Civil Division
United States Department of Justice

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Civil Division: Overview

MISSION: The Civil Division represents the United States in any civil or criminal matter within its scope of responsibility – protecting the public fisc, ensuring that the Federal Government speaks with one voice in its view of the law, preserving the intent of Congress, and advancing the credibility of the Government before the courts.

The Civil Division's role is two-fold in that it must represent some 200 Federal agencies and Congress while maintaining uniformity in Government policy. For any particular case, the Division must provide the best possible representation to the client agency involved. This responsibility must be balanced with the need to represent the Government as a whole and to ensure lasting precedents favorable to the United States.[1]

Generally, the Division's litigation falls into one of the following categories:

- **Cases that involve national policies:**
    - Numerous lawsuits challenge the constitutionality of the Foreign Intelligence Surveillance Act, which establishes procedures for requesting judicial authorization for surveillance and search of persons suspected of espionage.
- **Cases that are so massive and span so many years that they would overwhelm the resources and infrastructure of any individual U.S. Attorney's field office:**
    - The bailout of the savings and loan industry in the 1980s resulted in extensive litigation that continues to this day. The plaintiffs sought $30 billion in breach of contract damages resulting from the enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989. At present, 110 of the 122 original cases have been resolved.
- **Cases filed in national or foreign courts:**
    - Nuclear utilities filed 72 claims against the Department of Energy (DOE) in the United States Court of Federal Claims alleging breach of contract for DOE's failure to begin accepting spent nuclear fuel in 1998.
- **Cases that cross multiple jurisdictions:**
    - Pharmaceutical and procurement fraud cases often involve overlapping claims, defendants, and witnesses. The Civil Division plays a critical role in ensuring that investigations and litigation are properly coordinated among Federal and state entities.

[1] Electronic copies of the Department of Justice's Congressional Budget Justifications and Capital Asset Plan and Business Case exhibits can be viewed or downloaded from the Internet using the Internet address: **http://www.usdoj.gov/jmd/2011justification/.**

- **Cases to remove illegal aliens:**
    - Every year, the Department of Homeland Security apprehends thousands of aliens deemed removable. Many of these aliens appeal their enforcement decisions through administrative mechanisms. They may further appeal adverse opinions in circuit courts of appeals. These appellate cases are handled by the Division.

In the course of the Civil Division's role in representing the Government, the Division must handle thousands of lawsuits that are filed against the United States each year. These suits are filed as a result of the Government's policies, laws, and involvement in commercial activities, domestic and foreign operations, and entitlement programs, as well as law enforcement initiatives, military actions, and counterterrorism efforts. The Division saves the U.S. treasury billions of dollars by defeating unmeritorious claims every year. It also brings suits on behalf of the United States, primarily to recoup money lost through fraud, loan defaults, and the abuse of Federal funds. Annually, hundreds of millions, and often billions, of dollars are returned to the treasury, Medicare, and other entitlement programs as a result of the Division's affirmative litigation efforts.

While the Civil Division is primarily devoted to the conduct of litigation, it also works to maintain coordination with the Department, the Judiciary, and the Division's client agencies. For example, the Division works with the courts to establish case management and scheduling orders for its largest cases. It also works with agency general counsels to avoid potential litigation and prevent unfavorable outcomes should cases proceed. A prime example is the time it has spent consulting with the Department of the Treasury concerning the legal issues related to the Troubled Asset Relief Program.

The Civil Division seeks to successfully resolve its cases in a timely manner, when possible. While much of the Division's workload involves cases resolved through trial, nearly half are resolved through settlements and voluntary dismissals. It also administers two streamlined compensation programs. The first is the Vaccine Injury Compensation Program, which relies upon Special Masters to resolve its cases. The second is the Radiation Exposure Compensation Program, which resolves its claims through administrative adjudications.

Full Program Costs

Funds for the Legal Representation Decision Unit, the Civil Division's only decision unit, are devoted almost entirely to front-line litigation in observance of the management initiatives contained in the DOJ Strategic Plan (2007-2012). Of the Division's 1,475 authorized positions, the vast majority are assigned to the six litigating branches.

In FY 2009, $455,300,000 was available to the Division, exclusive of the RECA Trust Fund (see Civil's RECA Trust Fund Budget). Fifty-nine percent of this funding came from the General Legal Activities appropriation, while forty-one percent was provided through DOJ allotments and reimbursements. The following table displays the Civil Division's funding sources, including appropriations and reimbursements.

Civil Division Funding Sources (Dollars in Millions)

Appropriations	2003	2004	2005	2006	2007	2008	2009
Legal Representation (GLA)	167.5	174.4	174.9	192.2	208.3	250.1	270.4
Immigration & Katrina Emergency Supplemental	0	0	0	9.6	0	0	0
Subtotal	**167.5**	**174.4**	**174.9**	**201.8**	**208.3**	**250.1**	**270.4**
Reimbursements:							
FDIC - Winstar	32.3	38.5	30.2	18.3	17.5	11.4	4.3
Vaccine Compensation Program	4.0	4.0	6.3	6.3	6.3	6.8	7.8
Three Percent - Debt Collection	15.7	34.8	31.7	10.0	16.2	12.5	23.1
Health Care Fraud Abuse Control	14.4	14.5	15.5	15.3	15.9	15.9	16.1
HHS HCF Discretionary	0	0	0	0	0	0	8.2
Other Reimbursements	59.0	36.9	75.4	36.3	44.2	57.4	51.7
Subtotal	**125.4**	**128.7**	**159.1**	**86.2**	**100.1**	**104.0**	**111.2**
DOJ Accounts:							
Working Capital Fund	23.4	0	0	0	0	0	0
AFF & Super Surplus	0	0	0	.8	.8	.8	.8
Expert Witnesses (FEW)	38.0	46.6	45.1	49.1	54.0	53.2	52.7
Private Counsel (FEW)	7.2	9.0	12.3	15.3	13.0	11.0	12.3
Foreign Counsel	0	0	0	0	0	3.4	3.4
ALS No Year	0	2.5	3.3	15.6	7.0	2.1	4.3
VCR Carry Forward	2.0	0.2	0.2	0.2	0.2	0.2	0.2
Subtotal	**70.6**	**58.3**	**60.9**	**81.0**	**75.0**	**70.7**	**73.7**
TOTAL - ALL SOURCES	**363.5**	**361.4**	**394.9**	**369.0**	**383.4**	**424.8**	**455.3**

The FY 2010 appropriation provided 1,475 positions (1,059 attorneys), 1,350 FTE and $287,758,000 for the Civil Division to meet its mission and performance goals. For FY 2011, the Division requests 1,500 positions (1,072 attorneys), 1,469 FTE, and $334,944,000.

Issues, Strategies, and Outcomes

With a workforce of approximately 990 attorneys, the Civil Division expects to handle a workload of 56,191 cases in FY 2011. However, this number belies the true extent of the workload, as the Division is also handling nearly 500,000 administrative claims filed with the Army Corps of Engineers seeking damages associated with Hurricane Katrina. In addition, this total does not include approximately 100,000 administrative claims filed with FEMA seeking damages related to formaldehyde exposure from trailers supplied in response to Hurricanes Katrina and Rita.[2]

[2] These administrative claims are not included in the Division's total numbers because they are outliers that would significantly skew the data.

For handling the largest cases and families of cases, the Civil Division uses extensive litigation support services. Its contractors enable the Division to maintain paralegal, information technology, and consulting services to maintain discovery documents, perform fact research, and prepare for trials. Most of this large-scale support occurs in document centers. For medium and small-sized cases, the Division has developed self-help programs which provide a wide range of products and services for attorneys. Litigation support at all levels is a vital tool for ensuring success in many of the most critical matters handled by the Division.

External Challenges:

Because nearly 90 percent of the Civil Division's workload is defensive, it cannot control the number of cases filed, the timing of discovery, the size of evidentiary collections, the time span of litigation, or the scheduling of trials. The type, volume, and size of the cases are determined by many exogenous factors:

Military Actions	**Economic Conditions**
Immigration Enforcement	**Natural Disasters**
Statutory Enactments	**Whistleblower & Inspector General Referrals**
Counterterrorism Measures	**FTCA's Discretionary Function Exception**
Contract Disputes	**Federal Procurement Actions**

At any given time cases resulting from one of these factors could cause an influx in the Division's workload and significantly affect resource requirements. There are hundreds such cases pending. For example:

Hurricane Katrina – In addition to the 400 lawsuits already filed, nearly 500,000 claims have been received by the Army Corps of Engineers (the Corps) in response to the devastation that resulted from the flooding of the New Orleans metropolitan area in 2005. On November 18, 2009, the district court concluded in the lead case that negligence by the Corps led to the massive flooding that damaged much of the area. This adverse ruling for the Government could lead to the activation of the hundreds of thousands of other pending claims.

Guantanamo Bay – In June 2008, the Supreme Court ruled in *Boumediene v. Bush* that the review process under the Detainee Treatment Act of 2005 did not provide an adequate substitute for habeas corpus review. Currently, there are approximately 180 to 190 habeas corpus cases pending on behalf of the detainees still being held at Guantanamo Bay.

Internal Challenges:

External challenges create the Division's greatest internal challenge: the unpredictable volume and nature of the cases assigned to the Division. Specific internal challenges include:

- Critical legal and institutional knowledge is lost every year when experienced attorneys leave the Civil Division.

- Limited space in the Main Justice Building has resulted in the need to disperse staff across seven buildings in Washington, D.C. creating coordination issues.

Outcomes:

Despite these challenges, the Division has achieved remarkable success in recovering monies lost through fraud and in defending the public fisc.[3] The following are examples of achievements in affirmative and defensive litigation:

- ***Eli Lilly*** In January 2009, the Civil Division, working with the U.S. Attorney's Office in Philadelphia, prosecuted Eli Lilly and Co. Eli Lilly pled guilty to violating the Food, Drug, and Cosmetic Act for its illegal marketing of the anti-psychotic drug Zyprexa for uses that were not approved by the Food and Drug Administration. The global settlement totaled more than $1.4 billion, which included a $515,000,000 criminal fine. Eli Lilly will also pay $100,000,000 in forfeiture, and up to $800,000,000 in civil settlements.

- ***Pfizer*** In September 2009, Pfizer agreed to pay $2.3 billion, the largest health care fraud settlement in the history of the Department of Justice, to resolve criminal and civil liability arising from illegal promotion of certain pharmaceutical products. The company will pay a criminal fine of $1.195 billion and forfeit $105,000,000 for misbranding a drug with the intent to defraud or mislead. In addition, Pfizer agreed to pay $1 billion to resolve allegations that the company illegally promoted four drugs and caused false claims to be submitted to Government health care programs for uses not covered by these programs. The civil settlement also resolved allegations that Pfizer paid kickbacks to health care providers to induce them to prescribe its drugs.

- ***Cobell*** In December 2009, the Department of Justice and the Department of the Interior announced a settlement in the long-running *Cobell v. Salazar* class-action lawsuit. This suit was filed in 1996, on behalf of approximately 300,000 Native Americans alleging mismanagement of their Individual Trust Accounts. The settlement provides $1.4 billion as compensation for the alleged accounting and asset mismanagement claims. This amount is a small fraction of the $67 billion previously sought by plaintiffs. In addition, $2 billion will be used to purchase very small, fractionated land interests held by individual Indians. Congress must pass legislation to implement the settlement agreement and the U.S District Court for the District of Columbia must also approve it.

Environmental Accountability

The Civil Division has implemented many initiatives to improve its environmental accountability. The Division will develop and put in place an organizational environmental system by the end of FY 2011 in accordance with the schedule established by the DOJ. Some environmentally sound practices already utilized by the Division include providing a monthly

[3] See the Performance and Resource Tables on page 20 for more information and page 25 for additional accomplishments.

transit subsidy to approximately 900 staff in all its locations to promote the use of public transportation, encouraging a paperless environment through e-filing, and utilizing the conference call on phones to reduce travel.

The Civil Division currently emphasizes environmental accountability through the purchase and use of recycled equipment and products wherever possible and by facilitating and encouraging recycling within its offices. The Civil Division has purchased only recycled telephone units for the past nine years (over 1,500 units), and worn out telephone sets are traded in for refurbishment. The Division's recycling program was expanded in each of its seven buildings by adding large capacity plastic recycling containers for newspaper, glass, plastic, and aluminum. All restrooms use 100 percent recycled products. JCONext training will also instruct employees how to configure printers for double-sided printing in order to further minimize paper waste. In addition, the Division is undertaking new initiatives, which include placing centralized receptacles in all locations to make it easier to recycle spent toner cartridges and establishing a "Green Team" at one of its largest offices.

The Division emphasizes energy efficient practices in several ways. At its 1100 L Street location, where the Division is the primary tenant, motion detector light controls have been installed in all restrooms and the parking garage. This program will be expanded to conference rooms, server rooms, and corridors. The Civil Division has also ceased the purchase of incandescent light bulbs and now only purchases compact florescent replacement light bulbs. It is spending $40,000 over the next two years to re-lamp all of the office space at the L Street location with 25 watt "green lighting."

Additionally, the Division is exploring options for making all computer systems more energy efficient and is almost in full compliance with the Department's Power Management Policy Recommendations and Executive Order 13423. More than half of the workstations have integrated speakers which provide automatic energy savings. The Division recently purchased next generation hardware for its email servers that utilize solid state technology which consumes one-tenth the amount of electricity that traditional hard drives require and create a fraction of the heat. Furthermore, the Division has invested in next generation virtualization technology that has reduced the number of physical servers required to run all of its applications. All Division servers are now energy-star compliant.

Summary of Program Changes

Proposed FY 2011 Program Changes GLA Appropriation				
Item Name	**Pos.**	**FTE**	**Dollars ($000)**	**Page**
Spent Nuclear Fuel Litigation	13	7	$11,391	29
Response to Financial Crisis	0	0	$3,500	35
E-Discovery	12	12	$2,000	41
Adjust Travel Expenditures	0	0	($341)	43
Total GLA Program Increases	**25**	**19**	**$16,550**	

Spent Nuclear Fuel Litigation

- Nuclear power utilities filed 72 cases and seek in excess of $50 billion in damages for the Government's failure to begin accepting the utilities' spent nuclear fuel (SNF) by January 1998, as mandated by the Nuclear Waste Policy Act of 1982. Currently, 13 trials are expected to be held in FY 2011. These cases are complex in terms of scope and financial stakes.

- Without a Federal repository nuclear utilities may seek even further damages for a full breach of contract. This type of lawsuit will vastly increase the litigation costs and the ultimate exposure of the U.S. treasury.[4]

- If the Government is to avoid excessive monetary losses, it is imperative that the SNF attorney team be staffed appropriately and have access to sufficient litigation support services. The Division requests 13 positions (10 attorneys), 7 FTE, and $11,391,000, including $10,000,000 for litigation support in FY 2011.

Response to Financial Crisis

- Congress enacted two financial packages to jumpstart the economy, provide employment opportunities, and upgrade the Nation's infrastructure – the Troubled Asset Relief Program (TARP) and the Economic Stimulus Plan. The Government is spending over $1.4 trillion on these two plans.

- These programs are unprecedented in scope, size, and complexity and likely will result in litigation. Attorneys are expecting a flood of both defensive litigation, in the form of contract disputes, and affirmative litigation, in the form of fraud investigations. The Division is conducting nationwide investigations into potential fraud committed in connection with the recent financial crisis.

[4] The U.S. treasury has an account called the Judgment Fund, which is available for court judgments and Department of Justice compromise settlements of actual or imminent litigation against the Government.

- The Division's efforts will protect the public fisc by representing the Government in a plethora of lawsuits seeking unfounded treasury payments and recovering defrauded funds in the form of civil penalties and awards. Potentially billions of dollars could be lost absent additional resources.

- Both defensive and affirmative litigation require extensive support services, including computerizing documents, processing and standardizing electronic files, creating and researching databases, and consulting industry experts. The FY 2010 appropriation included 118 positions (87 attorneys), 28 FTE, and $10,000,000 ($5,027,000 for litigation support). However, this litigation support funding will not be adequate to handle massive discovery and trial support requirements across potentially hundreds of complex and novel cases. The Civil Division requests $3,500,000 for litigation support services in FY 2011.

E-Discovery

- The Department has undertaken a thorough review of the Division's current means of handling document discovery in civil litigation and has advised a new approach, specifically in regards to electronic discovery (e-discovery).

- Based on the current model used by the private sector, the Department's first recommendation is that the Civil Division retain a group of attorneys with more sophisticated technical proficiency. To address the need for this expertise in e-discovery matters, the Civil Division requests 3 positions (3 attorneys), 3 FTE, and $609,000.

- Additionally, the Department found that the civil litigation components have insufficient support staff which has resulted in a more than 20-to-1 attorney-to-support staff ratio. According to the findings of the Department's working group, such a ratio is too high to provide sufficient support staff services. To address this need, the Civil Division requests an additional 9 positions (9 FTE), and $1,391,000 in FY 2011.

Decision Unit Justification
Civil Division: Legal Representation Decision Unit

Legal Representation – TOTAL	Perm. Pos.	FTE	Amount ($000)
2009 Enacted with Rescissions	1,338	1,313	$270,431
2010 Enacted	1,475	1,350	$287,758
Adjustments to Base & Technical Adjustments	0	100	$30,636
2011 Current Services	1,475	1,450	$318,394
2011 Program Increases	25	19	$16,891
2011 Program Offsets	0	0	($341)
2011 Request	1,500	1,469	$334,944
Total Change 2010-2011	**25**	**119**	**$47,186**

The Division is composed of six litigating branches and the Office of Management Programs as described throughout the following pages.

Appellate Staff

Appellate Staff attorneys represent the United States at the highest levels of judicial review. When the Government receives an unfavorable decision, the Staff works closely with the Office of the Solicitor General to determine whether to seek further review, including review in the U.S. Supreme Court. The Appellate Staff docket includes challenges to Federal statutes, including the No Child Left Behind Act, the False Claims Act, and the Freedom of Information Act. Its work also concerns Federal programs, such as those under the Food, Drug and Cosmetic Act and health care matters. Recent Appellate Staff accomplishments include the successful appeal of the judgment finding tobacco manufacturers liable for conducting the affairs of their joint enterprise through a pattern of mail and wire fraud to deceive American consumers and the defense of constitutional challenges to provisions of the Bankruptcy Reform Law.

The Staff's workload has seen large increases in recent years in the area of counter-terrorism cases involving terrorist surveillance activities, the freezing of terrorist assets, and the designation of foreign terrorist organizations. These responsibilities have increased significantly in regard to the Guantanamo Bay detainee cases. The appeals in habeas cases brought by the Guantanamo detainees are handled by the Appellate Staff. These cases involve classified materials and present serious issues of law and fact.

Federal Programs

While most of the other branches handle cases that directly involve monetary claims, the majority of the Federal Programs Branch's (FP) cases are non-monetary. The attorneys handle

hundreds of defensive cases that are of unparalleled importance because of their far-reaching repercussions for Government programs and policies. The Branch defends Federal agency officials and actions in challenges to executive orders, Federal statutes, and Federal regulations. Another handful of cases protect the public fisc by defending entitlement programs such as Medicare and Social Security. Attorneys also handle certain specialized affirmative litigation and assert the interests of the government in litigation in which the United States is not a named party.

The diversity of the FP workload can be seen in the following examples. The Branch handles cases involving separation of powers and core executive privileges, such as litigation concerning the Terrorist Surveillance Program. FP attorneys are also responsible for handling litigation that affects the nation's foreign affairs and are handling the Guantanamo Bay detainees' habeas cases. In addition, the Branch handles challenges to provisions of the Troubled Asset Relief Program and the Economic Stimulus package. The Branch's work has also recently included litigation by ACORN and related organizations challenging language in the FY 2010 Appropriations Act barring them from new contracts and a series of cases challenging Congressional and Executive requirements concerning reimbursement under the Medicare program. FP attorneys also defend against challenges to Federal programs and activities that allegedly discriminate against individuals in violation of the Rehabilitation Act.

Torts Branch

Environmental Torts (ET)

The Environmental Torts Section defends the Government against claims for monetary damages resulting from death, personal injury, or property damage allegedly caused by environmental or occupational exposure to toxic substances. The largest case currently being handled by ET, *Adams v. United States*, involves claims of more than $800,000,000 stemming from the Department of the Interior's application of OUST, an herbicide, to wildfire burn areas in Southern Idaho in 1999 and 2000. More than 100 groups sued the United States and DuPont (OUST's manufacturer), alleging that the herbicide damaged their crops. The first trial concluded in August 2009 with a $17,800,000 jury verdict, of which the United States is liable for $5,300,000. It is up to the court now to determine the subsequent effect on the remaining claims.

http://www.fema.gov/hazard/hurricane/2005katrina/slideshow/page3.fema?id=3

ET is also representing the United States in *In re: FEMA Trailer Formaldehyde Product Liability Litigation.* Plaintiffs seek to recover damages for personal injuries allegedly resulting from exposure to formaldehyde in temporary emergency housing units provided by Federal Emergency Management Agency (FEMA) in response to Hurricanes Katrina and December 2008, the district court rejected the

would have covered all persons who resided in approximately 140,000 units issued by FEMA. About 100,000 administrative claims have already been filed. The court, having decided that the cases must be dealt with on an individualized basis, set a series of trials which began in September 2009. The United States was dismissed from the first case and the next case is scheduled for March 2010.

Federal Tort Claims Act (FTCA)

The FTCA permits filing suit against the United States for injuries allegedly caused by the "negligent or wrongful act of any employee of the Government while acting within the scope of his office or employment."[5] Prior to filing under the FTCA, the claimant must first file an administrative claim against the agency allegedly at fault and permit the agency at least six months to act on the claim.

One of the central responsibilities of the FTCA Staff is processing over 1,000 administrative tort claims each year, the majority of which are claims against DOJ components and the remaining are against outside agencies. The FTCA Staff directly handles and determines the outcome in nearly 300 of these claims each year. The rest are transferred to the appropriate agency if its identity can be determined from the claim submission. Additionally, support personnel processes hundreds of claims-related submissions or requests each year.

The largest group of cases currently being handled by the FTCA Staff is the 400 lawsuits that have been filed as a result of the flooding caused by Hurricane Katrina in New Orleans. Nearly 500,000 administrative claims are pending with the Army Corps of Engineers (the Corps). Claimants and plaintiffs seek compensation for personal injury, death, and property damage suffered as a result of the failure of the flood protection system. On November 18, 2009, the district court concluded in *Robinson v. United States,* the lead case in the litigation, that negligence on the part of the Corps in maintaining and operating the Mississippi River-Gulf Outlet led to the massive flooding that damaged much of the greater New Orleans area. Unless reversed on appeal, this ruling could result in the activation of hundreds of thousands of other cases from individuals, businesses, and Governmental entities with claims currently pending. The claims for damages would be heard individually, absent an alternate procedure.

Constitutional and Specialized Torts

The Constitutional Torts, or *Bivens* component, handles cases which involve employees in the executive and legislative branches who are personally sued for actions taken within the scope of their employment. These suits can cover a wide variety of actions and levels of employees, including those involved in law enforcement and national security. They go to the heart of the many missions of the Federal public service. Effective representation of Federal employees allows public servants to carry out their duties without fear of personal liability for their actions.

The Constitutional Torts staff had several major accomplishments in cases of national importance the past couple of years. Most notable was *Moore v. Hartman*, which was a highly complex retaliatory prosecution case that engendered an opinion by the Supreme Court and

[5] Federal Tort Claims Act, Pub. L. No. 79-601, § 403, 60 Stat. 812, 843 (1946).

several separate opinions by the Court of Appeals for the District of Columbia. The district court granted summary judgment dismissing the case on qualified immunity grounds.

Aviation and Admiralty Torts

The Aviation and Admiralty Section handles aviation and maritime accident cases and claims. Clients include the Federal Aviation Administration (FAA), the Army Corps of Engineers, the Coast Guard, the Maritime Administration, the Transportation Security Administration, and the Departments of Transportation, Defense, and Commerce.

http://www.faa.gov/about/office_org/headquarters_offices/aba/budgets_brief/

Aviation litigation arises from the Government's involvement in such activities as regulation of air commerce, air traffic control, aviation security, weather services, and aeronautical charting. When aircraft accidents occur, the Section handles high-dollar litigation involving the FAA's air traffic control and weather dissemination services, as well as its certification of airports, aircraft, and air personnel. The Section's most recent commercial airline matter was Comair flight 5191's crash on take-off from Lexington's Kentucky Bluegrass Airport in August 2006. The case is not yet fully resolved. The Continental crash on final approach to Buffalo Airport, which occurred in February 2009, is expected to spawn similar litigation.

The Section also represents the Government in its role as ship-owner, regulator, and protector of the nation's waterways. Litigation includes collisions involving U.S. vessels, grounding of vessels using U.S. produced charts, and challenges to the boarding of vessels on the high seas during national security and drug interdiction activities. Affirmative actions seek compensation for the loss of Government cargo, damage to locks, dams and natural resources, and the costs associated with maritime pollution cleanups.

Commercial Litigation

National Courts

Attorneys in National Courts handle cases in the Court of Federal Claims, the Court of International Trade, the Court of Appeals for the Federal Circuit, and other fora. This litigation involves a wide and varied range of substantive law, including Government procurement and contract disputes, Fifth Amendment takings, international trade, and claims brought by veterans and Federal employees. The Section routinely manages complex cases concerning significant legal issues and billions of taxpayer dollars.

The Division obtained a significant amount of institutional knowledge as a result of the *Winstar* claims. National Courts attorneys are putting that knowledge to use by consulting with various Federal agencies and their components, including the Department of the Treasury, Freddie Mac,

and Fannie Mae, concerning the legal issues associated with the implementation of the Troubled Asset Relief Program. The attorneys expect that this intensive involvement with client agencies will continue into the foreseeable future.

The most complex litigation currently managed by National Courts stems from the Government's commitment to accept and store spent nuclear fuel as required by the Nuclear Waste Policy Act of 1982. To date, utilities have filed 72 cases in the Court of Federal Claims seeking damages that they estimate exceed $50 billion. This litigation is enormously complex. As many as 12 trials are expected in FY 2010 and 13 in FY 2011. Litigation support services, which include collecting, organizing, and reviewing a substantial number of documents, continue to be critical to the Government's defense. See page 29 for further information.

Corporate/Financial

The Corporate/Financial Section handles a wide variety of lawsuits involving claims for money and property. A significant portion of the Section's resources are devoted to representing the Government's financial, contractual, and regulatory interests in large and complex Chapter 11 bankruptcies, including those involving defense contractors, commercial airlines, health care providers, and other major corporations.

The Section is handling one of the largest cases ever filed against the Government: *Cobell v. Salazar*. The Government recently negotiated a settlement of $3.4 billion, which must be approved by Congress and the court. The plaintiffs previously sought upwards of $67 billion. See page 5 for further details.

Foreign Litigation

The Office of Foreign Litigation attorneys retain and directly instruct foreign counsel to represent the United States in cases filed in foreign courts. Most of these cases are defensive and arise out of the wide range of international activities in which the United States is involved. These include commercial transactions, tort damages, and labor disputes arising from the many U.S. Government offices and facilities maintained overseas, as well as its extensive U.S. military overseas bases and deployments. The Office conducts affirmative litigation aimed at fighting cross-border fraud that targets American citizens, such as telemarketing fraud. Affirmative litigation also includes representing the interests of the United States in foreign cases involving terrorism or other criminal activities directed against the United States, its officers, and its employees.

The diversity of the Office can be seen in its recent litigation activities. In Paris, France, the Office appeared to oppose the parole application of Georges Ibrahim Abdallah, who was convicted of the murder of U.S. military attaché Charles Ray, and the attempted murder of U.S. diplomat Robert Homme. In Italy, it filed briefs before the Italian Court of Cassation asserting sovereign immunity in a case seeking an order to require the removal of nuclear weapons allegedly stored at the U.S. Air Force base in Aviano, Italy. In February 2009, the court adopted the United States' position, ruling that Italian courts lack jurisdiction to hear the matter.

Intellectual Property

Intellectually Property handles a wide variety of litigation involving patents, trademarks, copyrights, trade secrets, and other related matters. For example, when patent infringement claims threatened a cessation of BlackBerry service, Intellectual Property attorneys worked to ensure that the Government would be exempt from an injunction against use of the service. The most significant defensive suits are brought by major corporations seeking substantial recoveries for the Government's use of patented inventions, such as night vision compatible displays used in military aircraft in *Honeywell International v. United States*. Affirmative litigation enforces Government-owned patents, trademarks, copyrights, and patent indemnity agreements.

Fraud

A critical aspect of the affirmative litigation pursued by Commercial Litigation Branch attorneys involves suits to recover losses to the Government due to fraud. These efforts provide restitution to harmed Government programs and deter other fraudulent conduct. Since 1986, Branch attorneys and their colleagues in U.S. Attorneys' Offices have recovered more than $24 billion on behalf of Government programs, including Federal health care programs, such as Medicare and Medicaid, and programs vital to the country's defense and national security. These efforts provide significant deterrence to those contemplating defrauding these programs, and have the added benefit of encouraging health care providers to use Government funds to provide much needed health care to the beneficiaries of such programs.

The majority of False Claims Act cases are filed initially by private citizens or "whistleblowers" under the *qui tam* provisions of the False Claims Act. The Government assesses the merits of these whistleblower suits and, where appropriate, intervenes to pursue the Government's interests. Of the money recovered under the False Claims Act amendments through FY 2009, $15.6 billion was in *qui tam* actions.

The Division has seen a sharp growth in pharmaceutical (pharma) and medical device fraud cases. These cases are legally and factually complex. As of mid-December 2009, the Department was investigating or had intervened and was actively involved in more than 150 such cases. The cases were filed in dozens of judicial districts and involve hundreds of defendants and hundreds of drugs. Allegations include a wide range of illegal fraudulent schemes, such as promoting drugs and devices for purposes not approved by the Food and Drug Administration (FDA), submitting false or misleading data to doctors and the FDA to gain approval of new products, providing remuneration to pharmacies and doctors who p drug costs that are then used by Governmer providers. In FY 2009, the pharma cases re settlements.

www4.uwm.edu/.../newsletters/JanFeb_2009.cfm

Developments that will foster growth in the civil fraud workload include:

- On May 20, 2009, Attorney General Holder and HHS Secretary Sebelius announced the creation of a new interagency effort, the Health Care Fraud Prevention and Enforcement Action Team (HEAT), to combat Medicare fraud. AG Holder said,

  > "With this announcement, we raise the stakes on health care fraud by launching a new effort with increased tools, resources and a sustained focus by senior-level leadership."

- A new statute, the Fraud Enforcement and Recovery Act, strengthens provisions in the False Claims Act by enhancing the ability of DOJ to pursue *qui tam* cases and other matters alleging financial fraud involving Government funds and is expected to generate an increase in the number of *qui tam* cases referred to the Division, as well as litigation over amended provisions of the False Claims Act.

In other areas of anti-fraud enforcement, FY 2009 saw significant civil Federal recoveries. For example, in the area of mortgage fraud, the United States recovered $10,700,000 under the False Claims Act from RBC Mortgage Company for knowingly violating HUD underwriting and lending requirements and $1,100,000 from Dolphin Mortgage Corporation, which was held vicariously liable for an employee who submitted forged documentation in support of applications for Department of Housing and Urban Development-insured loans. In the largest General Services Administration defective pricing case to date, NetApp Inc. paid the Government $128,700,000.

Consumer Litigation

The Office of Consumer Litigation (OCL) is at the forefront of the efforts of both the Civil Division and the Department to protect consumers through vigorous civil and criminal enforcement of Federal consumer protection laws. Its enforcement includes fraud perpetrated by manufacturers and distributors of misbranded, adulterated, or defective consumer goods. OCL safeguards consumers through the pursuit of cases regarding deceptive advertisements and sales through unfair credit practices that extract billions of dollars from consumers. OCL also defends legal and constitutional attacks on consumer protection laws and statutes.

OCL handles a growing number of health care fraud-related cases, the majority of which are criminal cases. OCL is actively involved in investigating and prosecuting major prescription drug and device manufacturers believed to be illegally promoting misbranded and adulterated drugs or devices and distributing their products for unapproved uses. The majority of these criminal investigations emerge from lawsuits filed by whistleblowers alleging fraudulent activity. OCL works with the Division's Civil Fraud Section as well as U.S. Attorneys' Offices on these complex matters.

Many of the other affirmative cases OCL handles deal with protecting the consumers from business opportunity scams and malicious financial fraud. Building on past successes, OCL

obtained 24 felony convictions and 17 defendants were sentenced in FY 2009. Defendants charged in these prosecutions were involved in approximately 21 different fraudulent schemes that bilked more than 5,000 Americans of more than $118,000,000. The number of successful prosecutions, and the appropriate severity of the sentences, has produced real deterrence.

OCL successfully defended the FDA in a case challenging its authority to issue "Industry Guidance" under the new Tobacco Act. A Federal district court granted the Government's motion to dismiss, finding that such "guidances" merely represent the agency's current thinking and are not legally binding on either the agency or regulated industries.

Office of Immigration Litigation

Established in 1983 to achieve central control over immigration litigation, the Office of Immigration Litigation (OIL) defends Government agencies such as the Department of Homeland Security (DHS), the Department of State, and the Department of Labor in immigration related litigation, and defends decisions of DOJ's Executive Office for Immigration Review (EOIR) when aliens file petitions for review in the circuit courts of appeals. With its unique expertise in immigration law, OIL provides the Government with the best possible defense in district court cases and challenges to removal orders filed in circuit courts by illegal aliens, many of whom are criminals. OIL is divided into two sections: the Appellate Section, which handles petitions for review filed in circuit courts, and the District Court Section, which handles all other litigation in both the trial and appellate stages.

The Appellate Section's caseload is directly tied to DHS's immigration efforts and to the immigration adjudication rates of the Board of Immigration Appeals in EOIR. As DHS's enforcement activities become more aggressive, OIL receives a corresponding increase in petitions for review to defend in the circuit courts. For example, in FY 2008 Congress approved a new DHS immigration enforcement initiative, Secure Communities, which represents a new, comprehensive approach for expediting the removal of all criminal aliens held in U.S. prisons and jails.

The District Court Section (DCS) represents the United States in immigration cases which originate in Federal district courts nationwide. Most of DCS's litigation responsibilities are defensive in nature. Immigration litigation defense consists of a wide range of individual and class action cases filed against subcomponents of DHS, including U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement and the Customs and Border Protection, as well as the Department of State and the Department of Labor. Typical cases include the defense of petitions for writs of habeas corpus, Administrative Procedure Act challenges to denials of immigration benefits, visa challenges, and constitutional challenges to immigration policies. DCS also affirmatively files and prosecutes denaturalization cases. In addition, DCS handles matters in the court of appeals that arise out of district court cases.

Compensation Programs

Vaccine Injury Compensation Program

Congress enacted the National Childhood Vaccine Injury Act of 1986 (the Act) to avert a crisis affecting the vaccination of children against infectious childhood diseases. There were two primary concerns: 1) individuals injured by vaccines faced an inconsistent, expensive, and unpredictable tort system for compensating claims; and 2) the risk of tort litigation threatened to reduce the number of vaccine manufacturers that could viably meet market demands.

The Act established the Vaccine Injury Compensation Program (VICP or the Program), a no-fault compensation system for persons suffering injury or death allegedly attributable to certain vaccines. The Program is intended to provide a more expeditious, less costly way for resolving claims. An individual claiming a vaccine-related injury or death must file a petition with the Court of Federal Claims (CFC) before pursuing any civil action. Claims are closely examined for legal and medical sufficiency, with the recognition that eligible claimants should be compensated fairly and expeditiously. Special Masters conduct hearings as necessary to determine whether a petitioner is entitled to compensation and, if so, how much.

> *"Vaccination of children against deadly, disabling, but preventable infectious diseases has been one of the most spectacularly effective public health initiatives this country has ever undertaken…The Federal Government has the responsibility to ensure that all children in need of immunization have access to them and to ensure that all children who are injured by vaccines have access to sufficient compensation for their injuries."*
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> - H.R. Rep. No. 99-908, 99th Cong., 2d Sess. 7 (1986),

The Act created a Vaccine Injury Compensation Trust Fund that is used to pay awards to individuals injured by vaccines, in addition to claimants' attorneys' fees. Trust Fund monies also pay the administrative costs of Health and Human Services, Office of the Special Masters, and the Civil Division's VICP staff (the Division's current reimbursement level is 41 FTE and $7,833,000). The Trust Fund is funded by an excise tax imposed on each purchased dose of a covered vaccine. Since the inception of the Program, over $1.9 billion in compensation has been awarded to nearly 2,400 claimants.

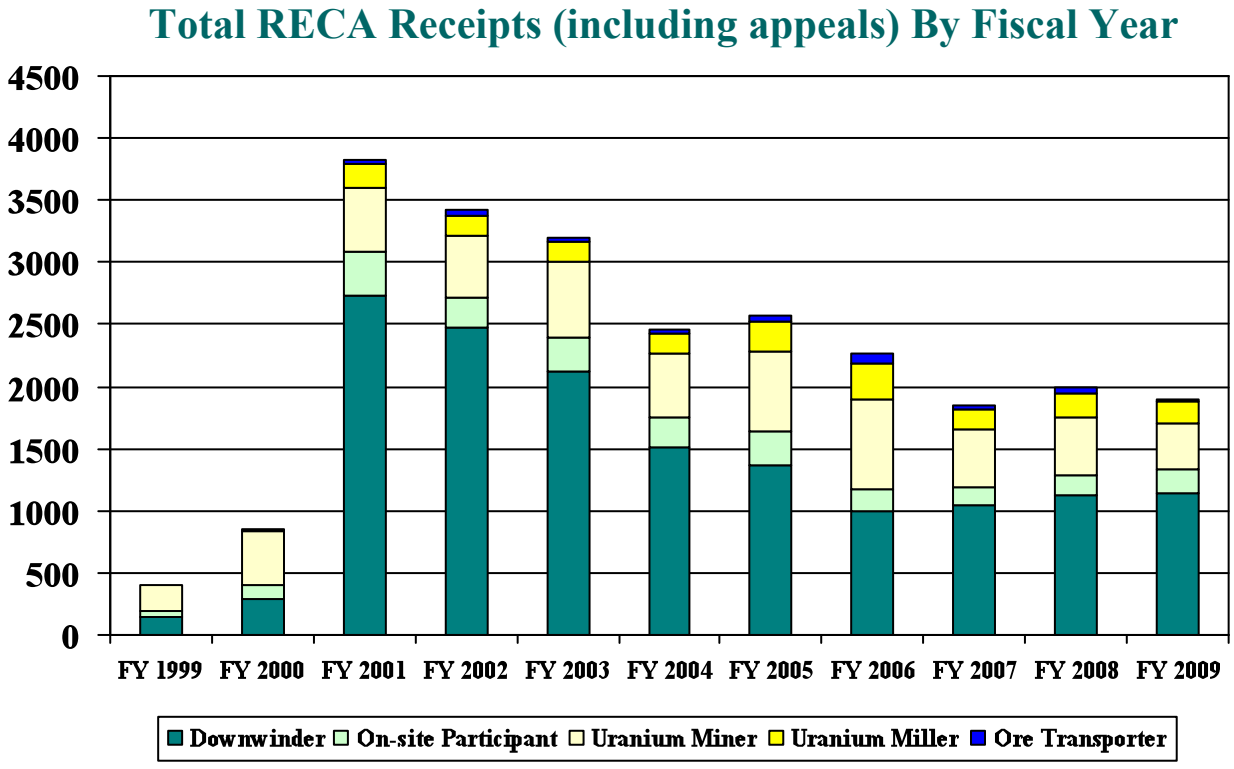
Since FY 2001, the Program has experienced a staggering increase in new claims. This increase can be partly attributed to the addition of new vaccines covered by the Program, including the widely administered influenza vaccine. However, the most significant reason is the approximately 5,000 claims asserting that certain vaccines, or a vaccine preservative, thimerosal, can cause autism. These cases comprise the Omnibus Autism Proceeding and account for approximately 85 percent of the Program's caseload. The potential financial exposure has been estimated at $10 billion, far exceeding the current Trust Fund balance of $3.1 billion. The Government achieved an initial victory in February 2009, when the Special Masters ruled in the first three test cases that thimerosal-containing vaccines combined with the measles-mumps-

rubella vaccine do not cause autism. In July and August 2009, three judges of the CFC affirmed the Special Masters' denial of compensation in those three cases. However, the impact of these rulings on the remaining 5,000 cases is unclear because these cases are not bound by the ruling and two of the three cases are pending on appeal at the U.S. Court of Appeals for the Federal Circuit.

Radiation Exposure Compensation Act

In passing the Radiation Exposure Compensation Act (RECA or the Act) in 1990, Congress offered an apology and monetary compensation to individuals who suffered disease or death as a result of exposure to radiation released during atmospheric nuclear weapons testing in the 1950s and 1960s, and underground uranium mining operations from the 1940s to the 1970s. This Program was designed as an alternative to litigation, in that the statutory criteria did not require claimants to establish causation. If claimants meet the criteria specified in the Act, compensation is awarded. RECA provides fixed payments in the following amounts: $50,000 for individuals who lived "downwind" of the Nevada Test Site; $75,000 for individuals present at test site locations; and $100,000 for uranium miners, mill workers, and ore transporters.

Since the Program began receiving claims in 1992, 31,312 claims have been filed and over $1.4 billion has been awarded to 21,992 claimants (as of January 1, 2010). The vast majority of claims are filed by people who live in the Four Corners region – Utah, Colorado, New Mexico, and Arizona. This area had the greatest concentration of uranium ore, and both the mining and production industries were centered there. The "downwind" regions, counties in Nevada, Utah, and Arizona, account for thousands of claims in connection with the fallout from above-ground nuclear weapons testing.



In July 2000, RECA Amendments extended compensation to new categories of beneficiaries, added compensable diseases, expanded both the years and geographic areas covered, and lowered the exposure level that miners must demonstrate to receive compensation. These statutory changes caused an influx of new claim filings and a substantial increase in awards. Over the past decade, receipts have decreased and are now averaging approximately 2,000 claims a year.

Office of Management Programs

The workload of the Civil Division is as broad and diverse as the activities of the 200-plus Federal agencies it represents. In addition to its role in defending and enforcing the laws, policies, and programs of the United States, the Division protects the public fisc. Key to ensuring the Division's continued success in these matters is responsive management capable of providing executive leadership and promoting performance and fiscal responsibility. The Office of Management Programs (OMP) serves this purpose. OMP is comprised of five administrative offices: the Office of Planning, Budget, and Evaluation; the Office of Litigation Support; the Office of Policy and Management Operations; the Office of Administration; and the Office of Management Information.