.

- **Office of Solicitor General To Argue in First Amendment Case.** On February 26, the Department will argue as petitioner in *Thompson* v. *Western States Medical Center*. The Food and Drug Administration Modernization Act of 1997 (FDAMA) exempts drugs compounded by pharmacists from various requirements of the federal Food, Drug, and Cosmetic Act. The question presented is whether FDAMA violates the First Amendment by limiting that exemption to pharmacists who do not solicit prescriptions for or advertise particular compounded drugs.

- **Office of Solicitor General Argued in Eleventh Amendment Case.** On February 25, the Department argued in support of petitioner Federal Maritime Commission in *Federal Maritime*

Commission v. *South Carolina State Ports Authority*. The question presented is whether the Eleventh Amendment prevents the Federal Maritime Commission from resolving, in an administrative non-judicial proceeding, a private party's claim that the State's agency violated the Shipping Act of 1984.

- **Office of Solicitor General Argued as *Amicus Curiae* in Eleventh Amendment Case.** On February 25, the Department argued as *amicus curiae* in support of petitioner in *Lapides* v. *Board of Regents of University of Georgia System*. The question presented is whether a State that voluntarily removes a case to federal court waives its Eleventh Amendment immunity, when state law does not expressly authorize the removing official to consent to suit. The Department argued that if a State voluntarily invokes a federal forum through removal, it waives its immunity from being sued in that forum.

B. LAST WEEK

- **Supreme Court Decided Medicaid Case.** On February 20, the Supreme Court issued its decision in *Wisconsin Department of Health and Family Services* v. *Blumer*. Through Medicaid, the federal government contributes funds to States for eligible needy persons' medical care. Federal law denies Medicaid eligibility to any married person who receives institutional medical care if she has a spouse who is not institutionalized (the "community spouse") and if that community spouse possesses financial resources above a specified level. The question presented was whether a State may, in assessing whether a community spouse's resource level exceeds that permissible level, consider income that the community spouse could receive from the institutionalized spouse. The Department argued that federal law allows States to consider such income transfers in assessing a community spouse's resources. The Supreme Court agreed, holding that the State's calculation method is consistent with the text and purpose of Medicaid's statutory and regulatory framework. Justice Stevens filed a dissenting opinion, which Justices O'Connor and Scalia joined.

- **Supreme Court Decided Education Case.** On February 19, the Supreme Court issued its decision in *Owasso Independent School District* v. *Falvo*. The question presented was whether allowing students to grade each other's homework and tests in class and orally to report the results to their teacher violates the Family Educational Rights and Privacy Act, which bars the release of students' "education records" that are "maintained by * * * a person acting for" a school or educational agency. The Department argued that such oral reporting did not violate the Act. The Supreme Court agreed, holding that the Act does not regulate students' conduct because the students do not "act[] for" the school; the Court also held that students did not "maintain" their peers' classwork grades for purposes of the Act. Although the Court's result was unanimous, Justice Scalia filed a separate opinion concurring in the judgment.

- **Supreme Court Decided Coal Act Case.** On February 19, the Supreme Court issued its decision in *Massanari* v. *Sigmon Coal District*. The question presented was whether the Coal

Industry Retiree Health Benefit Act of 1992, which provides lifetime health benefit payments to retired miners who were promised such benefits under collective bargaining agreements, permits the Commissioner of Social Security to charge a now-defunct mining company's "successor in interest" for benefit payments that must be made to the former employees of its predecessor. The Department argued that the Act grants the Commissioner such authority because a successor in interest is, within the terms of the statute, a "related person" to a "signatory operator." The Supreme Court disagreed, and construed the term "related person" narrowly, so as to cover only three statutorily specified categories of entities. Justice Stevens filed a dissenting opinion, which Justices O'Connor and Breyer joined.

- **Solicitor General Argued as *Amicus Curiae* in Establishment Clause Case.** On February 20, the Department argued as *amicus curiae* in support of petitioners in *Zelman* v. *Simmons-Harris*, which was consolidated with *Hanna Perkins School* v. *Simmons-Harris* and *Taylor* v. *Simmons-Harris*. The question presented is whether the Establishment Clause prevents a State from providing tuition aid as part of a general assistance program to the parents of children who attend failing public schools, if parents may use such aid to enroll their children in any private school they choose, without regard to religious affiliation. The Department argued that the program did not constitute an impermissible government "endorsement" of religion because it was religiously neutral in allowing parents to choose among a variety of educational options.

- **Office of Solicitor General Argued in Public Housing Cases.** On February 19, the Department argued as petitioner in *HUD* v. *Rucker*, which was consolidated with *Oakland Housing Authority* v. *Rucker*. The question presented is whether federal public housing tenants may be evicted for breaching a statutorily required lease provision — which provides that any drug-related activity by the tenant, the tenant's family, or anyone under the tenant's control is cause to terminate the lease — if the tenants did not know or have reason to know of the drug-related activity at issue.

- **Office of Solicitor General Filed Brief in Tax Case.** On February 22, the Department will file a brief as petitioner in *Fior D'Italia, Inc.* v. *United States*. The question presented is whether the government may reasonably estimate an employer's share of the Federal Insurance Contributions Act tax on employee tip income using the aggregate amount of tips received by all employees, rather than conducting individual employee audits.

- **Office of Solicitor General Filed Brief in Criminal Case.** On February 22, the Department filed a brief as respondent in *Harris* v. *United States*. The question presented is whether a finding that defendant "brandished" a firearm, for purposes of sentencing under 18 U.S.C. 924(c)(1)(A), must be alleged in the indictment and proved beyond a reasonable doubt, if such a finding would increase the applicable statutory minimum sentence but would not affect defendant's maximum sentence. The Department argued that such procedures are not constitutionally required.

- **Office of Solicitor General Filed Brief in Due Process Case.** On February 19, the Department filed a brief as petitioner in *United States* v. *Ruiz*. The questions presented are (i)

whether, before pleading guilty, a criminal defendant is constitutionally entitled to obtain all exculpatory information possessed by the government, including impeachment material, and, (ii) if so, whether that right may be waived by the terms of a plea agreement.

- **Office of Solicitor General Filed Brief in Fourth Amendment Case.** On February 19, the Department filed a brief as petitioner in *United States* v. *Drayton*. The question presented is whether a Fourth Amendment "seizure" occurs when a police officer informs a bus passenger that he is conducting drug and illegal weapons interdiction and asks the passenger for consent to search, if another officer stays at the front of the bus without blocking the exit.

- **Office of Solicitor General Filed Brief in Criminal Case.** On February 19, the Department filed a brief as petitioner in *United States* v. *Cotton*. The question presented is whether a defendant's enhanced sentence may be affirmed, despite his indictment's omission of the fact that justified his increased maximum sentence, because the defendant failed to object, because the evidence supporting the operative fact was overwhelming, and because the defendant was on notice that the fact at issue could be used to seek an enhanced sentence.

- **Office of Solicitor General Filed Brief in Social Security Case.** On February 19, the Department filed a brief as respondent in *Gisbrecht* v. *Barnhart*. Reasonable attorney's fees under 42 U.S.C. 406(b) are available as deductions from a prevailing claimant's back benefit award of social security benefits. The question presented is whether such reasonable attorney's fees should be calculated using the lodestar method — which essentially multiplies the hours the attorney worked by a reasonable hourly rate — or whether the court may rebuttably presume that the attorney should receive the maximum award permitted by the statute. The Department argued that courts should employ the lodestar method.

- **Office of Solicitor General Filed Brief as *Amicus Curiae* in Automotive Safety Case.** On February 19, the Department filed a brief as *amicus curiae* in support of petitioners in *City of Columbus* v. *Ours Garage and Wrecker Service*. The Federal Aviation Administration Authorization Act of 1994 prohibits States from regulating the price, route, or service of any motor carrier, but the Act does not diminish States' "safety regulatory authority * * * with respect to motor vehicles." 49 U.S.C. 14501(c)(2)(A). The question presented is whether a State's safety regulatory authority allows the State to delegate its regulatory power to municipalities within the State's borders. The Department argued that the Act does permit such a delegation of authority.

- **Office of Solicitor General Filed Brief as *Amicus Curiae* in Alien Diversity Case.** On February 19, the Department filed a brief as *amicus curiae* in support of petitioners in *Chase Manhattan Bank* v. *Traffic Stream (BVI) Infrastructure, Ltd.* The question presented is whether corporations organized under the laws of United Kingdom Overseas Territories are "citizens or subjects of a foreign state" for purposes of alienage diversity jurisdiction under 28 U.S.C. 1332(a)(2). The Department argued that such corporations are properly subject to federal jurisdiction.

- **Office of Solicitor General Filed Brief as *Amicus Curiae* in Qualified Immunity Case.** On February 19, the Department filed a brief as *amicus curiae* in support of petitioner in *Hope* v. *Pelzer*. The question presented is whether tying a prisoner to a "hitching post" for an extended, painful period of time violated clearly established Eighth Amendment rights. The Department argued that judicial precedents that were "materially similar" to the facts alleged would have informed a reasonable officer such conduct was unconstitutional.

- **Supreme Court Granted Certiorari in Copyright Case.** On February 19, the Supreme Court granted certiorari in *Eldred* v. *Ashcroft*. The questions presented are whether the Copyright Term Extension Act of 1998, which provides a 20-year extension for all copyrights, violates the First Amendment or the Constitution's Copyright Clause. The Department opposed petitioners' request for certiorari.

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U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

The Solicitor General

February 19, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- **Office of Solicitor General to Argue in Eleventh Amendment Case.** On February 25, the Department will argue in support of petitioner Federal Maritime Commission in *Federal Maritime Commission* v. *South Carolina State Ports Authority*. The question presented is whether the Eleventh Amendment prevents the Federal Maritime Commission from resolving, in an administrative non-judicial proceeding, a private party's claim that the State's agency violated the Shipping Act of 1984.

- **Office of Solicitor General to Argue as *Amicus Curiae* in Eleventh Amendment Case.** On February 25, the Department will argue as *amicus curiae* in support of petitioner in *Lapides* v. *Board of Regents of University of Georgia System*. The question presented is whether a State that voluntarily removes a case to federal court waives its Eleventh Amendment immunity, when state law does not expressly authorize the removing official to consent to suit. The Department will argue that if a State voluntarily invokes a federal forum through removal, it waives its immunity from being sued in that forum.

- **Office of Solicitor General to Argue in First Amendment Case.** On February 26, the Department will argue as petitioner in *Thompson* v. *Western States Medical Center*. The Food and Drug Administration Modernization Act of 1997 (FDAMA) provides a limited exemption from the new drug approval (and certain other) requirements of the Federal Food, Drug, and Cosmetic Act, for drugs compounded by pharmacists. The question presented is whether FDAMA's limitation of that

exemption to pharmacists who do not solicit prescriptions for or advertise particular compounded drugs is consistent with the First Amendment.

- **Office of Solicitor General to Argue as *Amicus Curiae* in Disabilities Case.** On February 27, the Department will argue as *amicus curiae* in support of petitioner in *Chevron, U.S.A., Inc.* v. *Echazabal*. The question presented is whether the Americans with Disabilities Act permits an employer to refuse to hire a job applicant because allowing him to fill the post at issue would, as a result of his disability, pose a direct threat to his own health or safety. The Department will argue that the EEOC regulations, which allow such refusals to hire, implement a reasonable interpretation of the Act and are therefore valid.

- **Office of Solicitor General to File Brief in Tax Case.** On February 22, the Department will file a brief as petitioner in *Fior D'Italia, Inc.* v. *United States*. The question presented is whether the employer's share of the Federal Insurance Contributions Act (FICA) tax on employee tip income must be determined by accumulating the result of individual audits of individual employees or may instead be based on a reasonable estimate of the aggregate amount of tips received by all employees.

B. THIS WEEK

- **Office of Solicitor General to Argue in Public Housing Cases.** On February 19, the Department will argue as petitioner in *HUD* v. *Rucker*, a case that has been consolidated with *Oakland Housing Authority* v. *Rucker*. The question presented is whether a statutorily required provision in a public housing lease — which provides that any drug-related activity by the tenant, the tenant's family, or anyone under the tenant's control provides cause to terminate the lease — is breached by drug-related activity of which the tenant did not know or have reason to know.

- **Solicitor General to Argue as *Amicus Curiae* in School Voucher Case.** On February 20, the Department will argue as *amicus curiae* in support of the petitioners in *Zelman* v. *Simmons-Harris*, which the Supreme Court has ordered consolidated with *Hanna Perkins School* v. *Simmons-Harris* and *Taylor* v. *Simmons-Harris*. The question presented is whether the Establishment Clause of the First Amendment prevents a State from providing tuition aid as part of a general assistance program to the parents of children who attend failing public schools and authorizing the parents to use that aid to enroll their children in a private school of their own choosing, without regard to whether the school is religiously affiliated. The Department will argue that the program at issue survives constitutional scrutiny.

- **Office of Solicitor General to File Brief in Criminal Case.** On February 19, the Department will file a brief as petitioner in *United States* v. *Ruiz*. The question presented is whether before pleading guilty, a criminal defendant has a constitutional right to obtain exculpatory information, including impeachment material, from the government, and, if so, whether that right may be waived through a plea agreement.

- **Office of Solicitor General to File Brief in Criminal Case.** On February 19, the Department will file a brief as petitioner in *United States* v. *Drayton*. The question presented is whether an officer who informs a passenger on a bus that the officer is conducting drug and illegal weapons interdiction and asks the passenger for consent to search, while another officer stays at the front of the bus without blocking the exit, has effected a "seizure" of that passenger withing the meaning of the Fourth Amendment and *Florida* v. *Bostick*, 501 U.S. 429 (1991).

- **Office of Solicitor General to File Brief in Criminal Case.** On February 19, the Department will file a brief as petitioner in *United States* v. *Cotton*. The question presented is whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence requires a court of appeals to vacate the enhanced sentence notwithstanding the defendant's failure to object to the sentence, the government's having introduced overwhelming proof of the fact that supports the enhanced sentence, and the defendant's having had notice that the fact could be used to seek an enhanced sentence.

- **Office of Solicitor General to File Brief in Social Security Case.** On February 19, the Department will file a brief as respondent in *Gisbrecht* v. *Barnhart*. The question presented is whether a court, when determining a "reasonable" attorney's fee under 42 U.S.C. 406(b), which is paid as a deduction from the back benefit award of a claimant for social security benefits who obtained a favorable judgment in court, should calculate the fee based on the "lodestar" method (which multiplies the hours that the attorney worked by the reasonable hourly rate, with certain adjustments for other relevant factors), or instead by applying a rebuttable presumption that the attorney should receive 25% of the back benefit award, which is the maximum award permitted by the statute. The Department will argue that courts should employ the former method.

- **Office of Solicitor General to File Brief in Criminal Case.** On February 22, the Department will file a brief as respondent in *Harris* v. *United States*. As framed by the Court, the question presented is: Given that a finding of "brandishing," as used in 18 U.S.S. Sec. 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of "brandishing" be alleged in the indictment and proved beyond a reasonable doubt?

C. LAST WEEK

- **Office of Solicitor General Petitioned for Supreme Court Review in Criminal Case.** On February 14, the Department filed a petition for a writ of certiorari in *United States* v. *Recio*. The question presented is whether a conspiracy ends as a matter of law when the government frustrates its objective.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

March 4, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- Nothing to report.

B. THIS WEEK

- **Supreme Court Decided Federal Power Act Case.** On March 4, the Supreme Court issued its decision in the consolidated cases of *New York* v. *FERC* and *Enron Power Marketing, Inc.* v. *FERC*. The questions presented were: (1) whether the Federal Power Act (FPA) gives the Federal Energy Regulatory Commission (FERC) jurisdiction over intrastate electrical transmissions from generators to retail customers, where the transmission service is "unbundled" from State-regulated retail sale of electricity and the consumer can choose a preferred power supplier; and (2) whether FERC lacks jurisdiction to regulate retail transmission service sold as part of a "bundled" transaction between a public utility and its retail customer where the customer cannot choose a power supplier. The Department argued that Congress's express grant of authority over interstate transmission allows FERC to regulate all transmissions over power systems connected to an interstate power grid. Because the Act leaves to the States the regulation of retail electricity sales, the Department argued that FERC reasonably left such bundled retail sales to state jurisdiction. The Supreme Court agreed, holding that the FPA gives FERC jurisdiction over unbundled retail transmissions and that FERC's decision not to regulate bundled retail transmissions was a statutorily permissible policy choice. Justice Thomas filed a separate opinion concurring in part and dissenting in part, in which Justices Scalia and Kennedy joined.

• **Supreme Court Decided Criminal Procedure Case.** On March 4, the Supreme Court issued its decision in *United States* v. *Vonn*. The questions presented were: (i) whether a district court's violation of Federal Rule of Criminal Procedure 11(c)(3), by not informing a defendant at his guilty plea hearing that he would be entitled to the assistance of counsel if his case went to trial, is subject to plain error review when the defendant fails to raise his claim before the district court; and (ii) whether in applying plain error review, the court of appeals may consider parts of the official record other than the guilty plea colloquy to determine whether substantial rights were affected. The Department argued that plain error review does apply to such circumstances, and that appellate courts should review the entire record in deciding whether substantial rights were violated. The Supreme Court agreed, holding that a defendant who lets Rule 11 error pass without objection in the trial court has the burden to satisfy the plain-error rule and that a reviewing court may consult the entire record when considering the effect of any error on substantial rights. Justice Stevens filed a separate opinion concurring in part and dissenting in part.

• **Supreme Court Decided Tax Case.** On March 4, the Supreme Court issued its decision in *Young* v. *United States*. The question presented was whether the three-year time limit for establishing the priority and nondischargeability of federal income taxes under the Bankruptcy Code should be tolled for a period of time when the government was precluded from collecting such taxes by an automatic stay in the debtors' bankruptcy proceeding. The Supreme Court agreed with the Department and held in a unanimous opinion that the period is tolled during the pendency of a prior bankruptcy petition.

C. LAST WEEK

• **Office of Solicitor General Argued as *Amicus Curiae* in Disabilities Case.** On February 27, the Department argued as *amicus curiae* in support of petitioner in *Chevron, U.S.A., Inc.* v. *Echazabal*. The question presented is whether the Americans with Disabilities Act permits an employer to refuse to hire an applicant because his job performance would, as a result of his disability, pose a direct threat to his own health or safety. The Department argued that the EEOC's regulations allowing such refusals implement a valid, reasonable interpretation of the Act.

• **Office of Solicitor General Argued in First Amendment Case.** On February 26, the Department argued as petitioner in *Thompson* v. *Western States Medical Center*. The Food and Drug Administration Modernization Act of 1997 (FDAMA) exempts drugs compounded by pharmacists from various requirements of the federal Food, Drug, and Cosmetic Act. The question presented is whether FDAMA violates the First Amendment by limiting that exemption to pharmacists who do not solicit prescriptions for or advertise particular compounded drugs.

• **Office of Solicitor General Argued in Eleventh Amendment Case.** On February 25, the Department argued in support of petitioner Federal Maritime Commission in *Federal Maritime Commission* v. *South Carolina State Ports Authority*. The question presented is whether the Eleventh Amendment prevents the Federal Maritime Commission from resolving, in an administrative

non-judicial proceeding, a private party's claim that the State's agency violated the Shipping Act of 1984.

- **Office of Solicitor General Argued as *Amicus Curiae* in Eleventh Amendment Case.** On February 25, the Department argued as *amicus curiae* in support of petitioner in *Lapides* v. *Board of Regents of University of Georgia System*. The question presented is whether a State that voluntarily removes a case to federal court waives its Eleventh Amendment immunity, when state law does not expressly authorize the removing official to consent to suit. The Department argued that if a State voluntarily invokes a federal forum through removal, it waives its immunity from being sued in that forum.

- **Office of Solicitor General Filed Brief in Tax Case.** On February 25, the Department filed a brief as petitioner in *United States* v. *Fior D'Italia, Inc.* The question presented is whether the employer's share of the Federal Insurance Contribution Act (FICA) tax on employee tip income must be determined by accumulating the result of individual audits of individual employees or may instead be based on a reasonable estimate of the aggregate amount of tips received by all employees. The Department argued that the government could determine the employer's share based on a reasonable estimate of the aggregate amount of tips received.

- **Office of Solicitor General Filed Brief in Family Educational Rights and Privacy Act Case.** On February 25, the Department filed a brief as *amicus curiae* in support of petitioner in *Gonzaga University* v. *John Doe*. The question presented is whether a student may sue a private university for damages under 42 U.S.C. 1983 to enforce provisions of the Family Educational Rights and Privacy Act of 1974 (FERPA) which bar the furnishing of federal funding to educational institutions that have a policy or practice of permitting education records to be released to unauthorized persons. The Department argued that a cause of action under Section 1983 is not available to enforce FERPA's disclosure provisions.

- **Office of Solicitor General Filed Brief in Case Concerning Conduct of Class Actions.** On February 27, the Department filed a brief as *amicus curiae* in support of respondent in *Devlin* v. *Scardelletti*. The question presented is whether, or in what circumstances, a non-named class member who objects to a class action settlement may appeal a district court judgment approving the settlement. The Department argued that non-named class members who object to a class action settlement may appeal a judgment approving the settlement if they intervene for the purpose of taking such an appeal.

- **Office of Solicitor General Filed Brief in Case Concerning Availability of Punitive Damages.** On February 27, the Department filed a brief as *amicus curiae* in support of petitioners in *Barnes* v. *Gorman*. The question presented is whether, or in what circumstances, the intent to provide a punitive damages remedy may be imputed to Congress in an inferred private right of action. The Department argued that a court should not impute to Congress an intent to allow a punitive damages remedy absent a clear congressional directive.

• **Office of Solicitor General Filed Brief in Social Security Case.** On March 1, at the invitation of the Supreme Court, the Department filed a brief as *amicus curiae* in support of petitioner Washington Department of Social and Health Services' application for a stay in *Washington Department of Social and Health Services* v. *Guardianship Estate of Danny Keffeler*. The case concerns whether a state agency, acting as the "representative payee" for a foster child who is entitled to Social Security or Supplemental Security Income benefits, may use those benefit payments to defray the State's costs of providing foster care for the child.

• **Supreme Court Decided Employment Discrimination Case.** On February 26, the Supreme Court issued its decision in *Swierkiewicz* v. *Sorema N.A.* The question presented was whether a complaint in an employment discrimination suit must plead specific facts establishing a prima facie case of discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). The Department argued as *amicus curiae* that a complaint is satisfactory under Federal Rule of Civil Procedure 8(a)(2) so long as it provides the defendant fair notice of the character of the claim and the grounds upon which it rests. In a unanimous opinion, the Supreme Court agreed, holding that an employment discrimination complaint need not contain specific facts establishing a prima facie case under the *McDonnell Douglas* framework but instead must contain only a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2).

• **Supreme Court Decided Prison Litigation Reform Act Case.** On February 26, the Supreme Court issued its decision in *Porter* v. *Nussle*. The exhaustion provision of the Prison Litigation Reform Act (PLRA) directs that "[n]o action shall be brought with respect to prison conditions under * * * Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a) (Supp. V 1999). The question presented was whether the exhaustion provision requires an inmate to exhaust available administrative remedies before filing an action alleging a use of excessive force by a correction officer. The Department argued as *amicus curiae* that the term "prison conditions" applies both to actions that challenge particular instances of alleged misconduct and to actions that challenge practices that affect the prison population generally and therefore that the exhaustion provision was applicable to an action alleging a single use of excessive force by a correction officer. In a unanimous opinion, the Supreme Court agreed, holding that the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.

• **Supreme Court Decided State Sovereign Immunity Case.** On February 27, the Supreme Court issued its decision in *Raygor* v. *Regents of the University of Minnesota*. The question presented was whether 28 U.S.C. 1367(d), the tolling provision of the federal supplemental jurisdiction statute, which tolls the limitations period of pendent state law claims while they are pending in federal court and for 30 days after they are dismissed, is unconstitutional as applied to claims against a nonconsenting state defendant. The Department argued as an intervenor that to avoid the constitutional question posed, the supplemental jurisdiction statute should be construed as not applying to state-law claims asserted against a nonconsenting state defendant, or as not applying to state-law claims that are

dismissed for reasons independent of the supplemental jurisdiction statute, such as Eleventh Amendment immunity. The Supreme Court agreed, holding that the tolling provision does not apply to state-law claims asserted against nonconsenting state defendants that are dismissed on Eleventh Amendment grounds. The Court also held that Section 1367(a)'s grant of jurisdiction does not extend to claims against nonconsenting state defendants. Justice Ginsburg filed a separate opinion concurring in part and concurring in the judgment, and Justice Stevens filed a dissent in which Justices Souter and Breyer joined.

- **Supreme Court Limited Grant of Certiorari in Copyright Case.** On February 25, the Supreme Court limited its grant of certiorari in *Eldred* v. *Ashcroft* to the questions whether the Copyright Term Extension Act of 1998, which provides a 20-year extension for all copyrights, violates the First Amendment or the Constitution's Copyright Clause. The Department opposed the petition for certiorari.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

February 11, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- **Office of Solicitor General to Argue in Public Housing Cases.** On February 19, the Department will argue as petitioner in *HUD v. Rucker*, a case that has been consolidated with *Oakland Housing Authority v. Rucker*. The question presented is whether a statutorily required provision in a public housing lease — which provides that any drug-related activity by the tenant, the tenant's family, or anyone under the tenant's control provides cause to terminate the lease — is breached by drug-related activity of which the tenant did not know or have reason to know.

- **Solicitor General to Argue as *Amicus Curiae* in School Voucher Case.** On February 20, the Department will argue as *amicus curiae* in support of the petitioners in *Zelman v. Simmons-Harris*, which the Supreme Court has ordered consolidated with *Hanna Perkins School v. Simmons-Harris* and *Taylor v. Simmons-Harris*. The question presented is whether the Establishment Clause of the First Amendment prevents a State from providing tuition aid as part of a general assistance program to the parents of children who attend failing public schools and authorizing the parents to use that aid to enroll their children in a private school of their own choosing, without regard to whether the school is religiously affiliated. The Department will argue that the program at issue survives constitutional scrutiny.

- **Office of Solicitor General to File Brief in Criminal Case.** On February 19, the Department will brief a brief as petitioner in *United States v. Ruiz*. The question presented is whether before pleading guilty, a criminal defendant has a constitutional right to obtain exculpatory information,

including impeachment material, from the government, and, if so, whether that right may be waived through a plea agreement.

- **Office of Solicitor General to File Brief in Criminal Case.** On February 19, the Department will file a brief as petitioner in *United States v. Drayton*. The question presented is whether an officer who informs a passenger on a bus that the officer is conducting drug and illegal weapons interdiction and asks the passenger for consent to search, while another officer stays at the front of the bus without blocking the exit, has effected a "seizure" of that passenger withing the meaning of the Fourth Amendment and *Florida v. Bostick*, 501 U.S. 429 (1991).

- **Office of Solicitor General to File Brief in Criminal Case.** On February 19, the Department will file a brief as petitioner in *United States v. Cotton*. The question presented is whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence requires a court of appeals to vacate the enhanced sentence notwithstanding the defendant's failure to object to the sentence, the government's having introduced overwhelming proof of the fact that supports the enhanced sentence, and the defendant's having had notice that the fact could be used to seek an enhanced sentence.

- **Office of Solicitor General to File Brief in Social Security Case.** On February 19, the Department will file a brief as respondent in *Gisbrecht v. Barnhart*. The question presented is whether a court, when determining a "reasonable" attorney's fee under 42 U.S.C. 406(b), which is paid as a deduction from the back benefit award of a claimant for social security benefits who obtained a favorable judgment in court, should calculate the fee based on the "lodestar" method (which multiplies the hours that the attorney worked by the reasonable hourly rate, with certain adjustments for other relevant factors), or instead by applying a rebuttable presumption that the attorney should receive 25% of the back benefit award, which is the maximum award permitted by the statute. The Department will argue that courts should employ the former method.

- **Office of Solicitor General to File Brief in Criminal Case.** On February 22, the Department will file a brief as respondent in *Harris v. United States*. As framed by the Court, the question presented is: Given that a finding of "brandishing," as used in 18 U.S.S. Sec. 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of "brandishing" be alleged in the indictment and proved beyond a reasonable doubt?

B. THIS WEEK

- Nothing to report.

C. LAST WEEK

- Nothing to report.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

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U.S. Department of Justice
Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

December 10, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

Nothing to report.

B. THIS WEEK

- **Supreme Court Decides Patent Case.** On December 10, the Supreme Court issued its decision in *J.E.M. Supply, Inc. v. Pioneer Hi-Breed International, Inc.* The question presented was whether utility patents under the Patent Act of 1790 that allow their holder to prevent others from sexually reproducing plants or plant varieties, or from selling or using such materials, are invalid because the Plant Variety Protection Act of 1970 and the Plant Patent Act of 1930 are the exclusive means for obtaining such authority. The Department argued as *amicus curiae* that the latter two statutes do not preclude the patentability of living things under the Patent Act of 1790. The Supreme Court agreed, holding that newly developed plant breeds fall within the subject matter of the Patent Act of 1790 and concluding that neither of the other two Acts limit the scope of its coverage.

- **Supreme Court Decides Fourth Amendment Case.** On December 10, the Supreme Court issued its decision in *United States v. Knights*. The question presented was whether a defendant's agreement to a term of probation that authorizes law enforcement officers to search a person or premises without a warrant or individualized suspicion of wrongdoing constitutes a valid consent to search. The Supreme Court did not decide the consent question, holding instead that the search at issue was valid because the defendant was "unambiguously informed" of the search condition when he was sentenced and because the search was supported by reasonable suspicion.

- **Supreme Court Grants Review in Criminal Case.** On December 10, the Supreme Court granted review in *Harris v. United States*. As framed by the Court, the question presented is: Given that a finding of "brandishing," as used in 18 U.S.C. Sec. 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of "brandishing" be alleged in the indictment and proved beyond a reasonable doubt?

- **Supreme Court Invites Solicitor General's Participation in Foreign Sovereign Immunities Cases.** On December 10, the Supreme Court invited the Solicitor General to file briefs in *Dole Food Co. v. Patrickson* and *Dead Sea Bromine Co., Ltd. v. Patrickson*. The Foreign Sovereign Immunities Act affords "foreign states" various substantive and procedural protections when they are sued in American courts. The Act defines "foreign state" as including "any entity * * * a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision." The question presented is whether a corporation in which a foreign sovereign controls a majority of shares indirectly through ownership of the corporation's ultimate parent is a "foreign state" within the meaning of the Act.

- **Office of Solicitor General to File Brief in Tax Case.** On December 10, the Department anticipates filing a brief in *Young v. United States*. The question presented is whether the three-year time limit for establishing the priority and nondischargeability of federal income taxes under the Bankruptcy Code, 11 U.S.C. 507(a)(8)(A)(i), 523(a)(1)(A), is tolled during the time the automatic stay in the debtors' prior bankruptcy proceeding precluded the government from collecting those taxes.

- **Office of Solicitor General to File Brief in Labor Law Case.** On December 10, the Department anticipates filing a brief in *Hoffman Plastic Compound, Inc. v. National Labor Relations Board*. The question presented is whether an order of the Board directing petitioner to pay back pay to an employee who was discriminatorily laid off for union-organizing activity in violation of Section 8(a)(3) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(3), but only up to the date on which petitioner discovered that the employee was an undocumented alien not authorized to be employed in the United States, is a proper exercise of the Board's authority to remedy petitioner's violation of Section 8(a)(3) of the Act.

- **Office of Solicitor General to File Brief in Food and Drug Case.** On December 13, the Department anticipates filing a brief in *Thompson v. Western States Medical Center*. The Food and Drug Administration Modernization Act of 1997 (FDAMA) provides a limited exemption from the new drug approval (and certain other) requirements of the Federal Food, Drug, and Cosmetic Act, for drugs compounded by pharmacists. The question presented is whether FDAMA's limitation of that exemption to pharmacists who do not solicit prescriptions for or advertise particular compounded drugs is consistent with the First Amendment.

C. LAST WEEK

- **Supreme Court Granted Certiorari and Summarily Vacated Court of Appeals' Decision in Indian Law Case.** On December 3, the Court granted certiorari and summarily vacated the court of appeals' judgment in *United States v. Little Six, Inc.* The case presents the question whether the Indian Gaming Regulatory Act (IGRA) exempts Indian Tribes from the wagering, excise, and occupational taxes imposed by chapter 35 of the Internal Revenue Code. The Court recently decided *Chickasaw Nation v. United States*, No. 00-507, and held that the IGRA does not exempt Tribes from the wagering, excise, and occupational taxes imposed by chapter 35. Accordingly, the Court granted certiorari, summarily vacated the decision of the United States Court of Appeals for the Federal Circuit, and remanded for further consideration in light of *Chickasaw Nation*.

- **Office of Solicitor General Argued as *Amicus Curiae* in Medicaid Case.** On December 3, the Department argued as *amicus curiae* in support of the petitioner in *Wisconsin Department of Health and Family Services v. Blumer*. Through the Medicaid program, the federal government contributes funds to States in order to provide medical services to eligible needy persons. Federal law denies Medicaid eligibility to a married individual who receives institutional medical care if she has a spouse who is not institutionalized (the "community spouse"), and if that community spouse possesses financial resources above a specified level. The question presented is whether a State may, in determining the maximum permissible resource level of a community spouse, consider possible income transfers from an institutionalized spouse. The Department argued that federal law permits States to consider such income transfers.

- **Solicitor General Argued as *Amicus Curiae* in First Amendment Case.** On December 3, the Department argued as *amicus curiae* in support of the respondent in *Thomas v. Chicago Park District*. A city ordinance requires individuals to obtain a permit before conducting "events involving more than fifty individuals" in municipal parks. The Department argued that petitioner's facial challenge to the ordinance is inappropriate and contended that the ordinance does not impose a "prior restraint" on speech. The Department also argued that First Amendment procedural standards are satisfied because individuals may obtain judicial review if their permit requests are denied.

- **Solicitor General Argued Related Telecommunications Act Cases.** On December 5, the Department argued as respondent in *Mathias v. Worldcom Technologies*, and as petitioner in *United States v. Public Service Commission of Maryland*. The Telecommunications Act of 1996 opens local markets to competition through interconnection agreements between incumbent local exchange carriers and potential competitors. The Telecommunications Act grants authority to state public utility commissions to regulate such interconnection agreements, and provides that the exercise of such authority is reviewable in federal court. The questions presented in *Mathias v. Worldcom Technologies* are: (i) whether a state commission's action relating to enforcement of an interconnection agreement is reviewable in federal court, (ii) whether the participation of a state commission in the Act's regulatory scheme constitutes a waiver of Eleventh Amendment immunity, and (iii) whether *Ex parte*

Young allows federal suits for prospective relief against state commissioners for ongoing violations of federal law in the performance of federal regulatory functions. The Department argued that such an action is reviewable in federal court, that a State's participation under the Act constitutes an Eleventh Amendment waiver, and that *Ex parte Young* permits suits for injunctive relief.

The related question presented in *United States v. Public Service Commission of Maryland* is whether a federal district court has subject matter jurisdiction under 28 U.S.C. 1331 to determine whether a state public utility commission's order interpreting or enforcing an interconnection agreement violates the Act. The Department argued in favor of such subject matter jurisdiction.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

December 31, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- **Office of Solicitor General To Argue as *Amicus Curiae* in Family and Medical Leave Act Case.** On January 7, the Department will argue as *amicus curiae* in support of petitioners in *Ragsdale v. Wolverine World Wide*. The Family and Medical Leave Act requires covered employers to provide eligible employees with a twelve-week leave period for "a serious health condition that makes the employee unable to perform the functions of the position of such employee." The question presented is whether the Secretary of Labor may, by regulation, forbid employers from counting leave against the Act's twelve-week period until and unless the employee is notified that such leave is being provided pursuant to the Act. The Department will argue that the regulation is valid because the Secretary reasonably determined that workers must receive notice of their statutory rights and responsibilities at the beginning of the leave period, so that they may adequately plan their treatment or care-giving activities.

- **Solicitor General To Argue as *Amicus Curiae* in Takings Clause Case.** On January 7, the Department will argue as *amicus curiae* in support of respondents in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*. The question presented is whether a temporary moratorium on land development constitutes a taking of property and thereby requires "just compensation" under the Takings Clause. The Solicitor General will argue that the moratorium did not effect a per se taking of property because it was reasonably designed to preserve the status quo pending completion of a comprehensive land-use plan.

- **Office of Solicitor General To Argue as *Amicus Curiae* in Patent Case.** On January 8, the Department will argue as *amicus curiae* in support of petitioner in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.* The questions presented are: (i) whether an amendment that narrows the scope of a patent claim for reasons related to statutory patent requirements creates prosecution history estoppel with respect to the amended portion of the claim, and (ii) whether such estoppel bars invocation of the doctrine of equivalents. The Department will argue that prosecution history estoppel does apply to such a patent amendment, but that prosecution history estoppel does not preclude application of the doctrine of equivalents.

- **Office of Solicitor General To Argue as *Amicus Curiae* in Title VII Case.** On January 8, the Department will argue as *amicus curiae* in support of petitioner in *Edelman v. Lynchburg College*. The question presented is whether a plaintiff may amend a charge filed with the EEOC by providing a sworn statement to verify the charge, if such verification is filed with the Commission after the statutory charge-filing period has expired. The Department will argue that, although Title VII requires that a timely-filed charge be verified before the respondent may be forced to participate in an EEOC investigation, EEOC regulations reasonably allow plaintiffs to provide such verification outside the charge-filing period.

- **Office of Solicitor General To Argue in Tax Case.** On January 8, the Department will argue as respondent in *Young v. United States*. The question presented is whether the three-year time limit for establishing the priority and nondischargeability of federal income taxes under the Bankruptcy Code should be tolled for a period of time when the government was precluded from collecting such taxes by an automatic stay in the debtors' bankruptcy proceeding.

- **Office of Solicitor General To Argue as *Amicus Curiae* in Title VII Case.** On January 9, the Department will argue as *amicus curiae* in support of petitioner in *National Railroad Passenger Corp. v. Morgan*. The question presented is whether a Title VII plaintiff may hold a private employer liable, under a "continuing violation" theory, for discriminatory conduct that would otherwise be time-barred because the plaintiff failed to file an EEOC charge within 300 days after the allegedly continuing violation began. The Department will argue that allegations of a continuing violation do not permit plaintiffs to establish liability and to recover damages based on discriminatory acts that occurred outside the charge-filing period, though such time-barred acts may be used to provide background for discriminatory acts that occurred within the charge-filing period.

B. THIS WEEK

- Nothing to report.

C. LAST WEEK

- **Office of Solicitor General Files Brief in Securities Case.** On December 26, the Department filed a brief on behalf of petitioner in *SEC v. Zandford*. The question presented is whether, for purposes of the Securities Exchange Act of 1934, a stockbroker's fraud is "in connection with the . . . sale" of securities when the stockbroker sells his customer's securities for the broker's own benefit and uses the proceeds himself without any disclosure to, or authorization from, the customer. The Department argued that both the sale and the resultant misappropriation of funds violate the Act.

- **Solicitor General Files Brief as *Amicus Curiae* in Disabilities Case.** On December 26, the Department filed a brief as *amicus curiae* in support of petitioner in *Chevron, U.S.A., Inc. v. Echazabal*. The question presented is whether the Americans with Disabilities Act permits an employer to refuse to hire a job applicant because allowing him to fill the post at issue would, as a result of his disability, pose a direct threat to his own health or safety. The Department argued that the EEOC regulations, which allow such refusals to hire, implement a reasonable interpretation of the Act and are therefore valid.

- **Solicitor General Files Brief as *Amicus Curiae* in Fourth Amendment Case.** On December 26, the Department filed a brief in support of petitioners in *Board of Education v. Earls*. The question presented is whether the Fourth Amendment prevents a public school district from requiring students who participate in voluntary, non-athletic interscholastic competitions to agree to random urinalysis testing for illegal drug use. The Department argued that the school district's drug policy was reasonable and thus constitutional.

- **Solicitor General Files Brief as *Amicus Curiae* in Eleventh Amendment Case.** On December 20, the Department filed a brief in support of petitioner in *Lapides v. Board of Regents of University of Georgia System*. The question presented is whether a State that voluntarily removes a case to federal court waives its Eleventh Amendment immunity, when state law does not expressly authorize the removing official to consent to suit. The Department argued that if a State voluntarily invokes a federal forum through removal, it waives its immunity from being sued in that forum.

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL
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U.S. Department of Justice
Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

December 17, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

Nothing to report.

B. THIS WEEK

Nothing to report.

C. LAST WEEK

- **Office of Solicitor General Files Brief in Food and Drug Case.** On December 13, the Department filed a brief in *Thompson v. Western States Medical Center*. The Food and Drug Administration Modernization Act of 1997 (FDAMA) provides a limited exemption from the new drug approval (and certain other) requirements of the Federal Food, Drug, and Cosmetic Act, for drugs compounded by pharmacists. The question presented is whether FDAMA's limitation of that exemption to pharmacists who do not solicit prescriptions for or advertise particular compounded drugs is consistent with the First Amendment.

- **Supreme Court Grants Review in Telecommunications Case.** On December 12, the Supreme Court granted review on the remaining questions presented in *Verizon Maryland Inc.* v. *Public Service Commission of Maryland* and the related case of *United States* v. *Public Service Commission of Maryland*. The petitions for certiorari in these cases presented the same questions at issue in *Mathias* v. *WorldCom Technologies*, plus the additional question of subject matter jurisdiction

under 28 U.S.C. 1331. Originally, the Court granted certiorari only on the additional question, and held the other questions pending their resolution in *Mathias*. However, because oral argument revealed that the Court might be unable to reach the merits of the questions presented in *Mathias*, it granted the writ of certiorari in this case on the remaining questions presented in order to ensure that it had jurisdiction over all the questions at issue in these cases.

- **Supreme Court Decides Patent Case.** On December 10, the Supreme Court issued its decision in *J.E.M. Supply, Inc. v. Pioneer Hi-Breed International, Inc.*. The question presented was whether utility patents under the Patent Act of 1790 that allow their holder to prevent others from sexually reproducing plants or plant varieties, or from selling or using such materials, are invalid because the Plant Variety Protection Act of 1970 and the Plant Patent Act of 1930 are the exclusive means for obtaining such authority. The Department argued as *amicus curiae* that the latter two statutes do not preclude the patentability of living things under the Patent Act of 1790. The Supreme Court agreed, holding that newly developed plant breeds fall within the subject matter of the Patent Act of 1790 and concluding that neither of the other two Acts limit the scope of its coverage.

- **Supreme Court Decides Fourth Amendment Case.** On December 10, the Supreme Court issued its decision in *United States v. Knights*. The question presented was whether a defendant's agreement to a term of probation that authorizes law enforcement officers to search a person or premises without a warrant or individualized suspicion of wrongdoing constitutes a valid consent to search. The Supreme Court did not decide the consent question, holding instead that the search at issue was valid because the defendant was "unambiguously informed" of the search condition when he was sentenced and because the search was supported by reasonable suspicion.

- **Supreme Court Grants Review in Criminal Case.** On December 10, the Supreme Court granted review in *Harris v. United States*. As framed by the Court, the question presented is: Given that a finding of "brandishing," as used in 18 U.S.C. Sec. 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of "brandishing" be alleged in the indictment and proved beyond a reasonable doubt?

- **Supreme Court Grants Review in *Bivens* Case.** On December 10, the Supreme Court granted review in *Warren v. Harbury*. Harbury's husband was killed by the Guatemalan military. She contends that senior State Department and National Security Council officials deliberately withheld information about her husband with the intent of deterring Harbury from bringing a lawsuit that might have saved his life. The United States Court of Appeals for the District of Columbia Circuit held that Harbury had stated a claim of a denial of her First Amendment right to access the courts and determined that the officials were not entitled to qualified immunity. The Court granted certiorari to consider both the access to the courts and the qualified immunity questions.

- **Supreme Court Invites Solicitor General's Participation in Foreign Sovereign Immunities Cases.** On December 10, the Supreme Court invited the Solicitor General to file briefs in

Dole Food Co. v. Patrickson and *Dead Sea Bromine Co., Ltd. v. Patrickson*. The Foreign Sovereign Immunities Act affords "foreign states" various substantive and procedural protections when they are sued in American courts. The Act defines "foreign state" as including "any entity * * * a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision." The question presented is whether a corporation in which a foreign sovereign controls a majority of shares indirectly through ownership of the corporation's ultimate parent is a "foreign state" within the meaning of the Act.

- **Office of Solicitor General Files Brief in Tax Case.** On December 10, the Department filed a brief in *Young v. United States*. The question presented is whether the three-year time limit for establishing the priority and nondischargeability of federal income taxes under the Bankruptcy Code, 11 U.S.C. 507(a)(8)(A)(i), 523(a)(1)(A), is tolled during the time the automatic stay in the debtors' prior bankruptcy proceeding precluded the government from collecting those taxes.

- **Office of Solicitor General Files Brief in Labor Law Case.** On December 10, the Department filed a brief in *Hoffman Plastic Compound, Inc. v. National Labor Relations Board*. The question presented is whether an order of the Board directing petitioner to pay back pay to an employee who was discriminatorily laid off for union-organizing activity in violation of Section 8(a)(3) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(3), but only up to the date on which petitioner discovered that the employee was an undocumented alien not authorized to be employed in the United States, is a proper exercise of the Board's authority to remedy petitioner's violation of Section 8(a)(3) of the Act.

MEMORANDUM

TO: Alberto R. Gonzales

CC: Counsel's Office Attorneys

FROM: Brett M. Kavanaugh

DATE: January 16, 2002

RE: Office of Solicitor General Update

Attached is the latest update from the Solicitor General.

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

January 14, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

Nothing to report.

B. THIS WEEK

- **Office of Solicitor General To Argue in Tax Case.** On January 14, the Department will argue as petitioner in *United States v. Craft*. The question presented is whether a tax lien may properly reach a delinquent taxpayer's rights regarding property held in a tenancy by the entirety. The Department will argue that a tax lien does attach to such property rights.

- **Office of Solicitor General to Argue as *Amicus Curiae* in Prison Litigation Reform Act Case.** On January 14, the Department will argue as *amicus curiae* in support of petitioners in *Porter v. Nussle*. The question presented is whether the exhaustion provision of the PLRA requires an inmate to exhaust available administrative remedies before filing an action against a corrections officer alleging use of excessive force. The Department will argue that exhaustion is required because an action challenging a particular instance of alleged excessive force is an action with respect to "prison conditions" within the meaning of the PLRA's exhaustion requirement.

- **Office of Solicitor General to Argue in Labor Case.** On January 15, the Department will argue as respondent in *Hoffman Plastic Compound v. NLRB*. The question presented is whether the NLRB exceeded its remedial authority by awarding backpay against an employer for discriminating against an employee for union-organizing activity, when the employee was an undocumented alien not

authorized to work in the United States. The Department will argue that the Board properly awarded backpay up to the date the employer learned the employee was an undocumented alien.

- **Office of Solicitor General to Argue as *Amicus Curiae* in Employment Discrimination Case.** On January 15, the Department will argue as *amicus curiae* in support of petitioner in *Swierkiewicz* v. *Sorema N.A.* The question presented is whether a complaint in an employment discrimination suit under Title VII or the Age Discrimination in Employment Act must plead specific facts establishing a prima facie case of discrimination under the Supreme Court's decision in *McDonnell Douglas Corp* v. *Green*. The Department will argue that the court of appeals' requirement that employment discrimination complaints include facts demonstrating a prima facie case is fundamentally flawed and that a complaint properly states a claim for relief when it meets the requirements of Federal Rule of Civil Procedure 8(a).

- **Office of Solicitor General to Argue as *Amicus Curiae* in ERISA Case.** On January 16, the Department will argue as *amicus curiae* in *Rush Prudential HMO, INC. v. Moran*. The question presented is whether Section 4-10 of the Illinois Health Maintenance Organization Act, which requires HMOs to "provide a mechanism for * * * review by a physician * * * in the event of a dispute between the primary care physician and the Health Maintenance Organization regarding the medical necessity of a covered service proposed by the primary care physician," is preempted by the Employment Retirement Income Security Act of 1974. The Department will argue that the law is not preempted because, although it "relates to" ERISA plans, it "regulates insurance" within the meaning of ERISA's insurance savings clause and does not conflict with any specific provision of ERISA.

- **Office of Solicitor General to Argue in Social Security Case.** On January 16, the Department will argue as petitioner in *Barnhart v. Walton*. The questions presented are: (1) whether a social security claimant is entitled to disability benefits even though his physical or mental disability will not prevent him from working for longer than twelve months; and (2) whether a claimant is entitled to a "trial work period" of up to nine months even though his alleged impairment no longer prevents him from working at the time his disability insurance benefits claim is adjudicated. The Department will argue that claimants are not entitled to social security benefits, or to a trial work period, under such circumstances.

C. LAST WEEK

- **Supreme Court Decided Occupational Safety and Health Act Case.** On January 9, the Supreme Court issued its decision in *Chao v. Mallard Bay Drilling, Inc.* The question presented was whether certain OHSA regulations, which govern working conditions on uninspected barges operating in inland waters, were precluded by an "exercise" of the Coast Guard's "statutory authority" to regulate such circumstances. We contended that the Coast Guard had no statutory authority regarding the working conditions at issue and that, even if it did, the Coast Guard had never exercised such authority sufficiently to displace OSHA's regulations. The Supreme Court unanimously ruled in our favor, holding that the Coast Guard had never exercised any authority that it may have possessed.

- **Supreme Court Decided Forfeiture Case.** On January 9, the Supreme Court issued its decision in *Dusenberry v. United States*. The question presented was whether the United States satisfied the Due Process Clause by notifying a federal prisoner of an administrative forfeiture proceeding via certified mail. The Department argued that such notice satisfied due process because it was "reasonably calculated" to apprise the prisoner of such proceedings. The Supreme Court agreed in an opinion by Chief Justice Rehnquist that was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justices Stevens, Souter, Ginsburg, and Breyer dissented.

- **Supreme Court Decided Disabilities Case.** On January 8, the Supreme Court issued its decision in *Toyota Motor Manufacturing v. Williams*. The question presented was whether impairment of an individual's ability to perform job-related manual tasks can constitute a "disability" under the Americans with Disabilities Act of 1990, if there is no proof that the individual is excluded from a class of jobs or a broad range of jobs, and no evidence that the individual's impairment substantially limits her ability to perform manual tasks outside of work. The Department argued as *amicus curiae* that the court below erred in considering only job-related manual tasks. The Supreme Court agreed in a unanimous opinion and remanded for a determination whether, considering all manuals tasks, job-related or not, the employee was substantially limited in her ability to perform manual tasks.

- **Supreme Court Decided ERISA Case.** On January 8, the Supreme Court issued its decision in *Great-West Life & Annuity Insurance Co. v. Knudson*. The question presented was whether a civil action under ERISA to enforce a plan term requiring reimbursement of medical expenses paid by the plan constitutes an action for "appropriate equitable relief" as authorized by Section 502(a)(3) if the plaintiff seeks recovery from a third-party tortfeasor. The Department contended as *amicus curiae* that such as suit is a permissible action for "appropriate equitable relief" because enforcing a plain's reimbursement term is similar to a traditional equity suit seeking repayment of an advance made from a trust. The Supreme Court disagreed, in an opinion by Justice Scalia, holding that the relief that the plaintiffs sought was legal, rather than equitable, in nature because they sought to impose personable liability for a contractual obligation to pay money. Justices Stevens, Souter, Ginsburg, and Breyer dissented.

- **Supreme Court Granted Review in Tax Case.** On January 11, the Supreme Court granted the Department's petition for a writ of certiorari in *United States v. Fior D'Italia, Inc.* The question presented is whether the employer's share of the Federal Insurance Contributions Act tax on employee tip income must be determined by accumulating the result of individual audits of individual employees or may instead be based on a reasonable estimate of the aggregate amount of tips received by all employees.

- **Office of Solicitor General Argued as *Amicus Curiae* in Family and Medical Leave Act Case.** On January 7, the Department argued as *amicus curiae* in support of petitioners in

Ragsdale v. Wolverine World Wide. The Family and Medical Leave Act requires covered employers to provide eligible employees with a twelve-week leave period for "a serious health condition that makes the employee unable to perform the functions of the position of such employee." The question presented is whether the Secretary of Labor may, by regulation, forbid employers from counting leave against the Act's twelve-week period until and unless the employee is notified that such leave is being provided pursuant to the Act. The Department argued that the regulation is valid because the Secretary reasonably determined that workers must receive notice of their statutory rights and responsibilities at the beginning of the leave period, so that they may adequately plan their treatment or care-giving activities.

- **Solicitor General Argued as *Amicus Curiae* in Takings Clause Case.** On January 7, the Department argued as *amicus curiae* in support of respondents in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*. The question presented is whether a temporary moratorium on land development constitutes a taking of property and thereby requires "just compensation" under the Takings Clause. The Solicitor General argued that the moratorium did not effect a per se taking of property because it was reasonably designed to preserve the status quo pending completion of a comprehensive land-use plan.

- **Office of Solicitor General Argued as *Amicus Curiae* in Patent Case.** On January 8, the Department argued as *amicus curiae* in support of petitioner in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.* The questions presented are: (i) whether an amendment that narrows the scope of a patent claim for reasons related to statutory patent requirements creates prosecution history estoppel with respect to the amended portion of the claim, and (ii) whether such estoppel bars invocation of the doctrine of equivalents. The Department argued that prosecution history estoppel does apply to such a patent amendment, but that prosecution history estoppel does not preclude application of the doctrine of equivalents.

- **Office of Solicitor General Argued as *Amicus Curiae* in Title VII Case.** On January 8, the Department argued as *amicus curiae* in support of petitioner in *Edelman v. Lynchburg College*. The question presented is whether a plaintiff may amend a charge filed with the EEOC by providing a sworn statement to verify the charge, if such verification is filed with the Commission after the statutory charge-filing period has expired. The Department argued that, although Title VII requires that a timely-filed charge be verified before the respondent may be forced to participate in an EEOC investigation, EEOC regulations reasonably allow plaintiffs to provide such verification outside the charge-filing period.

- **Office of Solicitor General Argued in Tax Case.** On January 8, the Department argued as respondent in *Young v. United States*. The question presented is whether the three-year time limit for establishing the priority and nondischargeability of federal income taxes under the Bankruptcy Code should be tolled for a period of time when the government was precluded from collecting such taxes by an automatic stay in the debtors' bankruptcy proceeding.

- **Office of Solicitor General Argued as *Amicus Curiae* in Title VII Case.** On January 9, the Department argued as *amicus curiae* in support of petitioner in *National Railroad Passenger Corp. v. Morgan.* The question presented is whether a Title VII plaintiff may hold a private employer liable, under a "continuing violation" theory, for discriminatory conduct that would otherwise be time-barred because the plaintiff failed to file an EEOC charge within 300 days after the allegedly continuing violation began. The Department argued that allegations of a continuing violation do not permit plaintiffs to establish liability and to recover damages based on discriminatory acts that occurred outside the charge-filing period, though such time-barred acts may be used to provide background for discriminatory acts that occurred within the charge-filing period.

- **Office of Solicitor General Filed Supplemental Brief in Telecommunications Case.** On January 11, the Department filed, at the Supreme Court's request, a supplemental brief in *United States v. Public Service Commission of Maryland*, a case that has been consolidated with *Verizon Maryland, Inc. v. Public Service Commission of Maryland.* The brief addressed the following questions and answered each in the affirmative: (1) Whether a state public utility commission's action relating to the enforcement of a previously approved Section 252 agreement entered into pursuant to the Telecommunications Act of 1996 is a "determination under [Section 252]" and is thus reviewable in federal court under 47 U.S.C. 252(e)(6) (Supp. V 1999); (2) Whether a state public utility commission's acceptance of Congress's invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity; and (3) Whether an official capacity action seeking prospective relief against state commissioners for allegedly ongoing violations of federal law in performing federal regulatory functions under the Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

March 18, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- **Office of Solicitor General to Argue as *Amicus Curiae* in Habeas Case.** On March 25, the Department will argue as *amicus curiae* in support of petitioners in *Bell* v. *Cone*. The questions presented are: (i) whether a defendant's claim of ineffective assistance of counsel may presume prejudice when counsel does not present mitigating evidence and does not offer a closing argument during a capital sentencing hearing, and (ii) if so, whether a state court's decision to deny such a claim involved an unreasonable application of clearly established federal law. The Department will argue that prejudice should not be presumed under such circumstances, because allegations of attorney error do not constitute a *per se* constitutional violation.

- **Office of Solicitor General to Argue in Criminal Case.** On March 25, the Department will argue as respondent in *Harris* v. *United States*. As framed by the Court, the question presented is: Given that a finding of "brandishing," as used in 18 U.S.C. Sec. 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of "brandishing" be alleged in the indictment and proved beyond a reasonable doubt?

- **Office of Solicitor General to Argue as *Amicus Curiae* in Case Concerning Conduct of Class Actions.** On March 26, the Department will argue as *amicus curiae* in support of respondent in *Devlin* v. *Scardelletti*. The question presented is whether, or in what circumstances, a non-named class member who objects to a class action settlement may appeal a district court judgment approving the settlement. The Department will argue that non-named class members who object to a class action

settlement may appeal a judgment approving the settlement if they intervene for the purpose of taking such an appeal.

- **Solicitor General to Argue Census Case.** On March 27, the Department will argue as respondent in *Utah* v. *Evans*. In the 2000 census, the Census Bureau used a process known as "imputation," under which the number of residents in a housing unit whose occupancy could not otherwise be determined was based on the known number of residents of a similar nearby unit. The questions presented are: (1) whether appellants' challenge to the Census Bureau's use of imputation is justiciable; (2) whether the use of imputation violated 13 U.S.C. 195, which prohibits "the use of the statistical method known as 'sampling'" in determining the population "for purposes of apportionment of Representatives in Congress among the several States"; and (3) whether the use of imputation violated the Census Clause of the Constitution, Article I, Section 2, Clause 3. The Department will argue that the appellants' claims are justiciable, and that imputation is consistent with both the statute and the Constitution.

B. THIS WEEK

- **Office of Solicitor General to Argue in Securities Case.** On March 18, the Department will argue as petitioner in *SEC v. Zandford*. The question presented is whether, for purposes of the Securities Exchange Act of 1934, a stockbroker's fraud is "in connection with the . . . sale" of securities when the stockbroker sells his customer's securities for the broker's own benefit and uses the proceeds himself without any disclosure to, or authorization from, the customer. The Department will argue that both the sale and the resultant misappropriation of funds violate the Act.

- **Solicitor General to Argue as *Amicus Curiae* in Access to Courts Case.** On March 18, the Department will argue in support of the petitioners in *Christopher v. Harbury*. The questions presented are: (1) whether governmental officials violated a private individual's right to access the courts by allegedly making deliberate misstatements that delayed the individual's decision to file a future lawsuit; and (2) if so, whether such a right was clearly established for purposes of qualified immunity.

- **Office of Solicitor General to Argue as *Amicus Curiae* in Student Drug Testing Case.** On March 19, the Department will argue in support of the petitioners in *Board of Education v. Earls*. The question presented is whether the Fourth Amendment prevents a public school district from requiring students who participate in voluntary, non-athletic interscholastic competitions to agree to random urinalysis testing for illegal drug use. The Department will argue that the school district's drug policy was reasonable and thus constitutional.

- **Office of Solicitor General to Argue in Social Security Case.** On March 20, the Department will argue as respondent in *Gisbrecht* v. *Barnhart*. Reasonable attorney's fees under 42 U.S.C. 406(b) are available as deductions from a prevailing claimant's back benefit award of social security benefits. The question presented is whether such reasonable attorney's fees should be

calculated using the lodestar method — which essentially multiplies the hours the attorney worked by a reasonable hourly rate — or whether the court may rebuttably presume that the attorney should receive the maximum award permitted by the statute. The Department will argue that courts should employ the lodestar method.

- **Office of Solicitor General to File Brief in National Labor Relations Act Case.** On March 20, the Department will file a brief as respondent in *BE & K Construction Co. v. NLRB*. The question presented is whether, under *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless under *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993).

- **Office of Solicitor General to File Brief in Land Use Case.** On March 22, the Department will file a brief as respondent in *Franconia Associates v. United States*. As formulated by the Court, the questions presented are: (1) whether a breach of contract claim accrues for purposes of 28 U.S.C. § 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans; and (2) whether a Fifth Amendment takings claim accrues for purposes of 28 U.S.C. § 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans. The Department will argue that the claims accrued when the statute was enacted rather than the date on which a particular owner tendered a prepayment.

C. LAST WEEK

- **Office of Solicitor General Filed Brief in Census Case.** On March 11, the Department filed a brief as appellee in *Utah v. Evans*, which will be argued next week.

- **Office of Solicitor Petitioned for Supreme Court Review in Indian Mineral Leasing Act Case.** On March 15, the Department filed a petition for a writ of certiorari in *United States v. Navajo Nation*. The Indian Mineral Leasing Act of 1938 (IMLA) and regulations thereunder authorize an Indian Tribe, with the approval of the Secretary of the Interior, to lease tribal lands for mining purposes. The question presented is whether the court of appeals properly held that the United States is liable to the Navajo Nation for up to $600 million in damages for breach of fiduciary duty in connection with the Secretary's actions concerning an Indian mineral lease, without finding that the Secretary had violated any specific statutory or regulatory duty established pursuant to the IMLA.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

March 11, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- **Office of Solicitor General to Argue in Securities Case.** On March 18, the Department will argue as petitioner in *SEC v. Zandford*. The question presented is whether, for purposes of the Securities Exchange Act of 1934, a stockbroker's fraud is "in connection with the . . . sale" of securities when the stockbroker sells his customer's securities for the broker's own benefit and uses the proceeds himself without any disclosure to, or authorization from, the customer. The Department will argue that both the sale and the resultant misappropriation of funds violate the Act.

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- **Office of Solicitor General to File Brief in National Labor Relations Act Case.** On March 20, the Department will file a brief as respondent in *BE & K Construction Co. v. NLRB*. The question presented is whether, under *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless under *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993).

- **Office of Solicitor General to File Brief in Land Use Case.** On March 22, the Department will file a brief as respondent in *Franconia Associates v. United States*. As formulated by the Court, the questions presented are: (1) whether a breach of contract claim accrues for purposes of 28 U.S.C. § 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans; and (2) whether a Fifth Amendment takings claim accrues for purposes of 28 U.S.C. § 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans. The Department will argue that the claims accrued when the statute was enacted rather than the date on which a particular owner tendered a prepayment.

B. THIS WEEK

- **Office of Solicitor General Filed Brief in Census Case.** On March 11, the Department filed a brief as appellee in *Utah v. Evans*. In the 2000 census, the Census Bureau used a process known as "imputation," under which the number of residents in a housing unit whose occupancy could not otherwise be determined was based on the known number of residents of a similar nearby unit. The questions presented are: (1) whether appellants' challenge to the Census Bureau's use of imputation is justiciable; (2) whether the use of imputation violated 13 U.S.C. § 195, which prohibits "the use of the statistical method known as 'sampling'" in determining the population "for purposes of apportionment of Representatives in Congress among the several States"; and (3) whether the use of imputation violated the Census Clause of the Constitution, Article I, Section 2, Clause 3. The Department argued that the appellants' claims are justiciable, and that imputation is consistent with both the statute and the Constitution.

C. LAST WEEK

- **Supreme Court Decided Federal Power Act Case.** On March 4, the Supreme Court issued its decision in the consolidated cases of *New York* v. *FERC* and *Enron Power Marketing, Inc.* v. *FERC*. The questions presented were: (1) whether the Federal Power Act (FPA) gives the Federal Energy Regulatory Commission (FERC) jurisdiction over intrastate electrical transmissions from generators to retail customers, where the transmission service is "unbundled" from State-regulated retail sale of electricity and the consumer can choose a preferred power supplier; and (2) whether FERC lacks jurisdiction to regulate retail transmission service sold as part of a "bundled" transaction between a public utility and its retail customer where the customer cannot choose a power supplier. The Department argued that Congress's express grant of authority over interstate transmission allows FERC to regulate all transmissions over power systems connected to an interstate power grid. Because the Act leaves to the States the regulation of retail electricity sales, the Department argued that FERC reasonably left such bundled retail sales to state jurisdiction. The Supreme Court agreed, holding that the FPA gives FERC jurisdiction over unbundled retail transmissions and that FERC's decision not to regulate bundled retail transmissions was a statutorily permissible policy choice. Justice Thomas filed a separate opinion concurring in part and dissenting in part, in which Justices Scalia and Kennedy joined.

- **Supreme Court Decided Criminal Procedure Case.** On March 4, the Supreme Court issued its decision in *United States* v. *Vonn*. The questions presented were: (1) whether a district court's violation of Federal Rule of Criminal Procedure 11(c)(3), by not informing a defendant at his guilty plea hearing that he would be entitled to the assistance of counsel if his case went to trial, is subject to plain error review when the defendant fails to raise his claim before the district court; and (2) whether in applying plain error review, the court of appeals may consider parts of the official record other than the guilty plea colloquy to determine whether substantial rights were affected. The Department argued that plain error review does apply to such circumstances, and that appellate courts should review the entire record in deciding whether substantial rights were violated. The Supreme Court agreed, holding that a defendant who lets Rule 11 error pass without objection in the trial court has the burden to satisfy the plain-error rule and that a reviewing court may consult the entire record when considering the effect of any error on substantial rights. Justice Stevens filed a separate opinion concurring in part and dissenting in part.

- **Supreme Court Decided Tax Case.** On March 4, the Supreme Court issued its decision in *Young* v. *United States*. The question presented was whether the three-year time limit for establishing the priority and nondischargeability of federal income taxes under the Bankruptcy Code should be tolled for a period of time when the government was precluded from collecting such taxes by an automatic stay in the debtors' bankruptcy proceeding. The Supreme Court agreed with the Department and held in a unanimous opinion that the period is tolled during the pendency of a prior bankruptcy petition.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

March 25, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- Nothing to report.

B. THIS WEEK

- **Office of Solicitor General to Argue as *Amicus Curiae* in Habeas Case.** On March 25, the Department will argue as *amicus curiae* in support of petitioners in *Bell v. Cone*. The questions presented are: (i) whether a defendant's claim of ineffective assistance of counsel may presume prejudice when counsel does not present mitigating evidence and does not offer a closing argument during a capital sentencing hearing, and (ii) if so, whether a state court's decision to deny such a claim involved an unreasonable application of clearly established federal law. The Department will argue that prejudice should not be presumed under such circumstances, because allegations of attorney error do not constitute a *per se* constitutional violation.

- **Office of Solicitor General to Argue in Criminal Case.** On March 25, the Department will argue as respondent in *Harris v. United States*. The question presented is whether the Constitution requires that the circumstance that the defendant "brandished" a firearm, which triggers an increased mandatory minimum under 18 U.S.C. 924(c)(1)(A), must be charged in the indictment and proved to the jury beyond a reasonable doubt. The Department will argue that any fact which increases a defendant's mandatory minimum sentence, but which does not increase the applicable statutory maximum sentence, may be determined by the court as a sentencing factor, using a preponderance of the evidence standard.

- **Office of Solicitor General to Argue as *Amicus Curiae* in Class Action Case.** On March 26, the Department will argue as *amicus curiae* in support of respondent in *Devlin v. Scardelletti*. The question presented is whether a non-named class member who objects to a class action settlement, but who does not formally intervene in the lawsuit, may appeal a district court's judgment approving the settlement. The Department will argue that non-named class members who object to a class action settlement may appeal a judgment approving the settlement if they intervene for the limited purpose of taking such an appeal.

- **Solicitor General to Argue Census Case.** On March 27, the Department will argue as respondent in *Utah v. Evans*. In the 2000 census, the Census Bureau used a process known as "imputation," under which the number of residents in a housing unit whose occupancy could not otherwise be determined was based on the known number of residents of a similar nearby unit. The questions presented are: (i) whether appellants' challenge to the Census Bureau's use of imputation is justiciable; (ii) whether such imputation violated 13 U.S.C. 195's prohibition against "the use of the statistical method known as 'sampling'" to determine population "for purposes of apportionment of Representatives in Congress among the several States"; and (iii) whether the use of imputation violated the Census Clause of the Constitution, Article I, Section 2, Clause 3. The Department will argue that appellants' claims are justiciable, but that imputation is consistent with both the statute and the Constitution.

C. LAST WEEK

- **Office of Solicitor General Argued in Securities Case.** On March 18, the Department argued as petitioner in *SEC v. Zandford*. The question presented is whether, for purposes of the Securities Exchange Act of 1934, a stockbroker's fraud is "in connection with the . . . sale" of securities when the stockbroker sells his customer's securities for the broker's own benefit and uses the proceeds without any disclosure to, or authorization from, the customer. The Department argued that both the sale and the resultant misappropriation of funds violate the Act.

- **Solicitor General Argued as *Amicus Curiae* in Access to Courts Case.** On March 18, the Department argued in support of the petitioners in *Christopher v. Harbury*. The questions presented are: (i) whether governmental officials violated the constitutional right to access the courts by allegedly making deliberate misstatements that delayed an individual's decision to file a future lawsuit; and (ii) if so, whether such a right was clearly established for purposes of qualified immunity. The Department argued that such misstatements violated no constitutional right and that such rights were not clearly established.

- **Office of Solicitor General Argued as *Amicus Curiae* in Student Drug Testing Case.** On March 19, the Department argued in support of the petitioners in *Board of Education v. Earls*. The question presented is whether the Fourth Amendment prevents a public school district from

requiring students who participate in voluntary, non-athletic interscholastic competitions to agree to random urinalysis testing for illegal drug use. The Department argued that the school district's drug policy was reasonable and thus constitutional.

- **Supreme Court Decided Family and Medical Leave Act Case.** On March 19, the Supreme Court issued its decision in *Ragsdale v. Wolverine World Wide*. The Family and Medical Leave Act requires employers to provide eligible employees with a twelve-week leave period for serious health conditions that prevent them from working. The question presented was whether regulations by the Secretary of Labor could forbid employers from counting leave against that twelve-week period until the impaired employee was notified specifically that leave was being provided under the Act, rather then under some other employment policy. The Department argued, as *amicus curiae* supporting the petitioner, that Secretary's regulations were valid based on her conclusion that workers must be notified of their statutory rights at the beginning of the leave period so that they can plan their treatment or care-giving activities. The Supreme Court disagreed, holding that the challenged regulations impermissibly granted employees a remedy even when their decisions about whether to take leave were unaffected by the employer's failure to provide notice. Justice O'Connor filed a dissenting opinion, in which Justices Souter, Ginsburg, and Breyer joined.

- **Supreme Court Decided Title VII Case.** On March 19, the Supreme Court issued its decision in *Edelman v. Lynchburg College*. The question presented was whether plaintiffs may amend a charge filed with the EEOC by providing a sworn statement verifying the charge, even though such verification is filed after the statutory period for filing a charge has expired. The Department argued that, although Title VII requires a charge to be verified before the respondent may be forced to participate in an EEOC investigation, EEOC regulations reasonably allow plaintiffs to provide such verification outside the charge-filing period. The Supreme Court agreed, holding that the time limit applicable to filing a charge does not necessarily apply to verifying such a charge. Justice Thomas filed a separate concurring opinion. Justice O'Connor filed an opinion concurring in the judgment, which Justice Scalia joined.

- **Office of Solicitor General Argued in Social Security Case.** On March 20, the Department argued as respondent in *Gisbrecht v. Barnhart*. Reasonable attorney's fees under 42 U.S.C. 406(b) are available as deductions from a prevailing claimant's back benefit award of social security benefits. The question presented is whether such fees should be calculated using the lodestar method, which multiplies the hours an attorney worked by a reasonable hourly rate, or whether courts must employee a rebuttable presumption that an attorney should receive the amount previously agreed to in a contingency fee agreement. The Department argued that courts should employ the lodestar method.

- **Office of Solicitor General Filed Brief in National Labor Relations Act Case.** On March 20, the Department filed a brief as respondent in *BE & K Construction Co. v. NLRB*. The question presented is whether the NLRB may hold an employer liable for filing an unsuccessful lawsuit in retaliation for the exercise of employees' legally protected rights, even if the lawsuit was not

objectively baseless. The Department argued that the NLRB could impose such liability pursuant to its authority to prevent employers from restraining, coercing, or interfering with such rights.

- **Office of Solicitor General Filed Brief in Land Use Case.** On March 22, the Department filed a brief as respondent in *Franconia Associates v. United States*. The questions presented are: (i) whether a breach of contract claim "first accrues" for purposes of 28 U.S.C. § 2501 when Congress enacts a statute abridging petitioners' contractual right to prepay government mortgage loans; and (ii) whether a Fifth Amendment takings claim based on the same underlying facts also "first accrues" at that time. The Department argued that petitioners' claims first accrued when the relevant statute was enacted, not on the date that any particular owner attempted to tender prepayment.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

April 1, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- Nothing to report.

B. THIS WEEK

- Nothing to report.

C. LAST WEEK

- **Supreme Court Decided Public Housing Case.** On March 26, the Supreme Court issued its decision in *HUD* v. *Rucker*, a case that was consolidated with *Oakland Housing Authority* v. *Rucker*. The question presented was whether a statutorily required provision in a public housing lease — which provides that any drug-related activity by the tenant, the tenant's family, or anyone under the tenant's control provides cause to terminate the lease — is breached by drug-related activity of which the tenant did not know or have reason to know. HUD had construed the statute to authorize public housing authorities to terminate the tenancy of tenants whose household members have engaged in drug-related activity, without regard to the tenant's knowledge of the activity, and the Department argued that this construction was the only permissible construction of the statute. In a unanimous opinion, the Supreme Court agreed, holding that the statute's plain language unambiguously requires lease terms authorizing local public housing authorities to terminate the lease of a tenant when a member of the household or guest engages in drug-related activity, regardless of the tenant's knowledge of the activity. Justice Breyer did not take part in the consideration of the case.

- **Supreme Court Decided Sixth Amendment Case.** On March 27, the Supreme Court issued its decision in *Mickens* v. *Taylor*. The question presented was whether a defendant who challenges, on Sixth Amendment grounds, a court's unreasonable failure to inquire into trial counsel's potential conflict of interest must show that an actual conflict occurred and that an adverse effect resulted. The Department argued that successfully alleging a Sixth Amendment violation under such circumstances does require proof of both an actual conflict and an adverse effect on counsel's performance. The Supreme Court agreed, holding that where the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known, a defendant seeking to demonstrate a Sixth Amendment violation must establish that a conflict of interest adversely affected his counsel's performance. Justice Kennedy filed a concurring opinion, in which Justice O'Connor joined. Justice Stevens filed a dissenting opinion, as did Justice Souter. Justice Breyer filed a dissenting opinion in which Justice Ginsburg joined.

- **Supreme Court Decided Social Security Case.** On March 27, the Supreme Court issued its decision in *Barnhart* v. *Walton*. The questions presented were (1) whether a social security claimant is entitled to disability benefits even though his physical or mental disability will not prevent him from working for longer than twelve months; and (2) whether a claimant is entitled to a "trial work period" of up to nine months even though his alleged impairment no longer prevents him from working at the time his disability insurance benefits claim is adjudicated. The Department argued that claimants are not entitled to social security benefits, or to a trial work period, under such circumstances. The Supreme Court agreed, holding that the Social Security Administration's interpretation of the governing statute to preclude benefits when a disability would not prevent a claimant from working longer than twelve months, and not to provide for a trial work period when an alleged impairment no longer prevents a claimant from working at the time his claim is adjudicated, was within its authority. Justice Scalia filed a separate opinion concurring in part and concurring in the judgment.

- **Supreme Court Decided Labor Case.** On March 27, the Supreme Court issued its decision in *Hoffman Plastic Compound* v. *NLRB*. The question presented was whether the NLRB exceeded its remedial authority by awarding backpay against an employer for discriminating against an employee for union-organizing activity, when the employee was an undocumented alien not authorized to work in the United States. The Department argued that the Board properly awarded backpay up to the date the employer learned the employee was an undocumented alien. The Supreme Court disagreed, holding that federal immigration policy, as expressed in the Immigration Reform and Control Act (IRCA), precluded the award of backpay to an undocumented alien who has never been legally authorized to work in the United States. Justice Breyer filed a dissenting opinion, in which Justices Stevens, Souter, and Ginsburg joined.

- **Office of Solicitor General Filed Brief as *Amicus Curiae* in Boat Safety Case.** On March 29, the Department filed a brief as *amicus curiae* in support of petitioner. The question presented is whether petitioner's state common-law tort action, based on respondent's failure to install a propeller guard on a motorboat, is preempted by the Federal Boat Safety Act of 1971, or by the

decision of the Secretary of Transportation in 1990 to take no regulatory action requiring installation of propeller guards on recreational boats. The Department argued that the Boat Safety Act does not expressly preempt petitioner's common-law claims, and that implied conflict preemption principles do not indicate that petitioner's suit is foreclosed by the Secretary of Transportation's 1990 decision.

- **Office of Solicitor General Argued as *Amicus Curiae* in Habeas Case.** On March 25, the Department argued as *amicus curiae* in support of petitioners in *Bell v. Cone*. The questions presented are: (i) whether a defendant's claim of ineffective assistance of counsel may presume prejudice when counsel does not present mitigating evidence and does not offer a closing argument during a capital sentencing hearing, and (ii) if so, whether a state court's decision to deny such a claim involved an unreasonable application of clearly established federal law. The Department argued that prejudice should not be presumed under such circumstances, because allegations of attorney error do not constitute a *per se* constitutional violation.

- **Office of Solicitor General Argued in Criminal Case.** On March 25, the Department argued as respondent in *Harris v. United States*. The question presented is whether the Constitution requires that the circumstance that the defendant "brandished" a firearm, which triggers an increased mandatory minimum under 18 U.S.C. 924(c)(1)(A), must be charged in the indictment and proved to the jury beyond a reasonable doubt. The Department argued that any fact which increases a defendant's mandatory minimum sentence, but which does not increase the applicable statutory maximum sentence, may be determined by the court as a sentencing factor, using a preponderance of the evidence standard.

- **Office of Solicitor General Argued as *Amicus Curiae* in Class Action Case.** On March 26, the Department argued as *amicus curiae* in support of respondent in *Devlin v. Scardelletti*. The question presented is whether a non-named class member who objects to a class action settlement, but who does not formally intervene in the lawsuit, may appeal a district court's judgment approving the settlement. The Department argued that non-named class members who object to a class action settlement may appeal a judgment approving the settlement if they intervene for the limited purpose of taking such an appeal.

- **Solicitor General Argued Census Case.** On March 27, the Department argued as respondent in *Utah v. Evans*. In the 2000 census, the Census Bureau used a process known as "imputation," under which the number of residents in a housing unit whose occupancy could not otherwise be determined was based on the known number of residents of a similar nearby unit. The questions presented are: (i) whether appellants' challenge to the Census Bureau's use of imputation is justiciable; (ii) whether such imputation violated 13 U.S.C. 195's prohibition against "the use of the statistical method known as 'sampling'" to determine population "for purposes of apportionment of Representatives in Congress among the several States"; and (iii) whether the use of imputation violated the Census Clause of the Constitution, Article I, Section 2, Clause 3. The Department argued that appellants' claims are justiciable, but that imputation is consistent with both the statute and the Constitution.

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

April 29, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: RJL for Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- **Office of Solicitor General to File Brief as Petitioner in Telecommunications and Bankruptcy Case.** On May 6, the Department will file a brief as petitioner in *Federal Communications Commission (FCC)* v. *NextWave Personal Communications, Inc.* The question presented is whether Section 525 of the Bankruptcy Code conflicts with and displaces the FCC's rules for congressionally authorized spectrum auctions, which provide that wireless telecommunications licenses obtained at auction automatically cancel upon the winning bidder's failure to make timely payments to fulfill its winning bid.

B. THIS WEEK

- **Supreme Court Decides First Amendment Case.** On April 29, the Supreme Court issued its decision in *Thompson* v. *Western States Medical Center*. The Food and Drug Administration Modernization Act of 1997 (FDAMA) exempts drugs compounded by pharmacists from various requirements of the federal Food, Drug, and Cosmetic Act. The question presented was whether FDAMA violates the First Amendment by limiting that exemption to pharmacists who do not solicit prescriptions for or advertise particular compounded drugs. The Department argued as petitioner that FDAMA's limited exemption from the new drug approval requirements for drugs compounded by pharmacists who do not solicit prescriptions for or advertise particular compounded drugs is consistent with the First Amendment. The Supreme Court disagreed, holding that the FDAMA's prohibitions on soliciting prescriptions for and advertising compounded drugs not subject to standard drug approval

requirements amount to unconstitutional restrictions on commercial speech. Justice Thomas filed a concurring opinion. Justice Breyer filed a dissenting opinion, which Chief Justice Rehnquist and Justices Stevens and Ginsburg joined.

C. LAST WEEK

- **Supreme Court Granted Certiorari in Indian Law Case.** On April 22, the Supreme Court granted the Department's petition for certiorari in *United States* v. *White Mountain Apache Tribe*. The question presented is whether the government's failure to maintain property in accordance with a particular, statutorily prescribed trust creates an action for monetary damages. The Department argues that monetary damages are not available under such circumstances.

- **Supreme Court Decided Takings Clause Case.** On April 23, the Supreme Court issued its decision in *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*. The question presented was whether a temporary moratorium on land development constitutes a taking of property and thereby requires "just compensation" under the Takings Clause. The Solicitor General argued as *amicus curiae* that the moratorium did not effect a per se taking of property because it was reasonably designed to preserve the status quo pending completion of a comprehensive land-use plan. The Supreme Court agreed, holding that the moratoria were not per se takings of property requiring compensation under the Takings Clause. Chief Justice Rehnquist filed a dissenting opinion, which Justices Scalia and Thomas joined, and Justice Thomas filed a dissenting opinion, which Justice Scalia joined.

- **Office of Solicitor General Argued Tax Case.** On April 22, the Department argued as petitioner in *United States* v. *Fior D'Italia, Inc.* The question presented is whether the employer' s share of the Federal Insurance Contribution Act (FICA) tax on employee tip income must be determined by accumulating the result of individual audits of individual employees or may instead be based on a reasonable estimate of the aggregate tips received by all employees. The Department argued that the government may determine the employer's share based on a reasonable estimate of the aggregate amount of tips received.

- **Office of Solicitor General Argued as *Amicus Curiae* in Automotive Safety Case.** On April 23, the Department argued as *amicus curiae* in support of petitioners in *City of Columbus* v. *Ours Garage and Wrecker Service*. The Federal Aviation Administration Authorization Act of 1994 prohibits States from regulating the price, route, or service of any motor carrier, but the Act does not diminish States' "safety regulatory authority * * * with respect to motor vehicles." 49 U.S.C. 14501(c)(2)(A). The question presented is whether a State's safety regulatory authority allows the State to delegate its regulatory power to municipalities within the State's borders. The Department argued that the Act permits such a delegation of authority.

- **Office of Solicitor General Argued as *Amicus Curiae* in Case Concerning Availability**

of Punitive Damages. On April 23, the Department argued as *amicus curiae* in support of petitioners in *Barnes* v. *Gorman*. The question presented is whether, or under what circumstances, courts should impute a Congressional intent to provide a punitive damages remedy in the context of an implied private right of action. The Department argued against imputing such Congressional intent with respect to Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

- **Office of Solicitor General Argued as *Amicus Curiae* in Family Educational Rights and Privacy Act Case.** On April 24, the Department argued as *amicus curiae* in support of petitioner in *Gonzaga University* v. *John Doe*. The question presented is whether a student may sue a private university for damages under 42 U.S.C. 1983 to enforce provisions of the Family Educational Rights and Privacy Act of 1974 (FERPA) that bar the furnishing of federal funding to educational institutions that permit the release of educational records to unauthorized persons. The Department argued that a cause of action under Section 1983 is not available to enforce FERPA's disclosure provisions.

- **Solicitor General Argued Criminal Case.** On April 24, the Department argued as petitioner in *United States* v. *Ruiz*. The questions presented are (1) whether, before pleading guilty, a criminal defendant is constitutionally entitled to obtain all exculpatory information possessed by the government, including impeachment material, and (2) if so, whether that right may be waived by the terms of a plea agreement. The Department argued that a defendant has no right to obtain such information before pleading guilty and that, if such a right exists, it may be waived in a plea agreement.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

April 8, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- **Office of Solicitor General to Argue in Criminal Case.** On April 15, the Department will argue as petitioner in *United States* v. *Cotton*. The question presented is whether a defendant's enhanced sentence may be affirmed, despite his indictment's omission of the fact that justified his increased maximum sentence, because the defendant failed to object, because the evidence supporting the operative fact was overwhelming, and because the defendant was on notice that the fact at issue could be used to seek an enhanced sentence. The Department will argue that such sentences may be upheld.

- **Office of Solicitor General to Argue in Statute of Limitations Case.** On April 15, the Department will argue as respondent in *Franconia Associates v. United States*. The questions presented are whether either a breach of contract claim or a Fifth Amendment takings claim accrued for purposes of 28 U.S.C. 2501, the six-year statute of limitations governing actions in the Court of Federal Claims, when Congress enacted a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans. The Department will argue that the claims accrued at the point the statute was enacted.

- **Office of Solicitor General to Argue in Fourth Amendment Case.** On April 16, the Department will argue as petitioner in *United States* v. *Drayton*. The question presented is whether a Fourth Amendment "seizure" occurs when a police officer informs a bus passenger that he is conducting drug and illegal weapons interdiction and asks the passenger for consent to search, if another officer

stays at the front of the bus without blocking the exit. The Department will argue that no seizure occurs in such circumstances.

- **Office of Solicitor General to Ague in Labor Law Case.** On April 16, the Department will argue as respondent in *BE&K Construction Company v. NLRB*. As framed by the Court, the question presented is whether the court of appeals erred in holding that the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show that the suit was not objectively baseless under *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993). The Department will argue that the NLRB acted properly.

- **Office of Solicitor to Argue in Qualified Immunity Case.** On April 17, the Department will argue as *amicus curiae* in support of the petitioner in *Hope v. Pelzer*. The question presented is whether tying a prisoner to a "hitching post" for an extended, painful period of time violated clearly established Eighth Amendment rights. The Department will contend that judicial precedents that were "materially similar" to the facts alleged would have informed a reasonable officer that such conduct was unconstitutional.

- **Office of Solicitor General to Argue in Alien Diversity Case.** On April 17, the Department will argue as *amicus curiae* in support of the petitioner in *Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure, Ltd.* The question presented is whether corporations organized under the laws of United Kingdom Overseas Territories are "citizens or subjects of a foreign state" for purposes of alienage diversity jurisdiction under 28 U.S.C. 1332(a)(2). The Department will argue that such corporations are properly subject to federal jurisdiction.

- **Office of Solicitor General to File Brief in Firearms Possession Case.** On April 15, the Department will file a brief as petitioner in *United States v. Bean*. Federal law prohibits persons who have been convicted of a felony from possessing firearms, but provides that the Secretary of the Treasury, acting through the Bureau of Alcohol, Tobacco, and Firearms (ATF), may grant relief from that prohibition if it is established to his satisfaction that certain preconditions are established. Since 1992, however, every appropriations law for ATF has specified that ATF may not expend any appropriated funds to act upon applications for such relief. The question presented is whether, despite that prohibition, a federal district court has authority to grant such relief to a person convicted of a felony.

B. THIS WEEK

- **Office of Solicitor General Filed Brief in Coal Act Case.** On April 8, the Department filed a brief as petitioner in *Barnhart v. Peabody Coal Co.*, which has been consolidated with *Holland v. Bellaire Corp.* The Coal Industry Retiree Health Benefit Act of 1992 established the United Mine Workers of America Combined Benefit Fund (Combined Fund) to ensure the continued provision of health-care benefits to retired coal miners who worked under collective bargaining agreements that

promised such benefits. Those benefits are financed principally through premiums paid to the Combined Fund by "signatory operators" that employed miners under those collective bargaining agreements and are assigned responsibility for their retired miners' benefits. The Act provides that the Commissioner of Social Security "shall, before October 1, 1993," assign responsibility for each eligible retired coal miner to an appropriate signatory operator (or to a "related person" of a signatory operator) that employed the miner. The Commissioner was unable, however, to complete all such assignments before October 1, 1993. The question presented is whether the Commissioner's assignments of responsibility for retired miners that were made on or after October 1, 1993, are void.

C. LAST WEEK

- **Office of Solicitor General Filed Brief in Transportation Case.** On April 5, the Department filed a brief as *amicus curiae* in *Yellow Freight System, Inc. v. Michigan*. The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) permits States to charge commercial motor vehicle carriers "a fee * * * that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." The question presented is whether the Michigan Supreme Court erred in holding that only a State's "generic" fee is relevant to determining the fee that was "collected or charged as of November 15, 1991." The Department argued that the Michigan Court did err, but suggested that the Court should remand the case for consideration of relevant issues that are not encompassed by the issue upon which the Court granted certiorari.

- **Office of Solicitor General Sought Supreme Court Review in Selective Prosecution Case.** On April 5, the Department filed a petition for a writ of certiorari in *United States v. Bass*. The questions presented are: (1) whether the court of appeals erroneously permitted a capital defendant to obtain discovery on a claim of selective prosecution in the absence of evidence that similarly situated individuals of a different race were not prosecuted; and (2) whether the court of appeals incorrectly permitted a defendant to make a prima facie showing of selective prosecution by relying on nationwide statistics that aggregate the individualized decisions made independently by multiple federal prosecutors across the country.

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

April 15, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- **Office of Solicitor General to Argue Tax Case.** On April 22, the Department will argue as petitioner in *United States* v. *Fior D'Italia, Inc.* The question presented is whether the employer' s share of the Federal Insurance Contribution Act (FICA) tax on employee tip income must be determined by accumulating the result of individual audits of individual employees or may instead be based on a reasonable estimate of the aggregate amount of tips received by all employees. The Department will argue that the government could determine the employer's share based on a reasonable estimate of the aggregate amount of tips received.

- **Office of Solicitor General to Argue as *Amicus Curiae* in Automotive Safety Case.** On April 23, the Department will argue as *amicus curiae* in support of petitioners in *City of Columbus* v. *Ours Garage and Wrecker Service*. The Federal Aviation Administration Authorization Act of 1994 prohibits States from regulating the price, route, or service of any motor carrier, but the Act does not diminish States' "safety regulatory authority * * * with respect to motor vehicles." 49 U.S.C. 14501(c)(2)(A). The question presented is whether a State's safety regulatory authority allows the State to delegate its regulatory power to municipalities within the State' s borders. The Department will argue that the Act does permit such a delegation of authority.

- **Office of Solicitor General to Argue as *Amicus Curiae* in Case Concerning Availability of Punitive Damages.** On April 23, the Department will argue as *amicus curiae* in support of petitioners in *Barnes* v. *Gorman* . The question presented is whether, or in what circumstances, the

intent to provide a punitive damages remedy may be imputed to Congress in an inferred private right of action. The Department will argue that a court should not impute to Congress an intent to allow a punitive damages remedy in Title II of the Americans with Disabilities Act or Section 504 of the Rehabilitation Act.

- **Office of Solicitor General to Argue as *Amicus Curiae* in Family Educational Rights and Privacy Act Case.** On April 24, the Department will argue as *amicus curiae* in support of petitioner in *Gonzaga University* v. *John Doe*. The question presented is whether a student may sue a private university for damages under 42 U.S.C. 1983 to enforce provisions of the Family Educational Rights and Privacy Act of 1974 (FERPA) which bar the furnishing of federal funding to educational institutions that have a policy or practice of permitting education records to be released to unauthorized persons. The Department will argue that a cause of action under Section 1983 is not available to enforce FERPA's disclosure provisions.

- **Solicitor General to Argue Criminal Case.** On April 24, the Department will argue as petitioner in *United States* v. *Ruiz*. The questions presented are (1) whether, before pleading guilty, a criminal defendant is constitutionally entitled to obtain all exculpatory information possessed by the government, including impeachment material, and (2) if so, whether that right may be waived by the terms of a plea agreement. The Department will argue that a defendant has no right to obtain such information before pleading guilty and that, if such a right exists, it may be waived in a plea agreement.

B. THIS WEEK

- **Office of Solicitor General Argues Criminal Case.** On April 15, the Department argued as petitioner in *United States* v. *Cotton*. The question presented is whether a defendant's enhanced sentence may be affirmed, despite his indictment's omission of the fact that justified his increased maximum sentence, because the defendant failed to object, because the evidence supporting the operative fact was overwhelming, and because the defendant was on notice that the fact at issue could be used to seek an enhanced sentence. The Department argued that such sentences may be upheld.

- **Office of Solicitor General Argues in Statute of Limitations Case.** On April 15, the Department argued as respondent in *Franconia Associates* v. *United States*. The questions presented are whether either a breach of contract claim or a Fifth Amendment takings claim accrued for purposes of 28 U.S.C. 2501, the six-year statute of limitations governing actions in the Court of Federal Claims, when Congress enacted a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans. The Department argued that the claims accrued at the point the statute was enacted.

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drug and illegal weapons interdiction and asks the passenger for consent to search, if another officer stays at the front of the bus without blocking the exit. The Department will argue that no seizure occurs in such circumstances.

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- **Office of Solicitor General Files Brief in Firearms Possession Case.** On April 15, the Department filed a brief as petitioner in *United States* v. *Bean*. Federal law prohibits persons who have been convicted of a felony from possessing firearms, but provides that the Secretary of the Treasury, acting through the Bureau of Alcohol, Tobacco, and Firearms (ATF), may grant relief from that prohibition if it is established to his satisfaction that certain preconditions are established. Since 1992, however, every appropriations law for ATF has specified that ATF may not expend any appropriated funds to act upon applications for such relief. The question presented is whether, despite that prohibition, a federal district court has authority to grant such relief to a person convicted of a felony.

- **Office of Solicitor General Files Brief as *Amicus Curiae* in Support of Petition Seeking Certiorari in Due Process Case.** On April 15, the Department filed a brief as *amicus curiae* in support of a petition seeking a writ of certiorari in *Connecticut Department of Public Safety* v. *Doe*. The question presented is whether the court of appeals erroneously concluded that petitioner Connecticut's sex offender registration law violates due process by failing to afford an offender a hearing regarding his "current dangerousness" before it publishes true and accurate information about him and his conviction history.

C. LAST WEEK

- **Office of Solicitor General Filed Brief in Coal Act Case.** On April 8, the Department filed a brief as petitioner in *Barnhart* v. *Peabody Coal Co.*, which has been consolidated with *Holland* v. *Bellaire Corp.* The Coal Industry Retiree Health Benefit Act of 1992 established the United Mine Workers of America Combined Benefit Fund (Combined Fund) to ensure the continued provision of health-care benefits to retired coal miners who worked under collective bargaining agreements that promised such benefits. Those benefits are financed principally through premiums paid to the Combined Fund by "signatory operators" that employed miners under those collective bargaining agreements and are assigned responsibility for their retired miners' benefits. The Act provides that the Commissioner of Social Security "shall, before October 1, 1993," assign responsibility for each eligible retired coal miner to an appropriate signatory operator (or to a "related person" of a signatory operator) that employed the miner. The Commissioner was unable, however, to complete all such assignments before October 1, 1993. The question presented is whether the Commissioner's assignments of responsibility for retired miners that were made on or after October 1, 1993, are void. The Department argued that such assignments are not void.

- **Office of Solicitor General Filed Brief Seeking Certiorari in Immigration Case.** On April 9, the Department filed a petition seeking a writ of certiorari in *Demore* v. *Kim*. Under 8 U.S.C. 1226(c)(1), the Attorney General is required to take into custody aliens who are inadmissible to or deportable from the United States because they have committed a specified offense, including an aggravated felony. Section 1226(c)(2) prohibits release of those aliens during administrative proceedings to remove them from the United States, except in very limited circumstances. The question presented is whether respondent's mandatory detention under Section 1226(c) violates due process where respondent was convicted of an aggravated felony after his admission into the United States.

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

May 20, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- Nothing to report.

B. THIS WEEK

- **Supreme Court Decided Criminal Case.** On May 20, the Supreme Court issued its unanimous decision in *United States* v. *Cotton*. The question presented was whether a defendant's enhanced sentence should be reversed because his indictment omitted a fact justifying the enhancement, even though the defendant failed to object to the omission, the government's evidence was overwhelming, and the defendant received notice that his sentence could be enhanced. The Department argued that reversal under such circumstances is improper, and the Supreme Court agreed. The Court unanimously held that factual omissions in an indictment do not present a jurisdictional error, and that such omissions are subject to plain error review. Where the government's evidence is overwhelming and undisputed, the Court held that such indictment errors do not affect a judicial proceeding's fairness, reputation, or integrity, and thus cannot justify reversal if the defendant fails to object at trial.

- **Supreme Court Decided Telecommunications Act Case.** On May 20, the Supreme Court issued its unanimous decision in *United States* v. *Public Service Commission of Maryland*. The Telecommunications Act of 1996 provides authority for state utility commissions to regulate "interconnection agreements" between local exchange carriers and potential competitors. The questions presented were: (1) whether a state commission's enforcement of an interconnection

agreement is reviewable in federal court, (2) whether the participation of a state commission in the Act's regulatory scheme constitutes a waiver of Eleventh Amendment immunity, and (3) whether injunctive relief is available for commissioners' ongoing violations of federal regulatory responsibilities. The Department argued that a commission's enforcement activities are federally reviewable, that participation under the Act constitutes an Eleventh Amendment waiver, and that *Ex parte Young* permits prospective injunctive relief. The Supreme Court agreed as to the questions of reviewability and prospective relief, and it did not decide the question of Eleventh Amendment waiver. Justice Kennedy filed a concurring opinion, and Justice Souter filed a concurring opinion that Justices Ginsburg and Breyer joined.

- **Supreme Court Dismissed Telecommunications Act Case.** On May 20, the Supreme Court issued an opinion dismissing as improvidently the writ of certiorari granted in *Mathias* v. *Worldcom Technologies*. *Mathias* raised issues identical to those considered in the *Public Service Commission* case.

- **Supreme Court Granted Certiorari in Sex Offender Case.** On May 20, the Supreme Court granted a petition for certiorari in *Connecticut Department of Public Safety* v. *Doe*. The question presented is whether a sex offender registration law violates the Due Process Clause by failing to provide a hearing before publicly disseminating an offender's conviction history and other personal facts. In an *amicus curiae* brief supporting the petitioners, the Department urged the Court to grant certiorari and argued that such a registration law does not violate due process.

C. LAST WEEK

- **Supreme Court Decided First Amendment Case.** On May 13, the Supreme Court issued its decision in *Ashcroft* v. *ACLU*. The Child Online Protection Act (COPA) forbids the commercial communication through the World Wide Web of any materials that are both available to and harmful to minors, unless good-faith efforts are made to prevent children from accessing such materials. The question presented was whether the Act violates the First Amendment by relying on a "community standards" test to identify materials that are harmful to minors. The Solicitor General argued as petitioner that reference to community standards is a permissible, well-established component of state and federal laws, and that there is nothing unreasonable about requiring commercial entities that operate within a nationwide medium to observe community standards throughout the nation. The Supreme Court agreed, holding that COPA's reliance on "community standards" to identify what material "is harmful to minors" does not by itself render the statute substantially overbroad for First Amendment purposes. Justices O'Connor and Breyer filed opinions concurring in part and concurring in the judgment. Justice Kennedy filed an opinion concurring in the judgment, which Justices Souter and Ginsburg joined. Justice Stevens filed a dissenting opinion.

- **Supreme Court Decided Telecommunications Case.** On May 13, the Supreme Court issued its decision in *Verizon Communications Inc.* v. *FCC*. The questions presented concerned the

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

June 10, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- Nothing to report.

B. THIS WEEK

- **Supreme Court Decided Fifth Amendment Case.** On June 10, the Supreme Court issued its decision in *McKune v. Lile*. The question presented was whether a State's rehabilitative program for incarcerated sexual offenders violates the Fifth Amendment privilege against compelled self-incrimination, because the program conditions institutional privileges on the participants' accepting responsibility for their offenses without barring the use of such confessions in future criminal prosecutions. The Department argued as *amicus curiae* in support of petitioner that conditioning institutional privileges in this way does not unconstitutionally coerce participants to incriminate themselves, and that providing such incentives is constitutionally reasonable in light of the State's penological interests in rehabilitating convicted sexual offenders. The Court agreed. Justice Kennedy announced the judgment of the Court and delivered an opinion, joined by Chief Justice Rehnquist and Justices Scalia and Thomas. Justice O'Connor wrote a separate opinion concurring in the judgment. Justice Stevens filed a dissenting opinion, in which Justices Souter, Ginsburg, and Breyer joined.

- **Supreme Court Decided Title VII Case.** On June 10, the Supreme Court issued its decision in *National Railroad Passenger Corp. v. Morgan*. The question presented was whether a Title VII plaintiff may hold a private employer liable, under a "continuing violation" theory, for discriminatory conduct that would otherwise be time-barred because the plaintiff failed to file an EEOC

charge within 300 days after the allegedly continuing violation began. The Department argued as *amicus curiae* in support of petitioner that allegations of a continuing violation do not permit plaintiffs to establish liability and to recover damages based on discriminatory acts that occurred outside the charge-filing period, though such time-barred acts may be used to provide background for discriminatory acts that occurred within the charge-filing period. In an opinion by Justice Thomas, the Court agreed, holding that a Title VII plaintiff raising claims of discrete discriminatory or retaliatory acts must file his charge within the appropriate 180- or 300-day period, but a charge alleging hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period. Justice O'Connor filed an opinion concurring in part and dissenting in part, in which Chief Justice Rehnquist joined and in which Justices Scalia, Kennedy, and Breyer joined in part.

- **Supreme Court Decided Disabilities Case.** On June 10, the Supreme Court issued its decision in *Chevron, U.S.A., Inc. v. Echazabal.* The question presented was whether the Americans with Disabilities Act permits an employer to refuse to hire an applicant because his job performance would, as a result of his disability, pose a direct threat to his own health or safety. The Department argued as *amicus curiae* in support of petitioner that the EEOC's regulations allowing such refusals implement a valid, reasonable interpretation of the Act. In a unanimous opinion by Justice Souter, the Court agreed, holding that the regulation is a permissible interpretation of the Act.

- **Supreme Court Decided Class Action Case.** On June 10, the Supreme Court issued its decision in *Devlin v. Scardelletti.* The question presented was whether a non-named class member who objects to a class action settlement, but who does not formally intervene in the lawsuit, may appeal a district court's judgment approving the settlement. The Department argued as *amicus curiae* supporting respondent that non-named class members who object to a class action settlement may appeal a judgment approving the settlement if they intervene for the limited purpose of taking such an appeal. In an opinion by Justice O'Connor, the Court disagreed, holding non-named class members who have objected in a timely manner to approval of a settlement at a fairness hearing generally have the power to bring an appeal. Justice Scalia filed a dissenting opinion, in which Justices Kennedy and Thomas joined.

- **Supreme Court Decided Statute of Limitations Case.** On June 10, the Supreme Court issued its decision in *Franconia Associates v. United States.* The questions presented were whether either a breach of contract claim or a Fifth Amendment takings claim accrued for purposes of 28 U.S.C. 2501, the six-year statute of limitations governing actions in the Court of Federal Claims, when Congress enacted a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans. The Department argued that the claims accrued at the point the statute was enacted. In a unanimous opinion by Justice Ginsburg, the Court disagreed, holding that the limitations period would begin to run when a borrower tenders prepayment and the government then dishonors its obligation to accept the tender and release its control over use of the property securing the loan.

- **Supreme Court Decided Alien Diversity Case.** On June 10, the Supreme Court issued its decision in *Chase Manhattan Bank* v. *Traffic Stream (BVI) Infrastructure, Ltd.* The question presented was whether corporations organized under the laws of United Kingdom Overseas Territories are "citizens or subjects of a foreign state" for purposes of alienage diversity jurisdiction under 28 U.S.C. 1332(a)(2). The Department argued as *amicus curiae* in support of petitioner that such corporations are properly subject to federal jurisdiction. In a unanimous opinion by Justice Souter, the Court agreed, holding that a corporation organized under the laws of the British Virgin Islands is a "citizen or subjec[t] of a foreign state" for purposes of alienage diversity jurisdiction.

- **Supreme Court Granted Certiorari in Lands Case.** On June 10, the Supreme Court granted a petition seeking a writ of certiorari in *Borden Ranch Partnership v. U.S. Army Corps of Engineers.* The questions presented are: 1) whether a rancher's "deep plowing" to enhance the soil's agricultural viability "add[s]" a "pollutant" to a wetland so as to constitute a regulated point-source "discharge" within the meaning of Section 404 of the Clean Water Act; 2) whether the "deep plowing" of ranchland, which is used to grow forage crops and is farmable in its natural state, in order to plan crops with deeper root systems, is statutorily exempt from regulation under Section 4044 as a "normal farming activity" that does not bring a water of the United States "into a use to which it was not previously subject"; and (3) whether the Clean Water Act's civil penalty section, authorizing penalties "not to exceed $25,000 per day for each violation," authorizes assessing the maximum daily penalty for each time a plow crosses a jurisdictional drainage feature, without regard to the number of days when such activity occurred.

C. LAST WEEK

- **Supreme Court Decided Securities Case.** On June 3, the Supreme Court issued its decision in *SEC v. Zandford.* The question presented was whether, for purposes of the Securities Exchange Act of 1934, a stockbroker's fraud is "in connection with the . . . sale" of securities when the stockbroker sells his customer's securities for his own benefit and uses the proceeds himself without any disclosure to, or authorization from, the customer. The Department argued that both the sale and the resultant misappropriation of funds violate the Act. In a unanimous opinion by Justice Stevens, the Court held that the SEC's position was entitled to deference because it is based on a reasonable construction of the Act. The Court explained that "the sales are properly viewed as a 'course of business' that operated as a fraud or deceit on a stockbroker's customer."

- **Office of Solicitor General Filed Brief as *Amicus Curiae* in Megan's Law Case.** On June 3, the Department filed a brief as *amicus curiae* in support of the petitioners in *Godrey v. Doe.* The question presented is whether Alaska's sex offender registration and community notification law imposes punishment in violation of the Constitution's prohibition on Ex Post Facto legislation. The Department argued that the Ex Post Facto Clause is inapplicable because Alaska intended its registration and notification law to advance the civil, regulatory purpose of promoting public safety,

because the law reasonably advances that goal, and because no other factors justify characterizing it as a "penal statute."

- **Office of Solicitor General Filed Brief Seeking Certiorari in Immigration Case.** On June 3, the Department filed a brief as petitioner seeking a grant of certiorari in *Comfort v. Sosa*. Section 1226(c)(1) of Title 8 of the United States Code requires the Attorney General to take into custody aliens who are inadmissible to or deportable from the United States because they have committed a specified offense, including an aggravated felony. Section 1226(c)(2) of Title 8 prohibits release of those aliens during administrative proceedings to remove them from the United States, except in very limited circumstances. The question presented is whether respondent's mandatory detention under Section 1226(c) violates the Due Process Clause of the Fifth Amendment, where respondent was convicted of an aggravated felony after his admission into the United States.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

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Washington, DC 20530

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

June 24, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- Nothing to report.

B. THIS WEEK

- **Supreme Court Decided Criminal Case.** On June 24, the Supreme Court issued its decision in *Harris v. United States*. The question presented was whether the Constitution requires that the circumstance that the defendant "brandished" a firearm, which triggers an increased mandatory minimum under 18 U.S.C. 924(c)(1)(A), must be charged in the indictment and proved to the jury beyond a reasonable doubt. The Department argued that any fact which increases a defendant's mandatory minimum sentence, but which does not increase the applicable statutory maximum sentence, may be determined by the court as a sentencing factor, using a preponderance of the evidence standard. The Court agreed, in an opinion by Justice Kennedy. Justice O'Connor filed a concurring opinion. Justice Breyer filed an opinion concurring in part and concurring in the judgment. Justice Thomas filed a dissenting opinion, in which Justices Stevens, Souter, and Ginsburg joined.

- **Supreme Court Decided Labor Law Case.** On June 24, the Supreme Court issued its decision in *BE&K Construction Company v. NLRB*. As framed by the Court, the question presented was whether the court of appeals erred in holding that the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show that the suit was not objectively baseless under *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508

U.S. 49 (1993). The Department argued that the NLRB acted properly. In an opinion by Justice O'Connor, the Court held that the NLRB's standard for imposing liability is invalid. The Court held that the right to file a lawsuit is protected by the Constitution's Petition Clause, and concluded that the NLRB's standard would interfere with a substantial amount of constitutionally-protected petitioning. Accordingly, the Court interpreted the National Labor Relations Act to require a higher standard for imposing liability. Justice Scalia filed a concurring opinion, in which Justice Thomas joined. Justice Breyer filed an opinion concurring in part and concurring in the judgment, in which Justices Stevens, Souter, and Ginsburg joined.

- **Supreme Court Decided Criminal Case.** On June 24, the Supreme Court issued its decision in *United States v. Ruiz*. The questions presented were: (i) whether, before pleading guilty, a criminal defendant is constitutionally entitled to obtain all exculpatory information possessed by the government, including impeachment material; and (ii) if so, whether that right may be waived by the terms of a plea agreement. The Department argued that a defendant has no right to obtain such information before pleading guilty and that, if such a right exists, it may be waived in a plea agreement. The Court unanimously agreed, in an opinion by Justice Breyer. Justice Thomas filed an opinion concurring in part and concurring in the judgment.

- **Office of Solicitor General Filed Brief As *Amicus Curiae* in Trademark Case.** On June 24, the Department filed a brief supporting reversal in part in *Moseley v. V Secret Catalogue, Inc.* Federal law permits the owner of a famous mark to obtain an injunction or other relief against another person's commercial use of a mark or trade name "if such use * * * causes dilution of the distinctive quality of the [famous] mark." The question presented is whether that requirement requires objective proof of actual injury to the economic value of the famous mark, as opposed to a presumption of harm arising from a subjective "likelihood of dilution" standard. The Department argued that: (i) a plaintiff seeking an injunction must show that some dilution of his famous mark has already occurred; (ii) a showing that two marks are so similar that consumers mentally associate the marks is important evidence in a dilution case, but does not automatically establish that dilution is occurring; (iii) federal law does not require a dilution plaintiff to establish that the defendant's use of a mark has caused consumers to purchase less of a particular product or has caused the market value of the famous mark to decline; and (iv) reversal in part is warranted because, although the court of appeals' opinion is ambiguous, there is a substantial possibility that it found only a likelihood of future dilution, rather than the existence of any present dilution.

- **Supreme Court Granted Review in Family and Medical Leave Act Case.** On June 24, the Supreme Court granted, over the Department's opposition, the petition for a writ of certiorari in *Nevada Department of Human Resources v. Hibbs*. The question presented is whether the family medical care provision of the Family and Medical Leave Act is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate State's Eleventh Amendment immunity from suit by individuals.

C. LAST WEEK

- **Supreme Court Decided Census Case.** On June 20, the Supreme Court issued its decision in *Utah v. Evans*. In the 2000 census, the Census Bureau used a process known as "imputation," under which the number of residents in a housing unit whose occupancy could not otherwise be determined was based on the known number of residents of a similar nearby unit. The questions presented were: (i) whether appellants' challenge to the Census Bureau's use of imputation was justiciable; (ii) whether such imputation violated 13 U.S.C. 195's prohibition against "the use of the statistical method known as 'sampling'" to determine population "for purposes of apportionment of Representatives in Congress among the several States"; and (iii) whether the use of imputation violated the Census Clause of the Constitution. The Department argued that appellants' claims were justiciable, but that imputation is consistent with both the statute and the Constitution. The Court agreed, in an opinion by Justice Breyer. Justice O'Connor filed an opinion concurring in part and dissenting in part. Justice Thomas filed an opinion concurring in part and dissenting in part, in which Justice Kennedy joined. Justice Scalia filed a dissenting opinion.

- **Supreme Court Decided Access to Courts Case.** On June 20, the Supreme Court issued its decision in *Christopher v. Harbury*. The questions presented were: (i) whether governmental officials violated a private individual's right to access the courts by allegedly making deliberate misstatements that delayed the individual's decision to file a future lawsuit; and (ii) if so, whether such a right was clearly established for purposes of qualified immunity. The Department argued as *amicus curiae* that such misstatements violated no constitutional right and that such rights were not clearly established. In an opinion by Justice Souter, the Court unanimously held that the misstatements had not violated the plaintiff's constitutional rights.

- **Supreme Court Decided ERISA Case.** On June 20, the Supreme Court issued its decision in *Rush Prudential HMO, Inc. v. Moran*. The question presented was whether Section 4-10 of the Illinois Health Maintenance Organization Act, which requires HMOs to "provide a mechanism for * * * review by a physician * * * in the event of a dispute between the primary care physician and the Health Maintenance Organization regarding the medical necessity of a covered service proposed by the primary care physician," was preempted by the Employment Retirement Income Security Act of 1974. The Department argued as *amicus curiae* that the law is not preempted because, although it "relates to" ERISA plans, it "regulates insurance" within the meaning of ERISA's savings clause and does not conflict with any specific provision of ERISA. The Court agreed, in an opinion by Justice Souter. Justice Thomas filed a dissenting opinion, in which Chief Justice Rehnquist and Justices Scalia and Kennedy joined.

- **Supreme Court Decided Automotive Safety Case.** On June 20, the Supreme Court issued its decision in *City of Columbus v. Ours Garage and Wrecker Service*. The Federal Aviation Administration Authorization Act of 1994 prohibits States from regulating the price, route, or service of any motor carrier, but the Act does not diminish States' "safety regulatory authority * * * with respect

to motor vehicles." 49 U.S.C. 14501(c)(2)(A). The question presented was whether a State's safety regulatory authority allows the State to delegate its regulatory power to municipalities within the State's borders. The Department argued as *amicus curiae* that the Act permits such a delegation of authority. The Court agreed, in an opinion by Justice Ginsburg. Justice Scalia filed a dissenting opinion, in which Justice O'Connor joined.

- **Supreme Court Decided Family Educational Rights and Privacy Act Case.** On June 20, the Supreme Court issued its decision in *Gonzaga University v. Doe*. The question presented was whether a student may sue a private university for damages under 42 U.S.C. 1983 to enforce provisions of the Family Educational Rights and Privacy Act of 1974 (FERPA) that bar the furnishing of federal funding to educational institutions that permit the release of educational records to unauthorized persons. The Department argued that a cause of action under Section 1983 is not available to enforce FERPA's disclosure provisions. The Court agreed, in an opinion by Chief Justice Rehnquist. Justice Breyer filed an opinion concurring in the judgment, in which Justice Souter joined. Justice Stevens filed a dissenting opinion, in which Justice Ginsburg joined.

- **Supreme Court Decided Fourth Amendment Case.** On June 17, the Supreme Court issued its decision in *United States v. Drayton*. The question presented was whether a Fourth Amendment "seizure" occurs when a police officer fails to inform bus passengers of their right not to cooperate or consent to searches. The Department argued that no seizure occurs in such circumstances. The Court agreed, in an opinion by Justice Kennedy. Justice Souter filed a dissenting opinion, in which Justices Stevens and Ginsburg joined.

- **Supreme Court Decided Tax Case.** On June 17, the Supreme Court issued its decision in *United States v. Fior D'Italia, Inc.* The question presented was whether the employer's share of the Federal Insurance Contribution Act (FICA) tax on employee tip income must be determined by accumulating the result of individual audits of individual employees or may instead be based on a reasonable estimate of the aggregate amount of tips received by all employees. The Department argued that the government could determine the employer's share based on a reasonable aggregate estimate. The Court agreed, in an opinion by Justice Breyer. Justice Souter filed a dissenting opinion, in which Justices Scalia and Thomas joined.

- **Supreme Court Decided Punitive Damages Case.** On June 17, the Supreme Court issued its decision in *Barnes v. Gorman*. The question presented was whether, or in what circumstances, the intent to provide a punitive damages remedy may be imputed to Congress in an inferred private right of action. The Department argued as *amicus curiae* in support of petitioner that the Court should not impute to Congress an intent to allow a punitive damages remedy in Title II of the Americans with Disabilities Act or Section 504 of the Rehabilitation Act. The Court agreed, in an opinion written by Justice Scalia. Justice Souter filed a concurring opinion, in which Justice O'Connor joined. Justice Stevens filed an opinion concurring in the judgment, in which Justices Ginsburg and Breyer joined.

- **Office of Solicitor General Filed Brief As *Amicuc Curiae* in Federal Employers' Liability Act Case.** On June 17, the Department filed a brief supporting the petitioner in *Norfolk & Western Railway Co. v. Ayers*. The Department's brief addressed the question whether the court below erred in awarding damages for emotional distress under the Federal Employers' Liability Act to plaintiffs based on an asserted fear of developing asbestos-related cancer, where the plaintiffs had not actually developed cancer or any symptoms related to cancer and presented no evidence of any corroborating physical manifestation of their emotional injury. The Department argued that the plaintiffs could not recover damages in such circumstances.

- **Office of Solicitor General Invited to File Brief Expressing Views in Habeas Case.** On June 17, the Supreme Court invited the Solicitor General to express the views of the United States in *In re Taylor* and *In re Wischkaemper*. The questions presented are: (i) whether 21 U.S.C. 848(q) affords federal habeas petitioners, who were sentenced to death by state courts, the right to appointed counsel in clemency and competency proceedings; (ii) whether section 848(q) provides the right to appointed counsel for successor post-conviction proceedings in state and federal court, particularly where a lawyer for a death-sentenced prisoner uncovers evidence of actual innocence; (iii) whether a district court may order appointed counsel to refund attorneys' fees previously approved and paid to him, without notice or a hearing; and (iv) whether, under the Federal Rules of Appellate Procedure and the Due Process Clause of the Fifth Amendment, a court of appeals may decide the merits of an appeal without permitting the appellant to file a brief, argue the case, or identify the issues before the court.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

TELEFAX TO:

RECIPIENT'S NAME: Brett Kavanaugh

AGENCY/FIRM:

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UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

June 17, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- Nothing to report.

A. THIS WEEK

- **Supreme Court Decided Fourth Amendment Case.** On June 17, the Supreme Court issued its decision in *United States v. Drayton*. The question presented was whether a Fourth Amendment "seizure" occurs when a police officer fails to inform bus passengers of their right not to cooperate or consent to searches. The Department argued that no seizure occurs in such circumstances. The Court agreed, in an opinion written by Justice Kennedy. Justice Souter filed a dissenting opinion, in which Justices Stevens and Ginsburg joined.

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intent to provide a punitive damages remedy may be imputed to Congress in an inferred private right of action. The Department argued as *amicus curiae* in support of petitioner that a court should not impute to Congress an intent to allow a punitive damages remedy in Title II of the Americans with Disabilities Act or Section 504 of the Rehabilitation Act. The Court agreed, in an opinion written by Justice Scalia. Justice Souter filed a concurring opinion, in which Justice O'Connor joined. Justice Stevens filed an opinion concurring in the judgment, in which Justices Ginsburg and Breyer joined.

- **Solicitor General Invited to File Brief Expressing Views in Habeas Case.** On June 17, the Supreme Court invited the Solicitor General to express the views of the United States in *In re Taylor and In re Wischkaemper*. The questions presented are whether: 1) 21 U.S.C. 848(q) affords federal habeas petitioners, who were sentenced to death by state courts, the right to appointed counsel in clemency and competency proceedings; 2) whether section 848(q) provides the right to appointed counsel for successor post-conviction proceedings in state and federal court, particularly where a lawyer for a death-sentenced prisoner uncovers evidence of actual innocence; 3) whether a district court may order appointed counsel to refund attorneys' fees previously approved and paid to him, without notice or a hearing; and 4) whether, under the Federal Rules of Appellate Procedure and the Due Process Clause of the Fifth Amendment, a court of appeals may decide the merits of an appeal without permitting the appellant to file a brief, argue the case, or identify the issues before the court.

C. LAST WEEK

- **Supreme Court Decided Fifth Amendment Case.** On June 10, the Supreme Court issued its decision in *McKune v. Lile*. The question presented was whether a State's rehabilitative program for incarcerated sexual offenders violates the Fifth Amendment privilege against compelled self-incrimination, because the program conditions institutional privileges on the participants' accepting responsibility for their offenses without barring the use of such confessions in future criminal prosecutions. The Department argued as *amicus curiae* in support of petitioner that conditioning institutional privileges in this way does not unconstitutionally coerce participants to incriminate themselves, and that providing such incentives is constitutionally reasonable in light of the State's penological interests in rehabilitating convicted sexual offenders. The Court agreed. Justice Kennedy announced the judgment of the Court and delivered an opinion, joined by Chief Justice Rehnquist and Justices Scalia and Thomas. Justice O'Connor wrote a separate opinion concurring in the judgment. Justice Stevens filed a dissenting opinion, in which Justices Souter, Ginsburg, and Breyer joined.

- **Supreme Court Decided Title VII Case.** On June 10, the Supreme Court issued its decision in *National Railroad Passenger Corp. v. Morgan*. The question presented was whether a Title VII plaintiff may hold a private employer liable, under a "continuing violation" theory, for discriminatory conduct that would otherwise be time-barred because the plaintiff failed to file an EEOC charge within 300 days after the allegedly continuing violation began. The Department argued as *amicus curiae* in support of petitioner that allegations of a continuing violation do not permit plaintiffs to establish liability and to recover damages based on discriminatory acts that occurred outside the

charge-filing period, though such time-barred acts may be used to provide background for discriminatory acts that occurred within the charge-filing period. In an opinion by Justice Thomas, the Court agreed, holding that a Title VII plaintiff raising claims of discrete discriminatory or retaliatory acts must file his charge within the appropriate 180- or 300-day period, but a charge alleging hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period. Justice O'Connor filed an opinion concurring in part and dissenting in part, in which Chief Justice Rehnquist joined and in which Justices Scalia, Kennedy, and Breyer joined in part.

- **Supreme Court Decided Disabilities Case.** On June 10, the Supreme Court issued its decision in *Chevron, U.S.A., Inc. v. Echazabal*. The question presented was whether the Americans with Disabilities Act permits an employer to refuse to hire an applicant because his job performance would, as a result of his disability, pose a direct threat to his own health or safety. The Department argued as *amicus curiae* in support of petitioner that the EEOC's regulations allowing such refusals implement a valid, reasonable interpretation of the Act. In a unanimous opinion by Justice Souter, the Court agreed, holding that the regulation is a permissible interpretation of the Act.

- **Supreme Court Decided Class Action Case.** On June 10, the Supreme Court issued its decision in *Devlin v. Scardelletti*. The question presented was whether a non-named class member who objects to a class action settlement, but who does not formally intervene in the lawsuit, may appeal a district court's judgment approving the settlement. The Department argued as *amicus curiae* supporting respondent that non-named class members who object to a class action settlement may appeal a judgment approving the settlement if they intervene for the limited purpose of taking such an appeal. In an opinion by Justice O'Connor, the Court disagreed, holding non-named class members who have objected in a timely manner to approval of a settlement at a fairness hearing generally have the power to bring an appeal. Justice Scalia filed a dissenting opinion, in which Justices Kennedy and Thomas joined.

- **Supreme Court Decided Statute of Limitations Case.** On June 10, the Supreme Court issued its decision in *Franconia Associates v. United States*. The questions presented were whether either a breach of contract claim or a Fifth Amendment takings claim accrued for purposes of 28 U.S.C. 2501, the six-year statute of limitations governing actions in the Court of Federal Claims, when Congress enacted a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans. The Department argued that the claims accrued at the point the statute was enacted. In a unanimous opinion by Justice Ginsburg, the Court disagreed, holding that the limitations period would begin to run when a borrower tenders prepayment and the government then dishonors its obligation to accept the tender and release its control over use of the property securing the loan.

- **Supreme Court Decided Alien Diversity Case.** On June 10, the Supreme Court issued its decision in *Chase Manhattan Bank* v. *Traffic Stream (BVI) Infrastructure, Ltd.* The question

presented was whether corporations organized under the laws of United Kingdom Overseas Territories are "citizens or subjects of a foreign state" for purposes of alienage diversity jurisdiction under 28 U.S.C. 1332(a)(2). The Department argued as *amicus curiae* in support of petitioner that such corporations are properly subject to federal jurisdiction. In a unanimous opinion by Justice Souter, the Court agreed, holding that a corporation organized under the laws of the British Virgin Islands is a "citizen or subjec[t] of a foreign state" for purposes of alienage diversity jurisdiction.

- **Supreme Court Granted Certiorari in Lands Case.** On June 10, the Supreme Court granted a petition seeking a writ of certiorari in *Borden Ranch Partnership v. U.S. Army Corps of Engineers*. The questions presented are: 1) whether a rancher's "deep plowing" to enhance the soil's agricultural viability "add[s]" a "pollutant" to a wetland so as to constitute a regulated point-source "discharge" within the meaning of Section 404 of the Clean Water Act; 2) whether the "deep plowing" of ranchland, which is used to grow forage crops and is farmable in its natural state, in order to plan crops with deeper root systems, is statutorily exempt from regulation under Section 4044 as a "normal farming activity" that does not bring a water of the United States "into a use to which it was not previously subject"; and (3) whether the Clean Water Act's civil penalty section, authorizing penalties "not to exceed $25,000 per day for each violation," authorizes assessing the maximum daily penalty for each time a plow crosses a jurisdictional drainage feature, without regard to the number of days when such activity occurred.

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

July 1, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- **Office of Solicitor General to File Brief as Petitioner in Indian Affairs Case.** On July 8, the Department will file a brief as petitioner in *United States* v. *White Mountain Apache Tribe*. In 1960, Congress declared that a former military post in Arizona would "be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." The question presented is whether that act of Congress authorizes the award of money damages against the United States for alleged breach of trust in connection with such property.

B. THIS WEEK

- Nothing to report.

C. LAST WEEK

- **Supreme Court Decided Selective Prosecution Case.** On June 28, the Supreme Court granted the Department's petition for a writ of certiorari and summarily reversed the judgment of the court of appeals in *United States* v. *Bass*. The questions presented were whether the court of appeals erroneously permitted a capital defendant to obtain discovery on a claim of selective prosecution in the absence of evidence that "similarly situated individuals of a different race were not prosecuted," and whether the court of appeals permitted a defendant to make a prima facie showing of discriminatory

intent by relying on nationwide statistics that aggregate the individualized decisions made independently by multiple federal prosecutors across the country. In a per curiam opinion, the Court held that a criminal defendant is entitled to discovery on a claim of selective prosecution only if he submits relevant evidence that similarly situated persons have been treated differently.

- **Supreme Court Decided School Voucher Case.** On June 27, the Supreme Court issued its decision in *Zelman* v. *Simmons-Harris*, which had been consolidated with *Hanna Perkins School* v. *Simmons-Harris* and *Taylor* v. *Simmons-Harris*. The question presented was whether the Establishment Clause of the First Amendment prevents a State from providing tuition aid as part of a general assistance program to the parents of children who attend failing public schools and authorizing the parents to use that aid to enroll their children in a private school of their own choosing, without regard to whether the school is religiously affiliated. The Department argued as *amicus curiae* that the program at issue survives constitutional scrutiny. In an opinion by Chief Justice Rehnquist, the Court agreed. Justices O'Connor and Thomas filed concurring opinions. Justice Stevens filed a dissenting opinion, Justice Souter filed a dissenting opinion in which Justices Stevens, Ginsburg, and Breyer joined, and Justice Breyer filed a dissenting opinion in which Justices Stevens and Souter joined.

- **Supreme Court Decided Student Drug Testing Case.** On June 27, the Supreme Court issued its decision in *Board of Education v. Earls*. The question presented was whether the Fourth Amendment prevents a public school district from requiring students who participate in voluntary, non-athletic interscholastic competitions to agree to random urinalysis testing for illegal drug use. The Department argued as *amicus curiae* that the school district's drug policy was reasonable and thus constitutional. The Court agreed, in an opinion by Justice Thomas. Justice Breyer filed a concurring opinion. Justice O'Connor filed a dissenting opinion, in which Justice Souter joined, and Justice Ginsburg filed a dissenting opinion, in which Justices Stevens, O'Connor, and Souter joined.

- **Supreme Court Decided Qualified Immunity Case.** On June 27, the Supreme Court issued its decision in *Hope v. Pelzer*. The question presented was whether tying a prisoner to a "hitching post" for an extended, painful period of time violated clearly established Eighth Amendment rights. The Department argued as *amicus curiae* that judicial precedents that were "materially similar" to the facts alleged would have informed a reasonable officer that such conduct was unconstitutional. In an opinion by Justice Stevens, the Court held that officials can be on notice that their conduct violates established law even in novel factual situations. The Court further held that the obvious cruelty of the "hitching post" practice as well as Circuit precedent forbidding several forms of corporal punishment should have put the officers on notice that their conduct was unconstitutional. Justice Thomas filed a dissenting opinion, in which Chief Justice Rehnquist and Justice Scalia joined.

- **Supreme Court Decided Criminal Case.** On June 24, the Supreme Court issued its decision in *Harris v. United States*. The question presented was whether the Constitution requires that the circumstance that the defendant "brandished" a firearm, which triggers an increased mandatory minimum under 18 U.S.C. 924(c)(1)(A), must be charged in the indictment and proved to the jury

beyond a reasonable doubt. The Department argued that any fact which increases a defendant's mandatory minimum sentence, but which does not increase the applicable statutory maximum sentence, may be determined by the court as a sentencing factor, using a preponderance of the evidence standard. The Court agreed, in an opinion by Justice Kennedy. Justice O'Connor filed a concurring opinion. Justice Breyer filed an opinion concurring in part and concurring in the judgment. Justice Thomas filed a dissenting opinion, in which Justices Stevens, Souter, and Ginsburg joined.

- **Supreme Court Decided Labor Law Case.** On June 24, the Supreme Court issued its decision in *BE&K Construction Company v. NLRB*. As framed by the Court, the question presented was whether the court of appeals erred in holding that the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show that the suit was not objectively baseless under *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993). The Department argued that the NLRB acted properly. In an opinion by Justice O'Connor, the Court held that the NLRB's standard for imposing liability is invalid. The Court held that the right to file a lawsuit is protected by the Constitution's Petition Clause, and concluded that the NLRB's standard would interfere with a substantial amount of constitutionally-protected petitioning. Accordingly, the Court interpreted the National Labor Relations Act to require a higher standard for imposing liability. Justice Scalia filed a concurring opinion, in which Justice Thomas joined. Justice Breyer filed an opinion concurring in part and concurring in the judgment, in which Justices Stevens, Souter, and Ginsburg joined.

- **Supreme Court Decided Criminal Case.** On June 24, the Supreme Court issued its decision in *United States v. Ruiz*. The questions presented were: (i) whether, before pleading guilty, a criminal defendant is constitutionally entitled to obtain all exculpatory information possessed by the government, including impeachment material; and (ii) if so, whether that right may be waived by the terms of a plea agreement. The Department argued that a defendant has no right to obtain such information before pleading guilty and that, if such a right exists, it may be waived in a plea agreement. The Court unanimously agreed, in an opinion by Justice Breyer. Justice Thomas filed an opinion concurring in part and concurring in the judgment.

- **Supreme Court Granted Stay in Immigration and National Security Case.** On June 28, the Supreme Court issued, at the Department's request, a stay of the district court's preliminary injunction in *Ashcroft* v. *North Jersey Media Group, Inc.*, pending disposition of the government's appeal to the United States Court of Appeals for the Third Circuit. The district court had entered a nationwide injunction requiring that administrative immigration proceedings with a substantial relationship to the government's investigation of terrorist activities related to the September 11, 2001, attacks be open to the public "in the absence of case-specific findings demonstrating that closure is narrowly tailored to serve a compelling governmental interest." The Department had argued that the injunction overrode the determination by the Attorney General that the public interest requires that all such proceedings be closed during this emergency to protect the national security, public safety, and ongoing criminal investigations.

- **Office of Solicitor General Filed Brief As *Amicus Curiae* in Trademark Case.** On June 24, the Department filed a brief supporting reversal in part in *Moseley v. V Secret Catalogue, Inc.* Federal law permits the owner of a famous mark to obtain an injunction or other relief against another person's commercial use of a mark or trade name "if such use * * * causes dilution of the distinctive quality of the [famous] mark." The question presented is whether that requirement requires objective proof of actual injury to the economic value of the famous mark, as opposed to a presumption of harm arising from a subjective "likelihood of dilution" standard. The Department argued that: (i) a plaintiff seeking an injunction must show that some dilution of his famous mark has already occurred; (ii) a showing that two marks are so similar that consumers mentally associate the marks is important evidence in a dilution case, but does not automatically establish that dilution is occurring; (iii) federal law does not require a dilution plaintiff to establish that the defendant's use of a mark has caused consumers to purchase less of a particular product or has caused the market value of the famous mark to decline; and (iv) reversal in part is warranted because, although the court of appeals' opinion is ambiguous, there is a substantial possibility that it found only a likelihood of future dilution, rather than the existence of any present dilution.

- **Supreme Court Granted Review in Immigration and Due Process Case.** On June 28, the Supreme Court granted the Department's petition for a writ of certiorari in *DeMore* v. *Kim*. Section 1226(c)(1) of Title 8 of the United States Code requires the Attorney General to take into custody aliens who are inadmissible to or deportable from the United States because they have committed a specified offense, including an aggravated felony. Section 1226(c)(2) prohibits release of those aliens during administrative proceedings to remove them from the United States, except in very limited circumstances. The question presented is whether respondent's mandatory detention under Section 1226(c) violates the Due Process Clause of the Fifth Amendment, where respondent was convicted of an aggravated felony after his admission into the United States.

- **Supreme Court Granted Review in Foreign Sovereign Immunities Act Cases.** On June 28, the Supreme Court granted writs of certiorari in *Dole Food Co.* v. *Patrickson* and *Dead Sea Bromine Co.* v. *Patrickson* and consolidated the cases. Upon the Court's invitation, the Department had filed a brief in support of petitioners and recommended that the Court ask the parties to address the question whether a corporation is an "agency or instrumentality" of a foreign state if the foreign state owned a majority of the shares of the corporation at the time of the events giving rise to the litigation, but no longer owns a majority of those shares at the time that the plaintiff commences a suit against the corporation. The Court granted review of the additional question presented by the Department and of the question whether a corporation is an "agency or instrumentality" if a foreign state owns a majority of the shares of a corporate enterprise that in turn owns a majority of the shares of the corporation.

- **Supreme Court Granted Review in Criminal Case.** On June 28, the Supreme Court granted, over the Department's opposition, the petition for a writ of certiorari in *Clay* v. *United States*. The question presented is whether petitioner's judgment of conviction became "final" within the meaning

of 28 U.S.C. 2255 one year after the court of appeals issued its mandate on direct appeal or one year after his time for filing a petition for a writ of certiorari expired.

- **Supreme Court Granted Review in Family and Medical Leave Act Case.** On June 24, the Supreme Court granted, over the Department's opposition, the petition for a writ of certiorari in *Nevada Department of Human Resources v. Hibbs*. The question presented is whether the family medical care provision of the Family and Medical Leave Act is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate State's Eleventh Amendment immunity from suit by individuals.

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

July 8, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: for Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- **Office of Solicitor General To File Petition for Certiorari in Drug Trafficking Case.** On July 12, the Department will file a petition for certiorari in *United States* v. *McGowan*. The question presented is whether the Federal Rules of Evidence categorically bar expert testimony about the structure and modus operandi of drug-trafficking organizations. The Department will argue that such evidence may be admitted where ordinary standards for relevant expert testimony are satisfied.

- **Office of Solicitor General To File Brief in Abortion Protest Cases.** On July 12, the Department will file a brief in *Scheidler* v. *NOW* and *Operation Rescue* v. *NOW*. The questions presented are: (i) whether The Racketeer Influenced and Corrupt Organizations Act (RICO) authorizes private parties to seek injunctive relief, and (ii) whether obtaining by threat control over a corporation's assets constitutes "extortion" for purposes of the Hobbs Act. The Department will argue that only the Attorney General may obtain injunctive relief under RICO, and that obtaining such control can constitute extortion of property.

B. THIS WEEK

- **Office of Solicitor General Filed Brief as Petitioner in Indian Affairs Case.** On July 8, the Department filed a brief as petitioner in *United States* v. *White Mountain Apache Tribe*. In 1960, Congress declared that a former military post in Arizona would "be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any

part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." The question presented is whether that act of Congress authorizes the award of money damages against the United States for alleged breach of trust in connection with such property; the Department argued that it does not.

- **Office of Solicitor General Filed Petition for Certiorari in Related Immigration Cases.** On July 3, the Department filed a petition for certiorari in *INS* v. *Chen*. The questions presented are: (i) whether the court of appeals wrongly reversed the Board of Immigration Appeals' assessment of a witness's credibility, and (ii) whether, following such reversal, the court of appeals improperly declined to remand other legal and factual issues for determination by the Board. The Department argued that the court of appeals erred on both points.

On July 5, the Department filed a petition for certiorari in *INS* v. *Ventura*. The question presented is whether, after reversing one of the Board of Immigration Appeals' determinations in a case, the court of appeals improperly declined to remand other legal and factual issues for determination by the Board. The Department argued that the case should be either consolidated with *Chen* or held pending disposition of the petition in *Chen*.

- **Office of Solicitor General Filed Brief as Intervenor in Transportation Case.** On July 5, the Department filed a brief as intervenor in *Pierce County* v. *Guillen*. To comply with federal law, a State that seeks federal funding for highway safety improvements must compile and collect certain data to support its request; Section 409 of Title 23 restricts individuals' ability to discover and use such compilations in litigation. The questions presented are: (i) whether the Supreme Court of Washington issued a final appealable judgment, (ii) whether a private individual has standing to challenge Section 409, (iii) whether Section 409 shields data compiled by local governments for reasons unrelated to obtaining federal highway funding, and (iv) whether Section 409 is a valid exercise of Congress's powers under Article I of the Constitution. The Department argued that finality and standing were satisfied, that Section 409 shelters only information compiled for highway safety purposes, and that Section 409 is a proper exercise of congressional power.

C. LAST WEEK

- Nothing to report.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

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OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

August 5, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- Nothing to report.

B. THIS WEEK

- **Office of Solicitor General Filed Brief in Copyright Case.** On August 5, the Department filed a brief as respondent in *Eldred v. Ashcroft*. The questions presented are: (i) whether the 20-year extension of unexpired copyright terms, as set forth in the Copyright Term Extension Act of 1998 (CTEA), violates the Constitution's Copyright Clause because it extends the copyright term of existing works, and (ii) whether the CTEA violates the First Amendment because it delays existing works from entering the public domain. The Department argued that the CTEA is a permissible exercise of congressional authority and does not impermissibly restrict free speech.

C. LAST WEEK

- **Office of Solicitor General Filed Brief in Capital Case.** On August 2, the Department filed a brief as *amicus curiae* supporting the respondent in *Sattazahn v. Pennsylvania*. The questions presented are: (i) whether the Double Jeopardy Clause bars imposing a death sentence on retrial, when the jury could not reach a verdict on that subject during the initial trial, and (ii) whether the Due Process Clause bars imposing a death sentence on retrial, when the defendant obtained a reversal of his

conviction on appeal and was again convicted of capital murder. The Department argued that imposing the death sentence under such circumstances is constitutionally permissible.

- **Office of Solicitor General Filed Brief in Social Security Case.** On August 2, the Department filed a brief as *amicus curiae* supporting petitioners in *Washington State Department of Social and Health Services v. Keffeler*. Children who receive Social Security benefits often have a federally appointed "representative payee" that is responsible for managing such benefits to maximize the beneficiary's interests. The question presented is whether a state agency, if it is the representative payee of a foster child, may use Social Security benefits to pay for that child's current needs and maintenance without violating the Social Security Act's anti-alienation provision. The Department argued that such use of Social Security benefits is consistent with the Social Security Act.

- **Office of Solicitor General Filed Brief in Criminal Case.** On August 2, the Department filed a brief as *amicus curiae* supporting respondent in *Ewing v. California*. The question presented is whether imposing a prison term of twenty-five years to life under a "Three Strikes Law" violates the Eighth Amendment's prohibition against cruel and unusual punishments, when the instant offense of conviction is grand theft, and defendant's criminal history includes at least two prior convictions of violent and serious felonies. The Department argued that such a criminal sentence does not violate the Eighth Amendment.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

January 21, 2003

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- **Office of Solicitor General to File Brief in Government Contracts Case:** On January 27, the Department will file a brief as respondent in *National Park Hospitality Ass'n* v. *Department of the Interior*. The question presented is whether a National Park Service regulation stating that National Park Service concession agreements are not contracts within the meaning of the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, is valid.

B. THIS WEEK

- **Supreme Court Rendered Decision in Conspiracy Case:** Today, January 21, the Supreme Court rendered a decision in *United States* v. *Recio*. The question presented was whether, as a matter of law, a criminal conspiracy ends when the government frustrates its objective. The Court held that the scope of a conspiracy is determined by the scope of the underlying agreement, not by the conspirators' ability to accomplish their goals. On November 12, the Department had so argued.

- **Office of Solicitor General Presented Argument in Fair Housing Act Case:** Today, January 21, the Department presented argument as *amicus curiae* supporting petitioners in *City of Cuyahoga Falls* v. *Buckeye Community Hope Foundation*. The case involves an application of Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. 3601 *et seq.*, to a local government's referendum process. The question presented is whether the court of appeals erred in holding that, in considering a

claim against a city for intentional discrimination from the delay arising out of a facially-neutral, citizen-initiated referendum petition, a court may inquire into the intent of the citizens supporting the referendum petition and impute that intent to city officials, who had no discretion under the City's Charter but to delay proceedings in response to the properly filed petition. The Department argued that government officials cannot be held liable under the Fourteenth Amendment or the Fair Housing Act for the procedural ramifications of a facially neutral referendum petition, absent evidence that the petition was a sham for unlawful discrimination; and that regardless of the standard applied, the court of appeals erred in finding evidence of intentional discrimination on the part of petitioners.

- **Office of Solicitor General to Present Argument in Foreign Sovereign Immunities Acts Cases:** On January 22, the Department will present argument as *amicus curiae* supporting respondents in *Dole Food Co.* v. *Patrickson* and *Dead Sea Bromine Co.* v. *Patrickson*. The Foreign Sovereign Immunities Act of 1976 defines an "agency or instrumentality of a foreign state" as an entity that is (among other requirements) a separate legal person, such as a corporation, "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." The questions presented are: (i) whether a corporation is an "agency or instrumentality" if the foreign state owns a majority of the shares of a corporate enterprise that in turns owns a majority of shares of the corporation; and (ii) whether a corporation is an "agency or instrumentality" if the foreign state owned a majority of its shares at the time of the events giving rise to the litigation, but the foreign state did not own a majority of those shares at the time the plaintiff commenced suit against the corporation. The Department will argue that a corporation is not an "agency or instrumentality" unless the foreign state actually owns a majority of its shares, and that ownership should be determined as of the time the suit is filed.

- **Office of Solicitor General to Present Argument in Medicaid Case:** On January 22, the Department will present argument as *amicus curiae* supporting petitioner in *Pharmaceutical Research* v. *Concannon*. The questions presented are: (i) whether the prior authorization provisions of the Maine Rx Program are consistent with the Medicaid statute; and (ii) whether those provisions violate the Commerce Clause of the Constitution. The Department will address only the first issue and argue that the prior authorization provisions conflict with the Medicaid Act.

- **Office of Solicitor General to File Brief in Involuntary Medication Case:** On January 22, the Department will file a brief as respondent in *Sell* v. *United States*. The question presented is whether the court of appeals erred in rejecting petitioner's argument that allowing the government to administer antipsychotic medication against his will solely to render him competent to stand trial for nonviolent offenses would violate his rights under the First, Fifth, and Sixth Amendments.

C. LAST WEEK

- **Supreme Court Rendered Unanimous Decision in Transportation Case:** On January 13, the Supreme Court rendered a unanimous decision in *Pierce County* v. *Guillen*. To comply with federal law, a State that seeks federal funding for highway safety improvements must compile and collect certain data

to support its request; Section 409 of Title 23 of the United States Code restricts individuals' ability to discover and use such compilations in litigation. The questions presented were: (i) whether the Supreme Court of Washington issued a final appealable judgment; (ii) whether a private individual has standing to challenge Section 409; (iii) whether Section 409 shields data compiled by local governments for reasons unrelated to obtaining federal highway funding; and (iv) whether Section 409 is a valid exercise of Congress's powers under Article I of the Constitution. The Court held that part (but not all) of the state court's decision was final and appealable; that Section 409 shields only those data that local governments compile for the purpose of obtaining federal highway funding; and that, so construed, Section 409 is a valid exercise of Congress's power to regulate interstate commerce. On November 4, the Department had so argued as intervenor defending the constitutionality of the statute. The Court declined to reach the question of standing, holding that the question was relevant only in relation to a Tenth Amendment challenge to the statute that had not been raised below, and which the Court also declined to reach.

- **Supreme Court Rendered Decision in Capital Punishment Case:** On January 13, the Supreme Court rendered a decision in *Sattazahn* v. *Pennsylvania*. The questions presented were: (i) whether the Double Jeopardy Clause bars imposing a death sentence on retrial, when the jury could not reach a verdict on that subject during the initial trial; and (ii) whether the Due Process Clause bars imposing a death sentence on retrial, when the defendant obtained a reversal of his conviction on appeal and was again convicted of capital murder. The Court held that neither clause bars the state from imposing a death sentence on retrial. On November 4, the Department had so argued as *amicus curiae* supporting respondents.

- **Supreme Court Rendered Decision in Copyright Case:** On January 14, the Supreme Court rendered a decision in *Eldred* v. *Ashcroft*. The questions presented were: (i) whether the 20-year extension of the terms of all unexpired copyrights, set forth in the Copyright Term Extension Act of 1998 (CTEA), violates the Copyright Clause of the Constitution insofar as it applies to works in existence when it took effect; and (ii) whether the CTEA's 20-year extension of the terms of all unexpired copyrights violates the First Amendment. The Court held that the CTEA violated neither the Copyright Clause nor the First Amendment. On October 9, the Solicitor General had so argued.

- **Supreme Court Rendered Decision in Coal Act Case:** On January 14, the Supreme Court rendered a decision in *Barnhart* v. *Peabody Coal Co.*, which was consolidated with *Holland* v. *Bellaire Corp.* The Coal Industry Retiree Health Benefit Act of 1992 established the United Mine Workers of America Combined Benefit Fund (Combined Fund) to ensure the continued provision of health-care benefits to retired coal miners who worked under collective bargaining agreements that promised such benefits. Those benefits are financed principally through premiums paid to the Combined Fund by "signatory operators" that employed miners under those collective bargaining agreements and are assigned responsibility for their retired miners' benefits. The Act provides that the Commissioner of Social Security "shall, before October 1, 1993," assign responsibility for each eligible retired coal miner to an appropriate signatory operator (or to a "related person" of a signatory operator) that employed the miner. The Commissioner was unable, however, to complete all such assignments before October 1, 1993. The

question presented was whether the Commissioner's assignments of responsibility for retired miners that were made on or after October 1, 1993, are void. The Court held that they were not. On October 8, the Department had so argued.

- **Supreme Court Noted Probable Jurisdiction in Voting Rights Act Case:** On January 17, the Supreme Court noted probable jurisdiction in *Georgia* v. *Ashcroft*. The questions presented are: (i) whether the district court erred in its application of Section Five of the Voting Rights Act when it denied preclearance to Georgia's redistricting plan; (ii) whether it violated the Equal Protection Clause by that denial; and (iii) whether private parties may intervene in a Section Five declaratory judgment action. On October 23, the Department had moved the Court to summarily affirm the decision below. The Court has ordered an expedited briefing schedule in this case.

- **Supreme Court Granted Certiorari in Public Utility Case:** On January 17, the Supreme Court granted certiorari in *Entergy Louisiana, Inc.* v. *Louisiana Public Service Comm'n*. The question presented is whether Louisiana's Public Service Commission violated federal law when it refused to allow an electric utility company to recover the full amount of costs allocated to it by a rate schedule of the Federal Energy Regulatory Commission. On November 4, the Court invited the Solicitor General to express the views of the United States. On December 23, the Department filed a brief as *amicus curiae* arguing that the Court should grant certiorari. The Court has ordered an expedited briefing schedule in this case.

- **Office of Solicitor General Presented Argument in Bankruptcy Case:** On January 13, the Department presented argument as *amicus curiae* supporting the petitioners in *Archer* v. *Warner*. Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. 523(a)(2)(A), provides that a debt for money obtained by means of fraud is not dischargeable in bankruptcy. The question presented is whether an otherwise non-dischargeable debt becomes dischargeable if the parties enter into a settlement agreement resolving the amount of the debt. The Department argued that such a debt does not become dischargeable under those circumstances.

- **Office of Solicitor General Presented Argument in Antiterrorism and Effective Death Penalty Act Case:** On January 13, the Department presented argument as respondent supporting the petitioner in *Clay* v. *United States*. The question presented is when a conviction becomes final under 28 U.S.C. 2255 para. 6(1) in cases in which the defendant files an appeal but not a petition for a writ of certiorari. The Department argued that the judgment in such cases becomes final when the time for filing a petition for a writ of certiorari expires. The Court has appointed an *amicus curiae* to defend the judgment of the court of appeals.

- **Office of Solicitor General Presented Argument in False Claims Act Case:** On January 14, the Department presented argument as *amicus curiae* supporting respondent in *Cook County, Illinois* v. *United States ex rel. Janet Chandler*. The question presented is whether local government entities are

subject to *qui tam* actions under the False Claims Act, 31 U.S.C. 3729. The Department argued that they are.

- **Office of Solicitor General Presented Argument in ERISA Preemption Case:** On January 14, the Department presented argument as *amicus curiae* supporting respondent in *Kentucky Ass 'n of Health Plans* v. *Miller*. The question presented is whether Kentucky's "any willing provider" law, which requires each health maintenance organization (HMO) in the State to make available to its subscribers the services of any medical provider in its geographical region that agrees to the terms and conditions offered by the HMO, is saved from preemption as a law that "regulates insurance" under ERISA Section 514(b)(2)(A), 29 U.S.C. 1144(b)(2)(A). The Department argued that Kentucky's law regulates insurance and therefore is not subject to ERISA preemption.

- **Solicitor General Presented Argument in Immigration and Due Process Case:** On January 15, the Solicitor General presented argument as petitioner in *DeMore* v. *Kim*. Section 1226(c)(1) of Title 8 of the United States Code requires the Attorney General to take into custody aliens who are inadmissible to or removable from the United States because they have committed a specified offense, including an aggravated felony. Section 1226(c)(2) prohibits release of those aliens during administrative removal proceedings, except in very limited circumstances. The question presented is whether respondent's mandatory detention under Section 1226(c) violates the Due Process Clause of the Fifth Amendment, where respondent was convicted of an aggravated felony after his admission into the United States.

- **Office of Solicitor General Presented Argument in Family Medical Leave Act/State Sovereign Immunity Case:** On January 15, the Department presented argument as respondent in *Nevada Department of Human Resources* v. *Hibbs*. The question presented is whether 29 U.S.C. 2612(a)(1)(C), the family medical care provision of the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.*, is within Congress's power under Section 5 of the Fourteenth Amendment, and thus a valid abrogation of the States' Eleventh Amendment immunity from private suit.

- **Office of Solicitor General Filed Briefs in University Admissions Cases**: On January 16, the Department filed briefs as *amicus curiae* supporting petitioners in *Grutter* v. *Bollinger* and *Gratz* v. *Bollinger*. The questions presented are: whether the admissions processes of (i) the University of Michigan's Law School (in *Grutter*) and (ii) its undergraduate college (in *Gratz*) violate the Equal Protection Clause of the Fourteenth Amendment because they consider and assign great weight to the race of applicants. The Department argued that the two schools' admissions processes violate the Equal Protection Clause.

- **Office of Solicitor General Filed Brief in Prison Visitation Case:** On January 16, the Department filed a brief as *amicus curiae* supporting petitioners in *Overton* v. *Bazzetta*. The questions presented are: (i) whether prisoners have a right to non-contact visitation protected by the First and Fourteenth Amendments; (ii) whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections are reasonably related to legitimate penological interests; and (iii)

whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections constitute cruel and unusual punishment in violation of the Eighth Amendment. The Department argued that prisoners have no constitutionally protected right to non-contact visitation and that if such a right exists Michigan's restrictions on non-contact visitation do not violate it.